THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket #2017-0142

N. Miles Cook, III

v.

Department of Environmental Services Wetlands Council

OPENING BRIEF OF N. MILES COOK, III

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Oral Argument Requested to be Argued by Michael J. Tierney, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Statutes

Regulations

TEXT OF APPLICABLE STATUTES AND REGULATIONS

482-A:1 Finding of Public Purpose. – It is found to be for the public good and welfare of this state to protect and preserve its submerged lands under tidal and fresh waters and its wetlands, (both salt water and fresh-water), as herein defined, from despoliation and unregulated alteration, because such despoliation or unregulated alteration will adversely affect the value of such areas as sources of nutrients for finfish, crustacea, shellfish and wildlife of significant value, will damage or destroy habitats and reproduction areas for plants, fish and wildlife of importance, will eliminate, depreciate or obstruct the commerce, recreation and aesthetic enjoyment of the public, will be detrimental to adequate groundwater levels, will adversely affect stream channels and their ability to handle the runoff of waters, will disturb and reduce the natural ability of wetlands to absorb flood waters and silt, thus increasing general flood damage and the silting of open water channels, and will otherwise adversely affect the interests of the general public.

Source. 1989, 339:1, eff. Jan. 1, 1990.

482-A:10 Appeals. –

I. Any person aggrieved by a decision made by the department under RSA 482-A:3 may appeal to the wetlands council and to the supreme court as provided in RSA 21-O:14, including the provisions relative to requesting mediated or unmediated settlement discussions. A person aggrieved under this section shall mean the applicant and any person required to be noticed by mail in accordance with RSA 482-A:8 and RSA 482-A:9.

II. Any person subject to an order of the department under RSA 482-A:6 may appeal to the wetlands council and to the supreme court as provided in RSA 21-O:14, including the provisions relative to requesting mediated or unmediated settlement discussions.

III. An appeal from a decision of the department under RSA 482-A:3 or an appeal from an order issued by the department under RSA 482-A:6, shall be filed in accordance with the applicable provisions of RSA 21-O:14 and rules adopted by the council pursuant to RSA 541-A regarding the number of copies to be filed, the address to which the notice of appeal must be sent or delivered, and the method of delivery.

IV. A notice of appeal to the council shall contain a detailed description of the land involved in the department's decision and shall set forth fully every ground upon which it is claimed that the decision complained of is unlawful or unreasonable. Only those grounds set forth in the notice of appeal shall be considered by the council.

V. Any appeal hearing held by the council shall be an adjudicative hearing as provided in RSA 541-A and the council's rules. The hearing shall be noticed in accordance with RSA 541-A:31, III. For appeals of department decisions under RSA 482-A:3, the notice shall also be sent to all persons entitled to notice of applications under RSA 482-A:8 and RSA 482-A:9. The burden of proof shall be on the party seeking to set aside the department's decision to show that the decision is unlawful or unreasonable. On appeal of requests proposed, sponsored, or administered by the department of transportation, there shall be a rebuttable presumption that there is a public need for the requested project, and that the department of transportation has exercised appropriate engineering judgment in the project's design. All findings of the department upon all questions of fact properly before it shall be prima facie lawful and reasonable.

V-a. Any person whose rights will be directly affected by the outcome of the appeal may appear and become a party to the appeal. Any person whose rights may be directly affected by

the outcome of the appeal may file a request to intervene as provided in RSA 541-A:32.

VI. On appeal, the council may affirm the decision of the department or may remand to the department with a determination that the decision complained of is unlawful or unreasonable. The council shall specify the factual and legal basis for its determination and shall identify the evidence in the record created before the council that supports its decision.

VII. Any party aggrieved by a decision of the council may apply to the council for reconsideration as specified in RSA 541.

VIII. Any party aggrieved by a decision of the council after reconsideration may appeal to the supreme court as specified in RSA 541.

IX. In the case of a remand to the department by the council, the department may accept the council's determination and reissue a decision or order, imposing such conditions as are necessary and consistent with the purposes of this chapter, or may appeal as provided in paragraphs VII and VIII.

X. [Repealed.]

XI. [Repealed.]

XII. [Repealed.]

XIII. [Repealed.]

XIV. [Repealed.]

XV. [Repealed.]

XVI. [Repealed.]

XVII. [Repealed.]

XVIII. If a permit is granted with respect to any activity proposed to be undertaken in or adjacent to a prime wetland as mapped, designated, and filed pursuant to RSA 482-A:15, the conservation commission or local governing body may appeal said decision to the wetlands council and the supreme court in the manner prescribed in this section. The filing of a request for reconsideration under paragraph VII shall automatically stay the effectiveness of the council's decision relating to said prime wetland. Said stay shall remain in force until the council has issued its decision after reconsideration.

Source. 1989, 339:1. 1991, 20:5. 1996, 296:45. 2004, 2:2, 3; 243:3. 2008, 171:6, 7, 16; 363:5. 2012, 246:8, 9, eff. June 18, 2012. 2013, 43:2, eff. Aug. 3, 2013.

485-C:4 Rulemaking. – The commissioner shall adopt rules, pursuant to RSA 541-A, relative to:

XII. All new groundwater withdrawals of 57,600 gallons or more in any 24-hour period. Such rules shall include:

(b) Requirements relative to conservation management plans which demonstrate the need for the proposed withdrawals, to be submitted by the persons seeking approval for a withdrawal.

Source. 1991, 344:1. 1995, 130:4. 1996, 228:110; 266:12. 1998, 124:2. 2006, 322:3, eff. Aug. 21, 2006.

541-A:31 Availability of Adjudicative Proceeding; Contested Cases; Notice, Hearing and Record. –

VII. The entirety of all oral proceedings shall be recorded verbatim by the agency. Upon the request of any party or upon the agency's own initiative, such record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs for such transcription. If a transcript is not provided within 60 days of a request by a person who is a respondent party in a disciplinary hearing before an agency responsible for occupational licensing, the proceeding shall be dismissed with prejudice. Any party may record an oral proceeding, have a transcription made at the party's expense, or both, but only the transcription made by the agency from its verbatim record shall be the official transcript of the proceeding.

Env-Wt 302.01 Statement of Purpose.

(a) For tidal wetlands, need shall be demonstrated by the applicant prior to department approval of any alteration of tidal wetlands. No project shall be allowed that intrudes into a tidal wetland unless the department finds it to be for the public good as set out in RSA 482-A:1. Preserving the integrity of salt marshes and other tidal wetlands shall be given highest priority by the department, because of the high productivity and rarity of such wetlands and the difficulty in restoration of value and function for those environments.

Env-Wt 302.04 Requirements for Application Evaluation.

(a) For any major or minor project, the applicant shall demonstrate by plan and example that the following factors have been considered in the project's design in assessing the impact of the proposed project to areas and environments under the department's jurisdiction:
(1) The need for the proposed impact;
(2) The alternative proposed by the applicant is the one with the least impact to wetlands or surface waters on site;
(3) The type and classification of the wetlands involved;
(4) The relationship of the proposed wetlands to be impacted relative to nearby wetlands and surface waters;
(5) The rarity of the wetland, surface water, sand dunes, or tidal buffer zone area;
(6) The surface area of the wetlands that will be impacted;
(7) The impact on plants, fish and wildlife including, but not limited to:
a. Rare, special concern species;
b. State and federally listed threatened and endangered species;
c. Species at the extremities of their ranges;
d. Migratory fish and wildlife;
e. Exemplary natural communities identified by the DRED-NHB; and
f. Vernal pools;
(8) The impact of the proposed project on public commerce, navigation and recreation;
(9) The extent to which a project interferes with the aesthetic interests of the general public. For example, where an applicant proposes the construction of a retaining wall on the bank of a lake,

the applicant shall be required to indicate the type of material to be used and the effect of the construction of the wall on the view of other users of the lake;
(10) The extent to which a project interferes with or obstructs public rights of passage or access. For example, where the applicant proposes to construct a dock in a narrow channel, the applicant shall be required to document the extent to which the dock would block or interfere with the passage through this area;
(11) The impact upon abutting owners pursuant to RSA 482-A:11, II. For example, if an applicant is proposing to rip-rap a stream, the applicant shall be required to document the effect of such work on upstream and downstream abutting properties;
(12) The benefit of a project to the health, safety, and well being of the general public;
(13) The impact of a proposed project on quantity or quality of surface and ground water. For example, where an applicant proposes to fill wetlands the applicant shall be required to document the impact of the proposed fill on the amount of drainage entering the site versus the amount of drainage exiting the site and the difference in thequality of water entering and exiting the site;
(14) The potential of a proposed project to cause or increase flooding, erosion, or sedimentation;
(15) The extent to which a project that is located in surface waters reflects or redirects current or wave energy which might cause damage or hazards;
(16) The cumulative impact that would result if all parties owning or abutting a portion of the affected wetland or wetland complex were also permitted alterations to the wetland proportional to the extent of their property rights. For example, an applicant who owns only a portion of a wetland shall document the applicant's percentage of ownership of that wetland and the percentage of that ownership that would be impacted;
(17) The impact of the proposed project on the values and functions of the total wetland or wetland complex;
(18) The impact upon the value of the sites included in the latest published edition of the National Register of Natural Landmarks, or sites eligible for such publication;
(19) The impact upon the value of areas named in acts of congress or presidential proclamations as national rivers, national wilderness areas, national lakeshores, and such areas as may be established under federal, state, or municipal laws for similar and related purposes such as estuarine and marine sanctuaries; and
(20) The degree to which a project redirects water from one watershed to another.

QUESTIONS PRESENTED FOR REVIEW[1]

1. Did the Wetlands Council act unlawfully and unreasonably in requiring Mr. Cook to prove a "need" for his dock where "need" is not a statutory element pursuant to RSA 482-A?

2. Did the Council act unlawfully and unreasonably in equating "need" with "necessity" as opposed to how the Court has previously defined need in the context of DES regulations concerning whether the proposal is "requisite, desirable, ***or*** useful." *In re Town of Nottingham*, 153 N.H. 539, 553 (2006) (emphasis added and quotation omitted)?

3. Did the Council act unlawfully and unreasonably in finding that Mr. Cook failed to show "need" as Mr. Cook could access a dock on a neighboring property by paying to have rights to that community association dock?

4. Did the Council err in failing to maintain a complete audio record of the proceedings as required by RSA 541-A:31,VII by only keeping a record of the direct examination of department witnesses and failing to preserve the cross examination of department witnesses?

5. Did the Council err in failing to find that the proposed dock would result in an appreciable gain in water depth and less environmental impact where this fact was conceded by the Department's own witness during cross examination?

6. Did the Council err in allowing a member who was not present for the entirety of deliberations to vote or must members of an administrative agency be held to the same standard as jurors? See *Opinion of the Justices*, 137 N.H. 100, 103 (1993); *State v. Sullivan*, 157 N.H. 124, 142 (2008) ("Constitutional concerns about the substitution of an alternate juror for a deliberating juror stem from the right of a defendant to have each juror arrive at his or her decision after engaging in ***all*** of the jury's deliberations.")

7. Did the Council act unlawfully, unreasonably and in violation of RSA 482-A by failing to find any factual or legal basis found as all votes resulted in a 5-5 tie?

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[1] All questions presented were properly raised and preserved in the Motion for Reconsideration/Rehearing and Reply thereto filed on January 10, 2017 and January 20, 2017. These pleadings are found in the Certified Record at CR 150 to 174. The Hearing Officer issued a Ruling on Request for Reconsideration on March 22, 2017 which is found in the Addendum at Add. 7-10 and in the Certified Record at CR 181 to CR 184.

STATEMENT OF FACTS AND OF THE CASE

Shorefront property owners have a common-law right to build docks to reach navigable water. *Donaghey v. Croteau*, 119 N.H. 320, 323 (1979)("In New Hampshire, the right to wharf out to navigable depth has long been recognized as a common-law littoral right.") Although this right can be reasonably limited to protect the public's right of access, these constitutional property rights are not dependent on an individual property owners' intended use or need for a dock. In fact, rights to wharf or dock can be sold or transferred separately from rights to underlying shorefront property. *Id.* (right to wharf out can be sold separately from underlying shorefront property); see also *Appeal of Michele*, 168 N.H. 98, 104 (2015)(easement holder has right to construct dock off of subservient estate); *Opinion of the Justices*, 139 N.H. 82, 90 (1994)("[p]rivate shorefront owners are entitled to exercise their property rights in the tidelands so long as they do not unreasonably interfere with the rights of the public.")

The Appellant, N. Miles Cook, III, owns a property with approximately 767 feet of frontage on the Piscataqua River in Dover. CR[2] 96. Mr. Cook's current dock only allows him to use a skiff at high tide. CR 299. At low tide, the skiff is unusable and rests on the mud bottom. CR 299. In over half of the tide cycle, Mr. Cook's current dock is unusable.[3]

In March 2013, Mr. Cook applied for a permit to expand his dock to 325 feet.[4] This proposed dock would have given him access to navigable water at all tides. CR 299. Mr.

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[2] All citations are to the Certified Record (CR) produced by the Wetlands Council to the Supreme Court on or about July 14, 2017.

[3] Mr. Cook's current dock has no or problematic access 64.28% of the time. CR 51.

[4] The width of the river in the vicinity of Mr. Cook's property is approximately 861 feet. CR 53. The NH Division of Ports and Harbors opined that this proposal would have no negative effect on navigation in the Piscataqua River channel. CR 299-300.

Cook's permit and appeal were both denied. See CR 297-307. The reasons given for the denial included that at 325 feet was just too long and longer than the nearby Brickyard community dock at 283 feet. CR 299.

On or about April 30, 2015, Mr. Cook filed for the instant permit under RSA 482-A. See CR 186-225. This application was for an approximately 280 foot dock, of which 220 feet would be in the public trust. See CR 27, CR 139. Although this proposal would not give Mr. Cook all tide access, it would improve access by approximately 25%. CR 51. It was also comparable in size to the 283 foot long Brickyard dock. CR 96. The Chief Harbor Master reviewed Cook's proposed dock and found the structure would have no negative effect on navigation in the channel. CR 35. The Dover Conservation Commission also unanimously voted to endorse the application. CR 237.

On October 9, 2015, the Department of Environmental Services [hereinafter the Department] denied Mr. Cook's application. CR 331-335. The Department felt that because Mr. Cook could drive approximately a half mile and utilize the Brickyard community dock by paying a membership fee, Mr. Cook did not "need" his own dock. Id.[5]

The Department's denial was appealed to the Wetlands Council [the Council] pursuant to RSA 482-A:10 which, after a hearing on August 9, 2016, and deliberations on August 30, 2016, deadlocked in a 5-5 tie. Nevertheless, even though the Wetlands Council failed to come to any conclusions, the Hearing Officer issued a December 13, 2016 Order denying the appeal. See

[5] Although the Department stated other and related reasons for the denial, "need" was the only reason considered by the Wetlands Council and therefore the only reason relevant to this appeal.

Order at CR 137 and at Add. 1 .[6] A Motion for Reconsideration was filed on January 10, 2017, CR 151-179, and denied by the Hearing Officer on March 22, 2017. CR 180-184 and at Add. 7-10.

[6] The Orders of the Wetlands Council under appeal appear both in the Certified Record at CR 137-142 and CR 181-184, and in the Addendum at Add. 1-10 pursuant to Supreme Court Rule 16(3)(i).

SUMMARY OF THE ARGUMENT

The December 13, 2016 Order affirming the denial of Mr. Cook's dock permit states "[t]he central issue in this appeal . . . is whether the Appellant could justify the expanded dock proposal based on his 'need' to access navigable water on a more frequent basis." There are three errors with the Order's need determination.

First, RSA 482-A does not require an applicant to show "need." Although the Department asserts that applicants need to show a need for a dock pursuant to Env-Wt 302.01(a) and 302.04(a)(1), these administrative rules are invalid because they do not effectuate the purpose of RSA 482-A but add new requirements not found in the statute. *See In re Mays*, 161 N.H. 470, 473-76 (2011)(regulation that adds new requirements not found in statute is invalid).

Second, even if "need" was an administratively required criteria, this Court has explicitly held "need" in DES rules means whether the proposal before DES is "requisite, desirable, ***or*** useful." *In re Town of Nottingham*, 153 N.H. 539, 553 (2006) (emphasis added and quotation omitted).[7] The Council erred in failing to apply "need" consistent with the definition in *In re Town of Nottingham.*

Finally, the Council erred in considering whether Mr. Cook go to the Brickyard community association dock and pay to use their quasi-public dock instead and therefore did not "need" an expanded dock off his own property. The Council should have applied need to the property at issue and not considered whether there was an offsite opportunity.

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[7] The regulations at issue in *Nottingham* were adopted pursuant to RSA 485-C while the regulations in this case were adopted pursuant to RSA 482-A. Nevertheless, the Supreme Court has instructed that "[w]ords used with plain meaning in one part of a statute are to be given the same meaning in other parts of the statute unless a contrary intention is clearly shown." *Appeal of Lake Sunapee Protective Ass'n*, 165 N.H. 119, 128 (2013).

In addition, there were several procedural errors at the hearing and deliberations before the Wetlands Council.

First, although RSA 541-A:31,VII requires the Wetlands Council to keep a complete audio recording of the hearing, the Council kept only the direct examination of Department witnesses and turned off the recorder for cross examinations.

Second, RSA 482-A:10, VI provides that "On appeal, the council may affirm the decision of the department or may remand to the department with a determination that the decision complained of is unlawful or unreasonable. The council ***shall*** specify the factual and legal basis for its determination and shall identify the evidence in the record created before the council that supports its decision." (Emphasis added.) The Council failed to reach any conclusions as each vote it took resulted in a 5-5 tie.

Third, the Council erred in allowing a member, who was not present for the entirety of deliberations, to vote. See *Opinion of the Justices*, 137 N.H. 100, 103 (1993); *State v. Sullivan*, 157 N.H. 124, 142 (2008) ("Constitutional concerns about the substitution of an alternate juror for a deliberating juror stem from the right of a defendant to have each juror arrive at his or her decision after engaging in ***all*** of the jury's deliberations." (emphasis added). Had this late arriving member not voted, the Council would have reversed the Department's decision by a 5-4 vote.

ARGUMENT

I. The Department Erred in Applying "Need" to Deny Cook's Application

This court reviews "an agency's interpretation of a statute *de novo* and 'will not defer to an agency's interpretation if it clearly conflicts with the express statutory language ... or if it is plainly incorrect.'" *Appeal of Morrissey*, 165 N.H. 87, 91 (2013)(quoting *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012)).

The Department's primary basis for denying Mr. Cook's application, and the only basis considered by the Council on appeal, was that Mr. Cook failed to demonstrate a need for an expanded dock.[8] In particular, the Council stated that Mr. Cook failed to prove his "need" of a dock to "access navigable water on a more frequent basis." See Order, p. 2, at CR 138 and at Add. 2; see also, Order, p. 5, at CR 141and Add. at 5 (finding Cook "failed to meet his burden to demonstrate that he had a need for the expanded dock within the meaning of Env-Wt 302.01(a).")

"Need" is not an appropriate criteria but even if "need" was an appropriate criteria, the Council erred in applying the wrong definition of need and improperly looking at offsite structures.

a. Need is Not a Required Element

In reviewing applications for dock permits, the Department can only consider the requirements of RSA 482-A and regulations adopted that advance the statutory purposes of RSA 482-A. The Department cannot create new requirements not present in the statute.

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[8] The Council's Order states that it appeared evenly split on DES's other findings but no votes were taken as the Council was deadlocked with a 5-5 tie on the first finding regarding need. See Order, p. 5 at CR 141.

Need, as applied by the Council in this case, is not based on any statutory provision or a properly adopted regulation. A regulation may only "fill in the details to effectuate the purpose of the statute . . . [and may] not impermissibly add to the statutory requirements." *In re Mays*, 161 N.H. 470, 475 (2011). "Need" is not based on any statutory purpose and therefore the Department cannot, by regulation, add it as an additional element for the applicant to prove.[9]

The Council erred in requiring Cook to prove his "need" for a dock and the decision must be reversed.

b. Even if Need was a Required Element, Need Should be Applied Using its Usual Definition as Determined in *Nottingham*

As noted in the Council's December 13, 2016 Order, "need" appears in Env-Wt 302.01(a) and Env-Wt 302.04(a)(1) but the term "need" is not further defined.[10] See Order, 2-3 at CR 138-139 and at Add. 2-3. Where the term is not specifically defined otherwise, this Court should apply the usual dictionary definition of need. *In re Town of Nottingham*, 153 N.H. 539, 553 (2006).

In the context of other DES rules, the New Hampshire Supreme Court has explicitly held "need" means whether the proposal before DES is "requisite, desirable, ***or*** useful." *In re Town*

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[9] The Department argued that "need" required a showing that the dock be in the "public good" consistent with the statement of purpose at RSA 482-A:1. CR 156 to CR 160, ¶¶ 2-11. Nevertheless, the Department's proffered definition was explicitly rejected by the Wetlands Council. See Order on Reconsideration at CR 183-184 and Add. 9-10. Furthermore, if a shorefront owner needed to show that their private dock was in the public good (as opposed to just showing that it would not interfere with the rights of the public), this would likely constitute an unconstitutional taking. See *Opinion of the Justices*, 139 N.H. 82, 90 (1994).

[10] Env-Wt 302.01(a) is entitled "Statement of Purpose" while Env-Wt 302.04 is entitled "Requirements for Application Evaluation." "Need" is the first of 20 criteria in Env-Wt 302.04.

of Nottingham, 153 N.H. 539, 553 (2006) (emphasis added and quotation omitted).[11] This Court has specifically rejected equating "need" with "required." *Id.* at 554. It does not matter that the regulations at issue in *Nottingham* were adopted pursuant to RSA 485-C while the regulations in this case were adopted pursuant to RSA 482-A. "Words used with plain meaning in one part of a statute are to be given the same meaning in other parts of the statute unless a contrary intention is clearly shown." *Appeal of Lake Sunapee Protective Ass'n,* 165 N.H. 119, 128 (2013). There is no statutory or regulatory basis for defining need for DES's regulations under RSA 482-A differently than DES's regulations under RSA 485-C.

Even if "need" was defined to mean "necessary," the definition was not properly applied in this case. This Court has held in the context of shoreland permits for boat launches that "the phrase 'as necessary' [means] that a *permit* is necessary for the project—*i.e.*, that without it, the project cannot be completed." *Appeal of Lake Sunapee Protective Ass'n,* 165 N.H. 119, 128 (2013). There is no basis why a permit for boat launch under RSA 483-A is treated differently than a permit for a dock under RSA 482-A.

Therefore, this case should be remanded for the Department to apply the correct definition of need.

c. Offsite Public Docks Are Not Relevant to Need Analysis

Finally, the Department erred in determining there was no "need" for an expanded dock as Mr. Cook could just use a dock on a different property. In particular, the Department felt because Mr. Cook could pay to use the Brickyard community association dock approximately a

[11] The regulations at issue in *Nottingham* were effectuating RSA 485-C:4(XII)(b) which statutorily requires applicants to show a "demonstrated need" and explicitly authorizes the adoption of regulations regarding "need." As previously stated, "need" does not appear in RSA 482-A.

half mile away from Mr. Cook's house, there was no "need" for Mr. Cook to have his own dock. See Order 3-4 at CR 139-140 and at Add. 3-4. The Department further compared the cost of paying to become a member of a community dock as compared to Mr. Cook having his own dock on his 767 feet of frontage. This was error.

Neither the statute nor the regulations authorize the department to look at potential offsite options as a basis to obtaining a permit on one's own property. If the cost and availability of offsite docks could be considered in need analysis, then the Department could deny every private dock permit request as one could simply access navigable water via a public dock or a commercial dock by paying to use someone else's dock. This would lead to an absurd result. As noted in the Council's Order, five of the ten Council members who heard this case found it unreasonable for the Department to apply an unwritten rule requiring applicants to "use a public dock if it were in the vicinity of their property." Order, p. 5 at CR 141 and at Add. 5. Other than the present case, the Department cites no other case where a private dock permit was denied on the basis that the landowner could pay to become a member of a community association dock. Instead, the Department stated that it simply applies unwritten rules to determine need "on a case by case basis." Order, p. 4 at CR 140 and at Add. 4.

II. The Council Made Several Errors in the Conduct of the Appeal

a. The Wetlands Council Did Not Reach Any Decisions

RSA 482-A:10 provides that "On appeal, the council may affirm the decision of the department or may remand to the department with a determination that the decision complained of is unlawful or unreasonable. The Council shall specify the factual and legal basis for its determination and shall identify the evidence in the record created before the council that supports its decision." In the present case, the Council failed to reach any conclusions. Ten

members of the Council heard the appeal and their votes were split five in favor and five against. See Order, p. 6.[12] The Council acted unlawfully and unreasonably in that it neither affirmed nor denied and did not specify the factual and legal basis for its decision to affirm or deny.

b. The Council Acted Unlawfully in Allowing a Council Member to Vote After Attending Only Part of the Deliberations

Pursuant to the New Hampshire Constitution, a fact finder must be present for the entirety of deliberations in order to vote on the issues to be decided. See *Opinion of the Justices*, 137 N.H. 100, 103 (1993); see also *State v. Sullivan*, 157 N.H. 124, 142 (2008)("[c]onstitutional concerns about the substitution of an alternate juror for a deliberating juror stem from the right of a defendant to have each juror arrive at his or her decision after engaging in ***all*** of the jury's deliberations.") The members of administrative boards effecting property rights act in a quasi-judicial capacity and as such must meet the impartiality standards constitutionally demanded of jurors. *Winslow v. Town of Holderness Planning Bd.*, 125 N.H. 262 (1984).[13] Just as it would be unconstitutional to have a juror vote after missing the beginning of deliberations, it was unlawful and unreasonable for the Council to have a council member vote who was not present for the entirety of the deliberations.

In this case, the deliberations on August 30, 2016, opened with nine members of the Wetlands Council. See August 30, 2016 Transcript, 3-4 at CR 515 to 516. Only nine members

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[12] The statute provides that there shall be an odd number of council members. RSA 21-O:5-a. If the appeal was heard by an odd number of members, there would not have been a tie vote.

[13] The Department does not dispute that members of the Wetlands Council must be constitutionally held to the same standard as jurors. See Department's Reply, ¶ 3, at CR 177. "The Department agrees that administrative boards acting in a quasi-judicial capacity must meet the impartiality standards constitutionally demanded of jurors. *Winslow v. Town of Holderness Planning Bd.*, 125 N.H. 262 (1984)."

should have voted. Nine members would have been able to reach a five to four decision.[14] Nevertheless, a tenth member, Sheridan Brown, showed up late and was allowed to vote after missing the beginning of the deliberations. See Transcript, p. 1-8 at CR 513 to 522. By allowing Mr. Brown to vote, the Council deadlocked in a 5-5 tie.

No one disputes that Mr. Brown missed the beginning of deliberations. Prior to Mr. Brown arriving, Council Member St. Pierre explained that in determining "need" DES "applied unpromulgated regulations that were put into effect at some unknown time and are known only to department staff . . . [and] it is both unreasonable , and unlawful, to apply regulatory criteria that do not exist." See Transcript, 7-8, at CR 519-520. It is unclear what effect hearing the entirety of deliberations would have had on Mr. Brown's ultimate vote.

In denying reconsideration, the Hearing Officer wrote that "[t]here does not appear to be any specific harm suffered by the appellant due to this few minutes' absence." CR 182. It is impossible to tell the effect on Mr. Brown's reasoning if he had been present for the entirety of the deliberations. Nevertheless, where the Council ultimately deadlocked in a 5-5 tie and Mr. Brown moved and voted to affirm the Department's permit denial, the harm to Mr. Cook is clear. Mr. Cook's permit would have been approved by the Council on a 5-4 vote had Mr. Brown not been allowed to vote. Not only was the harm specific, it was dispositive of the entire case.

c. Failure to Maintain A Record

Finally, the Council acted unlawfully and unreasonably in failing to maintain a complete audio recording of the hearing held on August 9, 2016, as required by RSA 541-A:31 (VII). The statute specifically requires the Council to record all hearings and provide a transcript if

[14] Of the nine members who were present for the entirety of the deliberations, five voted that the Department acted unreasonably and unlawfully in denying Mr. Cook's permit while only four voted to affirm the Departments permit denial.

requested. "The entirety of all oral proceedings shall be recorded verbatim by the agency. Upon the request of any party or upon the agency's own initiative, such record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs for such transcription." RSA 541-A:31 (VII).

It is undisputed that the Council failed to meet its statutory obligation. As the Hearing Officer stated in denying reconsideration, "[t]he Council grants that the audio recording of the August 9, 2016 hearing is incomplete." CR 182. It is irrelevant why the Council failed to maintain a record of the proceedings. The Council was obligated to maintain a record of the entire proceedings but failed to do so.

The Council's December 13, 2016 Order relies on testimony from Mr. Adams and Mr. Pelletier on both the issue of need and whether there would be an appreciable gain in water depth.[15] Mr. Cook challenged those findings in a motion for Reconsideration, see Order, p. 4 at CR 152 and at Add. 4 . In particular, contrary to the Hearing Officer's recitation of Mr. Adams' testimony on page 4 of the Order, Mr. Adams acknowledged during his cross examination that there would be a 2 foot appreciable gain in usable water. In addition, Council Member Mellor correctly recounted during the August 30, 2016 deliberations "that Mr. Collis Adams of Department of Environmental Services confirmed the information attested to by numerous expert witnesses that the proposed configuration in Cook's application would result in less environmental impact." See Transcript of Deliberations, 68:12 at CR 580. Unfortunately, the Council failed to maintain a record of the cross examination of Mr. Adams and again for Mr.

[15] Whether there is any appreciable gain in water depth is directly related to the question of whether Mr. Cook demonstrated his need for an expanded dock. See CR 334, ¶ 1.

Pelletier. Transcript, p. 149-150, at CR 510 to 511. Therefore, Mr. Cook was not able to use Mr. Adam's concessions in cross examination as he was denied access to a transcript.

CONCLUSION

The Department erred in denying the permit on the basis that Mr. Cook did not "need" a dock but could simply pay to use the Brickyard community dock. Need is not appropriate criteria under RSA 482-A. Even if need was an appropriate criteria, need should have been applied consistent with its ordinary meaning and as applied in the context of other DES rules and statutes. See *In re Town of Nottingham*, 153 N.H. 539, 553 (2006) (defining need to mean "requisite, desirable, ***or*** useful"); *Appeal of Lake Sunapee Protective Ass'n,* 165 N.H. 119, 128 (2013)(determining in the context of shoreland permits that "the phrase 'as necessary' [means] that a *permit* is necessary for the project"). Whether Mr. Cook or any other private landowner could pay to use a community dock on a different property is not relevant to whether one can wharf out on their own shorefront property. *Opinion of the Justices*, 139 N.H. 82, 90, 649 A.2d 604, 609 (1994)("[p]rivate shorefront owners are entitled to exercise their property rights in the tidelands so long as they do not unreasonably interfere with the rights of the public.")

The case should be remanded to the Department to reconsider consistent with this Court's opinion.[16]

[16] Even if the Court were to find that remand was not necessary on the issue of "need", the Court should remand to the Wetlands Council to rehear the case while maintaining a complete record, only having members who are present for the entirety of the deliberations vote and requiring that the Council actually "specify the factual and legal basis for its determination and shall identify the evidence in the record created before the council that supports its decision" consistent with RSA 482-A:10.

CERTIFYING STATEMENT

I hereby certify that every issue raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important questions regarding statutory construction and the due process rights of property owners appearing before quasi-judicial administrative agencies. The Wetlands Council deadlocked on these issues in 5-5 tie vote. Oral argument before the full Court would be helpful to resolving these issues. If oral argument is granted, the Appellant requests 15 minutes to be presented by Attorney Michael J. Tierney.

Respectfully submitted,

N. Miles Cook, III

By his Attorneys,

Wadleigh, Starr & Peters, P.L.L.C.

Date: August 25, 2017

By: _____

Michael J. Tierney – NHBA# 17173
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Manchester, NH 03101
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 25th day of August, 2017, by U.S. mail, postage prepaid, to Mary E. Maloney, Esq. at 33 Capitol Street, Concord, NH 03301, counsel to the Department of Environmental Services and to the Wetlands Council, Paula Scott, Appeals Clerk, P.O. Box 95, 29 Haven Drive, Concord, NH 03302-0095.

By: _____
Michael J. Tierney, NH Bar #17173

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Before the
STATE OF NEW HAMPSHIRE

WETLANDS COUNCIL

RE: DOCKET NO. 15-12 WtC APPEAL OF N. MILES COOK, III
("APPELLANT")

DECISION AND ORDER

ON

PETITION FOR APPEAL

BACKGROUND

On November 5, 2015, Appellant N. Miles Cook, III, filed his Petition for Appeal ("Appeal" or "App.") in this matter, alleging that the Department of Environmental Services ("DES") illegally or unreasonably denied his wetlands permit application to reconstruct and extend his existing Piscataqua River tidal dock from approximately 107 linear feet to approximately 263 feet from the highest observable tide line with 219 feet extending into the public trust lands. (DES determined the length to be 280 feet from the highest observable tide line.) This application was initiated by the Appellant in response to a previous denial of a dock permit by DES, sustained by the Wetlands Council in Docket NO. 13-12 WtC, which would have created a dock of approximately 325 feet in overall length and would have provided all-tide access for Appellant's use of his watercraft.

Appellant's new application was dated March 10, 2015, and the stated purpose for that submission was "providing the Applicant with reasonable access to navigable water." App. at heading "Littoral/Riparian Rights". The Application expanded on this purpose under the heading "Need" as follows:

> The existing dock at this location does not provide reasonable access to navigable public water over more then (sic) half of the tidal cycle, and provides problematic access during almost all of the tidal cycle. It cannot be disputed that because this property does not have access to navigable water over a significant period of time, that its access rights cannot be reasonably exercised. Multiple photos, surveys, and plan outlines prove that in order for the access rights at this property to be reasonably exercised, that a larger dock is needed. (emphasis supplied)

DES denied this application by letter dated October 9, 2015 (the "Denial") (App. Ex. D). This letter cited seven "findings" in support of its decision to deny the application:

(i) failure to demonstrate "need" pursuant to Env-Wt 302.01(a) and 302.04(a)(1), as the Appellant has an existing dock that provides partial tidal access, a mooring in the Piscataqua River, and the ability to use the Brickyard Estates community dock on abutting property that provides all-tide access to his mooring. Moreover, the plans for the proposed dock show that that there will be no more water depth at the new proposed location than is available with the

Appellant's current dock. And the "public good" requirement of Env-Wt 302.01(a) is not met by expanding the current dock when the Brickyard dock is available and had been constructed to serve many users in one location, thereby minimizing environmental impacts (App. Ex. D, para. 1, pg. 4);

(ii) failure to demonstrate "avoidance and minimization" of adverse impacts to the wetlands within the meaning of Env-Wt 302.03 given the fact that the new proposal causes a 260% greater impact to the environment compared with the existing structure (id. para. 2, pg. 4);

(iii) failure to establish that the proposal satisfies Env-Wt 302.04(a)(2) requiring that the alternative be the one with the least impact to wetlands compared with other alternatives. In this case there exists an alternative requiring no additional impact to wetlands...i.e., use of the existing dock in conjunction with the Brickyard dock to provide all-tide access (id. para. 3, pg. 4);

(iv) and (v) failure to conform to Env-Wt 402.21, in that the proposal is more environmentally impacting and provides for more construction surface area over public submerged lands than the current configuration (id. paras. 4 and 5, pg. 4);

(vi) Pursuant to Env-Wt 302.04(d)(1), and given the above findings, the applicant failed to refute the DES opinion that there is a practicable alternative that would have less adverse impact on the area and environments under DES jurisdiction (id. para. 6, pg. 4); and

(vii) Pursuant to Env-Wt 302.04(d)(3), DES determined that the proposal would cause random or unnecessary destruction of wetlands (id. para. 7, pg. 4).

The Council heard testimony regarding the Appeal from witnesses called by Appellant and DES on August 9, 2016. Deliberations were held on August 30, 2016.

DISCUSSION

As the appealing party, Appellant has the burden of proving by a preponderance of the evidence that the Department's decision to deny the permit was unlawful or unreasonable. RSA 482-A:10, V; Env-WtC 206.07(a), (c).

The central issue in this appeal, as it was in his prior appeal, is whether the Appellant could justify the expanded dock proposal based on his "need" to access navigable water on a more frequent basis than he currently experiences with the existing dock. Although the Appellant presented testimony directly, and through expert witnesses, supporting his argument that each of DES's seven findings pertaining to his revised permit application were flawed in a number of respects, his primary focus was on DES's determination that he had failed to prove the degree of "need" necessary to approve the permit as required by Env-Wt 302.01 (a) and 302.04(a)(1). Env-Wt 302.01(a) provides that:

(a) For tidal wetlands, need shall be demonstrated by the applicant prior to department approval of any alteration of tidal wetlands. No project shall be allowed that intrudes into a tidal wetland unless the department finds it to be for the public good as set out in RSA 482-A:1. Preserving the integrity of salt marshes and other tidal wetlands shall be given highest priority by the department, because of the high productivity and rarity of such wetlands and the difficulty in restoration of value and function for those environments.

"Need" is not further defined by either statute or rule.

For purposes of establishing his need for an expanded dock, Appellant offered testimony and accompanying exhibits including, in part, his own summary of existing conditions. His current 107 foot long dock accommodates an eighteen foot skiff that he uses to access his larger craft moored in deep water. At low tide the skiff rests on the mud bottom, at high tide he easily accesses his larger boat, and at other stages of the tide such access is unreasonably difficult, in part due to the existence of a shoal area set off from his float. While the 325- foot proposed dock involved in Appellant's prior appeal would have allowed all-tide access, he was now willing to forego that proposal with his latest 263-foot plan that in his opinion would allow more reasonable access than he currently realizes, if not full-tide access. Appellant's expert, Geometres Blue Hills, LLC, prepared a Site Plan as part of the application, which reports that at mean low water on a 0-0 tide, the proposed dock would have approximately .5 foot of water available for navigation beyond the shoal area, versus the existing dock, which in the same circumstance would be roughly .7 feet above the water level. Moreover, at the shoal area in front of the existing dock, at mean low water, the mud flat would extend roughly 1.6 feet above water. Thus, Appellant argued that approximately 2 feet of total gain in usable water would be realized if the new dock were approved.

Appellant's witness, Sen. Deborah Stiles, also testified that Rene Pelletier, a DES official, had indicated to her that a proposal to extend a dock roughly 220 feet into tidal wetlands, as here, could be approved by DES. Appellant stated that this information formed the basis of his decision to design the current proposal with such a length. He further testified that he was familiar with a number of similarly lengthy docks in the Piscataqua River, including the neighboring Brickyard homeowners' association community dock at 283 feet, as well as other individual homeowners with similar or longer docks, including one that was allegedly long enough to access deep water at all tides and extended well into the navigational channel of another tidal river. See e.g., App. Ex. 3. Appellant's proposal does not extend into the navigational channel of the Piscataqua.

The Appellant acknowledged that he and his family are members of the homeowners association, and do have rights--subject to payment of fees-- to use the abutting 283- foot community dock for dinghy access to his larger vessel. But that dock was almost one-half mile away from his residence by land, his use would be subject to the use of the other homeowners participating in the community facility, and it was not reasonable to expect him to pay initiation fees and annual dues for a privilege that as a waterfront property owner, he already had.

Furthermore, Appellant testified that in addition to his family's recreational use of their waterfront, he is involved in the business of selling watercraft, and occasionally invites customers aboard his moored vessel for demonstration purposes. The current shorter dock makes these efforts much more difficult than if the extended dock were in place.

DES called Collis Adams, Administrator of the Wetlands Bureau, and signatory to the October 9, 2015, permit denial, to explain DES's position regarding Appellant's assertion of need for an expanded dock. He explained that because "need" is not further defined, and there are no regulatory limits on the length of a permittable dock, his department considers a number of factors in making a needs analysis on a case by case basis. In the subject case, those included a review of available alternatives, which would include use of the Brickyard dock for full-tide access during periods of low water, and use of Appellant's existing dock at other times. It also included an analysis of the costs of the proposal versus the costs of alternatives. In the subject case, Mr. Adams noted that the Appellant estimated that the cost to complete the proposed dock would be approximately $90,000 while the initiation fee to join the Brickyard dock organization would be $1500, and annual dues would be approximately $250. Regarding Appellant's argument that the Brickyard dock was used by many others, thus restricting his own use, Mr. Adams noted that the evidence indicated that only fifteen homeowners were members of the dock association, and it was possible that only seven of them owned watercraft.

With regard to DES's opinion that " there will be no more water depth at the new proposed float...than is available to the applicant with his current dock" (App. Ex. D, at para. 1, pg. 4), Mr. Adams explained that 6 inches of available water depth at mean low water is not necessarily an appreciable value because that would depend on the type of vessel involved. Reference was also made that DES takes the position that usable water equates to one foot of depth at mean low water compared with three feet of depth in non-tidal waters. Moreover, it will not provide all-tide access, and as detailed in the Denial, there would be many instances during minus tide conditions when even the new dock would be unusable. Given the above, Mr. Adams asserted that the proposal produced no appreciable gain in usable water when balanced against its impact to the public trust.

Appellant cross-examined Mr. Adams regarding DES's position that the permit should be denied for failure to comply with Env-Wt 402.21 "Modification of Existing Structures" (Denial findings # 4 and #5). Appellant asserted that those rules, which would deny a permit to modify an existing shoreline structure unless it provided for fewer boat slips and less construction surface area over public submerged lands than the current configuration, only apply to fresh water environments. Mr. Adams stated that it was DES's position that the Env-Wt 400 regulations address all shoreline structures and apply to both salt and fresh water situations.

DES called Rene Pelletier to testify regarding his conversation with Sen. Stiles in which he indicated a 220-foot dock could be approved for the Appellant. He explained that his comments were general in nature, that he made clear that the final decision would be made only on the specific facts and circumstances of the project, and that he would not have guaranteed that a permit would be issued in this case. Moreover, he did not review Appellant's permit application.

The Council considered the parties' evidence and arguments regarding DES's first finding that the Appellant failed to demonstrate a need for this project at its deliberative

session. Five members found that DES acted unreasonably by misstating or disregarding the amount of usable water Appellant would gain with the new dock. They also believed that it was unreasonable to require the Appellant to pay to use the neighboring community dock during low tides. Some members also thought it was unreasonable for DES to apply unwritten rules to deny this permit, including the so-called "one foot" rule and an indication that some DES staff thought Appellant's proposed dock was simply too long to be approved. In the same vein, there are no rules requiring applicants in general to use a public dock if it were in the vicinity of their property; and in the case of the Brickyard dock, there was no evidence that the grant of its permit was intended to foreclose property owners from constructing their own private docks.

The remaining five members of the Council thought that Appellant had not presented sufficient objective evidence to support his need for this expansion plan, when there existed for the Appellant's use of his shorefront a private partial tide dock, a mooring and an available all-tide access dock nearby. The proposal appeared to be based on the fact that it would be more convenient for Appellant to have the expanded dock, rather than an identified need for the same. It was noted that the Army Corps of Engineers agreed with DES that there was no significant gain in usable water with the new configuration; and, in any event, a shorefront owner's common law wharf out rights are not unlimited and are subject to reasonable restrictions including limited access to navigable water at various tide levels.

On a motion to find that the Appellant had failed to meet his burden to demonstrate that he had a need for the expanded dock within the meaning of Env-Wt 302.01(a), and, therefore, DES acted neither illegally nor unreasonably in denying the permit, the Council split the vote five members in favor, and five against. Because a majority of the Council failed to find that DES acted illegally or unreasonably regarding finding # 1, Appellant failed to satisfy his burden of proof on this issue and DES's denial of the permit on this basis was sustained.

Having found that Appellant failed to satisfy his burden to demonstrate need for the expanded dock, the Council also split their votes evenly on a motion to find that DES acted illegally or unreasonably in finding that there was no more usable water at the proposed dock compared with the existing dock. Although specific motions were not made regarding the DES's findings #2 and #3, it was apparent that the Council was evenly divided on the question whether DES correctly held that the application failed to avoid or minimize impacts to the wetlands to the maximum extent practicable, Env-Wt 302.03, and whether the proposal was the alternative with the least impact to wetlands given other practical alternatives available. Env-Wt 302.04(a)(2). The same applies to the reasonableness or legality of DES's interpretation and application of the shoreline structures rules, Env-Wt 402.21 in findings #4 and #5. Similarly, the Council appeared to be evenly divided, but did not specifically vote, on DES's findings #6 and #7 pertaining to the conclusion that a practical alternative with less impact to jurisdictional wetlands was available, Env-Wt 302.04(d)(1); and whether the proposed dock would cause random or unnecessary destruction of wetlands. Env-Wt 302.04(d)(3).

CONCLUSION

The Council concluded their deliberations with a motion to find that the Appellant failed to meet his burden of proof that the DES denial of his application was either illegal or unreasonable. The Council members split their vote five in favor, five against. Because the Appellant failed to convince a majority of the Council that DES acted illegally or unreasonably, the Appellant did not meet his burden to prove that DES's denial was unlawful or unreasonable.

ORDER

Appellant's Appeal is DENIED.

Any party may file a Motion for Reconsideration or Rehearing with the Council consistent with the requirements of RSA 541:3 within thirty days of the date of this decision.

By Order of the Hearing Officer

12/13/16
Date

COPY
David F. Conley, Esq. (NH Bar #130)

Hearing Officer

STATE OF NEW HAMPSHIRE

WETLANDS COUNCIL

Docket No. 15-12 WtC

Appeal of N. Miles Cook
In Re: DES Permit Denial October 9, 2015 File 2015-00960

Ruling on
Request for Reconsideration

Background

On October 9, 2015 NH Department of Environmental Services ("DES") denied a dock permit application submitted by N. Miles Cook ("Appellant") file 2015-00960.

On November 5, 2015 the Appellant filed an appeal with the NH Wetlands Council ("the Council").

Following a hearing and deliberation the Council issued its December 13, 2016 Decision denying the appeal.

On January 10, 2017 the Appellant filed this Request for Reconsideration.

On January 17, 2017 DES filed its Objection to the Request.

On January 20, 2017 the Appellant filed its Reply to the Objection.

On January 27, 2017 DES filed its Sur-Reply.

Discussion

The Request raises five arguments of alleged error by the Council in fact, legal reasoning, and procedure: Need, Appreciable Gain in Water Depth and Less Environmental Impact, Council Not Reaching Any Decision, One Council Member Voting who did not attend entire deliberation, and Failure to Maintain a Record.

Some of the arguments raised by the appellant are primarily issues of law; in light of RSA 21-M:3 IX (d) the Hearing Officer reviewed all arguments for the Council. His comments and rulings are incorporated into the discussion and ruling below.

The appellant's arguments are addressed in reverse order.

Failure to Maintain a Record:

The Council grants that the audio recording of the August 9, 2016 hearing is incomplete. As indicated in the Objection at 22, 23, 24, and the accompanying affidavit of Carolyn Guerdet, Council Clerk, this recording failure was unintentional. The Reply states specific harm through lost review of cross-examination of Collis Adams, DES' primary witness; alleging that Mr. Adams agreed to less environmental impact and appreciable gain in water depth, statements the appellant finds at variance with the Council's decision. Without the audio recording these and other statements by Mr. Adams are unavailable beyond the memories of all participants. The testimony on these points was conflicting; but even granting the appellant's position on the testimony, the Council does not believe this would change the Council's determination on the question of "need", the threshold requirement for granting a Wetlands permit.

One Council Member Voting who did not attend entire deliberation:

This occurred at the start of deliberations as described in the objection at 20 at which time Councilor St. Pierre read his partial analysis, the missing member arrived during this reading and took part in all further deliberations including review by all deliberating members of Councilor St. Pierre's analysis. There does not appear to be any specific harm suffered by the appellant due to this few minutes absence. At the time the Hearing Officer allowed the member to be seated and participate in the deliberations that extended in excess of three hours.

Council Not Reaching Any Decision:

As indicated in the Request at III and Objection at 14, 15, 16, & 17 the Council tied at five votes for and five votes against on two motions. One motion, that the appellant established the "need" for the project, "need" that was denied by DES; and a second motion that the appellant did not establish "need". Further deliberation revealed that the Council was at an impasse. As the appellant bears the burden of proof before the Council and the appellant failed to meet that burden the appeal was denied. Establishment of need is a requirement of obtaining a wetlands permit, therefore any Council determination of unreasonable or unlawful action by DES in other aspects of the permit process would have failed to reverse the outcome of denial on this issue. The Council believes that under RSA 482-A:10 VI this action constitutes a lawful decision.

Appreciable Gain in Water Depth and Less Environmental Impact:

The Request draws conclusions regarding the facts of gain in water depth and environmental impact issues disputed at the hearing. The Council's decision votes were based on "need" coupled with the water depth and environmental issue. To the extent that the appellant is asking the Council to rehear the appeal for the sole purpose of determining that two feet is an appreciable gain of depth and that the proposal has less environmental impact, the effort is futile without an establishment of "need". We also note the Objection and other filings reference rulings on various findings of fact; findings of fact stating "Mr. X testified ….", merely indicate Council agreement that such testimony was made not that the Council agreed or disagreed with the testimony.

Need:

The Request proposes a definition of "requisite, desirable, or useful", based on *In Re Town of Nottingham* 153 NH 539, 533 (2006) referencing RSA 485; a proposal opposed in the Objection at 9 & 10. DES, under RSA 482-A, uses "need" to balance the landowners benefit gained by the requested wetlands activity with public good, public trust, and wetlands impacts. For the Council to grapple with a new (to it) definition of "need" not directly in RSA 482-A or Wetlands rules and based on RSA 485 case law is not desirable, useful, or even within its authority.

The Objection at 2 thru 11 first argues that in tidal waters private docking structures must possess "public good" to meet the requirement for "need". The Council rejected this argument in deliberation and rejects it now. The appellants' proposal possesses no more or less "public good" than any other private tidal dock in the state; as stated in the Reply DES' "public good" argument in this application implies they should issue no private tidal dock permits. DES also argues that the dock as proposed does not provide access to usable water thus not meeting "need"; as noted at the hearing this could easily be rectified by DES recommending and allowing a longer dock than applied for, such as the length previous applied for by the appellant and rejected by DES and as offered by the appellant at the hearing.

Second, DES argues that the existence of a nearby, off property, all tide docking facility (Brickyard Estates) that the appellant can use coupled with his existing half-tide dock, is a practicable alternative that negates his "need" for an all-tide dock on his property to provide reasonable access to navigable waters. The Request makes the same argument the appellant made during the hearing: this DES argument is tantamount to saying that anyone can join a nearby yacht club or marina, for reasonable cost compared to building a private dock, and therefore no tidal littoral property owner has "need" for a private dock accessing navigable waters. On this issue the Council tied five-five, resulting in the appellant's failure to meet the burden of proof on "need". After extensive discussion the Council sees no reason, except the vagaries of attendance, a different result would come from rehearing.

This appeal raises several important issues regarding RSA 482-A determination of "need": Can one private dock be declared not a "public good" in the face of many others that apparently are? Can a tidal littoral landowner be told to join an available docking facility as a practicable alternative to a personal dock to reasonably access navigable waters? Does a dock that is "useful" meet the requirement of "need"? The Council rejected the first, tied on the second, and does not believe reasonable rehearing on the last.

Ruling

The Motion for Reconsideration **IS DENIED**, in accordance with the Council's decision on February 15, 2017.

So Ordered for the Council: COPY March 22, 2017.
George W. Kimball, Chairman

Reconsideration:

In accordance with RSA 481-A: 10, VIII (eff. July 1, 2008), any party aggrieved by a decision of the Council after reconsideration may appeal to the Supreme Court as specified in RSA 541.