THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0650

Appeal of New Hampshire Department of Environmental Services

APPEAL PURSUANT TO RULE 10 FROM AN ORDER
OF THE WETLANDS COUNCIL

BRIEF OF THE APPELLANT, STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

May 16, 2019

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL
SERVICES

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The State requests fifteen minutes of oral argument before the full court, to be presented by Senior Assistant Attorney General K. Allen Brooks

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4. Whether the Wetlands Council acted unlawfully or clearly unreasonably with respect to its findings of height and the Department of Environmental Services' methodology for measuring height. A114-20.

STATEMENT OF THE LAW AND FACTS[1]

A. The Shoreland Water Quality Protection Act

RSA 483-B:17, IV of the Shoreland Water Quality Protection Act ("Shoreland Act") allows the Department of Environmental Services ("Department") to make rules regulating small accessory structures in the protected shoreland. RSA 483-B:17, IV. Pursuant to this section, the Department enacted New Hampshire Administrative Rule, Env-Wq 1405.03, which restricts accessory structures to 12 feet in height. An applicant may repair or replace an accessory structure without submitting a full application to the Department if the intended work meets the requirements of RSA 483-B:5-b. RSA 483-B:5-b, I(a). In such cases, the applicant need only file a permit by notification ("PBN") with the Department before commencing work. *Id.* PBNs are not permits issued by the Department. Rather, the PBN process allows a project proponent to issue its own permit and simply notify the Department. *Id*. The PBN process is meant to provide an efficient approval process for simple projects. The Department issues a document acknowledging receipt and completeness of the PBN. RSA 483-B:5-b, V(d).

If the Department learns that the project has violated the Shoreland Act or its attendant administrative rules—such as the height restriction for accessory structures—the Department may issue an administrative order requiring corrective action. RSA 483-B:5, V. The person subject to an order may appeal it to the Wetlands Council. RSA 21-O:14, I-a. Pursuant to RSA 21-M:3, during an appeal to the Wetlands Council the Hearing Officer decides all questions of law and, after deliberating with the council members, decides all mixed questions of law and fact. RSA 21-M:3, IX (e), (d). The Council makes findings of fact for the Hearing Officer to adopt; however, the Hearing Officer can reject any finding of the Council that is without evidentiary support. RSA

[1] Citations to the record are as follows:
"A" refers to the Appendix provided with this brief;
"Supp." refers to the supplemental documents included herein;
"H" refers to the Hearing transcript;
"Del. Tr." refers to the June 12, 2018 deliberations transcript;
"Rec.Tr" refers to the October 9, 2018 reconsideration deliberation transcript.

21-M:3, IX (c). The Hearing Officer also drafts and issues all decisions. RSA 21-M:3, IX (f).

RSA 483-B:11 of the Shoreland Act governs nonconforming structures located within the protected shoreland. RSA 483-B:11 allows the footprint of a grandfathered nonconforming structure to be expanded if the structure is made more nearly conforming than the existing structure. RSA 483-B:11, I. Department rules set forth the method by which an applicant can request permission under RSA 483-B:11 to expand a nonconforming structure. N.H. Admin. R., Env-Wq 1408.05. Work on a nonconforming structure cannot be commenced by simply filing a PBN; changes to nonconforming structures require the filing of a standard permit. *Id.*

B. The Corrs' Violation of the 12-foot Height Restriction for Accessory Structures

This case involves property along Lake Winnipesaukee owned by Bryan and Linda Corr. A10. Up until 2016, the Corrs' property featured a waterfront accessory structure (boathouse) measured by the Corrs' own consultant to be 17 feet tall at its highest point. Supp. 50, #28; A3-9. In reality, only the first couple feet of the structure reached such a height. The remainder of the structure was dug into the bank and was, therefore, considerably shorter. *See* photographs at A130.

The Corrs submitted a PBN claiming that they intended to replace the structure with one having the "EXACT LOCATION AND HEIGHT." Supp. 37 (capitalization original). The Corrs later submitted a second PBN without any specific reference to height. A57-63. The second PBN did, however, reference the prior PBN stating: "A PREVIOUS WETLANDS APPROVAL WAS GRANTED (FILE #2016-00009) TO REPLACE THE STRUCTURE IN KIND. THIS APPLICATION IS TO REPLACE THE STRUCTURE BY MOVING BACK 10' AS A RESULT OF A VARIANCE GRANTED BY THE MOULTONBOROUGH ZBA." Supp. 38 (capitalization original); A57. In 2016 or early 2017, the Corrs began construction of an accessory structure that was approximately 27 feet high. A6. Within weeks of learning that a building was being constructed to more than the maximum height allowed by rule and to more than the

existing grandfathered height, the Department informed the Corrs and asked them to stop and fix the problem. A6-7. The Corrs refused. *Id*.

The Department then issued Administrative Order No. 17-028 WD ("Administrative Order"). A3-9. The Administrative Order did not find that the Corrs' new structure, by exceeding the height of the original structure, had lost its grandfathered status. *Id*. Had the Department determined that the Corrs' reconstruction to a greater height resulted in the effective abandonment of their old structure in favor of a new one, the Administrative Order arguably could have required complete removal. *Lawlor v. Town of Salem*, 116 N.H. 61, 63 (1976). The Administrative Order also did not require the Corrs to reduce the size of the structure by a specified number of feet. A3-9. Instead, the Administrative Order simply required the Corrs to make the new structure match the height of the previously grandfathered structure. A8. The height specified had been provided by the Corrs. A6-7; A124-125. The Corrs appealed to the Wetlands Council. A10-33.

C. Hearing Officer's Dismissal Order

As noted by the Hearing Officer, the Corrs' Notice of Appeal contained four claims:

> Appellants in their Appeal, raise four alternative arguments that DES acted unlawfully or unreasonably in issuing the AO: (1) DES lacks statutory authority to regulate the height of buildings within the protected shore land; and even if such authority exists, the lack of a standard for determining the height of a building renders that authority unenforceable. *Appeal,* para. 51, 63; (2) DES may only regulate "small" accessory structures, and the subject boathouse, which measures 18 feet wide by 38 feet long, is not a "small" accessory structure. *Appeal,* para. 69; (3) DES lacks authority to regulate the size and placement of "small accessory structures." *Appeal,* para. 78; and (4) the Order is unlawful and\or unreasonable as DES should have applied the vested rights exemption or granted a waiver of the rules. *Appeal,* para 87, 94.

Supp. 39. As shown above, the first basis for appeal contained two parts: first, an assertion that the Department lacked the ability to regulate height and, second, an assertion that even if such authority existed, the lack of a standard measurement methodology rendered the whole concept of height restrictions "unenforceable." A10-33.

The appeal did not assert that the Corrs disputed that their structure was at most 17 feet tall prior to reconstruction or that, under any methodology, it was much taller after reconstruction. A10-33.

The Department filed a motion to dismiss the appeal, arguing that the Department can, in fact, regulate the height of accessory structures such as the Corrs' boathouse and that, despite the Corr's attempt to support its claims using RSA 483-B:11, the Department's Administrative Order was consistent with RSA 483-B:11 as a matter of law. A64-96. The Hearing Officer ruled on the motion on April 11, 2018 ("Dismissal Order"). Supp. 37-43. The Hearing Officer first properly held that none of the relevant facts related to height – i.e., that the grandfathered structure was 17 feet high and that the new structure was substantially higher – were in dispute. Supp. 39 ("Here there is no dispute regarding the relevant facts summarized above"); *See also* Supp.50-51, #19-38 (showing that the Council also found these facts undisputed).

The Hearing Officer also held that "[a]s a threshold matter, Appellants' boathouse meets the definition of an 'accessory structure' within the meaning of RSA 483:B:4, II." Supp. 39. He then ruled that the Department could regulate the height of accessory structures:

> Both the common understanding of the term "size" as well as the history of the regulation surviving several readoption proceedings before JLCAR are sufficient to conclude that DES may lawfully regulate the size of shorefront accessory structures, including the height of such structures.

Supp. 41.

The Corrs had raised RSA 483-B:11 to bolster their argument that the Department lacked the ability regulate height. A17. The Corrs had not submitted a request for a permit under RSA 483-B:11 and Env-Wq. 1408.05; instead, their argument simply claimed that the Department's height restriction was fundamentally inconsistent with RSA 483-B:11. A14-19. In response, the hearing officer summarized the Corrs' argument as follows:

> Appellants argue that adding the twelve-foot maximum height requirement of Env-Wq 1405.03(b)(1) to the body of law pertaining to shoreland

> development and protection conflicts with RSA 483-B because, in part, it would mean that "a nonconforming structure, which also happens to be a small accessory structure, could not be replaced in kind even if it satisfied ... [RSA 483-B:11] if it also increased the height of the structure." *Objection,* at para. 27. The original boathouse was seventeen feet tall according to Appellants.

Supp. 42. The Hearing Officer rejected this argument, finding that, under the Department's interpretation of its rules "in kind" simply means "the same"; therefore, the Corrs could have built a structure that was 17 feet tall even though it exceeded the 12-foot height restriction. *Id*. Therefore, the Department's interpretation of its rules was reasonable. *Id*.

The Corrs' final argument, in their objection to the State's motion to dismiss, related to reconstruction under RSA 483-B:11. The Corrs argued that the Administrative Order is inconsistent with RSA 483-B:11 because that statute does not specifically reference height. A17. The Corr's argument suggested that since RSA 483-B:11 does not reference height that they should be allowed to keep the expanded height of their rebuilt structure. The Corrs maintained this argument even though they had never requested permission to expand under RSA 483-B:11, and even though they had only submitted a PBN whereas the rules require submittal of a full permit application for such expansions. *See* N.H. Admin. R. Env-Wq. 1408.05. The Hearing Officer both summarized the Corr's argument and disposed of the issue as follows:

> Appellants observe that in certain circumstances a grandfathered nonconforming structure may be expanded beyond its original size within the waterfront buffer. Env-Wq 1408.05. And they argue that their project should be entitled to this relief. Env-Wq 1408.05 (c) (1) and (2), however, provide that any such expansion must be "more nearly conforming than the existing structure" and "will provide at least the same degree of protection to the public waters." **Appellants' project does not satisfy these conditions** because, as the State argues, relocating the structure ten feet away from the shoreline does make it more conforming to shoreland protection rules than its predecessor; however, increasing the height of the structure from seventeen feet to twenty-seven feet makes it less conforming within the meaning of RSA 482-B:11. In fact, DES was willing to permit Appellants' expanded project at the new location as it would be more nearly conforming

> than its predecessor, provided it maintained the seventeen-foot maximum height dimension. *Motion,* at 11.

Supp. 42-43 (emphasis added). In other words, the order found that RSA 483-B:11 allows a grandfathered nonconforming structure to be expanded only if it is "more nearly conforming." It does not allow a project to be more nearly conforming in one respect and less conforming in other respects.[2]

The Hearing Officer then applied this interpretation to the undisputed facts of the case, [3] noting that the Corrs' structure had gone from an already nonconforming height of 17 feet, to a much greater height of approximately 27 feet. Supp. 42-43. Consequently, he found that the "Appellants' project does not satisfy these conditions," meaning the requirements of RSA 483-B:11 as further explained in the administrative rules. Supp. 43. In other words, even if the Corrs had applied for relief under RSA 483-B:11, and done so properly, on the undisputed facts, the request would have been properly denied. This ruling was final and conclusive.

The Dismissal Order left only three issues for appeal:

> Appellants raise an issue whether DES's methodology used to measure height in this case is arbitrary and subject to unfettered discretion. *Appeal,* at para. 66. There does not appear to be any evidence in the file explaining how

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[2] There are many rules that a grandfathered structure may violate and, thereby, be considered "nonconforming." Specifically, an accessory structure:

- Must not exceed 12 feet in height (Env-Wq 1405.03);
- Must be no larger than 1.5 square feet per linear foot of shoreline (Env-Wq 1405.03);
- Cannot result in a violation of the point score for calculating area of vegetative cover found in RSA 483-B:9, V(a)(2) (Env-Wq 1405.03);
- Must be set back at least 20 feet from the reference line (shoreline) (Env-Wq 1405.04); and,
- Cannot be constructed on land having greater than a 25% slope (Env-Wq 1405.05).

A structure that is nonconforming with respect to any one of these rules may be expanded, but it may still only be expanded consistent with the other rules.

[3] Although the Council undertakes most fact-finding tasks, the Hearing Officer need not accept any finding of the Council "without evidentiary support" and may rule on undisputed facts as a matter of law. In any event, the Council itself eventually found these facts to be true. Supp.50-51, #19-38.

> DES does employ this methodology, and given its factual nature, the Council should rule on this issue after a hearing. Similarly, factual issues pertain to Appellants' assertions that they were entitled to a so-called "vested rights" determination under Env-Wq 1406.03(c) or a waiver of the regulations under Env-Wq 1409.01. *Appeal,* section D. The State contests these arguments. A hearing on **these issues** is scheduled for May 8, 2018.

Supp. 43 (emphasis added). The Hearing Officer, alone, issued the Dismissal Order. *Id*.

The Corrs did not ask for reconsideration of the Dismissal Order. The Hearing Officer never reconsidered, overruled, or vacated the Dismissal Order.

D. The Wetlands Council Hearing and Order

On May 8, 2018, the Wetlands Council held a hearing on the Corr's appeal. At the hearing, both parties understandably focused on the three issues remaining in the appeal following the Dismissal Order. Supp. 46. Although the Corrs attempted to revive their argument regarding the Department's authority to regulate height in their opening statement, the Corr's attorney admitted that those issues were previously dismissed by the Hearing Officer. H11-12.

Following close of the evidence, the Council engaged in deliberations on June 12, 2018, *see* Del. Tr., and issued a written decision on August 6, 2018, *see* Decision and Order on Petition for Appeal ("Hearing Order")(Supp. 44-62). In its order, the Wetlands Council erroneously ignored the Hearing Officer's ruling on the ability of the Department to regulate height, and also engaged in an analysis that it recognized had not been advanced by anyone. The Hearing Order states:

> The Appellants' testimony was similarly focused on issues pertaining to regulation of accessory structures within the setback.
>
> However, after reviewing the testimony and documentation offered in the record and at the hearing, the Council's deliberations focused on the concept that once the new structure was relocated further back from the reference line than the original boathouse, it should be treated as a "nonconforming structure" within the meaning of RSA 483-B:4, XI-d rather than an "accessory structure" and subject to different rules. ... RSA 483-B:11, II describes a "more nearly conforming structure" as one that involves "alteration of the location or size of the existing footprints, or redevelopment of the existing conditions of the property, such that the structures or the

> property are brought into greater conformity with the design standards of this chapter." This can be accomplished by various means, including "enhancing stormwater management" and adding "infiltration areas and landscaping."
>
> The Council noted that Appellants' new design was located 10' further away from the shorefront and design details specified stormwater management features not present at the original boathouse. Thus, it was possible in their opinion that the new nonconforming structure would qualify as a "more nearly conforming structure." Because there are no statutory or regulatory rules addressing the height of such a nonconforming structure, as compared with the 12' height restriction on "accessory structures", the Council determined that the Order should be remanded to the Department for its consideration of the new structure's compliance with the nonconforming structure rules of RSA 483-B:l l, I and II.

Supp. 46-47. In short, the Council's decision directly conflicted with the Hearing Officer's legal rulings that, based on the undisputed facts in the case, the Corrs' structure was an "accessory structure," that RSA 483-B:11 does not allow a nonconforming structure to become more nonconforming, and that the "Appellants' project does not satisfy the[] conditions [of RSA 483-B:11 as explained in the rules]." Supp. 43.

E. The Wetlands Council's Reconsideration Order

The Department filed a motion for reconsideration, arguing, among other things, that the Council erred both because it engaged in statutory interpretation, a task reserved for the Hearing Officer, and because it did so in a way that directly contradicted the Hearing Officer's prior decision. A114-20. The Department also asserted that the Wetlands Council had not decided any of the three issues actually before it. *Id*. The Corrs' objected. A121-23.

The Council deliberated on the motion on October 9, 2018, *see* Rec. Tr., and issued a written decision on October 23, 2018, denying the Department's motion for reconsideration. Supp. 63-68. Even though this involved a purely legal issue, the Council concluded that the applicability of RSA 483-B:11 to the Corrs' structure was a mixed question of law and fact, that it rather than the Hearing Officer decided such issues and that it was not estopped by the Hearing Officer's Dismissal Order. Supp. 65-66. The Council further found that a portion of its prior order specifically finding that a

nonconforming accessory structure was not an accessory structure was merely "inexact." Supp. 66.[4]

Finally, the Council claimed to "restate" its prior reasoning, although that reasoning had now been somewhat reimagined. *Id*. It held essentially that RSA 483-B:11 allowed for a balancing of pros and cons irrespective of whether aspects of a project had become more nonconforming or, presumably, whether aspects that originally had been conforming became nonconforming for the first time. Supp. 65-67. In other words, it stated that a structure could become more nonconforming with respect to height if it became more conforming in other ways – a decision squarely at odds with the Dismissal Order.[5]

The order on reconsideration ("Reconsideration Order"), for the first time, asserted that height was also not "a design standard of this chapter" as described in RSA 483-B:11, II which describes what it means for a structure to be "more nearly conforming." Supp. 66. The Council then made the purely legal ruling that "design standards" refers only to those requirements found in section 9 of the Shoreland Act. *Id*. However, section 9 is not labeled "design standards," and nothing indicates the term is so limited. There is no reason to believe that design standards validly enacted pursuant to the chapter are not also considered "design standards of [the] chapter." *Id*. More importantly, this ruling

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[4] The Council and Hearing Officer appeared to abide by RSA 21-M:3, IX(f) which requires the Hearing Officer to "Prepare and issue all written decisions" for the first two decisions as only the Hearing Officer signed and apparently drafted these documents. The Reconsideration Order, however, appears to have been drafted by the Chair, was signed by both, and may reflect a more pervasive problem. Supp.68; *see also* Rec.Tr. 4 (CHIP KIMBALL [Chair]: "It's not even clear who really writes this. I started writing it so I don't know, maybe I'm … DAVID CONLEY [Hearing Officer]: "Maybe I'll, Maybe I'll let you do that." CHIP KIMBALL: Yeah, we did it with Claussen, [ph.] we did it with one or two others….").

[5] As a further oddity, the Council added, for the first time, that the "department failed to consider that by moving the building back from shore 10 feet, the building is … more nearly conforming to RSA 482-A [the Wetlands Act], having been moved out of RSA 482-A jurisdiction." Supp. 66. This statement on being more conforming under the Wetlands Act is both *non-sequitur* and wrong for at least two reasons: first, RSA 483-B only refers to compliance with "design standards of this chapter" which is the Shoreland Act not the Wetlands Act, and second, the project was only nonconforming under RSA 482-A with regard to its abutting property line setback, an element unchanged in the relocated, rebuilt structure at issue.

simply found a new way to assert that the Department's height requirement did not apply at all whereas the Hearing Officer's ruling already found that it did.

The Reconsideration Order also took up the three issues that actually were the subject of the hearing but were never considered. The Council: (1) determined that the Department's methodology for measuring height was unreasonable, notwithstanding that it consistently applied a commonly accepted method, because other possible methods existed; (2) denied the Corrs' claim regarding a waiver; and (3) denied the Corrs' claims regarding vested rights. Supp. 67-68.

The Reconsideration Order also included, for the first time, a directive regarding the Department's approach to settlement – a topic outside of both the Notice of Appeal and the Council's authority – holding that "in a situation like this, DES is **required** to make a reasonable effort to consider all statutory avenues and possible waivers to resolve the dispute." Supp. 68 (emphasis added).

Unfortunately, the Council's order provided no definitive outcome. The Hearing Order and Reconsideration Order merely remanded the case to the Department to determine whether other aspects of the project offset the increase in nonconforming height (or perhaps, to ignore height altogether). Supp. 44-62; Supp. 63-68. At the same time, the Dismissal Order held that this analysis cannot occur. Supp. 37-43. Both are final orders on the merits. *See Jenks v. Menard*, 145 N.H. 236, 239 (2000). Therefore, the Council process, one that lasted for 11 months, left the Department in the impossible position of having to abide by two conflicting final orders from the same adjudicatory body.[6]

In short, a hearing that was supposed to be dedicated solely to examining three specific issues identified in the Dismissal Order—(1) the Department's *methodology* for measuring height; (2) whether the Corrs should have received a rule waiver (one that they never requested); and (3) whether vested rights precluded application of the statute and

[6] Although they may disagree, this result is also to the detriment of the Corrs. The Corrs have not received permission for their structure and have no idea what the Department may do on remand.

rules—morphed into one that once again included *whether* the Department could measure height. The resulting Hearing Order then addressed none of those issues, instead engaging in statutory interpretation in a way that directly contradicted the Dismissal Order. On reconsideration, the Council and Hearing Officer combined to further abandon the Dismissal Order, to make unsupported findings, and to create rulings outside of the Wetlands Council's jurisdiction.

This appeal followed.

SUMMARY OF THE ARGUMENT

The Hearing Officer originally determined as a matter of law that:

- the Corrs' structure was an accessory structure;
- the Department had the authority to promulgate rules restricting the height of such accessory structures;
- the Shoreland Act does not allow the expansion of nonconforming accessory structures in a way that renders the structure more nonconforming with respect to height; and,
- because it had become more nonconforming with respect to height, the Corrs' structure did not meet the requirements of RSA 483-B:11.

This was a final decision on the merits with respect to those issues. The Wetlands Council then unlawfully overturned the decision of the Hearing Officer.

Pursuant to RSA 21-M:3: The Hearing Officer (1) may adopt the finding of facts of the Wetlands Council if such findings have evidentiary support, (2) must deliberate with the Council and then make decisions on all mixed questions of law and fact, and (3) must solely make all rulings of law including the interpretation of statutes. Whether the Shoreland Act allows nonconforming accessory structures to become more nonconforming is purely a legal issue and must be decided by the Hearing Officer. Even mixed questions of law and fact are ultimately still disposed of by the Hearing Officer. In any event, no issue is subject to determination by both the Hearing Officer and the Council. By usurping the authority of the Hearing Officer, even with his seeming acquiescence, the Wetlands Council demanded that the Department review a permit application that was never submitted and do so in contravention of an order that had already disposed of the issue.

In addition, the Wetlands Council made an unsupportable finding with respect to the Department's methodology for measuring height and waded into the Department's settlement process, an area well outside of its jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

This Court's standard of review of a Wetlands Council decision is set forth in RSA 541:13 (2019). "The petitioners have the burden of demonstrating that the Wetlands Council's decision was 'clearly unreasonable or unlawful.'" *Appeal of Lake Sunapee Protective Ass'n*, 165 N.H. 119, 124 (2013) (citing RSA 541:13). However, this Court may also reverse the decision of the Wetlands Council for "errors of law." *Id*. This Court "review[s] questions of law *de novo*." *Randall v. Abounaja*, 164 N.H. 506, 508 (2013). Further, this Court "will not overturn [a] trial court's ruling on a mixed question unless it is clearly erroneous." *Poland v. Twomey*, 156 N.H. 412, 414 (2007). "If, however, [a] court misapplies the law to its factual findings, [the Court will] review the matter independently under a plain error standard." *Id.*

II. THE WETLANDS COUNCIL'S FINAL ORDER IS UNLAWFUL BECAUSE IT OVERRULES THE DECISION OF THE HEARING OFFICER ON QUESTIONS OF LAW.

For the reasons discussed above, the Department filed a motion to dismiss the appeal asserting that the Department could, in fact, regulate height. A68-73. The motion argued, among other things, that although the Corrs' project had become more conforming in one respect (setback), it had become more nonconforming in another respect (height). A73-74. The Department argued that RSA 483-B:11 does not permit structures to become more nonconforming. *Id*. Instead, the section allows nonconforming structures to be expanded within the limits applicable to all accessory structures such as those set forth in Env-Wq 1405.03, .04, and .05. In any event, the Corrs never filed an application requesting relief under RSA 483-B:11.

On April 11, 2018, the Hearing Officer partially granted the Department's motion holding that:

- the Corrs' original grandfathered nonconforming structure was 17 feet high and the new structure was substantially higher (Supp. 37-43);
- the "Appellants' boathouse meets the definition of an 'accessory structure' within the meaning of RSA 483-B:4, II" (Supp. 37-43);

- the Department can regulate the height of accessory structures (Supp. 37-43);
- RSA 483-B:11 does not permit a nonconforming structure to be reconstructed in a way that is more conforming in one respect if it is more nonconforming in another (Supp. 37-43); and,
- the Corrs' structure did not satisfy the requirements of RSA 483-B:11 (Supp. 37-43).

The Hearing Officer's concluded:

> Env-Wq 1408.05 (c) (1) and (2) … provide that any … expansion must be "more nearly conforming than the existing structure" and "will provide at least the same degree of protection to the public waters." **Appellants' project does not satisfy these conditions** because, as the State argues, relocating the structure ten feet away from the shoreline does make it more conforming to shoreland protection rules than its predecessor; however, increasing the height of the structure from seventeen feet to twenty-seven feet makes it less conforming within the meaning of RSA 48[3]-B:11.

Supp. 43 (emphasis added). In other words, the Dismissal Order construes RSA 483-B:11 as allowing a grandfathered nonconforming structure to be expanded only if alterations result in a structure that is "more nearly conforming." The Dismissal Order determined that RSA 483-B:11 does not allow a project to be more nearly conforming in one respect and less conforming in other respects. Supp. 43.

So that there could be no confusion, the Dismissal Order specified the only three issues left in the appeal:

- The methodology the Department used to measure height;
- Whether the Corrs were entitled to a "so-called 'vested rights' determination under Env-Wq 1406.03 (c)"; and,
- Whether the Corrs were entitled to a waiver of the regulations under Env-Wq 1409.01.

Supp. 43 (emphasis added) (internal citations omitted). None of these three issues have any connection to RSA 483-B:11.[7]

[7] A "'vested rights' determination under Env-Wq 1406.03" is separate from the analysis under RSA 483-B:11. N.H. Admin. Rule Env-Wq 1406.03. "Waivers" under Env-Wq 1409.01 deal

The justification for the rulings in the Dismissal Order are set forth below in subsequent sections. At present, this Court need only note that the Hearing Officer found, as a matter of law and upon application of undisputed facts, that the Corrs' accessory structure did not qualify for relief under RSA 483-B:11 because it had become more nonconforming with respect to height. The Corrs did not ask for reconsideration of the Dismissal Order. The Hearing Officer never reconsidered, overruled, or vacated the Dismissal Order.

After the hearing, however, the Wetlands Council ignored the Dismissal Order. Instead of focusing on the remaining issues, the Hearing Order "focused on the concept that once the new structure was relocated further back from the reference line than the original boathouse, it should be treated as a 'nonconforming structure' within the meaning of RSA 483-B:4, XI-d rather than an 'accessory structure' and subject to different rules." Supp. 46. The Wetlands Council, therefore, in direct contravention of the Dismissal Order found that "it was possible in their opinion that the new nonconforming structure would qualify as a 'more nearly conforming structure'" under RSA 483-B:11. Supp. 47. Despite the Dismissal Order's ruling that regulations regarding height applied to the Corrs' structure, the Wetlands Council further found that "there are no statutory or regulatory rules addressing the height of [] a nonconforming [accessory structure]." *Id*. In other words, the Wetlands Council found that, whereas a fully conforming structure was subject to size restrictions, a nonconforming structure could be reconstructed without limits. The result was a remand "to the Department for its consideration of the new structure's compliance with the nonconforming structure rules of RSA 483-B:11, I and II." *Id*.

The Council's decision thereby abandoned, *sua sponte*, the Hearing Officer's legal ruling that the Corrs' structure was an "accessory structure," that RSA 483-B:11 does not allow a nonconforming structure to become more nonconforming, and the conclusive finding that the "Appellants' project does not satisfy the[] conditions [of RSA 483-B:11

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with a specific provision in RSA 483-B:9, not RSA 483-B:11. N.H. Admin. Rule Env-Wq 1409.01. Eventually, the Corrs lost on both of these issues.

as explained in the rules]." Supp. 43. Instead, it both held the opposite and asserted, contrary to the Dismissal Order, that a nonconforming accessory structure is no longer an accessory structure at all. Supp. 44-47.

On reconsideration, rather than correcting the problems noted above, the Council ignored both the Dismissal Order and its own prior ruling. To accomplish this, it first mischaracterized the Department's motion as a "mixed question of law and fact," even though it rested squarely on an interpretation of RSA 483-B:11 and on the procedural claim that the council members cannot overrule the Hearing Officer. Supp. 65.

The council members then took it upon themselves to decide the "application of law to the facts." Supp. 65-66. However, RSA 21-M:3 establishes the roles of council members and the Hearing Officer, stating:

> IX. When designated as the hearing officer for a particular appeal, the hearing officer shall:
>
> > (c) Adopt all findings of fact made by the council except to the extent any such finding is without evidentiary support in the record;
> >
> > **(d) Deliberate with the council before reaching conclusions on mixed questions of law and fact**;
> >
> > **(e) Decide all questions of law** presented during the pendency of the appeal; and
> >
> > (f) Prepare and issue written decisions on all motions and on the merits of the appeal….

RSA 21-M:3, IX (emphasis added). Therefore, the Hearing Officer must "deliberate" with council members before reaching a conclusion on mixed questions of law and fact but the council members do not make these conclusions. In any event, the issue was one of law or, at the very best, the application of law to undisputed facts,[8] rather than a mixed

[8] The application of law to facts does not even rise to the level of "mixed questions of law and fact," i.e., issues like proximate cause where factual issues and legal issues are inextricably "intertwined." *See Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270, 282 (1992)(citing *Matter of Estate of Ames*, 152 Wis.2d 217, 232, 448 N.W.2d 250, 255-56 (1989)). As such, deliberation with the council would not be necessary at all and the justification for deferral to the council in any way is simply incorrect. Nevertheless, no matter how described, the ultimate decision is for the Hearing Officer alone.

question of law and fact.

To the extent there is any confusion about the responsibility of applying law to the facts, further support can be found in the paragraph of RSA 21-M:3 addressing the qualifications of the Hearing Officer. It states: "Such individual or individuals shall: (a) Be qualified by education and experience in the conduct of administrative adjudicative hearings and the application of law to facts…." RSA 21-M:3, VIII (emphasis added). The statute plainly contemplates that the Hearing Officer will perform this function.

In this case, the Hearing Officer determined the meaning of RSA 483-B:11 and, subsequently, applied it to the undisputed facts, as the statute requires. The result was that the Corrs did not qualify for relief under RSA 483-B:11. The council members exceeded their statutory authority when they abandoned the Dismissal Order, [9] engaged in statutory interpretation, and applied their version of the "law" to the facts. According to the council members, the Hearing Officer allowed this to occur:

> The Hearing Officer stated during reconsideration, that the Council's consideration at the hearing of the applicability of RSA 483-B:11 was tied to the question of height raised by the appellants, was not estopped by the Ruling on the Motion to Dismiss, and being a question of **applying fact to relevant law** it was within the Council authority.

Supp. 65-66 (emphasis added). The Hearing Officer did not overrule his prior judgment, he simply deferred. He also allowed a council member to draft and co-sign the order in violation of RSA 21-M:3, IX(f) (the hearing officer shall "[p]repare and issue written decisions on all motions and on the merits"). [10] Supp. 68. This left the Department in the impossible position of trying to comply with two conflicting final orders. *See Jenks*, 145 N.H. at 239 ("The dismissal of a writ for failing to state a claim upon which relief may be granted is a substantive decision based on the merits of the case."). The issue simply cannot be within the purview of both the council and the Hearing Officer. By statute, the

[9] The Hearing Order is clearly the council's order rather than that of the Hearing Officer. *See* Supp. 44-62; *See also* Del. Tr. 49-51.

[10] As noted, the Chair volunteered to and apparently did write the Reconsideration Order and it was inexplicably signed by both the Hearing Officer and the Chair. Supp. 68.

council members cannot make rulings of law and certainly cannot overrule the decision of the Hearings Officer. The Hearing Officer must apply the law to the facts and makes all decisions on mixed questions. The Wetlands Council ignored all of these statutory requirements. Therefore, this case must be remanded to rectify these significant procedural errors.

III. THE WETLANDS COUNCIL'S DECISION WAS UNLAWFUL AND CLEARLY UNREASONABLE BECAUSE THE WETLANDS COUNCIL INCORRECTLY INTERPRETED AND APPLIED RSA 483-B:11

To the extent this Court wishes to examine the substance of RSA 483-B:11, the following analysis shows that the Hearing Officer in his Dismissal Order, and not the council members, interpreted it correctly. However, any discussion of RSA 483-B:11 is also moot. The Corrs simply never submitted an application for relief under RSA 483-B:11. As noted above, the Corrs only ever submitted PBNs, all of which were devoid of reference to RSA 483-B:11. In contrast, Env-Wq 1408.05 requires submittal of a full application by anyone wishing to obtain a decision under RSA 483-B:11.

Despite the fact that the Corrs never applied for relief under RSA 483-B:11, in its Hearing Order, the Wetlands Council "focused on the concept that once the new structure was relocated further back from the reference line than the original boathouse, it should be treated as a 'nonconforming structure' within the meaning of RSA 483-B:4, XI-d rather than an 'accessory structure' and subject to different rules." Supp. 46-47. The Council went on to state that "RSA 483-B:11, I provides that such nonconforming structures may be altered or expanded so as to expand the existing footprint within the 50' waterfront buffer, 'provided the structure is not extended closer to the reference line and the proposal or property is made more nearly conforming than the existing structure or the existing conditions of the property.'" *Id*. The Council held that it was the Department's responsibility to conduct an analysis under RSA 483-B:11 even though the Corrs had never requested it and had, again, submitted only a PBN rather than the full application that RSA 483-B:11 requires. Supp. 47.

The interpretation of RSA 483-B:11 is straightforward. RSA 483-B:11, I provides that a nonconforming structure may be "repaired, replaced in kind, reconstructed in place, altered, or expanded" but that "alteration or expansion of a nonconforming structure may expand the existing footprint within the waterfront buffer, provided the structure is not extended closer to the reference line and the proposal or property is made more nearly conforming than the existing structure or the existing conditions of the property." RSA 483-B:11, I. The statute then defines "more nearly conforming" to mean:

> alteration of the location or size of the existing footprints, or redevelopment of the existing conditions of the property, such that the structures or the property are brought **into greater conformity with the design standards of this chapter**. Methods for achieving greater conformity include, **without limitation**, reducing the overall square footage of structural footprints, enhancing stormwater management, adding infiltration areas and landscaping, upgrading stormwater treatment, improving traffic management, or other enhancements that improve wildlife habitat or resource protection.

RSA 483-B:11, II (emphasis added). Accordingly, an individual seeking to rebuild, redevelop, or replace a nonconforming structure has several options, all of which would comply with the requirements of RSA 483-B:11 and the attendant administrative rules within Env-Wq 1400 et seq. The person may: (1) apply for and build a completely new accessory structure in accordance with all rules, thereby abandoning the pre-existing structure's nonconforming status; (2) reconstruct the nonconforming structure "in kind" by replacing the previous nonconforming structure with a new, nonconforming structure of the same size, or (3) expand the existing footprint of the structure as long as it is not placed closer to the reference line and provided that the structure or property is brought into greater conformity than the original structure.

If an individual pursues the third option, the expansion is limited either to the nonconforming dimensions of the previous structure or to what current regulations would allow for a new accessory structure under similar circumstances. Thus, under the proper interpretation, the statute protects an owner's pre-existing nonconforming structure while

simultaneously allowing the owner to expand the footprint out to what current regulations allow.

A project runs afoul of the plain language of RSA 483-B:11 and the purpose of the statute if, upon redevelopment or replacement, the structure becomes more conforming with current regulations in one aspect but increases a nonconformity or creates a new nonconformity in another aspect. The purpose of RSA B:11 is to allow waterfront owners to maintain the character and uses of structures that existed prior to the enactment of more stringent laws and rules; however, the purpose of the statute overall is to guard against uncontrolled building in the protected shoreland and to prevent the "uncoordinated, unplanned and piecemeal development along the state's shorelines." RSA 483-B:2. RSA 483-B operates similar to local zoning regulations. Generally, in the zoning context, the "policy…is to carefully limit the enlargement or extension of nonconforming uses." *New London Land Use Ass'n v. New London Zoning Bd. of Adjustment*, 130 N.H. 510, 518 (1988)(citing *Arsenault v. Keene*, 104 N.H. 356, 359 (1962) and *Ackley v. Nashua*, 102 N.H. 551, 554 (1960)). [11] Further, the "ultimate purpose of zoning regulations [contemplates that nonconforming uses] should be reduced to conformity as completely and rapidly as possible…." *New London Land Use Ass'n*, 130 N.H. at 518 (quoting 82 Am.Jur.2d *Zoning and Planning* §191 (1976)).

Applying the options described above to the present case, the Corrs could have: (1) applied for a new structure altogether that met the 12 foot height limitation of Env-Wq 1405.03 and was located outside the 20 foot reference line setback limitation of Env-Wq 1405.04; (2) rebuilt the structure "in kind" as their initial permit-by-notification described, which would have allowed a height of seventeen feet; or (3) reconstructed the structure in a way that achieved greater conformity (after submitting a full application approved by the Department rather than a PBN). Instead, the Corrs ultimately relocated

[11] "The right to maintain nonconforming uses is meant to protect property owners from a retrospective application of zoning ordinances, so that property owners may continue using and enjoying their property when their uses were lawful prior to the enactment of a zoning ordinance or amendment thereto." *New London Land Use Ass'n*, 130 N.H. at 516.

the structure away from the reference line but made it less conforming by substantially raising the height. *See* N.H. Admin. R. Env-Wq 1405.03.

Contrary to the holding of the Wetlands Council, nothing in the statute allows owners of nonconforming structures to swap one nonconformity with another. Instead, under option three, the redeveloped or replaced structure may either maintain the pre-existing nonconformity and go no further or may expand the footprint within the parameters allowed by regulations applicable to all structures. Other interpretations lead to an absurd result. For instance, an applicant proposing a fully compliant structure would have to meet restrictions on height and footprint whereas an applicant making a nonconforming structure only slightly less nonconforming would be subject to no restrictions at all. "It is a fundamental principle of statutory construction that whenever possible, a statute will not be construed so as to lead to absurd consequences. Thus, as between a reasonable and unreasonable meaning of the language used, the reasonable meaning is adopted." *State v. Wilson*, 169 N.H. 755, 766 (2017)(citing *Appeal of Marti*, 169 N.H. 185, 190 (2016)). It would be absurd for a fully-compliant structure to have to meet restrictions while a noncompliant structure could become more nonconforming. Accordingly, the reasonable interpretation must be that "expansion" under RSA 483-B:11 means expansion to the extent allowed by current laws and regulations.

The Wetlands Council's specific justifications are equally infirm. First, the Council's interpretation assumes that RSA 483-B:11's reference to "design standards" is limited to those within RSA 483-B:9. Supp. 66. However, no such limitation on what is considered "design standards" is stated in the statute. Instead, RSA 483-B:17 specifically provides rulemaking authority to the Department of Environmental Services to create rules for the size and placement of small accessory structures, which Env-Wq 1405 does, in part. RSA 483-B:17, IV. Simply stated, "design standards of the chapter" include design standards enacted pursuant to the chapter. Supp.43.

Second, the Wetlands Council, in its Hearing Order, stated that "[b]ecause there are **no statutory or regulatory rules addressing the height of such a nonconforming structure**, as compared with the 12' height restriction on 'accessory structures', the

Council determined that the [Administrative Order] should be remanded to the Department for its consideration of the new structures' compliance with the nonconforming structure rules of RSA 483-B:11, I and II." Supp. 47 (emphasis added). However, as the Hearing Officer found and as the council members agreed on reconsideration, the structure at issue is an "accessory structure," and Env-Wq 1405.03 limits the height of accessory structures to twelve feet. Supp. 39-43; Env-Wq 1405.03. Further, Env-Wq 1408.06, which implements RSA 483-B:11, specifically requires that the Department only approve an application for the expansion or redevelopment of a nonconforming structure where "(1) [the] requirements specified in Env-Wq 1406.01 through Env-Wq 1406.14 and **any applicable criteria in Env-Wq 1405 are met**…" Env-Wq 1408.06(a)(emphasis added). Accordingly, as Env-Wq 1405 contains the twelve-foot height limitation for accessory structures, the administrative rules expressly direct the Department to the height regulations when reviewing nonconforming structures. The Council's interpretation that the RSA 483-B:11 analysis does not include height, therefore, is an error requiring the Department to ignore the express requirements of Env-Wq 1408.06(a).

Third, the Wetlands Council's interpretation and application of RSA 483-B:11 next assumes that, upon the decision to redevelop a nonconforming accessory structure, the movement of the structure back from the reference line provides the structure's owner with seemingly unlimited expansion rights. On reconsideration, members of the council stated that "[b]ut the rule says they can expand within—if, if they move back they get credit and they can expand it…" and that "it seemed to me their logic in somehow denying that you could expand it after you got credit for moving it back and then being allowed to expand it, it didn't really work." Rec. Tr. 4-12, 20, 30. These comments suggest[12] that the Council believed that an owner, under RSA 483-B:11, could offset the expansion of nonconforming elements of their structure or the creation of new nonconforming elements by achieving greater conformity elsewhere. However, such a

[12] Pages 4-12, 20, and 30 of the reconsideration transcript appear to deal with the topics addressed herein but the deliberations are exceptionally difficult to follow.

system is contrary to the purpose of RSA 483-B:11 and comparable zoning authority. As explained above, merely achieving greater conformity in one respect upon redevelopment/replacement does not authorize an owner to expand other pre-existing nonconforming components of the structure.

Finally, to the extent the Council or the Corrs assert that RSA 483 B:11's lack of a direct reference to height precludes Department regulations, just the opposite is true. RSA 483-B:17 sets forth the Department's authority for creating restrictions. RSA 483-B:11, in contrast, specifies the limited circumstances in which an applicant may obtain an exemption from applicable restrictions. Absent RSA 483-B:11, the Corrs would not have been able to expand their nonconforming structure at all. Application of RSA 483-B:11 grants some relief to applicable restrictions but only in the manner specified and nothing more. *See Hutchins v. Peabody*, 151 N.H. 82, 84 (2004) ("We will neither consider what the legislature might have said nor add words that it did not see fit to include."). The section does allow the expansion of the **footprint** of a nonconforming structure. Specifically, whereas the first sentence of paragraph I simply states that an owner may "expand" a nonconforming structure, the third sentence describes this expansion as follows: "alteration or expansion of a nonconforming structure **may expand the existing footprint** within the waterfront buffer…." RSA 483-B:11, I (emphasis added). Although the statute explicitly gives the Department the ability to regulate height, RSA 493-B:11 does not appear to permit an expansion of height. The absence of a reference to height in RSA 483-B:11 may lend itself to an interpretation that height can never be expanded. At a minimum, it does not support the Council's claim that height is somehow unrestricted. Therefore, the exceptional efforts of the Wetlands Council to undermine the Department's determination restricting height using a section only specifically allowing expansion of footprints is completely unwarranted.

IV. THE WETLANDS COUNCIL UNLAWFULLY DETERMINED THAT THE DEPARTMENT "IS REQUIRED TO MAKE A REASONABLE EFFORT TO CONSIDER ALL STATUTORY AVENUES AND POSSIBLE WAIVERS TO RESOLVE A DISPUTE."

The Wetlands Council's October 23, 2018 Reconsideration Order ended with the assertion that:

> The Hearing Officer noted, and the Council agreed, that in a situation like this, DES is required to make a reasonable effort to consider all statutory avenues and possible waiver[s] to resolve the dispute.

Supp. 68. The Wetlands Council, however, is a creature of statute that may only hear appeals of agency decisions and to consider only those grounds for appeal raised in an appellant's notice of appeal. RSA 21-O:14, I-a. As a quasi-judicial body charged with reviewing Department permitting and enforcement decisions, the Wetlands Council does not have jurisdiction to direct the methods by which the Department reaches settlement or the methods by which it enforces the laws it is charged with enforcing and implementing. *See Appeal of Lowrie*, 2018 WL 4940774 (2018)(quoting *Appeal of Morgan*, 144 N.H. 44, 98 (1999), which explains that "'decisions to investigate and prosecute are committed to the sound discretion of the agency' and that '[b]y virtue of its specialized knowledge and authority, the agency alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by the legislature and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically'"). Second, methods and decisions made by the Department of Justice in its defense of an appeal of an agency enforcement decision are equally beyond the authority of the Wetlands Council to control. Finally, no statute or rule states that the Department of Environmental Services is "required" or should "make a reasonable effort to consider all statutory avenues and waivers to resolve [a] dispute." Supp. 68 (emphasis added). Accordingly, the Wetlands Council lacks authority to require the Department, and in this case, the Department of Justice, to settle cases. This holding is, therefore, unlawful.

V. THE WETLANDS COUNCIL'S DECISION REGARDING THE DEPARTMENT'S METHODOLOGY FOR MEASURING HEIGHT WAS UNREASONABLE

During the May 8, 2018 hearing, the Wetlands Council heard testimony regarding the height of the old, collapsed structure and the height of the new structure. Supp. 46. The Wetlands Council also heard testimony regarding the Department's methodology for measuring height. *Id*. The Wetlands Council did not address this issue in the Hearing Order; however, upon reconsideration, the Wetlands Council determined that the Department's height measuring method was unreasonable. Supp. 44-62; Supp. 67.

The Department measures height from the lowest point to the highest point of a structure. Supp. 49, #5-10. This comports with the plain meaning of the word "height." *Height*, Merriam-Webster's Collegiate Dictionary (10th ed. 1988) (defining "height" as "the distance from the bottom to the top of something standing upright"). The Wetlands Council stated that the Department's methodology was unreasonable because it was not written within a rule and because it produces a different result than the methodology used by the town of Moultonborough when on sloping land. Supp. 67. However, as the Wetlands Council found, the Department has always measured height in this manner and has done so for some time. Supp. 49, #5-10. The Department believes that measuring height in this manner is reasonable according to the plain meaning of "height."

Nevertheless, the facts that the height of the Corrs' original structure was 17 feet and that it increased in height were undisputed. Supp. 39; Supp. 50, #19-28. In fact, the Corrs' own consultant determined that the original structure was 17 feet tall[13] and the new structure was 27 feet tall. Supp. 50, #28; A124-25. The Corrs' attorney transmitted this finding to the Department. *Id*. Further, even using the town of Moultonborough's methodology for measuring height, which is to average (1) the highest ground point to the roof ridgeline and (2) the lowest ground point to the roof ridgeline, the new structure is still beyond 17 feet in height. Supp. 50-51, #19-38.

[13] This is the best possible measurement for the Corrs as it is the highest possible measurement of the pre-existing structure.

The Corrs never presented a reasonable methodology for measuring height that would make their structure's height be 17 feet or less. Accordingly, the Department cannot be held to have acted arbitrarily in using its standard practice of measuring height, whether written or not, when the evidence before the Council demonstrated that the Corrs did not comply with any conceivable measuring methodology. In fact, the Administrative Order did not require that the Corrs' structure be reduced to a height using a specific methodology or that it be lowered by a certain number of feet. It merely stated that it needed to be restored to its previous height. A8. It is the Administrative Order that is on appeal, not the Department's practice in other cases. The Administrative Order simply requires reconstruction to the structure's prior height. A8. That height had been supplied by the Corrs. To the extent the Corrs submitted plans showing reconstruction to what they believed was the previous height, and the Department disagreed with the plans, the Corrs could have appealed any difference in height-measuring methodology. That never occurred.

In short, the Department's method for measuring height is reasonable. More importantly, there was no material issue with respect to height in this case and no relevant dispute as to methodology. The Department's general approach to measuring height could be an issue for another day, if ever, but it is not a basis for remanding the Administrative Order.

VI. THE CORRS' CROSS-APPEAL TO THIS COURT SHOULD BE DISMISSED

The State reiterates and incorporates by reference the arguments made in its December 5, 2018, motion to this Court to dismiss the cross-appeal as not appropriately filed pursuant to RSA 541:3, RSA 541:6, and N.H. Supreme Court Rule 10(8). The State will respond more fully on this issue should the Corrs proceed with their cross-appeal.

CONCLUSION

For these reasons, the State requests that the case be remanded to the Wetlands Council for further proceedings consistent with the Dismissal Order and the findings of this Court.

Pursuant to New Hampshire Supreme Court Rule 16(i), the State hereby certifies that the appealed decision is in writing and is appended to this brief within the below Supplement.

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONEMTNAL SERVICES

By its attorney,

GORDON J. MACDONAL
ATTORNEY GENERAL

Date: May 16, 2019

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Certificate of Compliance

This brief complies with the word limitation set forth in Supreme Court Rule 16(11) and this Court's April 16, 2019 Order, by containing 9,073 words.

Certificate of Service

I hereby certify that a copy of the Department of Environmental Services' brief was sent by service through the New Hampshire Supreme Court's electronic filing system to Attorney John G. Cronin of Cronin, Bisson & Zalinsky, P.C.

Date: May 16, 2019

/s/ Joshua C. Harrison
Joshua C. Harrison

SUPPLEMENT

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STATE OF NEW HAMPSHIRE

WETLANDS COUNCIL

DOCKET NO. 17-16 WtC

RE: BRYAN AND LINDA CORR APPEAL

("APPELLANTS")

ORDER ON STATE'S MOTION TO DISMISS

ORDER: STATE'S MOTION GRANTED IN PART AND DENIED IN PART

Background

This Appeal concerns the Department of Environmental Services, Wetlands Bureau's ("DES") issuance of Administrative Order 17-028 WD ("AO") to the Appellants, dated November 3, 2017. Briefly, the circumstances giving rise to the AO, and its appeal, are as follows:

Appellants own Lake Winnipesaukee waterfront property in Moultonboro, NH. The property included a "grandfathered" dry boathouse located approximately two feet from the shore that had collapsed as a result of snow load. Appellants intended to replace this boathouse.

Accordingly, Appellants' filed and DES accepted Appellants' Permit by Notification (WETLANDS PBN #2016-00009), in January, 2016, with a project description that reads "REPLACE PREVIOUSLY EXISTING NON-CONFORMING ACCESSORY STRUCTURE WHICH COLLAPSED FROM SNOW LOAD IN MARCH 2015 WITH NEW STRUCTURE IN EXACT LOCATION AND HEIGHT." *AO*, para.8.

The height of the grandfathered structure was confirmed by Appellants' agent to be approximately seventeen feet. *AO*, para. 17.

This project was subsequently revised, and a new Permit by Notification was accepted by DES on May 27, 2016 (SHORELAND PBN #2016-01498). This PBN describes the project, in part, as "A PREVIOUSLY EXISTING GRANDFATHERED STRUCTURE COLLAPSED FROM SNOW LOAD. A PREVIOUS WETLANDS APPROVAL WAS GRANTED (FILE #2016-00009) TO REPLACE THE STRUCTURE IN KIND. THIS APPLICATION IS TO REPLACE THE STRUCTURE BY MOVING BACK 10' AS A RESULT OF A VARIANCE GRANTED BY THE MOULTONBOROUGH ZBA." *AO*, para. 10.

Moultonborough issued a building permit for the new boathouse on June 9, 2016, based on plans submitted by Appellants that included a twenty-seven-foot maximum height for the structure. *Appeal*, at para. 27. The Appellants subsequently framed the boathouse to a height of twenty-seven feet at the "maximum point". *Id.*, at para. 31.

A subsequent DES inspection of Appellants' boathouse construction project resulted in a finding that the height of the replacement structure would exceed the seventeen-foot height of the original structure. Moreover, the framed height exceeded DES's regulation establishing a twelve-foot maximum height of a new accessory structure located within fifty feet of the lakeshore. *AO*, para. 15; Env-Wq 1405.03 and RSA 483-B: 4 XIII.

After a series of exchanges between DES and Appellants, DES ultimately advised the Appellants that their project was out of compliance with the above rules, and that the height of the boathouse must be reduced to the seventeen-foot height of the original structure. *AO*, para. 23. Appellants, through counsel, notified DES that they would not comply, and instead chose to challenge DES's authority to regulate the height of the boathouse. *AO*, para. 24. The Administrative Order was then issued, requiring Appellants, among other things, to reduce "the height of the new boathouse to no more than seventeen feet, consistent with the original grandfathered structure approved for replacement." *AO*, Order, para. 3. Appellants appealed to the Wetlands Council, and this Motion to Dismiss ("Motion") and Appellants' "Objection" followed.

Analysis

RSA 21-M: 3, IX (e) provides that the Hearing Officer is to decide all questions of law presented during the pendency of an appeal. That would include the legal issues raised by the subject Motion.

In ruling on a motion to dismiss, the facts alleged by the Appellant are assumed to be true. If those facts do not constitute a basis for legal relief, then the motion to dismiss should be granted. *See, e.g., Hobin v. Caldwell Banker Residential Affiliates, Inc.* 744 A.2d 1134 (NH 2000) (standard of review; motion to dismiss).

Here there is no dispute regarding the relevant facts summarized above. Rather, Appellants in their Appeal, raise four alternative arguments that DES acted unlawfully or unreasonably in issuing the AO: (1) DES lacks statutory authority to regulate the height of buildings within the protected shoreland; and even if such authority exists, the lack of a standard for determining the height of a building renders that authority unenforceable. *Appeal*, para. 51, 63; (2) DES may only regulate "small" accessory structures, and the subject boathouse, which measures 18 feet wide by 38 feet long, is not a "small" accessory structure. *Appeal*, para. 69; (3) DES lacks authority to regulate the size and placement of "small accessory structures." *Appeal*, para. 78; and (4) the Order is unlawful and\or unreasonable as DES should have applied the vested rights exemption or granted a waiver of the rules. *Appeal*, para 87, 94.

As a threshold matter, Appellants' boathouse meets the definition of an "accessory structure" within the meaning of RSA 483-B:4, II (a "structure...on the same lot and customarily incidental and subordinate to the primary structure...; or a use, including but not limited to paths, driveways, patios, any other improved surface, pump houses, gazebos, woodsheds, garages, or other outbuildings.").

A "primary structure" is one that is "central to the fundamental use of the property and is not accessory to the use of another structure on the same premises." RSA 483-B: 17, XIV.

While a primary structure may not be located any closer to the shoreline than fifty feet (the so-called "primary building line" or "waterfront buffer" of RSA 483-B: 17, XIII), accessory structures may be located within the waterfront buffer provided certain conditions are met. The legislature has delegated to DES the authority to define by rule what those conditions shall include. Thus, RSA 483-B: 17, IV provides that DES shall adopt rules relative to "[p]rocedures and criteria for the size and placement of small accessory structures such as storage sheds and gazebos, which are consistent with the intent of this chapter, between the ... [waterfront buffer] and the primary building line."

DES adopted Env-Wq 1405.03(b) (1) pursuant to this grant of rulemaking authority, which provides that accessory structures located between the shoreland and the primary building line "shall not exceed 12 feet in height."

Appellants first argue that DES lacks authority to regulate the "height" of an accessory structure because RSA 483-B: 17, IV only allows it to regulate the "size" of such a structure, i.e., its footprint, which does not include the height of the structure. They claim that the plain language of a statute referencing "size" does not include "height" as a component of the thing to be measured unless the legislature has specifically done so. *Cf.* RSA 674:16, I (a) (regulate height, number of stories, and size of buildings). They also assert that imposing a height restriction on accessory structures is inconsistent with RSA 483-B in general, given its emphasis on building sites, locations, impervious surfaces and footprints. Moreover, limiting accessory structures to a maximum height, while primary structures are not so limited, makes little sense. *Appeal*, paras. 58-62.

The State moves to dismiss these arguments on several bases. First, with respect to the meaning of "size" within the statute, it notes that the language of a statute should be construed, if possible, in accordance with its plain and ordinary meaning, citing *State v. Maxfield*, 167 N.H. 677, 679 (2015) and *Appeal of Local Government Ctr.*, 165 N.H. 790, 804 (2014). The Motion quotes several common sources of the meaning of terms, including Webster's Third New International Dictionary at 2130 (ed. 2002), which

defines "size" to mean "the physical magnitude, extent, or bulk: the actual, characteristic, normal, or relative proportion of a thing: relative or proportionate dimensions...." And, "size, usu. applies to things having length, width and depth or height....*Id.*" *Motion*, at 6. The State also refutes Appellants' argument that the legislature does not define "size" to include "height" by reference to RSA 266:16, which defines "size" to include the "height, length and width" of a vehicle. *Id.*, at 8.

Furthermore, the State relies on the principle under New Hampshire law that an interpretation of a statute by an agency charged with its administration is entitled to deference. *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012). Such deference is warranted in this case because of the fact that Env-Wq 1405.03 (b) (1) has been in existence since 1996, and readopted through the JLCAR process in 2004 and 2008 without any interference by the legislature. (Long-standing administrative interpretation of a statute in absence of legislative interference is evidence that "the administrative construction conforms to the legislative intent." *N.H. Retirement Sys. v. Sununu*, 126 N.H. 104 (1985)). *Motion*, at 6, 7.

In my opinion the State's argument is persuasive on this point. Both the common understanding of the term "size" as well as the history of the regulation surviving several readoption proceedings before JLCAR are sufficient to conclude that DES may lawfully regulate the size of shorefront accessory structures, including the height of such structures.

Appellants' argument that DES cannot regulate the size of the structure contemplated here because in their opinion it is "large", while RSA 483-B: 17, IV provides that DES may only adopt rules relative to "*small* accessory structures such as storage sheds and gazebos..." [emphasis added] is not well founded. As the State notes in its Motion, Appellants' argument leads to an illogical result: "waterfront property owners could build large, sprawling structures within the waterfront buffer without any agency regulation whatsoever, merely because they are not small." *Motion*, at 9. Moreover, limiting the size of accessory structures that are allowed to extend into the

protected shoreland to those that are "small" is consistent with the legislature's interest in minimizing shoreland development within that critical zone. RSA 483-B: 9, I.

Appellants argue that adding the twelve-foot maximum height requirement of Env-Wq 1405.03(b) (1) to the body of law pertaining to shoreland development and protection conflicts with RSA 483-B because, in part, it would mean that "a non-conforming structure, which also happens to be a small accessory structure, could not be replaced in kind even if it satisfied... [RSA 483-B: 11] if it also increased the height of the structure." *Objection*, at para. 27. The original boathouse was seventeen feet tall according to Appellants.

The state argues that under the repair, replacement-in-kind, and reconstruction rules of RSA 483-B:11 and Env-Wq 1408, Appellants could have rebuilt their boathouse to a height of seventeen feet at its historic location without running afoul of any shoreland statute or regulation. As height is a component of a structure, the State's interpretation of what is contemplated by a "replacement-in-kind" project that will comply with RSA 483-B: 11, I is, in my opinion, a reasonable one under the circumstances. It is also consistent with Appellants' understanding of what their original permit application contemplated. ("REPLACE PREVIOUSLY EXISTING NON-CONFORMING ACCESSORY STRUCTURE... WITH NEW STRUCTURE IN EXACT LOCATION AND HEIGHT." WETLANDS PBN #2016-00009.)

Their second permit application appears to incorporate that representation as well. ("A PREVIOUS WETLANDS APPROVAL WAS GRANTED (FILE #2016-00009) TO REPLACE THE STRUCTURE IN KIND. THIS APPLICATION IS TO REPLACE THE STRUCTURE BY MOVING BACK 10' AS A RESULT OF A VARIANCE GRANTED BY THE MOULTONBOROUGH ZBA." SHORELAND PBN #2016-01498.) This second application makes no mention of increasing the height of the replacement structure from seventeen to twenty-seven feet.

Appellants observe that in certain circumstances a grandfathered nonconforming structure may be expanded beyond its original size within the waterfront buffer. Env-Wq

1408.05. And they argue that their project should be entitled to this relief. Env-Wq 1408.05 (c) (1) and (2), however, provide that any such expansion must be "more nearly conforming than the existing structure" and "will provide at least the same degree of protection to the public waters." Appellants' project does not satisfy these conditions because, as the State argues, relocating the structure ten feet away from the shoreline does make it more conforming to shoreland protection rules than its predecessor; however, increasing the height of the structure from seventeen feet to twenty-seven feet makes it less conforming within the meaning of RSA 482-B:11. In fact, DES was willing to permit Appellants' expanded project at the new location as it would be more nearly conforming than its predecessor, provided it maintained the seventeen-foot maximum height dimension. *Motion*, at 11.

Appellants raise an issue whether DES's methodology used to measure height in this case is arbitrary and subject to unfettered discretion. *Appeal*, at para. 66. There does not appear to be any evidence in the file explaining how DES does employ this methodology, and given its factual nature, the Council should rule on this issue after a hearing. Similarly, factual issues pertain to Appellants' assertions that they were entitled to a so-called "vested rights" determination under Env-Wq 1406.03 (c) or a waiver of the regulations under Env-Wq 1409.01. *Appeal*, section D. The State contests these arguments. A hearing on these issues is scheduled for May 8, 2018.

Accordingly, given the above analysis, the State's Motion to Dismiss is granted in part and denied in part.

By order of the Hearing Officer.

4/11/18
Date

For David F. Conley, Esq. (Bar #130)
Hearing Officer

STATE OF NEW HAMPSHIRE

WETLANDS COUNCIL

DOCKET NO. 17-16 WtC

RE: BRYAN AND LINDA CORR APPEAL

("APPELLANTS")

DECISION AND ORDER

ON

PETITION FOR APPEAL

Background

This Appeal concerns the Department of Environmental Services, Wetlands Bureau's ("DES") issuance of AO 17-028 WD ("AO" or "Order") to the Appellants, dated November 3, 2017. Briefly, the circumstances giving rise to the AO, and its appeal, are as follows:

Appellants own Lake Winnipesaukee waterfront property in Moultonboro, NH. The property included a "grandfathered" dry boathouse located approximately two feet from the shore that had collapsed as a result of snow load. Appellants intended to replace this boathouse.

Accordingly, Appellants' filed and DES accepted Appellants' Permit by Notification (WETLANDS PBN #2016-00009), in January, 2016, with a project description that reads "REPLACE PREVIOUSLY EXISTING NON-CONFORMING ACCESSORY STRUCTURE WHICH COLLAPSED FROM SNOW LOAD IN MARCH 2015 WITH NEW STRUCTURE IN EXACT LOCATION AND HEIGHT." *AO*, para.8.

The height of the grandfathered structure was confirmed by Appellants' agent to be approximately seventeen feet. *AO*, para. 17.

This project was subsequently revised, and a new Permit by Notification was accepted by DES on May 27, 2016 (SHORELAND PBN #2016-01498). This PBN describes the project, in part, as "A PREVIOUSLY EXISTING GRANDFATHERED STRUCTURE COLLAPSED FROM SNOW LOAD. A PREVIOUS WETLANDS APPROVAL WAS GRANTED (FILE #2016-00009) TO REPLACE THE STRUCTURE IN KIND. THIS APPLICATION IS TO REPLACE THE STRUCTURE BY MOVING BACK 10' AS A RESULT OF A VARIANCE GRANTED BY THE MOULTONBOROUGH ZBA." *AO*, para. 10.

Moultonborough issued a building permit for the new structure on June 9, 2016, based on plans submitted by Appellants that included a twenty-seven-foot maximum height for the structure. *Appeal*, at para. 27. The Appellants subsequently framed the structure to a height of twenty-seven feet at the "maximum point". *Id.*, at para. 31. Testimony at the hearing confirmed that the new structure was designed as a "game room" with plumbing and other finish details, and a concrete foundation serving as a crawl space beneath for small boat and other equipment storage.

A subsequent DES inspection of Appellants' construction project resulted in a finding that the height of the replacement structure would exceed the seventeen-foot height of the original structure. Moreover, the framed height exceeded DES's regulation establishing a twelve-foot maximum height of a new accessory structure located within fifty feet of the lakeshore. *AO*, para. 15; Env-Wq 1405.03 and RSA 483-B: 4 XIII.

After a series of exchanges between DES and Appellants, DES ultimately advised the Appellants that their project was out of compliance with the above rules, and that the height of the boathouse must be reduced to the seventeen-foot height of the original structure. *AO*, para. 23. Appellants, through counsel, notified DES that they would not comply, and instead chose to challenge DES's authority to regulate the height of the boathouse. *AO*, para. 24. The AO was then issued under RSA 483-B: 5, V, stating that

Appellants "violated RSA 483-B, Env-Wq 1405 and … [their Permit] by replacing a grandfathered accessory structure on the Property with a new accessory structure that is greater than 12' in height, and greater in height than the original grandfathered structure." *AO*, Section D, pg. 6. The AO required Appellants, among other things, to reduce "the height of the new accessory structure to no more than seventeen feet, consistent with the original grandfathered structure approved for replacement." *AO*, Order, para. 3. Appellants appealed this Order to the Wetlands Council on November 30, 2017.

The Council heard testimony regarding the Appeal from witnesses called by Appellant and DES on May 8, 2018. Deliberations were held on June 12, 2018.

DISCUSSION

As the appealing party, Appellants have the burden of proving by a preponderance of the evidence that the Department's decision to issue the Order was unlawful or unreasonable. RSA 482-A:10, V. In summary terms, Appellants challenged the Department's authority to regulate the height of accessory structures built within the protected shoreland.

The Council heard testimony from Department staff confirming the findings in the Order that the Department regarded the newly constructed structure as an "accessory structure" that was subject to DES's regulation establishing a twelve-foot maximum height of a new accessory structure located within fifty feet of the lakeshore. *AO*, para. 15; Env-Wq 1405.03 and RSA 483-B: 4 XIII. It also exceeded the seventeen foot height of the original boathouse. The Appellants' testimony was similarly focused on issues pertaining to regulation of accessory structures within the setback.

However, after reviewing the testimony and documentation offered in the record and at the hearing, the Council's deliberations focused on the concept that once the new structure was relocated further back from the reference line than the original boathouse, it should be treated as a "nonconforming structure" within the meaning of RSA 483-B:4, XI-d rather than an "accessory structure" and subject to different rules. RSA 483-B:11, I provides that such nonconforming structures may be altered or expanded so as to expand

the existing footprint within the 50' waterfront buffer, "provided the structure is not extended closer to the reference line and the proposal or property is made more nearly conforming than the existing structure or the existing conditions of the property."

RSA 483-B:11, II describes a "more nearly conforming structure" as one that involves "alteration of the location or size of the existing footprints, or redevelopment of the existing conditions of the property, such that the structures or the property are brought into greater conformity with the design standards of this chapter." This can be accomplished by various means, including "enhancing stormwater management" and adding "infiltration areas and landscaping."

The Council noted that Appellants' new design was located 10' further away from the shorefront and design details specified stormwater management features not present at the original boathouse. Thus, it was possible in their opinion that the new nonconforming structure would qualify as a "more nearly conforming structure." Because there are no statutory or regulatory rules addressing the height of such a nonconforming structure, as compared with the 12' height restriction on "accessory structures", the Council determined that the Order should be remanded to the Department for its consideration of the new structure's compliance with the nonconforming structure rules of RSA 483-B:11, I and II.

Order

Appeal GRANTED. AO remanded to the Department for further consideration consistent with the Council's determination, above.

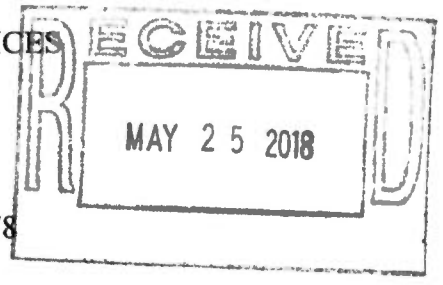
By Order of the Hearing Officer

8/6/18
Date

For David F. Conley, Esq. (Bar #130)

Reconsideration:
Pursuant to RSA 541:3, any party whose rights are directly and adversely affected by this decision may file a motion for rehearing with the NH Wetlands Council within thirty days of the date of this decision.

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WETLANDS COUNCIL



Bryan J. Corr
Linda M. Corr
96 Payson Road, Belmont, Massachusetts 02478

v.

State of New Hampshire
Department of Environmental Services
29 Hazen Drive, Concord, New Hampshire 03301

Docket No. 17-16 WtC – Bryan and Linda Corr Appeal

All findings accepted except paragraphs 6. and 39; and paragraphs 44, 61, 62, and 63 found "not applicable."

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The New Hampshire Department of Environmental Services (the "Department" or "DES"), by and through their counsel, the Office of the Attorney General (collectively the "State"), hereby respectfully requests that this Council, pursuant to Env-WtC 206.10, make the following findings of fact following the hearing on May 8, 2018 and for the Hearing Officer to make the following conclusions of law.

Proposed Findings of Fact and Conclusions of Law[1][2]

1. (L) RSA 483-B:4, II defines an accessory structure as "a structure, as defined in paragraph XXII of this section, on the same lot and customarily incidental and subordinate to the primary structure, as defined in paragraph XIV of this section; or a use, including but not limited to paths, driveways, patios, any other improved surface, pump houses, gazebos, woodsheds, garages, or other outbuildings."

2. (L) New Hampshire Department of Environmental Services administrative rule Env-Wq 1405.03(b) states that accessory structures shall not exceed 12 feet in height.

3. (F) Rule Env-Wq 1405.03 was first promulgated in 1996 under a different iteration and approved by JLCAR as part of the Shoreland Protection Rules.

4. (F) From 1996 to 2008, that height limitation was 20 feet.

[1] "(F)" indicates a proposed finding of fact.
[2] "(L)" indicates a proposed conclusion of law.

5. (F) In 2008, the Shoreland Protection Rules were changed and renumbered and the height limitation for accessory structures became 12 feet.

6. (F) DES measures the height of accessory structures from the lowest contour to the peak.

7. (F) Jason Aube, DES, measures the height of accessory structures from the lowest contour to the peak.

8. (F) Darlene Forst, DES, measures the height of accessory structures from the lowest contour to the peak.

9. (F) DES has a fact sheet from 2000, before the change in accessory structure height from 20 feet to 12 feet.

10. (F) The DES fact sheet states that accessory structures are to be measured from the lowest contour to the peak.

11. (F) Appellants' first PBN (#2016-00009) was to "replace an existing structure in the exact location and size." Later, the project description on page 6 of the PBN describes the project as "replace an existing shoreland structure which was collapsed by snow load with a new structure in exact location and height."

12. (F) Appellants filed an application with the Town of Moultonborough requesting a variance to move their accessory structure back from the lake by 10 feet.

13. (F) The Town of Moultonborough granted the variance on May 6, 2016.

14. (F) One of the conditions for the variance stated "the approved shore land permit by notification [must] be resubmitted to NH DES as an amended application and be in line with this approval."

15. (F) PBN #2016-01498 dated May 27, 2016 stated that "[a] previous wetlands approval was granted (File #2016-00009) to replace the structure in kind."

16. (F) PBN #2016-01498 did not describe that it would no longer be following the first PBN's language that the structure would be rebuilt to its exact previous height.

17. (F) PBN #2016-01498 stated "[t]his application is to replace the structure moving it back 10' as a result of a variance granted by the Moultonborough ZBA."

18. (F) Appellant Bryan Corr signed §G(3) of Shoreland PBN #2016-01498, which reads "I understand that project proposals that do not meet the minimum standards of RSA 483-B and Administrative Rules Chapter Env-Wq 1400 as explained within the Summary of the Minimum Standards Fact Sheet, including the minimum standard relative to impervious surfaces, as explained on page 4, shall be rejected."

19. (F) DES Exhibit 24, bates stamp 95, contains the as-built plan dated March 3, 2017.

20. (F) The record consists of an enlarged as-built plan distributed during the hearing, dated March 3, 2017, which includes a "licensed land surveyor" stamp signed by the Appellants' surveyor Carl Johnson.

21. (F) The as-built plan includes the following labels:

    a. Original Structure
    b. Peak of Roof = 533.60
    c. Finished Floor = 506.60
    d. Grade at Top of Bank = 512.0.

22. (F) The as-built plan contained in Exhibit 24 includes the additional label of "proposed finished grade = 517.0."

23. (F) The letter from Attorney Cronin in Exhibit 24 states "as you will note, the ground to the peek at the front [roadside] is 16.6 feet."

24. (F) The peak of roof elevation minus the finished floor elevation equals a height of 27 feet.

25. (F) Accordingly, the appellants' consultant measured the structure's height from the lakeside.

26. (F) The peak of roof elevation minus the grade at top of bank elevation equals 21.60 feet.

27. (F) Appellants' original structure was approximately 17 feet tall on the lakeside.

28. (F) Appellants' consultant, Carl Johnson, in a letter dated March 28, 2017 (DES exhibit 18) stated that he estimated the original building height to be 17 feet tall by "measuring components of the rubble including the doors and a portion of the roof which were largely intact."

29. (F) As constructed, Appellants' new structure is 27 feet tall on the lakeside.

30. (F) Appellants' increased the lakeside height of their structure by 10 feet.

31. (F) Appellants original structure was no more than 10 feet on the roadside.

32. (F) Jason Aube, DES, estimated the roadside height of the original structure to be 9 or 10 feet tall.

33. (F) Jason Aube made that estimate by using the photograph on DES Exhibit 8, bates stamp 54, and the known dimension of 17 feet on the lakeside of the original structure as a scale to estimate the roadside height of the original structure to be 9 or 10 feet.

34. (F) The as-built plan (DES Exhibit 24, bates stamp 95) demonstrates that the peak of roof elevation minus proposed finished grade elevation (517.0 feet) equals 16.6 feet.

35. (F) As constructed, Appellants new structure is 16.6 feet tall on the roadside.

36. (F) The Appellants increased the roadside height of their structure by 6.6 feet or 7.6 feet.

37. (F) If measuring from the top of bank elevation to peak of roof elevation, the Appellants raised the height of the structure from 17 feet to 21.6 feet on the lakeside.

38. (F) Don Cahoon testified that the Town of Moultonborough measures the height of structures by taking the average of the ridge to the lowest ground point and the ridge to the highest ground point.

39. (F) The Appellants have made the structure more non-conforming with respect to height.

40. (F) While DES uses the simple method of lowest contour to peak, the Appellants have violated Env-Wq 1405.03 under each height measuring method.

41. (L) Env-Wq 1406.03(a) states that "subject to (e), below, activities in the protected shoreland shall not require a permit under RSA 483-B:5-b if the property owner or developer can demonstrate to the department's satisfaction, pursuant to (b) or (c), below, that the property owner or developer has incurred substantial liabilities in a reasonable, good faith reliance on the absence of a controlling law or regulation, sometimes called vested rights."

42. (L) Env-Wq 1406.03(c) states that "A property owner or developer who is not able to show any of the conditions listed in (b)(1)-(5) may submit other evidence to demonstrate that the property owner or developer has otherwise incurred substantial liabilities and that such liabilities: (1) resulted from a reasonable, good faith reliance on the absence of a controlling law or regulation; and (2) Are related to the provision of RSA 483-B from which the property owner or developer is seeking relief."

43. (L) Env-Wq 1406.03(d) states that a property owner claiming vested rights shall provide the following to the department in writing:

    1) the name and address of the property owner;
    2) the name, mailing address, and daytime telephone number and, if available, an e-mail address, of an individual authorized to act on behalf of property owner with whom the department can discuss the proposed project;

3) The physical address of the proposed project site, if different from the property owner's mailing address;
4) The name of the surface water that causes the property to be subject to RSA 483-B;
5) If the exemption is claimed under (b)(1), above, proof that the notice was issued;
6) If the exemption is claimed under (b)(2), above, a copy of the detailed plan or narrative description submitted with the building permit application;
7) If the exemption is claimed under (b)(3), above, proof that the foundation has been installed, such as dated photographs or a bill for the foundation showing the date of installation; and
8) If the exemption is claimed under (c), above, the following information:
    a. A budget showing the total estimated cost of the project;
    b. A narrative describing the full scope of the project, including all work expected to be done on the property within a 5-year period;
    c. How much of the total estimated cost had been incurred prior to July 1, 2007 and how much of the total estimated cost had been incurred prior to July 1, 2008'
    d. How much of the total scope of the project had been completed prior to July 1, 2007 and how much of the total scope of the project had been completed prior to July 1, 2008;
    e. What revisions would be required to redesign the project to reflect the standards enacted to be effective July 1, 2008;
    f. The cost of the revisions that would be needed; and
    g. The relationship of the revisions to the full scope of the project as originally envisioned.

44. (F) Because there was no absence of a regulation regarding height as the height limitation has been in existence since 1996, the Appellants could not have substantially relied on the absence of a controlling law or regulation.

45. (F) Appellant Bryan Corr signed section G(3) of the Shoreland PBN certifying his understanding and conformity with the Shoreland Protection Rules.

46. (F) The Appellants never submitted any documentation claiming a vested rights exemption.

47. (F) The Appellants never submitted a document containing the information in 1406.03(d)(8)(a)-(g).

48. (F) Darlene Forst testified that a vested right determination only relieves those with projects from the requirement to obtain a permit; it does not relieve persons of the obligation to comply with the Shoreland Protection Rules.

49. (F) The Appellants submitted and obtained two permits by notification.

50. (L) Env-Wq 1409.01 "Requests for Waivers of Minimum Standards" states "[e]ach applicant for a waiver under RSA 483-B:9, V(i) shall provide the following information with the application required by Env-Wq 1406.06:

    a) A statement of the waiver requested, with specific references to the paragraph or subparagraph of RSA 483-B:9, V for which the request is being made;

    b) An explanation of how the applicable criteria of Env-Wq 1409.02 have been met;

    c) If the request is for a reasonable accommodation of the needs of an individual with one or more disabilities, a statement signed by the physician who is attending the individual for the disability or disabilities certifying that the impacts or structures for which the waiver is being requested are necessary to accommodate the individual's disability or disabilities; and

    d) Verification that all of the abutters have been notified of the proposed project as required by Env-Wq 1406.13.

51. (L) Env-Wq 1409.02 "Decision on Waiver Request" states:

    a) The department shall approve a request for a waiver under RSA 483-B:9, V(i) that is not requested to accommodate the reasonable needs of an individual or individuals with disabilities upon finding that:

        1) Strict compliance with the minimum standards of RSA 483-B:9, V will provide no material benefit to the public; and
        2) Waiving the standard will have no material adverse effect on the environment or the natural resources of the state.

    b) The department shall approve a request for a waiver under RSA 483-B:9, V(i) for a reasonable accommodation of needs of an individual or individuals with disabilities if:

        1) The proposal is adequate to ensure that the intent of RSA 483-B is met; and
        2) The statement is submitted pursuant to Env-Wq 1409.01(c) is sufficient to demonstrate that the waiver is necessary to accommodate the individual's disability.

    c) The department shall notify the applicant in writing of its decision in conjunction with the decision on the application for shoreland permit. If the request is denied, the department shall identify the specific reason(s) for the denial.

52. (F) The Appellants never requested a waiver of the Shoreland Protection minimum standards under RSA 483-B:9.

53. (L) Env-Wq 1405.03's height limitation is not a minimum standard found within RSA 483-B:9, V.

54. (L) Env-Wq 1405.03's height limitation is an Administrative Rule within Chapter 1400, the Shoreland Protection Rules.

55. (L) Env-Wq 1413 provides for waivers from rules.

56. (L) Env-Wq 1413.03 states, in part:

a. The person requesting the rule waiver shall provide the following information:

1) The name, mailing address, daytime telephone number, and e-mail address, if any, of:

a. The property owner; and

b. The applicant, if other than the property owner;

2) The location of the property to which the rule waiver request relates, if other than the mailing address of the property owner or applicant;

3) The specific section number of each rule for which a waiver is sought;

4) A full explanation of why a rule waiver is being requested, including an explanation of the operational and economic consequences of complying with the rule as written;

5) If applicable, a full explanation of the alternate that is proposed to be substituted for the requirement in the rule, including written documentation and/or data to support the alternative; and

6) A full explanation of why the applicant believes that having the rule waiver granted will meet the criteria of Env-Wq 1413.04....

57. (L) Env-Wq 1413.04 Criteria, states, in part:

a. Subject to (b), below, a request for a rule waiver shall be granted if:

1) Granting the request will not result in:

a. An adverse effect to the environment or natural resources of the state, public health, or public safety; or

b. An impact on abutting properties that is more significant than that which would result from complying with the rule; and

2) One or more of the following conditions is satisfied:

a. Granting the request is consistent with the intent and purpose of the rule being waived.

b. Strict compliance with the rule will provide no benefit to the public and will cause an operational or economic hardship to the applicant.

58. (F) The Appellants never requested a waiver of the administrative rules under Env-Wq 1413.

59. (F) The Appellants never submitted the required documentation for a rule waiver under 1413.03.

60. (F) Darlene Forst testified that a person claiming to be an abutter called and complained about the view of the lake being obstructed by the height of the new structure.

61. (F/L) Pursuant to Env-WtC 206.07, the appellants have failed to meet their burden of proving by a preponderance of the evidence that the Department acted unlawfully or unreasonably by not granting a waiver of the Shoreland Protection Rules.

62. (F/L) Pursuant to Env-WtC 206.07, the appellants have failed to meet their burden of proving by a preponderance of the evidence that the Department acted unlawfully or unreasonably by not making a vested right determination.

63. (F/L) Pursuant to Env-WtC 206.07, the appellants have failed to meet their burden of proving by a preponderance of the evidence that the Department acted unlawfully or unreasonably by finding the appellants violated the height limitation of Env-Wq 1405.03.

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WETLANDS COUNCIL

Bryan J. Corr and Linda M. Corr
v.
State of New Hampshire Department of Environmental Services

Docket No. 17-16 WtC –Bryan and Linda Corr Appeal

Case Number: 01-17-005-7595

REQUESTS FOR FINDING AND RULINGS

NOW COME Bryan J. Corr and Linda M. Corr (collectively "Corr" or "Corrs"), by and through their attorneys, Cronin Bisson & Zalinsky, P.C., and request that the Wetlands Council ("Council") make the following findings and rulings based on evidence presented at the evidentiary hearing on May 8, 2018.

PRELIMINARY STATEMENT

This case is a perfect example of government overreach into private property rights that is a concern of the executive branch and the public at large. Without statutory support or an express rule, the Department of Environmental Services ("DES") has caused the Corrs to spend tens of thousands of dollars to maintain a modest structure that pales in comparison to the countless monstrosities that line the shore of Lake Winnipesaukee (A24). Despite numerous available remedies, the DES' insistence on demolition is puzzling when the undisputed evidence establishes the structure is more nearly conforming than the boathouse in disrepair it replaced and the DES has no statutory authority or rule regulating the height of structures. The only conclusion that can be made from the evidence is that the DES' unwritten policy is arbitrary and not suitable for enforcement.

The case also suffers from numerous due process issues such as the lack of a Complaint recorded in the file, incomplete communications in the file and an admission that the DES has no

idea what else may be missing from the file. DES' prosecution appears to be either politically motivated or based on the personal desires of DES employees who demand that the Corrs demolish their structure based solely on potential future uses that may arise due to plumbing when there is no proof that the Corrs' structure has any negative impact to the wetlands or the shoreland. This case is an affront to justice that the Council has the power to correct.

All Findings Accepted except Paragraphs 45, 52, 57, 59 and 60.

FACTS

1. The Corrs own property at 46 Deerhaven Road, Moultonborough, New Hampshire. See, A5[1].

2. When the Corrs purchased the property, it was improved with a small home, garage, and partially collapsed dry boathouse. See, A1-A4.

3. As the boathouse continued to collapse, it became an eyesore and liability hazard. See, A1-A2.

4. The Corrs desired to remove the hazard and replace the dry boathouse, on the water's edge, on the same location. See, T-BC[2].

5. The process required approvals from the Town of Moultonborough and the DES.

6. The Corrs hired Carl Johnson, an experienced land use consultant, to assist them in the process. See, A4.

7. The Town of Moultonborough maintains a comprehensive zoning ordinance that specifically regulates, among other things, the height of structures in the community. See, T-BC.

8. The Town of Moultonborough's zoning ordinance includes provisions to protect the waterfront. See, A10.

[1] References to Appellants' exhibits will be shown throughout thisdocument as "A" followed by the exhibit number.
[2] References to testimony from the May 8,2018 hearing shall be shown throughout this document as "T-" followed

9. The Town of Moultonborough's zoning ordinance limits the height of structures to 32 feet. See, T-BC.

10. Initially, the Corrs obtained a Permit by Notification ("PBN") to rebuild the dry boathouse in its original location. See, T-JA.

11. Prior to starting construction, a decision was made to move the boathouse away from the shoreline by approximately 10 feet.

12. The Corrs sought and received permits from the Town of Moultonborough which supported the movement of the structure back from the waterline and unanimously granted the approvals. See, A8.

13. The decision of the Town of Moultonborough did not limit the height of the structure. See, A8.

14. DES did not allow the Corrs to amend the initial PBN. See, T-BC.

15. DES required a new Application for a PBN and charged an additional application fee. See, T-BC/A4.

16. The Shoreland Permit by Notification Application (the "Application") is lengthy. See, A4.

17. The Application requests significant information. See, A4.

18. The Application does not require any information regarding height. See, A4.

19. DES had the opportunity to reject the Application if it were deemed incomplete. See, A4.

20. DES had the opportunity to request more information if it desired. See, A4.

21. The DES did not reject the Application or request information regarding the height of the structure. See, A4/T-JA.

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by the witness' initials.

22. DES reviewed the Application and approved the new PBN on May 27, 2016 (the "Approval").

23. The Approval was subject to certain conditions - none of which are related to the height of the structure. See, A4, Paragraph D.

24. When approving the Application, DES agreed that the proposal resulted in a more nearly conforming structure. See, A4, Paragraph B.

25. The Town of Moultonborough issued a building permit. See, A9.

26. The Corrs commenced construction after obtaining both the building permit and the new PBN.

27. The Corrs expended over $100,000.00 to construct the permitted structure.

28. After the building was nearly complete, DES visited the site and issued a Letter of Deficiency on April 5, 2017. See, A14.

29. The visit was purportedly made in response to a Complaint filed by a neighbor that opposed the removal of the collapsed dry boathouse. See, T-DF.

30. DES has no record of any Complaint or communications related to the Complaint in the Corrs' file and admitted that communications may be missing from the file. See, T-DF.

31. DES is required to maintain complete and accurate files.

32. The Letter of Deficiency directed the Corrs to cease and desist from further construction.

33. In compliance with the Letter of Deficiency, the Corrs have not undertaken any further construction and the structure remains unusable to date.

34. The DES issued a Field Inspection Report indicating that the structure built is higher than the collapsed structure, and therefore, violated RSA 483-B and Env-Wq. 1400. See, A13.

35. RSA 483-B does not grant the DES authority to regulate height.

36. Env-Wq 1440 allows DES to regulate the height of small accessory structures such as gazebos and sheds.

37. The structure in dispute is not a small accessory structure such as a gazebo or shed.

38. The land where the structure is located slopes steeply toward the Lake. See, T-BC/T-BR/A15.

39. The height of the structure at the front (street side) is less than 17 feet. See, A-15.

40. The back (lakeside) of the structure is over 17 feet, but under the 32 feet permitted in Moultonborough, due to the natural grade and slopes of the land. See, T-BC/T-RR/A-15.

41. The height of the structure itself is only 17 feet or less if measured from the top of the foundation. See, T-BC.

42. The Town of Moultonborough measures height of structures based on average grades. See, T-Bl.

43. The DES does not have a rule or policy in place on how to measure the height of a structure. See, T-CA/T-JS/T-DF.

44. Gary Brock, an architectural expert, opined the structure could not be modified to be a uniform height of 17 feet without being demolished. See, A17.

45. DES testimony regarding the desired remedy to modify rather than demolish the structure is disingenuous to the extent it claims it does not want the building demolished but only modified as such modification is impossible. See, T-CA.

46. DES offered no testimony how the structure could be modified and ignored Mr. Brock's expert opinion.

47. Building Codes require the structure to be built on a foundation. See, T-BI.

48. Common sense dictates the foundation and structure should be level.

49. To maintain compliance with building codes, the structural modifications suggested by DES would result in a structure that is 3 feet tall above the foundation. See, A17.

50. The height of the structure has no negative impact on water quality or wetlands. See, T-RR/A22.

51. The Corrs proposed reasonable landscape improvements on two occasions to improve purported water impacts and make the structure more nearly conforming. See, A19/A22.

52. The DES rejected these proposals and instead, insisted that the structure be demolished. See, T-CA/T-JA/T-DF/ DES24[3].

53. Bryan Corr offered credible testimony.

54. No evidence was offered to prove the Corrs engaged in fraud.

55. No evidence was offered to prove that the Corrs intended to mislead the DES.

56. The Corrs did not misrepresent any facts.

57. The comedy among horrors was the DES' introduction of a fact sheet available to measure height of small accessory structures. See, DES29.

58. DES testified the fact sheet was out of date and not valid, but stated DES was working on a new fact sheet to be published and made effective at some future date.

59. DES admitted that its unyielding prosecution of this case was due to its fears that the structure may have plumbing and people may try to occupy it at a later date.

[3] References to Department of Environmental Services' exhibits will be shown throughout this document as "DES" followed by the exhibit number.

60. This admission proves the DES was acting in bad faith in this case and seeking to enforce personal goals (no plumbing for accessory structures) that take away protected property rights without legislative or rulemaking authority.

61. The Corrs' new septic system is located over 200 feet from the shore of Lake Winnipesaukee. See, TBC.

62. The septic system is approved. See, T-BC/T-DF.

63. The installation of plumbing will not have any negative impact on the Lake or wetlands. See, T-RR/T-DF.

64. The structure in place is, as a matter of fact, more nearly conforming than the dry boathouse it replaced. See, T-BC/T-CA/T-JA.

RULINGS OF LAW

65. The DES enforcement regarding the height of other than small accessory structures is arbitrary.

66. The DES does not have legal authority to take enforcement action to promote personal goals that are not based on statutory or rulemaking authority.

67. NH RSA 483-B:11 regulates non-conforming structures in the protected shoreland.

68. The relevant sections of NH RSA 483-B:11 provide:

> I. Except as otherwise prohibited by law or applicable municipal law or applicable municipal ordinance, non-conforming structures located within the protected shoreland may be repaired, replaced in kind, reconstructed in place, altered or expanded. Repair, replacement in kind or reconstruction in place may alter or remodel the interior design or existing foundation of the non-conforming structure but shall result in no expansion or relocation of the existing footprint within the waterfront buffer. **However, alteration or expansion of a nonconforming structure may expand the existing footprint within the waterfront buffer,** (emphasis added) provided the structure is not extended closer to the reference line and the

STATE OF NEW HAMPSHIRE

WETLANDS COUNCIL

Docket No. 17-16 WtC

Appeal of Bryan and Linda Corr
In Re: DES AO 17-028 WD

Ruling on Motion for Reconsideration

Background

On November 30, 2017, Bryan and Linda Corr (Appellants), timely filed an appeal with the New Hampshire Wetlands Council (Council), appealing an Administrative Order, AO 17-028 WD (The Order), issued November 3, 2017 by the NH Department of Environmental Services (DES). The Order states, at D page 5, that the Appellants "violated RSA 483-B, Env-Wq 1405, and PBN #2016-01498 by replacing a grandfathered accessory structure on the Property with a new accessory structure that is greater than 12' in height, and greater in height than the original grandfathered structure."

On February 22, 2018, DES filed a Motion to Dismiss.

On March 14, 2018, the appellant filed an Objection to the Motion to Dismiss.

On April 11, 2018, the Hearing Officer issued his Ruling on Motion to Dismiss, granting in part and denying in part the motion.

The appeal hearing was held on May 8, 2018 with deliberations on June 12, 2018.

On August 6, 2018, the Hearing Officer issued his ruling granting the appeal.

On September 4, 2018, DES filed this Motion for Reconsideration.

On September 10, 2018 the Appellants filed their Objection to Reconsideration.

Activity Prior to the Order

On January 4, 2016, the Appellants filed and DES later accepted a Wetlands/Shoreland PBN (Permit by Notification) #2016-00009 for construction on Lake Winnipesaukee waterfront property in Moultonborough for a project described as "REPLACE AN EXISTING SHORELAND STRUCTURE WHICH WAS COLLAPSED BY SNOW LOAD WITH A NEW STRUCTURE IN EXACT LOCATION AND HEIGHT." (DES-1, Bates 000011)

The project was revised and on May 27, 2016 the Appellants filed and DES later accepted a new PBN # 2016-01498 describing the project as "A PREVIOUSLY EXISTING GRANDFATHERED STRUCTURE COLLAPSED FROM SNOW LOAD. A PREVIOUS WETLANDS APPROVAL WAS GRANTED (FILE #2016-00009) TO REPLACE THE STRUCTURE IN KIND. THIS APPLICATION IS TO REPLACE THE STRUCTURE MOVING IT BACK 10' AS A RESULT OF A VARIANCE GRANTED BY THE MOULTONBOROUGH ZBA. THE PROJECT WOULD INVOLVE 1480 SF OF TEMPORARY DISTURBANCE BUT RESULT IN NO ADDITIONAL IMPERVIOUS AREA BECAUSE THE NEW STRUCTURE WILL BE THE EXACT FOOTPRINT OF THE ORIGINAL STRUCTURE. THE RESULT WILL BE A MORE NEARLY CONFORMING STRUCTURE." (DES-2, Bates 000024)

The PBN application form does not require any information regarding height. (Appellant requested finding of fact #18. Granted.)

A third PBN, 2016-01735, for septic modifications elsewhere on the Appellants' property was filed on June 14, 2016, and later approved by DES. (DES -3)

On or about September 12, 2016, following building permit issuance on June 9, 2016, the appellant proceeded with construction of the building 27 feet high with the same size footprint as approved by the Moultonborough ZBA. (Appeal #27, 28, & 29 and testimony)

On or about February 9, 2017, DES received photographs of the building; DES conducted an inspection on February 22, 2017. (Appeal #34 & 35, Order #12, & 15)

On February 24, 2017, DES issued a letter stating that the building exceeded the scope of PBN # 2016-001498. (DES 16) At the time the appellants received DES's letter, the building was completely framed, roofed, and windows installed. (Appeal #38)

On March 3, 2017, the appellants' consultant estimated the original structure to have been approximately 17 feet in maximum height. (Exhibit A-20, pg. 50)

DES issued a Letter of Deficiency ("LOD") on April 5, 2107. (DES-19) The Appellants ceased and desisted all work upon receipt of the LOD. (Appeal #46)

DES and the Appellants failed to resolve the issue through negotiation. (DES-21 thru DES-26, Appeal #42, 43, 44)

DES issued AO 2017-028 WD on November 3, 2017. (DES-4)

Motion and Objection

The Motion for Reconsideration raises two issues:

First, that the Council's finding that DES failed to reasonably consider the allowance for expansion provided under RSA 483-B:11, was estopped by the Hearing Officer's April 18, 2018 Ruling on the Motion to Dismiss, was a ruling of law outside the Council's authority, and was wrongly decided.

Second, that the Council failed to decide three discrete issues listed in the Ruling on the Motion to Dismiss: "whether the Department's methodology for measuring height was arbitrary, has not determined whether the Appellants were entitled to a waiver, and did not determine whether the Appellants were entitled to a vested rights determination." (Motion page 5, final sentence)

The Objection at 4 & 5 supports the Council's concerns regarding DES's method of determination building height. At 6, regarding errors of law, the Objection states that these would be properly addressed to the Superior Court; while this might be true if DES proceeds with an enforcement action, at present, before the Council, questions of law are properly addressed to the Hearing Officer with mixed questions of fact and law being the purview of the Council and Hearing Officer together. (RSA 21-M:3, IX d & e) Further action following Council reconsideration in this appeal would be before the Supreme Court as indicated in RSA 21-O:14, III and RSA 541:6.

Discussion

The Motion for Reconsideration raises mixed questions of fact and law; the Hearing Officer and Council deliberated at the Council's October 9, 2018 meeting.

A. RSA 483-B:11

The Motion on page 4 argues that the question of height and RSA 483-B:11 is a matter of law previously decided in the Hearing Officer's Ruling on Dismissal. The Hearing Officer stated during reconsideration, that the Council's consideration at the hearing of the applicability of RSA 483-B:11 was tied to the question of height raised by the appellants, was not estopped by the Ruling on the Motion to Dismiss, and being a

question of applying fact to relevant law it was within Council authority. (RSA 21-M:3, IX d)

Contrary to the Motion at page 2, second paragraph, the Council did not create a new type of structure "nonconforming". Nonconforming is defined at RSA 483-B:4 XI-d and used in RSA 483-B:11 Nonconforming Structures. The Council decision at page 3, last paragraph, inexactly uses the words "rather than an accessory structure." RSA 483-B defines structures as "primary" or "accessory" and either "nonconforming" or not. The structure under consideration here is a nonconforming accessory structure.

The salient points are in the Council's decision at page 3, last paragraph. We restate them here:

The structure is a nonconforming structure. (RSA 483-B:4, XI-d) RSA 483-B:ll, I provides that such nonconforming structures may be "altered, or expanded" "provided the structure is not extended closer to the reference line and the proposal or property is made more nearly conforming than the existing structure or the existing conditions of the property".

The department failed to consider that by moving the building back from shore 10 feet, the building is more nearly conforming to RSA 483-B and more nearly conforming to RSA 482-A, having been moved out of RSA 482-A jurisdiction. There was no evidence that DES had reasonably considered the expansion allowed by RSA 483-B :11, I.

The possible expansions of a structure are footprint or height; the Appellants chose to increase height. It is DES's responsibility to determine if the result of moving the building back from the shore, thereby "altering the location or size of the existing footprints", and "enhancing stormwater management, adding infiltration and landscaping, upgrading wastewater treatment, improving traffic management, or other enhancements that improve wildlife or resource protection" is a positive or negative compared to the allowed expansion, in this case height, and "bring the structure more nearly into conformity with the design standards of this chapter" (RSA 483-B:11, II).

The design standards of this chapter are stated in RSA 483-B:9 Minimum Shoreland Protection Standards, an extensive section that only references "height" three times, always related to shrubs or trees.

The Motion's argument at the top of page 3 that the structure must be more

conforming in all respects ignores the plain meaning of RSA 483-B:11.

B. Failure To Decide Three Discrete Issues

The Council agrees that it did not adequately decide if DES's method of measuring height was arbitrary; note that the actual appeal uses the words "ambiguous … standard" – see Appeal #63, 64, 65, & 66. The Council denied DES's finding of fact 6 that states DES's height measurement method. The Council reconsideration deliberation centered on several points that were also extensively discussed during hearing deliberation:

1. DES does not have in rule how it measures height. (Appellant requested finding of fact #43. Granted.)

2. As testified by DES personnel and the Moultonborough Building inspector there are several ways to measure a building's height, the two most frequent are "average height" as used by Moultonborough and "maximum height" used by DES. The Council takes judicial notice that while for a structure on level ground these two methods produce nearly the same result, on sloping ground, such as that typical of shoreland sloping to a waterbody, DES's method produces a result that is greater than the "average height" method.

3. DES testified that they have used the same method consistently and it was described in an outdated fact sheet from 2000. (Testimony and DES requested findings of fact #9 & 10. Granted.)

Some Council members argued that item 1 alone or 1 and 2 above would make DES height measurement methodology unreasonable, other members believed that the consistency exhibited in 3 rendered it reasonable. A motion was made, seconded, and passed that DES's height measurement method was unreasonable.

The Council believes it did decide the issue of a waiver by granting DES's requested findings of fact 50, 51, & 52; to be clear, the Council denies the Appeal's Claim of Error "D" sub-part waiver.

The Council believes it did decide the issue of vested rights by granting DES's

requested findings of fact 42, 43, 46, & 47; to be clear, the Council denies the Appeal's Claim of Error "D" sub-part vested rights.

The Council, both at the hearing deliberation and under reconsideration, had extensive discussion of the relationship between PBN 2016-00009 and PBN 2016-01498. Specifically: is the statement in PBN 2016-00009 "exact location and height" carried over to PBN 2016-01498 by the second sentence in its description, or is the second sentence merely informing DES the first PBN is inoperative and that the stated Moultonborough ZBA variance approval is controlling? The Motion did not request reconsideration of this issue and the Council does not re-decide it here.

The Hearing Officer noted, and the Council agreed, that in a situation like this, DES is required to make a reasonable effort to consider all statutory avenues and possible waivers to resolve the dispute.

Ruling

The Motion is **DENIED** under reconsideration.

So Ordered for the Council: _____ October 23, 2018.
SOT David F Conley, Esq. (Bar #130)
Hearing Officer

_____ October 23, 2018.
SOT George W. Kimball, Chairman

Further Appeal:

In accordance with RSA 21-O:14 III, any party aggrieved by a decision of the Council after reconsideration may appeal to the Supreme Court as specified in RSA 541.