THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0650

Appeal of New Hampshire Department of Environmental Services

In re: Bryan and Linda Corr

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

BRIEF OF THE APPELLEE / CROSS-APPELLEE, BRYAN AND LINDA CORR

Bryan and Linda Corr,
By and through their attorneys,
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Dated: June 17, 2019

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The Appellee / Cross Appellee requests fifteen minutes of oral argument before the full court, to be presented by Attorney John G. Cronin.

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QUESTIONS PRESENTED FOR REVIEW-CROSS APPEAL

1. Whether, in partially dismissing the appeal, the hearing officer lawfully or reasonably concluded that the New Hampshire Department of Environmental Services ("DES") had the authority to regulate the height of a redeveloped non-conforming accessory structure. A. at 98-102. [1]
2. Whether, in partially dismissing the appeal, the hearing officer lawfully or reasonably determined that the Department of Environmental Services had the authority to regulate the size, including the height, of the redeveloped boathouse where the statute limited the grant to "small accessory structures." A. at 102-104

[1] For the sake of convenience, the Corrs shall use the same citations to the record as the New Hampshire Department of Environmental Services as set forth in footnote 1 on page 8 of the "Brief of the Appellant, State of New Hampshire Department of Environment Services." In addition, it shall use the following citations for other portions of the record: "C.R." for the Certified Record and "C.A." for Appendix to Brief of Appellees and Cross Appellants, Bryan and Linda Corr, "DES Brief" for "Brief of the Appellant, State of New Hampshire Department of Environmental Services."

STATEMENT OF CASE

On or about November 30, 2017, Bryan and Linda Corr (collectively, the "Corrs") filed a Petition to Appeal Administrative Order No. 17-028 WD Wetlands Bureau File Nos. 2016-00009, 2016-01498, and 2016-01735 (the "Appeal Petition") with the New Hampshire Wetlands Council (the "Council"). C.R. at Tab 1. In the Appeal Petition, the Corrs challenged an enforcement decision by the New Hampshire Department of Environmental Services dated November 30, 2017 ordering them, in relevant part, to reduce the height of a replacement boathouse to seventeen (17) feet. Id. More specifically, the Corrs, in part, asserted that DES lacked authority to regulate the height of buildings within the protected shoreland and, in any event, its height regulations was overly vague as it lacked a method for determining height. Id. at Tab 1 [¶¶55-66]. The Corrs further asserted that DES only had the authority to regulate the size of "small accessory structures," rather than all accessory structures under RSA 483-B:17, IV and the boathouse was not a "small accessory structure." Id. at Tab 1 [¶¶67-73]. They additionally asserted that the boathouse was a nonconforming structure, DES lacked authority to adopt regulations relative to nonconforming structures, and is so doing effectively and improperly circumvented RSA 483-B:11. Id. at Tab 1 [¶¶74-84]. Finally, the Corrs complained that the enforcement decision was unlawful or unreasonable because they should have been deemed to have vested rights or a waiver granted. Id. at Tab 1 [¶¶85-94]. The Council accepted the Appeal Petition on or about January 10, 2018. C.R. at Tab 4.

On that same date, the Council requested from the New Hampshire Department of Justice the assignment of a hearing officer for the appeal. C.R. at Tab 5. On or about January 18, 2018, the New Hampshire Department of Justice assigned David Conley, Esquire, as the hearing officer for the Corrs' appeal (the "Hearing Officer"). On or about February 14, 2018, the Hearing Officer conducted a prehearing conference. C.R. at Tab 9.

On or about February 22, 2018, DES filed a Motion to Dismiss. C.R. at Tab 10. In its Motion to Dismiss, DES asserted that the Corrs did not demonstrate that DES acted unlawfully or unreasonably in regulating the size of accessory structures within the waterfront buffer under RSA 483-B:17, IV when it regulated the height of accessory structures. Likewise, although it acknowledged that RSA 483-B:17, IV spoke of adopting rules relative to the "[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 reference line and the primary building line," DES further argued that it had the authority to regulate the size of all "accessory structures," a term of art under RSA 483-B:4, II which was said to include not only "gazebos" but "paths, driveways, patios, any other improved surface, pump houses,...woodsheds, garages, or other outbuildings." DES further argued that its administrative order was consistent with RSA 483-B:11 as a nonconforming structure expanded in terms of one dimension can never be "made more conforming" as defined by RSA 483-B:11. Finally, it asserted that the Corrs did not have vested rights and it had acted lawfully in not granting a waiver as the Corrs had not asked for a waiver. The Corrs filed an Objection to the Motion to Dismiss. C.R. at Tab 11.

On or about April 11, 2018, the Hearing Officer issued a decision granting, in part, and denying, in part the Motion to Dismiss (the "Dismissal Order"). DES Brief at 37-43. The Hearing Officer held that DES had the authority under RSA 483-B:17 to regulate the height of accessory structures generally and to regulate the height of the Corrs' boathouse notwithstanding its size. Id. As such, the Hearing Officer dismissed the Corrs' challenges based upon DES's authority to regulate the height of accessory structures. Id. The Hearing Office also held that RSA 483-B:11 was not applicable to the Corr's boathouse, but did so on the presumption that the height rule applied. However, the Hearing Officer denied the Motion to Dismiss with respect to the Corrs' claim that the DES's methodology for determining height was arbitrary as well as it claims relative to vested rights and waivers. Id. The Hearing Officer left the consideration of those matters to the

Council, thus leaving open the possibility that the height rule upon which he based his decision under RSA 483-B:11 might be found to be unenforceable. Id.

On or about May 8, 2018, the Council heard the Corrs' appeal. At the hearing, the Corrs presented testimony from Mr. Corr regarding the property and the effort to rebuild a collapsed boathouse. H. 16:1 to 84:4. They also presented the testimony of the Town of Moultonborough Building Inspector, who, *inter alia*, testified that different methodologies exist to measure the height of a structure and the Town of Moultonborough Zoning Ordinance expressly dictates the methodology that he is to use. H. 90:4-14; 91:18-22; 92:1-10. The Corrs procured admissions from DES staff that their height regulations did not provide for a methodology by which they or anyone else were to determine the height of a structure and that there are different methodologies for measuring height. *See, e.g.* H. 98:3-23; 211:12-18. The written document produced at the hearing relative to DES's methodology for determining height was an old fact sheet which, while referencing accessory structures in general, only listed the alleged height restriction under requirements for "small accessory structures." C.R. Tab 26 [DES-29]. Both a wetlands expert produced by the Corrs and a DES official testified that the height of a structure has no effect on water quality. H. 148:2-23; 149:1-5; 214:8-11.

The Council conducted deliberations on the matter on June 12, 2018. The Hearing Officer was present for the deliberations. *See, e.g.* Del.Tr. at 2:1-14; 3:16-23. During the deliberations, while acknowledging that the Hearing Officer had ruled that DES had authority to regulate height, Council members repeatedly raised concerns that the regulation did not provide a methodology for measuring height and the ambiguities relative to the same. *See, e.g.*, Del.Tr. at 4:4-23, 5:1-6 15:13-23; 20:18-23; 28:12-23; 29:1-12; 66:1-22. Council members also acknowledged that DES did not even ask about height in its application. Del.Tr. at 47:15-20. Council members also stated that rulings of law, including the Hearing Officer's prior rulings, were not for them. Del.Tr. at 55:21-23, 70:14-23, 75:20-23, 76:3. . However, the Council also noted that DES asked them to make a finding of fact that "the [Corrs] have made the structure more non-conforming

with respect to height," Del.Tr. at 70:20-23; 71:1-12, and recognized that their finding as to the height regulation might bear on the issue. Del.Tr. at 71:13-23. The Council concluded its deliberations asking the Hearing Officer if they had done enough. Del.Tr. 78:6-10.

On August 6, 2018, the Hearing Officer issued a decision on behalf of the Council. The decision concluded that:

> 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 [DES] for its consideration of the new structure's compliance with the nonconforming structure rules of RSA 483-B:1 l, I and II.

DES Brief at 47.

DES filed a motion for reconsideration on September 4, 2018. A. at 114. In its Motion, DES asserted that the Council had improperly overruled the Hearing Officer on a question of law decided in the Dismissal Order relative to RSA 483-B:11 and that the Council had failed to address the three issues presented to it under the Dismissal Order. Id. The Corrs filed an objection to the Motion for Reconsideration. A. at 121.

The Council and the Hearing Officer considered the Motion for Reconsideration on October 9, 2018. The Council agreed that it had not adequately addressed whether the methodology was arbitrary in its August 6, 2018 decision, but consistent with findings and deliberations made back in June, clarified its decision to provide the methodology was arbitrary. DES Brief at 67. The Council rejected the Motion for Reconsideration otherwise in a written order dated October 23, 2018. DES Brief at 68. This appeal ensued.

. STATEMENT OF FACTS

This case concerns the Corrs' efforts to remove and replace an eyesore from their otherwise modest lakefront property in the form of a collapsed boathouse. Unlike other stories involving effort to build along the waterfront, this is not a story in which the Corrs

acted first and asked questions later. It is the story of how the Corrs attempted to play by the rules, including through the use of professionals, but in so doing, expended significant time and resources for what could be nothing given the murky regulation of accessory and non-conforming structures in the protected shoreland.

The Corrs acquired the property located at 46 Deerhaven Road, Moultonborough, New Hampshire (the "Property") in 2014. H. 7:18-20. The Property is a waterfront lot with approximately one hundred and forty linear feet (140') of frontage on Lake Winnipesaukee. A. at 3. As is common with lakefront lots, the Property slopes down towards Lake Winnipesaukee. H. 18:20-23; 147:1-10. Indeed the Property is characterized by a steep elevation change at about the half-way point of the Property. H. 147:10, 18-23; A. at 133.

The Corrs did not purchase a sprawling estate when they acquired the Property. The Property was affordable for the Corrs because it was improved by a small single family home dating back to the 1940's in need of some help and a boathouse. H. 16:19-23; 17:4-12; 21:5-13. The boathouse dated back to the same period as the house and was located within two (2) feet of the reference line of Lake Winnipesaukee. H 6:6-9. Given the age of the boathouse, it was a grandfathered or nonconforming structure. H. 181:9-13. The Corrs considered the boathouse a hazard when they purchased the Property. H. 26:9-18.

The existing boathouse collapsed due to snow loads during the winter of 2015. A. at 47. The boathouse had not been measured in terms of its height at various points prior to its collapse. Estimates of its height from the reference line to the roof ridge ranged from seventeen (17) feet to twenty-five (25) feet. H. 155:22-23; 156:1-23; 157:11-21. The Corrs' original intent was to raze the boathouse and reconstruct it in its original location. H. 23:14-16. The Corrs were advised that they needed approvals from the Town of Moultonborough (the "Town") and the DES to reconstruct the boathouse and engaged an engineer to obtain those approvals. H. 23:11-13.

Given the location of the boathouse relative to the reference line, the Corrs applied to DES for a permit by notification under RSA Chapter 482-A from DES to reconstruct the boathouse in its original location. The application for the permit by notification under RSA Chapter 482-A (the "Wetlands PBN") does include language that the reconstructed structure would be at the same location and the same height. H. 24:1-7. DES granted the Wetlands PBN.

However, during the proceedings before the Town, it was suggested that the reconstructed boathouse be made less non-conforming in order to decrease runoff from the structure into Lake Winnipesaukee by moving it back to ten (10) feet from the reference line. H. 85:6-17. The Corrs agreed to the same and, on or about April 21, 2016, the Town granted the permits and approvals necessary to re-build the boathouse ten (10) feet back from the reference line of Lake Winnipesaukee and twenty seven (27) feet high as defined by the Town of Moultonborough Zoning Ordinance. H. 85:18-22; C.R. at Tab 25 [A8].

With the change in location of the reconstructed boathouse, RSA Chapter 482-A ceased to govern the reconstruction of the boathouse as that structure would be within the protected shoreland governed by RSA Chapter 483-B. H. 220:15-23; 221:1-21. As the relocated and reconstructed boathouse would impact less than 1,500 square feet and add no more than 900 square feet of impervious area within a protected shoreland area, the Corrs, through their engineer, applied for a new permit by notification pursuant to RSA 483-B:5-b(I)(a)(1) and paid an additional application fee. A. at 57. The Shoreland Permit by Notification application expressly advises applicants that it cannot be used for projects impact areas with the jurisdiction of RSA Chapter 482-A and "expanding the footprints of nonconforming primary structures within 50 feet of the reference line." A. at 57. The Corr's engineer described the structure at issue as a "previously existing grandfathered structure collapsed from snowload" and the result of the relocation "would be a more nearly conforming structure." Id. As a part of the application, the Corrs were required to certify their understanding that projects which did not meet "the minimum standards of

RSA 483-B and the Administrative Rule Chapter Env-Wq as explained within the Summary of Minimum Standards Fact Sheet…" could be rejected. A. at 58. Unlike the Wetland PBN application, there was no reference to height in the Shoreland Permit by Notification at all, A. at 57-60; H. 183:98-21, and DES officials could offer no explanation why they did not ask about height. *See, e.g.*, H. 211:4-11. DES accepted the Shoreland Permit by Notification (the Shoreland PBN") in May 2016. A. at 57. In approving the Shoreland PBN, there is nothing in the record suggesting that DES advised the Corrs that they needed to file any further documentation or request a waiver in light of the representations made in their Shoreland PBN application.

In the fall following the issuance of the Shoreland PBN, the Corrs started reconstruction of the boathouse in its new location. H. 28:11-18. The redeveloped boathouse was to measure up to eighteen (18) feet wide and up to thirty-eight and two tenths (38.2) feet long. C.R. at Tab 25 [A20]. The replacement structure was framed to match the footprint of the prior non-conforming structure. However, after receiving a complaint, DES conducted an inspection of the Property in February 2017 and concluded the reconstructed boathouse exceeded the seventeen foot height of the original boathouse without offering any explanation as to how the height was determined. C.R. Tab 25 [A13], Tab 26 [DES-15]. DES did not suggest that the reconstructed boathouse was inconsistent with the information *actually* requested and provided in the Shoreland PBN. Id.

On February 24, 2017, DES sent a letter to the Appellants notifying them that it had received a complaint asserting that the reconstruction of the boathouse exceeded the scope of the Shoreland PBN. C.R., Tab 26 [DES-16]. By the time the Appellants received said letter, the reconstructed boathouse was completely framed and otherwise about seventy-five percent complete. H. 33:11-16, 35:3-8. On or about April 5, 2017, DES issued a Letter of Deficiency in which it asserted that the reconstructed boathouse exceeded its original height and ordered that the Appellants have a qualified professional draw up a restoration plan to reduce the height of the boathouse to seventeen (17) feet.

C.R. Tab 26 [DES-19]. The Letter of Deficiency also failed to specify how the height of the reconstructed boathouse was to be measured and once again did not indicate that the reconstructed boathouse was inconsistent with the information actually sought on the Shoreland PBN. Id.

Due to the design of the reconstructed boathouse, the roof line of the reconstructed boathouse cannot be reduced. C.R. Tab 25 [A17]. As such, the Corrs, through counsel, challenged DES's authority to regulate the height of structures within the protected shoreland and offered alternative remedies in an effort to resolve the Letter of Deficiency. C.R. Tab 25 [A15, A19]; Tab 26 [DES-23].

Those efforts were unsuccessful, H. 103:15-22, and DES issued an order on November 3, 2017 directing the Corrs to cease and desist all work within the protected shoreland, hire a qualified professional to create and file a restoration plan reducing the height of the boathouse to no more than seventeen (17) feet, and to implement the filed restoration plan. C.R. Tab 26 [DES-27]. The November 3, 2017 order also failed to advise the Corrs as to how to measure the height of the boathouse. Id.

SUMMARY OF ARGUMENT-CROSS APPEAL

In their Cross Appeal, the Corrs assert alternative grounds for holding that the height of their reconstructed boathouse was not within the scope of DES's permitted regulatory authority. More specifically, first, RSA 483-B:17, IV, the provision upon which DES relies, to regulate the height of the Corr's boathouse only grants DES the right to regulate small accessory structures, rather than all accessory structures. Accessory structure is a term of art under RSA 483-B and the definition provides a list of examples of such structures. The Legislature elected not only to modify "accessory structure" with the word "small" in RSA 483-B:17, IV, but elected to provide samples of small accessory structures which just happen to be those accessory structures identified in the general definition of "accessory structure" that tend to be smaller in size, namely, gazebos and sheds. There is nothing absurd with affording RSA 483-B:17, IV its plain reading. The Legislature could have determined that the statutory minimum standards

applicable to primary structures would be sufficient to regulate larger accessory structures. At the hearing, DES staff admitted that the boathouse with its dimensions was not like a shed or gazebo (i.e. it was not a small accessory structure). DES's current regulation, which include the height restriction, applies to all accessory structure contrary to the enabling legislation and, therefore, the boathouse is outside the scope of DES's permissible regulatory jurisdiction.

Alternatively and additionally, while "size" can include height if one relies on dictionary definitions, a statute is to be read in the context of the entire statutory scheme. RSA 483-B when addressing size focuses upon area or footprint. Indeed, there is no height restriction for larger structures under RSA 483-B. If the Legislature deemed height a concern surely it would have imposed a limitation on larger primary and accessory structures, but it did not. Furthermore, as recognized at the appeals hearing, height has little, if any, impact on water quality. As such, RSA 483-B:17, IV, which is a part of a scheme designed to protect water quality, does not afford DES with the right to regulate height of any accessory structures.

ARGUMENT

A. GENERAL STANDARD OF REVIEW

RSA 541:13 governs the Court's review of the Council's decision on this appeal. Appeal of Lake Sunapee Protective Association, 165 N.H. 119, 124 (2013); RSA 21-O:14, III. Under that statute, the Council's findings of fact are deemed prima facie lawful and reasonable. RSA 541:13. As the appealing party, the DES must show that the Wetland Council's decision was clearly unreasonable or unlawful. Id. As such, the Court must uphold the decision of the Wetlands Council except for errors of law or unless it is satisfied by a clear preponderance of the evidence that the decision is unjust or unreasonable. Lake Sunapee Protective Association, 165 N.H. at 124. "In reviewing the Council's findings, [the Court's] task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." Appeal of Cook, 170 N.H. 746, 749

(2018). The Court reviews rulings on issues of law *de novo*. *See* id.; RSA 541:13. In reviewing a claim of a procedural irregularity, the Court will not vacate a "decision for a procedural irregularity ... unless the complaining party shows material prejudice." Ruel v. New Hampshire Real Estate Appraiser Board, 163 N.H. 34, 44 (2011). Finally, the Court may affirm a decision on alternative grounds if the lower tribunal reached the right result, albeit for the wrong reasons. State v. Dion, 164 N.H. 544, 552 (2013) [Court may affirm on alternative grounds if the trial court reaches the right result on the wrong grounds.]. For the reasons set forth below, DES fails to meet its burden and, therefore, the Court should uphold the Council's decision.

B. THE COUNCIL'S DECISION REGARDING DES'S METHODOLOGY FOR MEASURING HEIGHT WAS NOT UNREASONABLE.

DES, in part, asserts that the Council's determination that DES's methodology for measuring height was arbitrary was unreasonable. While this is DES's third claim of error, the resolution of this claim may prove dispositive relative to resolution of DES's appeal in general as DES's initial enforcement decision and its claims of errors on appeal are all effectively predicated upon an alleged height violation. If the height restriction is not enforceable, as the Council, held because it was arbitrary, then all of DES's claims of error fail as will be explained further in the context of each claim. The Council's factual determination that DES's methodology for measuring height was arbitrary is not clearly unreasonable and, therefore, DES's claim of error fails.

A statute may be impermissibly vague if it either fails to provide persons of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits or it allows or encourages arbitrary or discriminatory enforcement. State v. MacElman, 154 N.H. 304, 307 (2006). The Dismissal Order left the question as to whether DES's methodology for determining height under N.H. Admin. Rule Env-Wq 1405.03(b) as a question of fact and DES does not challenge the Dismissal Order in this regard. In addition, DES does not contest the lawfulness of the determination (i.e. whether the findings were legally sufficient to show that the height regulation was

impermissibly vague. DES only contests whether the Council could have reasonably found that DES's methodology for measuring height under N.H. Admin. Rule Env-Wq 1405.03(b) (the "Rule") was arbitrary.

As an initial matter, DES frames its issue in a manner contrary to the applicable standard of review. As discussed above, DES is obligated to show that the Council's factual findings were clearly unreasonable, not simply unreasonable.

Turning to the merits of the claim, the Rule provides, in relevant part, that "[a]ccessory structures shall...[n]ot exceed 12 feet in height." N.H. Admin. Rule Env-Wq 1405.03(b)(1). The Rule was purportedly adopted pursuant to RSA 483-B:17, IV, which allows DES to 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 reference line and the primary building line." As was discussed at the appeals hearing, the land between the reference line and the primary building line is often sloped towards the waterfront and indeed, in the case of the Corrs' property, the protected shoreland was characterized by a steep slope. H. 147:3-10. Under such circumstances, the distance between the ground and the top of the structure may vary over the length of the structure and did so in the case of the boathouse. H. 154:5-23; 155:1-11 Given this reality and, contrary to Mr. Adams's suggestion that how one measures height is self-evident, H. at 98:6-11, it was undisputed that different methodologies exist for measuring the height of a structure built on or into such terrain. H. 92:1-10; 98:16-23. For example, the Town of Moultonborough measures from the highest and lowest grades and obtains an average height to determine the height of a structure near the waterfront with that methodology specifically provided for in the zoning ordinance. H. 90:4-11; H91:18-22. Additionally, there are other considerations relative to measuring the height of a structure if the same is to be usable. For example, building codes, which are applicable in this State, RSA Chapter 155-A, generally require that foundations be set below the frost line. H. 86:13-17. DES requires that accessory structures comport with the building code. N.H. Admin. Rule Env-Wq

1405.02(b). At the same time, foundations generally must allow the structure to sit above grade to avoid water and insect damage. H. 86:18-23; 87:1. As such, to allow a usable structure, any measurement of height would need to take into account the same. In short, while in the abstract it may appear that height of a structure is readily apparent, in reality, it is not self-evident and, therefore, must be defined.

As the grant of authority is to adopt rules, the power to regulate the size and placement of small accessory structures is not self-executing, but may only be accomplished through the adoption of rules. *See, e.g.*, Lemm Development Corp. v. Town of Bartlett, 133 N.H. 618, 622-623 (1990) [Planning board had to promulgate site plan regulations to exercise site plan review where enabling legislation provided for adoption of regulations.]. As such, DES should have adopted a rule specifying how height was measured. However, it was undisputed that neither the Rule or any other regulation specified how one was to measure the height of an accessory structure to determine if one wanted to comply with the same. H. 97:19-22; 98:3-15; 211:12-18. Indeed, the only written document that existed that discussed how was to measure height was a 2000 Fact Sheet. That Fact Sheet described minimum standards for "small accessory structures," described such structures as having a maximum footprint of 150 square feet, and included a statement under such standards that "accessory structures can be no higher than 20 feet from lowest contour to peak." C.R. Tab 26 [DES-29]. DES staff, however, described the same as an advisory document, not a rule, which was no longer in force. H. 268:11-23; 269:1-22. The Council recognized that there were different methodologies to measure height, but that DES had failed to adopt any rule specifying the methodology it was using and the Fact Sheet, per DES, was not effective any more. Del. Tr. 4:14-18; 65:5-23; 66:1-23; Rec. Tr. 23:16-23; 24:1-15; 25:4-23;25:1-5. The record amply supports such findings.

While Mr. Adams asserted it was implicit what height of a structure meant, DES staff did not necessarily share the same understanding how to measure the height of accessory structures. For example, Mr. Aube testified that he measured height from the

lowest contour elevation. H.194:4-7. While he believed others took a similar approach, Mr. Aube did acknowledge that he knew of instance where a colleague measured height from the reference line; a more stringent approach. H.194:8-13. Mr. Adams, the long-time Administrator of the Wetlands Bureau, testified that he did not know how the Corrs' boathouse was measured, even though the same should have been self-evident if the notion of height was as obvious as he believed. H. 104:10-23. Moreover, Mr. Adams testified that he, like Mr. Aube's unidentified colleague, would measure from the "water line," not the lowest contour elevation. H. 106:1-3. While Ms. Forst testified that she measured dug out boathouses in a manner similar to Mr. Aube, the overall testimony in the record demonstrated that the potential for arbitrary enforcement existed as the so-called administrators of the regulation did not necessarily agree what the unwritten policy was. While references were made to the ridge, it is not clear whether structures such as cupolas would be considered or not under the unwritten policy. Furthermore, Mr. Adams begrudgingly admitted that his interpretation of the unwritten policy might lead to practical difficulties in constructing a usable building as a significant disturbance of the waterfront soils would be the only option and the law does not look kindly on the same. H.107:6-23; 108:1-3; *see also*, RSA 483-B:9, V:2 [Minimum standards limiting certain disturbances within protected shoreland as well as buffer requirements indirectly limiting disturbances.] A landowner is not going to guess that height will be measured in a manner that effectively limits the construction of usable structures making the unwritten policy even that more arbitrary.

Finally, as if having an unwritten policy with respect to which administrators might have different views is not bad enough, DES does not even inquire as to the height of structures on its Shoreland PBN application. No explanation could be offered as to why DES did not ask for such information. Indeed, DES's own regulation for redevelopment or expansion of a nonconforming structure does not require information on height. N.H. Admin. Rule Env-Wq 1408.05. Such an omission leads a person of reasonable intelligence to believe that the same is not an issue in the context of such

applications and the matter of building height was left to the local municipalities and their land use regulations. Moreover, as DES admitted, the lack of information in the application may lead its staff to make presumptions about projects, H.228:17-23; 229:1-4, apparently even though it is known, such as the case here, that the structure is being relocated and the topography may change. A regime predicated upon presumptions can lead to arbitrary or discriminatory enforcement. The Council recognized that DES's failure to even inquire about the height relative to a project where the same was purportedly relevant lent itself to arbitrary results. *See, e.g.*, Rec. Tr. 18:10-23; 19:1-8.

In an effort to blunt the deficiencies in their application process relative to height and shift blame to the Corrs, DES has raised the certification in Paragraph (G)(3) of the Shoreland PBN. While DES has asserted that the applicant certifies his or her understanding that the application may be rejected if it violates RSA 483-B:11 or DES's rules, C.R. Tab 26 [DES-15] it perhaps needs to read its own application a little more carefully. Section G(3) of the Shoreland PBN provides "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 Minimum Standards Fact Sheet, including the minimum standard relative to impervious surfaces, as explained on page 4, shall be rejected." A. at 58. DES did not provide the Summary of Minimum Standards Fact Sheet and presumably it would have if that document referenced a building height restriction. A. 57-60. In short, on the record before the Council, the application merely confirmed the arbitrary nature of the Rule.

In sum, the record clearly demonstrates that the height of structures, particularly, on sloped waterfront lots can be determined through various methodologies and, even though its purported authority to regulate height was based upon the adoption of rules, DES had no rule advising persons how it intended to determine the height of a structure under the Rule. Indeed, the record showed that there was no written guidance in effect when the Corrs went to reconstruct the boathouse and there was not necessarily a consensus among DES staff as to its exact unwritten policy. That unwritten policy could

render structures unusable; a result which would not be expected by persons of reasonable intelligence. Finally, not only did DES not advise applicants of the applicable standard for measuring height, it did not even let them know that measurement of height was even a consideration as its applications did not make any inquiry on the same. Such findings reasonably support the Council's overall finding that the Rule was arbitrary and, therefore, the first claim of error must fail.

C. THE COUNCIL DID NOT UNLAWFULLY OVERRULE THE HEARINGS OFFICER ON QUESTIONS OF LAW WITH ITS FINAL ORDER.

The August 6, 2018 decision issued by the Hearing Officer concludes that:

> 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 [DES] for its consideration of the new structure's compliance with the nonconforming structure rules of RSA 483-B:11, I and II.

DES Brief at 47. DES, as its first claim of error in its Brief, complains that the Council unlawfully overruled the Hearing Officer on questions of law in the August 6, 2018 decision issued by the Hearing Officer contrary to RSA 21-M:3, IX. Specifically, DES complains about the Council's consideration of RSA 483-B:11 in the context of the Corrs' reconstructed boathouse. Neither the law nor the record support DES's first claim of error. Indeed, as discussed below, the record demonstrates that DES forfeited any right to raise its claim of error.

The Corrs appealed a department enforcement decision that their boathouse violated the height restriction for accessory structures in their regulations to the Council. The procedure on an administrative appeal of a department enforcement decision is generally governed by RSA 21-O:14, a statute wholly ignored by DES. With respect to the conduct of the appeals hearing, that statute provides:

> Appeal hearings before any council established by this chapter shall be conducted in accordance with the provisions of RSA 541-A governing adjudicative proceedings by an administrative hearing officer assigned by

> the department of justice, under RSA 21-M:3, VIII. All issues shall be determined as specified in RSA 21-M:3, IX.

RSA 21-O:14, II. Although RSA 21-M:3, IX was adopted in 2010, N.H. Laws 2010, 354:1, there are no provisions of RSA 541-A that specifically govern adjudicative proceedings conducted by an administrative hearing officer assigned under RSA 21-M:3, IX, *see generally*, RSA 541-A:29 et seq. [Provisions governing adjudicative hearings][2], thereby rendering the exact procedure applicable to appeal hearings ambiguous at best. Ignoring the ambiguities created by the first sentence, RSA 21-O:14 proceeds to require that issues at the appeals hearing be decided in accordance with RSA 21-M:3, IX. Under that statute, the hearing officer is to:

> (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…

RSA 21-M:3, IX(c)-(e). RSA 21-M:3, IX further requires that the hearing officer "[p]repare and issue written decisions on all motions and on the merits of the appeal within 90 days of the conclusion of the hearing on the merits." RSA 21-M:3, IX(f). RSA 21-O:14 also addresses procedure after a final disposition of an administrative appeal (i.e. after the appeals hearing) providing that "[p]ersons aggrieved by the disposition of administrative appeals before any council established by this chapter may appeal such results in accordance with RSA 541." RSA 21-O:14, III. Unlike RSA 21-O:14, II, RSA 21-O:14 does not expressly reference or incorporate RSA 21-M:3, IX and such a reference cannot be added after the fact. Furthermore, RSA 541:5 grants the "commission" the authority to act upon a motion for rehearing. As such, procedurally,

[2] There are provisions of RSA Chapter 541-A referencing "presiding officers," but those predate 2010 and, by definition, a "presiding officer" is not necessarily a hearing officer assigned pursuant to RSA 21-M:3. *See,* RSA 541-A:1 (XIV); *see e.g.*, RSA 541-A:31, V(b); RSA 541-A:33, II.

RSA 21-O:14 establishes distinct procedures for the appeal hearing and the rehearing process and DES fails to recognize the same.

However, the Court need not consider the merits of DES's claim of error. While DES protests that the Council overruled the Hearing Office on a question of law when it considered RSA 483-B:11 in an effort to overturn the Council's decision, it ignores that it invited the Council to address the issue as a question of fact below and did not otherwise object to its consideration at the appeal hearing. More specifically, DES explicitly requested that the Council find as a matter of fact that "the Appellants have made the structure more non-conforming with respect to height." <u>DES Brief</u> at 51 [¶39]. All parties agreed that the boathouse was a non-conforming structure. RSA 483-B:11, I allows for the expansion of a non-conforming structure if it is not moved closer to the reference line and the "proposal or property" is "made more nearly conforming." The statute defines "more nearly conforming" to mean an "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." RSA 483-B:11, II. It further identifies methods for making a structure "more nearly conforming" to include, inter alia, "reducing the overall square footage of structural footprints, enhancing stormwater management, adding infiltration areas and landscaping..., or other enhancements that improve wildlife habitat or resource management." <u>Id</u>. The requested finding reasonably suggested that the nonconforming structure was before the Council. Furthermore, DES did not object on the grounds that the issue was decided by the Hearing Officer when the issue of non-conforming structures and their expansion was raised repeatedly at the appeals hearing. *See, e.g.*, H. 113:6-23, 114:1-22; 130:15-23; 131:1-9; 132:20-23; 133:1; 149:9-23; 150:1-14; 208:16-23; 209;214:1-11; 270:4-23; 272:5-22; 285-292. Furthermore, DES admitted during the appeals hearing that it had been operating under a misunderstanding of the law in terms of what constituted an in kind replacement of a non-conforming structure for purposes of RSA 483-B:11. *Compare* H. 183:13-15 [Testimony of Mr. Aube incorporating old

definition in kind replacement by DES in response to question from DES counsel.] *with* H. 300:11-23 [Ms. Forst admitting use of old version of law relative to in kind replacement by DES]. Indeed, RSA 483-B:4 made clear that "repairs" were what now involved structures of the same exterior dimensions. RSA 483-B:4, XVIII-b. In light of DES's conduct at the appeals hearing, including its admission after the Dismissal Order that it had been operating under a mistake of law as to RSA 483-B:11, and the nature of the requested finding of fact, the Council reasonably construed the same to raise an issue under RSA 483-B:11. *See, e.g.*, Del. Tr. 70-72. Having not only failed to raise contemporaneous objections to repeated inquiries under RSA 483-B:11, but having reasonably invited the Council to consider the same as a question of fact, DES is in no position now to complain that the Council addressed the issue. State v. Goodale, 144 N.H. 224, 227 (1999) [Party cannot avail itself of alleged error into which it has led the court, intentionally or unintentionally]; *see also*, Broderick v. Watts, 136 N.H. 153, 167-168 (1992) [Timely objection requirement to preserve issue for appeal as timely objection allows tribunal meaningful opportunity to correct error before it affects proceedings.]; Appeal of Cheney, 130 N.H. 589, 594 (1988) [Errors must be raised at the earliest time possible before the trial forum.]. As such, the claim is forfeited.

Alternatively and additionally, the law and the record offer no support to DES's claim that the Council overruled the Hearing Officer on a question of law, particularly with respect to RSA 483-B:11. First, the record amply demonstrates that the Hearing Officer did not defer, acquiesce or otherwise allow the Council to overrule him on his rulings relative to issues of law he decided. *See, e.g.* H. 139-140; Rec. Tr. 10:13-20. It also reflects that the Council was aware of the Dismissal Order and the limits on their authority. Del. Tr. 42:16-23; 5:5-6; 64:6-14; 75:21-23. The Hearing Officer effectively presumed for purposes of the Dismissal Order that the height regulation was enforceable and according to DES, the increased height was the reason why RSA 483-B:11 did not apply. A. at 11. However, the Dismissal Order also left the issue of whether DES's methodology for measuring height was arbitrary and, therefore, unenforceable to the

Council. DES does not contest the referral of this issue to the Council under RSA 21-M:3, IX. Logically, if the Council found the methodology arbitrary and the height restriction unenforceable as a result, the Hearing Officer's original ruling relative to the applicability of RSA 483-B:11,which presumed enforceability and an increased height, would be a nullity as the underlying presumption that height was a consideration would be a nullity. The Council, in accordance with the plain language of the Dismissal Order, considered whether DES's methodology for measuring height was arbitrary and found that it was. DES did not contest whether that finding was lawful and, for the reasons discussed above, the finding was reasonable. With height no longer a consideration, RSA 483-B:11 was applicable to the Corrs' reconstructed boathouse under DES's own interpretation of the statute which the Hearing Officer had accepted. Accordingly, the Council remanded the matter back to DES to consider the reconstructed boathouse under the very statute DES had asserted was now applicable. In short, the Council acted in accordance with the Dismissal Order and the rulings of law thereunder to a tee.

The apparent participation of the Council's chairman in drafting the order on the DES's Motion for Reconsideration does not alter the above conclusion. RSA 21-O:14 only incorporates RSA 21-M:3, IX into the procedure relative to appeal hearings. The Legislature elected not to reference that statute in the separate provision regarding rehearing. No provision of RSA Chapter 541, which the provision on rehearing does reference, incorporates RSA 21-M:3, IX either. As noted above, RSA 541:5 speaks of the commission deciding the motion. If DES or its counsel wants a distinct comprehensive procedure governing all administrative proceedings where a hearing officer is assigned under RSA 21-M, they need to speak to the Legislature. In any event, any alleged participation by the Council's chairman does not alter the fact that the Council's decision was consistent with the Dismissal Order and the rulings of law therein and, therefore, DES, at best, asserts a minor procedural irregularity that had no apparent effect on the outcome.

Similarly, in that DES alleges a procedural irregularity, it must demonstrate material prejudice. Not only does it fail to allege any material prejudice, but the record shows that there was no prejudice to DES. First, while DES characterizes the application of RSA 483-B:11 as a question of law, its own evidence and pleadings, not to mention the law, suggest otherwise. RSA 483-B:11 allows for expansion of a nonconforming structure if it is made more nearly conforming. RSA 483-B:11, I. The "more nearly conforming" standard does not focus upon whether a particular element of the structure is made more conforming, but rather entails a broader inquiry as to whether the altered structure plus any changes to the property render the property more compatible with the design standards of RSA Chapter 483-B. RSA 483-B:11, III [Definition of "more nearly conforming" and examples of means to achieve the same.]. This approach, rather than DES's focus on the individual violation, *see e.g.*, H. 105:16-18 [Collis Adams stating only way to make boathouse more conforming is to reduce height.], is consistent with the general purpose of RSA 483-B to protect water quality, RSA 483-B;1, and the directive that DES perform its duties in furtherance of that purpose. RSA 483-B:3. DES's own pleadings and testimony reflect the factual nature of the inquiry. More specifically, DES requested that the Council find as a matter of fact that the boathouse was less conforming, a consideration under RSA 483:B:11. It made this request after the Wetlands Bureuan Administrator, Mr. Adams, testified that the impact of a structure's height depends on a number of considerations. H. 97:12-18. Furthermore, the Council was presented testimony by Mr. Roseen, the Corrs' expert, and Mr. Aube from DES that the height of the boathouse would not impact the water quality and the relocation of the boathouse and additional plantings would benefit the same. H. 148:2-23;149:1-23; 150:1-14; 208:3-6; 217:20-23; 218:1-2. It also had testimony from Ms. Forst from DES that the agency had been operating under old law when it came to replacements in kind, H. 300:4-23; 301:1-17, believing the same to require that the new structure have the same exact dimensions as the old structure. In short, there was a question as to whether DES had misapplied the law from the outset. While it invokes zoning law in its Brief for policies which may not

necessarily be wholly consistent with its statutory directive under RSA 483-B:3, DES ignores that the question of whether the expansion of a nonconforming use is permissible is a factual question under the very zoning case it cites. New London Land Use Association v. New London Zoning Board of Adjustment, 130 N.H. 510, 516-517 (1988) [Whether expansion is permissible requires consideration of facts relative to the time that the non-conforming use was created.]. In short, both before the Council and on this appeal, DES itself effectively makes the case that whether a proposed expansion of a nonconforming structure under RSA 483-B would be permitted is a question of fact which would have been in the Council's jurisdiction under RSA 21-M:3, IX and, therefore, it suffered no prejudice in the statute.

Additionally, with respect to the lack of material prejudice, DES appears to have ignored the Council's actual decision. While DES may not have foreseen the unintended consequences of its legal position and the Dismissal Order adopting the same, the Council followed its directive under the Dismissal Order. For the reasons discussed above, DES's limited challenge to that finding is unfounded. The Corrs asked that the Council merely vacate DES's enforcement decision. Rather than merely vacate DES's enforcement decision, the Council afforded DES opportunity to review the project again, but under a statute which DES's own interpretation would appear to concede is applicable if height of the structure is no longer an issue. In short, by remanding the matter, the Council did not prejudice DES, but afforded it an opportunity that the Corrs had asked be denied it. Absent a remand, the Council's decision would otherwise merely vacate DES's enforcement decision. If DES would prefer that its enforcement decision merely be vacated in light of the Council's decision on the height restriction, the Corrs certainly have no objection to the same.

Finally, DES argues that the Council erred in remanding the matter for consideration under RSA 483-B:11 because the Corrs did not file some form with it. Both before the Council and on this appeal, DES has relied upon hypertechnical claims that the process by which Corrs applied for relief was not proper procedurally. In the

context of land use approvals, the Court has recognized that municipalities have a constitutional duty under N.H. Const. pt. 1, art. 1 to assist their citizens, including "informing applicants not only whether their applications are substantively acceptable, but also whether they are technically in order." Savage v. Town of Rye, 120 N.H. 409, 411 (1980). N.H. Const. pt. 1, art. 1 does not apply to merely municipalities, but to the "Government" in general meaning that the State and its agencies are subject to the same duty.

The Corrs filed an application for a Shoreland PBN with DES in which they expressly asserted that they were making a nonconforming structure more conforming. While the application identified certain circumstances where it was not appropriate, the Corrs' scenario was not one of them. A. at 57. DES does not identify any instance in which it advised the Corrs that they needed to file another form to claim protection under RSA 483-B:11 as the duty to assist requires.

While it attempts to take advantage of a technical flaw in the Corrs' application, DES attempts to pursue enforcement of a height restriction which its own applications did not suggest existed or applied after the Corrs had completed approximately 75 percent of the structure. It also attempts to take advantage of a technical flaw in the manner in which the Corrs applied for relief, while urging that the Corrs certified that their project comported with RSA 483-B and its regulations when their own application only include a certification based upon a fact sheet apparently not provided by DES and which presumably does not reference the height restriction at issue. Finally, while it attempts to take advantage of a technical flaw in the Corrs' application process which it never bothered to raise, DES was not inquiring as to all the relevant facts of a project, but rather making presumptions relative to the same. The Corrs might not be here if DES spent some more time assisting in the application process rather than trying to shift blame for its flawed process after the fact. The Council also recognized that DES fell short when it came to assisting the Corrs. *See, e.g.*, Del. Tr. 29:13-23; 3-:1-22. In sum, DES is hardly in the position to rely upon technical flaws relative to the manner in which the

Corrs applied when it not only did nothing to assist the Corrs, but employed an application and approval process riddled with substantive flaws.

In sum, the Council did exactly what the Dismissal Order allowed it to do and, in truth, afforded DES an opportunity that it did not necessarily deserve, particularly given the substantive flaws with its application process, by remanding the matter to allow DES to consider the Corrs' proposal under RSA 483-B:11.

D. THE COUNCIL DID NOT MISINTERPRET OR MISAPPLY RSA 483-B:11.

DES next claims that the Council misconstrued or misapplied RSA 483-B:11. More specifically, DES essentially reiterates a variant of its argument that the Council overruled the Hearing Officer's rulings of law, including its claim that the Corrs did not file the appropriate form to seek relief under RSA 483-B:11. As explained above, the DES asserted that RSA 483-B:11 did not apply to the Corr's reconstructed boathouse merely because of its height and the Hearing Officer agreed with the same presuming that the height regulation was enforceable. The Council, consistent with the Dismissal Order, determined that the methodology for determining height was arbitrary and unenforceable. As such, the Council, in effect, merely recognized that, per DES's own argument, the reconstructed boathouse would be covered by RSA 483-B:11 with the height no longer being an issue. Likewise, DES's claim that the manner in which the Corrs applied for relief was technically wrong is foreclosed by its failure to assist the Corrs, particularly given the substantive flaws with its application and approval process as discussed above.

Additionally, DES itself introduced a competing interpretation of RSA 483-B:11 at the appeals hearing. More specifically, Mr. Adams, the Administrator for the Wetlands Bureau, testified that RSA 483-B:11, I applied only to primary structures. H. 113:6-23; 114:1-16. RSA 483-B:11, I applies to "nonconforming structures" under its plain language and "nonconforming structure" is a term of art which is not limited to primary structures, another term of art. RSA 483-B:4, XI-d, XIV. Furthermore, as discussed above, DES acknowledged at the appeals hearing that it had been operating

under a mistake of law with respect to a concept, replacement in kind, which was relevant to an analysis under RSA 483-B:11, I. Furthermore, its current construction of RSA 483-B:11 is inconsistent with its regulation implementing the same, N.H. Admin. Rule 1408.05, under which height is not relevant. In short, DES presses an interpretation which it, at times, effectively disclaimed or declared was predicated upon a mistake of law after the Dismissal Order.

Furthermore, even if height were still a relevant consideration, the Corrs could obtain relief under RSA 483-B:11. A "nonconforming structure" for purposes of RSA 483-B is "a structure that, either individually or when viewed in combination with other structures on the property, does not conform to the provisions of this chapter, including but not limited to the impervious surface limits of RSA 483-B:9, V(g)." RSA 483-B:4, XI-d. As such, by definition, a nonconforming structure does not meet all of the design standards of RSA 483-B and the regulations adopted thereunder. While acknowledging that it allows for expansion under certain circumstances, DES construes RSA 483-B:11 to prohibit expansion of a non-conforming structure unless the expanded nonconforming structure meets the design standards of RSA 483-B and the regulations thereunder in the first instance. Because, as a matter of definition, an expanded non-conforming structure will not meet all of the design standards of RSA 483-B and the regulations thereunder, DES's construction essentially renders the express expansion right in RSA 483-B:11 superfluous contrary to well-established rules of statutory construction as no nonconforming structure would qualify for expansion. Winnacunnet Coop. School District v. Town of Seabrook, 148 N.H. 519, 525-526 (2002) [Court is to give effect to all words in the statute and presumes that the Legislature did not intend superfluous or redundant language.]. RSA 483-B:11, II further undermines DES's approach which focuses upon whether any single nonconformity has increased or expanded. More specifically, that provision defines than the existing structure or the existing conditions of the property." RSA 483-B:11, I. The statutes defines "more nearly conforming" as " 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 wastewater treatment, improving traffic management, or other enhancements that improve wildlife habitat or resource protection." RSA 483-B:11, II. Although they are recognized means to make a non-conforming structure more conforming for purposes of RSA 483-B:11, many of the means have nothing to do with the structure itself. For example, while it may offset the impact of the same, adding filtration areas and landscaping would not alter the amount of impervious area in an expanded non-conforming driveway. As such, RSA 483-B:11 contemplates that when assessing whether an expanded or altered nonconforming structure is more nearly conforming that DES look at the big picture and determine whether the enhancements in resource protection proposed in conjunction with the proposed expansion of the nonconforming structure will bring the project into greater conformity with the purposes of the design standards in the statute (i.e. better protect the water quality). Such an approach finds support in testimony of those with DES. For example, even the most cautious of DES's witnesses, Mr. Adams acknowledged that there are a number of considerations that bear on whether the height of the structure impacts water quality. Along similar lines, RSA Chapter 483-B serves to protect water quality, RSA 483-B:1, and DES is obligated to perform all of its duties in accordance with that purpose. RSA 483-B:3. A singular focus on a feature, height, which DES acknowledges may not have an impact on water quality, rather than the overall impact of the expanded nonconforming structure on water quality is not consistent with that directive and yet DES advocates, at least, here for that approach. In short, RSA 483-B:11 is not about the singular tree (one nonconforming dimension), but the overall forest (i.e. improved water quality protection). Given the same, with the additional enhancements offered by the Corrs, DES

should have considered whether the same was a permissible expansion under RSA 483-B:11 and the Council's approach could be affirmed under this alternative theory.

E. THE COUNCIL DID NOT UNLAWFULLY DETERMINE THAT THE DEPARTMENT "IS REQUIRED TO MAKE A REASONABLE EFFORT TO CONSIDER ALL STATUTORY AVENUES AND POSSIBLE WAIVERS TO RESOLVE A DISPUTE."

In its final claim of error, DES finds fault in the last sentence of the Council's order denying its Motion for Reconsideration. More specifically, it reads the admonition that it "is required to make a reasonable effort to consider all statutory avenues and possible waivers to resolve a dispute" as a directive to settle the matter. DES makes a mountain out of mole hill as read in context of the overall case, the admonition is far less controversial and builds upon a point raised by the Corrs repeatedly in this Brief.

More specifically, before the Council and continuing in its Brief, DES has engaged a bit of technical gamesmanship. It repeatedly has asserted that a remedy was not available to the Corrs because of the manner in which the Corrs applied of relief. As discussed in the context of DES's other claims, DES's conduct in this case, particularly given the significant substantive flaws with its application process, fell well short of its constitutional duty to assist the Corrs. As noted earlier, the Council saw the same thing. In short, this admonition puts DES on notice that it is not to continue with a status quo where it relies on a flawed application and approval process and then takes advantage of those flaws after the fact to frustrate good faith efforts by applicants, like the Corrs, to play by the rules. As merely an express reminder to DES of its constitutional obligation to assist applicants, such as the Corrs, the statement is not the least bit unlawful and indeed is necessary. Carbonneau v. Town of Rye, 120 N.H. 96 (1980) [Admonishing town, pursuant to duty to assist, to attempt to negotiate workable plan for septic issue which owner had been trying to remedy for several years and with respect to which town had taken the position it was not its job to tell the applicant what to do.].

F. THE CORRS' CROSS APPEAL SHOULD NOT BE DISMISSED.

The Corrs' generally reiterate and incorporate herein the arguments raised in their Objection to Motion to Dismiss, but add a few additional observations. As discussed above, RSA 21-O:14 expressly contemplates specific procedure for administrative hearings conducted by hearing officers, but, for reasons unknown, the Legislature has not adopted such a procedure as a part of RSA 541-A. Presumably, that procedure would address what process a party is to follow when an interlocutory order, such an order on a motion to dismiss made by the hearing officer, is to be challenged. As it stands right now, the statute provides no notice of the applicable procedure with its reference to a nonexistent set of statutes.

Additionally, the Corrs asserted that RSA 483-B:17, IV did not afford DES the right to regulate structures such as the boathouse. As such, the Corrs effectively challenged the scope of DES's subject matter jurisdiction under RSA 483-B. Subject matter jurisdiction may be raised at any time, including on appeal, in the first instance and it cannot be conferred where it does not exist. Gordon v. Town of Rye, 162 N.H. 144, 149 (2011).

Finally, as a point of emphasis, RSA 21-O:14 requires parties aggrieved the final disposition to pursue a motion for rehearing. RSA 21-O:14, III. The Corrs did not disagree with the result of the final decision which held the height restriction unenforceable, although they would have preferred the result on different grounds. Requiring a prevailing party to file a motion for rehearing to preserve alternative theories for affirming the result reached by the agency would create confusion in an area where the multiple motions can already create procedural doubt and uncertainty. *Cf.*, MacDonald v. Town of Effingham, 152 N.H. 171 (2005) [Addressing need for second motion for rehearing where denial of first motion raised new issues under comparable procedure involving motions for rehearing.]. While this Court's jurisprudence suggests that alternative theories to affirm a decision may be presented by the prevailing party, the scope of that right as opposed to issues which must be cross-appealed to be raised is not

necessarily clear and the Corrs cross-appealed in order to protect their right to pursue an alternative theory for affirmance. The Corrs would have no issue if the Court found that they could present their jurisdictional arguments as alternative theories.

E. CROSS-APPEAL: DES LACKED AUTHORITY TO REGULATE THE HEIGHT OF THE CORRS' RECONSTRUCTED BOATHOUSE.

As noted above, the enforcement decision subject to the Corrs' appeal was completely predicated upon the reconstructed boathouse's alleged violation of the Rule only. DES asserted that it had the authority to regulate the height of accessory structures under RSA 483-B:17, IV. However, when read in the context of the entire statute and the specific definitions therein, RSA 483-B:17, IV does not afford DES the right to regulate height generally or the boathouse specifically.

An administrative agency must "comply with the governing statute, in both letter and spirit." Appeal of Rainville, 143 N.H. 624, 627 (1999) [citation omitted]. "Even a 'long-standing administrative interpretation of a statute is irrelevant' if that interpretation clearly conflicts with express statutory language." Id. Agency regulations which conflict with the governing statute exceed the agency's authority. Appeal of Gallant, 125 N.H. 832, 834 (1984).

Turning to the enabling legislation, RSA 483-B:17, IV grants DES the right to adopt regulations 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 reference line and the primary building line." "Accessory structure" is a term of art under RSA 483-B and is defined 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." RSA 483-B:4, II. Under its plain language, RSA 483-B:17, IV does not grant the right to regulate all accessory structures, but only "small" accessory structures. Winnacunnet Coop. School District,

supra. [All words in the statute are to be given meaning.]. That the Legislature truly intended that DES only regulate a certain subset of accessory structures is confirmed by the list of examples set forth in the general definition and in RSA 483-B:17, IV. The general definition includes a more extensive list of sample structures, while RSA 483-B:17 only lists those structures which fall within the general definition of "accessory structure," but tend to be smaller in size. It should be observed the DES itself, at least, at one point recognized the distinction in the statute as evinced by the expired Fact Sheet which expressly addresses standards for "small accessory structures. C.R. Tab 26 [DES-29].

DES attempted to circumvent the plain language of the statutes by asserting that limiting its authority to small accessory structures would be an absurd result. However, the Legislature could have determined that the statutory minimum standards, including the limits on the impervious surface, which are generally deemed sufficient to control primary structures were sufficient, together with local land use regulations, to regulate larger accessory structures. *See,* RSA 483-B:9. It is not for the Court or other tribunal to second guess the Legislature's judgment in this regard. Deere & Co. v. State, 168 N.H. 460, 470 (2015).

The Corrs' boathouse was up to 15 feet by 32 feet. Mr. Adams, the Administrator of the Wetlands Bureau, admitted that the boathouse was not a gazebo or shed, the types of structures identified as small accessory structures in RSA 483-B:17, IV. H. 117:6-8. In short, the record demonstrated that the boathouse was not the type of accessory structure that the Legislature intended DES to regulate through rules under RSA 483-B:17, V.

As discussed above, where the right to regulate through the adoption of rules is granted, the power to regulate is not self-executing, but rather requires the adoption of the necessary rules. Lemm Development, *supra*. DES's current rules purport to govern all accessory structures contrary to the enabling legislation, *See, e.g.*, N.H. Admin. Rule Env-Wq 1405.03(a) [Regulation governs accessory structures in protected shoreland.];

N.H. Admin. Rule Env-Wq 1402.02 [Adopting statutory definition of "accessory structure" for purposes of regulations], and, therefore, exceeded DES's regulatory authority. DES would have adopt rules applicable to small accessory structures only before it could continue to regulate small accessory structures and, therefore, would have no basis to regulate the boathouse or any larger accessory structure.

Additionally and alternatively, RSA 483-B:17, IV grants to DES the authority to adopt rules relative to the size of small accessory structures. While "size" may refer to height as a matter of dictionary definition as DES has observed in the abstract, statutes are not construed in the abstract, but rather in the context of the overall statutory scheme of which they are a part. Petition of Carrier, 165 N.H. 719, 721 (2013).

RSA Chapter 483-B recognizes both primary and accessory structures. RSA 483-B:4, II, XIV. The statute imposes minimum standards that are generally applicable to development in the protected shoreland. RSA 483-B:9. Structures focus on thing with a permanent location on or in the ground, not above the ground. RSA 483-B:4, XXII. Where size is involved, the minimum standards speak of area, not height. RSA 483-B:9(V)(g). Indeed, there is no restriction on the height of primary structures within the protected shoreland. Similarly, when it discusses nonconforming structures, the statutory scheme focuses on footprints and area, not height. RSA 483-B:11. Coincidentally, DES itself focused upon footprints and area and excluded height when implementing a regulation for RSA 483-B:11. N.H. Admin. Rule Env-Wq1408.05. As discussed earlier in this Brief, the testimony at the appeals hearing revealed that the height of structures does not have a significant effect, if any, on water quality, the protection of which is the purpose of RSA Chapter 483-B. RSA 483-B:1. In short, the statutory scheme focuses on footprints and area, not height, and therefore, size in RSA 483-B:17, IV, should be read to focus on footprints and area, not height, meaning that the Rule exceeds the scope of its authority and is invalid.

CONCLUSION

For the reasons set forth above, the Council's decision should be affirmed whether

on the original or the alternative grounds.

REQUEST FOR ORAL ARGUMENT

The Corrs hereby request oral argument and John G. Cronin, Esquire, shall present same on behalf of the Corrs.

WORD LIMIT CERTIFICATION

This brief complies with the word limitation set forth in Supreme Court Rule16(11) by containing 11,085 words.

Respectfully submitted,
Bryan and Linda Corr
By their attorneys,
CRONIN, BISSON & ZALINSKY, P.C.

Dated: June 17, 2019

By: /s/ John G. Cronin
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief were forwarded this 17th day of June 2019 to Joshua Harrison, Esquire and K. Allen Brooks, Esquire, counsel for DES, through the New Hampshire Supreme Court's electronic filing system.

/s/John G. Cronin
John G. Cronin, Esquire

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.

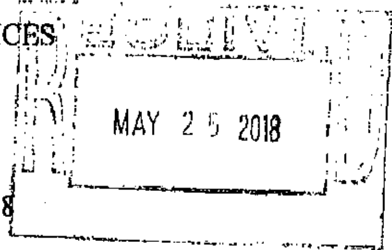
By Order of the Hearing Officer

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 <u>Criteria</u>, 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

MAY 2 2018

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-BI.

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.

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[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:11, 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

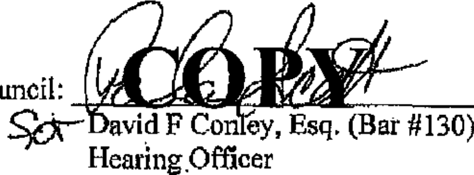
requested findings of fact 42, 43, 46, & 47; to be clear, the Council denies the Appeal's Claim of Error "D" sub-part vested rights.

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.

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

October 23, 2018.

S/ 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.