

WETLANDS COUNCIL

MINUTES

March 12, 2013

The Wetlands Council met on Tuesday, March 12, 2013 in Rooms 112, 113, & 114 at the Department of Environmental Services, 29 Hazen Drive, Concord, NH

Attendees: Chairman Chip Kimball, Councilors: Frank Byron, Ryan Crosbie, Carol Henderson, James Kennedy, Russ St. Pierre, Seth Prescott, Thomas Sloan, and Robert Snelling

Absentees: Councilors: Sharon Champagne, Deborah Lievens, and Susan Slack

Also present was: Paula Scott, Appeals Clerk and Carolyn Guerdet, Council Clerk

The regular Wetlands Council meeting was called to order by Chairman Kimball at 9:00 a.m. with introductions and a quorum present.

1. **Approval of Minutes**

- ***Councilor Snelling made a motion to approve the January 22, 2012 minutes, second by Councilor St. Pierre. Motion passed unanimously with Councilor Byron abstaining.***

2. **Public Input:** None

3. **Status Report**

I. New Appeals

II. Decisions that need to be written/finalized and issued.

Docket No: 10-31 WtC – Larry Crocker

Subject: 10/24/10 Denial of Reconsideration regarding a permit issued to Christopher Hemingway, File #2009-03021

Presiding Officer: David Conley, Esq. appointed on May 30, 2012

Action: Council found appeal had been timely filed at its March 13, 2012 meeting. On 3/14/12 sent insufficient appeal letter. 4/2/12 received revised petition for appeal and sent receipt of revised petition. 4/6/12 Mary Ann Tilton filed an appearance on behalf of DES. Council accepted the appeal at its May 8, 2012 meeting. 5/9/12 issued appeal accepted letter. June 4, 2012 issued Notice of PHC which is scheduled for 6/20/12 at 11 a.m. PHC was held on June 20, 2012 and a hearing has been scheduled for November 27, 2012 @ 9 a.m. June 25, 2012 received Motion to Intervene and an Appearance of Attorney Brad Wilder for the applicant/permittee. June 26, 2012 Hearing Officer granted Motion to Intervene. July 31, 2012 received Request for 2rd PHC from Appellant. August 10, 2012 issued ruling on Request for 2rd PHC which was denied. Sept. 28, 2012 received Motion to Supplement the Record. Motion was granted and letter issued on 11/5/12. 11/2/12 received Appellant's Witness and Exhibit List. 11/14/12 rec'd Appellant's Exhibits. 11/19/12 Hearing Officer issued an order regarding intervenor's presentation time and exhibit submissions. 11/26/12 rec'd Appearance for Collis Adams. 11/27/12 Hearing and Deliberations were held. January 22, 2013 Council accepted draft Decision and Order, which was issued on 1/25/13. February 27, 2013 received Motion for Rehearing which per Env-WtC 202.09 appears to be untimely.

- ***Councilor Sloan made a motion to deny as untimely filed, second by Councilor Prescott. Motion passed unanimously.***

Hearing Officer Conley will issue the denial.

Docket No: 12-02 WtC – Rene Montplaisir & Barbara Fraser

Subject: 12/30/11 Administrative Order No. 11-037 WD

Presiding Officer: David Conley, Esq. appointed by AG on 3/15/12

Action needed: Appeal filed timely on 1/20/2012, issued receipt of appeal letter. Council accepted appeal on 3/13/12. PHC is scheduled for May 2, 2012 @ 10:30. 4/10/12 rec'd appearance from Linda Magoon. PHC was held on May 2nd, a second PHC is scheduled for August 13, 2012 @ 9 a.m. and a hearing is scheduled for August 28, 2012 @ 1 p.m. 2nd PHC was held on Aug. 13, 2012; hearing has been rescheduled to 9a.m. on August 28th. 8/20/12 rec'd appearance of Biron Bedard for the Appellant and an Assented-To Motion to Continue. 8/21/12 Hearing Officer granted Motion to Continue and issue ruling. 9/14/12 issued rescheduled hearing notice with hearing scheduled for January 22, 2013 at 1 p.m. 1/11/13 received DES' Witness and Exhibit List. 1/14/13 received Appellant's Witness and Exhibit List. Hearing and deliberations were held on January 22, 2013. March 6, 2013 sent draft Decision to Council members for review.

- ***Councilor Henderson made a motion to adopt, second by Councilor Sloan. Motion passed unanimously.***

Docket No: 12-03 WtC – Hixon Realty Trust

Subject: 01/24/12 Denial of Reconsideration regarding a permit issued to Steve McKallagat, File #2011-01061

Presiding Officer: David Conley, Esq. appointed on 5/30/12

Actions: 2/22/12 rec'd Notice of Appeal, 2/22/12 issued insufficient notice of appeal letter. 3/22/12 rec'd addendum to Notice of Appeal. 3/23/12 issued receipt of revised appeal letter. Council accepted appeal at its May 8th meeting. June 4th issued Notice of PHC which is scheduled for June 20th @ 12 p.m. June 11th rec'd Request for Continuance from Appellant. Request for continuance was granted and PHC was rescheduled to July 12, 2012. PHC was held on July 12, 2012 and PHO was issued with a scheduled hearing date of Dec. 11, 2012 and a 2nd PHC scheduled for Dec. 3, 2012. July 12, 2012 rec'd appearance for Darlene Forst. December 3, 2012 a 2nd PHC was held and filing deadlines were issued. 12/7/12 rec'd DES' Exhibit and Witness List and Exhibits. The hearing and deliberations were held on Dec. 11, 2012. March 5, 2013 sent draft Decision to Council members for review.

- ***Councilor Sloan made a motion to adopt the Decision as written, second by Councilor Snelling. Motion passed unanimously with Councilor Henderson abstaining.***

III. Hearings or PHCs Pending

Docket No: 11-02 WtC – Kathryn Wolf

Subject: 01/24/11 Decision on Reconsideration of File #2004-02929 (granting amended wetland application for Norman Davis)

Presiding Officer: David Conley, Esq. appointed on 12/19/11

Status: On 11/30/11, received a revised Petition for Appeal. On 12/7/11, sent receipt of revised appeal. Council accepted appeal on 12/13/11. 1/12/12 changed name of appeal to correctly reflect appellant's name. PHC held Feb. 15, 2012. Hearing scheduled for July 24, 2012 at 9 a.m. July 17, 2012 received appellant's Witness and Exhibit List and Proposed Stipulation of Facts. July 23, 2012 received Appearance from Mary Ann Tilton for DES and also received Assented-To Motion to Continue. July 23, 2012 Assented-To Motion was granted and issued. Original hearing date set for January 8, 2013 at 9 a.m. 11/20/12 issued rescheduled hearing notice for hearing on January 22, 2013 at 9 a.m. 11/20/12 issued rescheduled hearing notice for hearing to be on January 22, 2013 at 9 a.m. January 14, 2013 received Assented to Motion to Continue. 1/15/13 issued letter granting Assented to Motion to Continue. Hearing rescheduled to March 12, 2013. March 11, 2013 received Withdrawal of Appeal via email.

Docket No: 12-07/11-03 WtC – Joseph DeVelis

Subject: 1/25/11 Administrative Order No. 11-002 WD

Status: Subject: 1/25/11 Administrative Order No. 11-002 WD

Presiding Officer: David Conley assigned by AG on Nov. 28, 2012(for consolidated appeals)

Status: Rulings on Motion to Extend Time and Motion to Modify PHO were issued on Nov. 2, 2011 and mailed on Nov. 3, 2011. Hearing was set for March 13, 2012 @ 9 a.m. 12/27/11 Received DES' and Appellant's Witness and Exhibit Lists. 3/9/12 Motion was granted and notice sent. Hearing scheduled for March 13 was continued. Councilor Crosbie spoke with Atty. English regarding Motion to Modify Hearing Date. March 9, 2012 Motion was

granted and notice sent. Hearing rescheduled to October 9, 2012 at 10 a.m. Hearing Postponement notice was issued on Sept. 19, 2012. Oct. 2, 2012 received letter from Atty. Bisbee regarding the Hearing Postponement letter. Status carried forward from Docket No. 12-07 WtC- Subject: 6/20/12 Denial on Reconsideration of Permit application #2012-00368. On July 20, 2012 rec'd Notice of Appeal. 7/24/12 issued receipt of appeal letter. 8/15/12 rec'd appearance from Atty. Evan Mulholland. 9/14/12 issued appeal accepted letter. Council voted Nov. 13th to consolidate this Docket and Docket No. 12-07 WtC – Joseph DeVelis. 11/13/12 Requested Hearing Officer for consolidated appeals. 12/3/12 sent notice of PHC scheduled for Jan. 28, 2013 at 9 a.m. Pre-Hearing Order(PHO) was issued on January 28, 2013 with notice of Hearing scheduled for April 9, 2013 at 9 a.m. March 11, 2013 received Appellants' Memorandum of Law.

Docket No: 12-08 WtC – Renate U. Ranniger

Subject: 7/25/12 Granting of Shoreland Impact Permit No. 2012-01713 to Anna and James Coleman
Hearing Officer: David Conley, Esq. appointed by AG on 11/28/12

Actions: On Aug. 22, 2012 rec'd Petition for Appeal. 8/29/12 issued insufficient appeal letter. 9/5/12 rec'd added information and appeals clerk issued receipt of appeal letter. 9/24/12 rec'd Appearance from Permittees' Anna and James Coleman. 11/2/12 rec'd Addendum to Petition for Appeal. 11/13/12 Council accepted the appeal and declined to accept Addendum. 11/13/12 sent appeal accepted letter. 12/3/12 sent notice of PHC scheduled for Jan. 28, 2013 at 10:30 a.m. 12/4/12 rec'd Motion to Amend Petition for Appeal and Proposed Amendments to Petition for Appeal. January 28, 2013 received Appearance for Darlene Forst. PHO was issued on 1/28/13 with notice of Hearing scheduled for May 14, 2013 at 9 a.m. Hearing Officer also granted Addendum to Petition for Appeal at the PHC and noted on the PHO. February 26, 13 received Appellant's Second Amended Petition for Appeal. Hearing Officer to act on Second Amended Petition.

Docket No: 12-10 WtC – Robert and Katherine Michele

Subject: 9/4/12 Denial of Reconsideration for permit No. 2007-02868 issued to Joseph and Linda Bremner
Hearing Officer: David Conley, Esq. appointed by AG on 11/28/12

Actions: On Oct. 4, 2012 rec'd Petition for Appeal and appearance notices for Attorneys David Rayment and Mark Derby. Oct. 5, 2012 issued receipt of appeal letter. Oct. 30, 2012 rec'd Objection to Petition for Appeal. Council accepted appeal with request for complete copies of the relevant court decision to be forwarded to the Council at its Nov. 13, 2012, meeting. 11/15/12 appeal accepted letter was issued. 11/21/12 rec'd Appearance of Gretchen Hamel for the Department. 12/3/12 sent notice of PHC scheduled for Jan. 28, 2013 at 11:30 a.m. 1/18/13 received appearance of Mark Johnson and Michael Klass for permittee. 1/22/13 received Withdrawal as Counsel from David Tower. Pre-hearing Conference was held on 1/28/13 and continued to May 13, 2013 at 10 a.m.

Docket No: 12-12 WtC – William & Elizabeth Frago, Trustees-William S. Frago Trust & Elizabeth Hall Frago Trust

Subject: 9/18/12 Denial of Reconsideration of permit #2011-01677 issued to Hopgood Bixby Shore Family Trust
Hearing Officer: David Conley, Esq. appointed by AG on 12/12/12

Status: On Oct. 17, 2012 received Petition for Appeal. Oct. 18, 2012 issued receipt of appeal letter. Nov. 6, 2012 rec'd Appearance of Attys. Gregory Smith, Mark Rouvalis and Michael Walls. Also received Motion for Summary Affirmance pursuant to Env-WtC 204.01. Nov. 15, 2012 received Objection to Applicants' Motion for Summary Affirmance. December 13, 2012 issued appeal accepted letter. January 4, 2013 received Appearance from Atty. Allen Brooks. 1/23/13 sent notice of PHC scheduled for February 12, 2013 at 9 a.m. 2/7/13 received Assented-To Motion to Continue. 2/11/13 issued letter regarding Motion to Continue which was granted and PHC was rescheduled to 2/15/13 at 9:30 a.m. PHC was held on 2/15/13 and a hearing was scheduled for July 9, 2013. Notice was given per 2/15/13 PHO. 2/15/13 received Permittee's Prehearing Conference Memorandum.

Docket No: 12-13 WtC – Edward Kimball

Subject: 10/16/12 Letter of Deficiency LRM 12-029 issued to Wayne Killam

Hearing Officer: David Conley, Esq. appointed by AG on 2/13/13

Status: On Nov. 15, 2012 received Notice of Appeal. 11/16/12 issued insufficient appeal letter. On December 17, 2012 received Amended Notice of Appeal. 12/18/12 issued receipt of revised appeal letter. Council accepted appeal at its January meeting. January 23, 2013 issued appeal accepted letter. February 20, 2013 sent notice of scheduled PHC for March 19, 2013 at 9 a.m. 2/26/13 received Appearance from Gretchen Hamel and a Motion to Dismiss. March 1, 2013 received Appearance from Regina Nadeau and Joinder to Motion to Dismiss. 3/8/13 received Objection to Motion to Dismiss. Hearing Officer to act on Motion to Dismiss and Objection.

Docket No: 12-14 WtC – Mastoran Corporation and B & P Realty Ventures, LLC

Subject: 11/8/12 Denial on reconsideration of Denial of Application File #2012-00768

Hearing Officer: David Conley, Esq. appointed by AG on 2/13/13

Status: November 27, 2012 received Notice of Appeal and Motion to Stay Appeal. 11/28/12 issued insufficient appeal letter. December 28, 2012 received supplement to Notice of Appeal and Motion to Stay Appeal. January 3, 2013 issued receipt of revised appeal. Council accepted appeal at its January meeting. January 23, 2013 issued appeal accepted letter. Hearing Officer to rule on Motion to Stay Appeal.

Docket No: 12-15 WtC – Michael Griffin

Subject: 5/21/10 Shoreland Impact Permit #2010-00767 issued to Tamra Kennedy

Hearing Officer: David Conley, Esq. appointed by AG on 2/13/13

Status: On Nov. 28, 2012 received Petition for Appeal, which was untimely filed. Nov. 29, 2012 issued receipt of Appeal letter. Dec. 4, 2012 rec'd Appearance for Gretchen Hamel and Motion to Summarily Dispose of Appeal. Council to accept or decline appeal at its Jan. 8, 2013 meeting. 12/14/12 received Objection to DES' Motion to Summarily Dismiss Appeal. January 23, 2013 issued appeal accepted letter. February 26, 2013 received Motion to Dismiss. March 6, 2013 received Objection to DES' Motion to Dismiss. Hearing Officer to act on Motion and Objection.

IV. Inactive/Status Letter or Pending Settlement/Withdrawal

Docket No: 10-10 WtC – Donald Lee

Subject: 5/23/10 Decision on Reconsideration, Wetlands File No. 2008-01253

Presiding Officer: Chip Kimball assigned by AGO on January 26, 2011

Status: Hearing scheduled for Jan. 10, 2012 per notice of PHO issued on 8/31/11 Rec'd Suggestion of Bankruptcy on Dec. 5, 2011. On 12/6/11 rec'd withdrawal of appearance from appellant's attorney and issued Order for Continuance. Appeal is Stayed due to filing in Bankruptcy Court.

Docket No: 10-14 WtC – Akwa Marina Yacht Club

Subject: 6/11/10 Decision on Reconsideration, Wetlands File No. 2009-01047

Presiding Officer: David Conley, Esq. appointed by AG on 12/22/11

Status: On Nov. 2, 2011, rec'd DES' addendum to the Witness and Exhibit List. 11-07-11 Assented-to Motion to Continue was filed. Motion to Continue was granted verbally on 11/7/11 and PO will have written ruling out within a few days. Written ruling on Motion to Continue was issued on Nov. 8, 2011. 11/14/11 received Supplement to Appeal. Hearing Notice was issued on 12/9/11. Rescheduled hearing for Feb 14, 2012 @ 9 a.m., notice sent on Dec. 30, 2011. Jan 4, 2012, appellant filed Assented-To Motion to Continue. Jan 9, 2012, PO granted Motion to Continue. Hearing has been rescheduled to June 12, 2012 @ 9 a.m., notice given 1/18/12. Hearing is today, June 12th. Hearing was continued until a settlement agreement is made or either party requests to resume the hearing. The appellant's attorney will update the council within 60 days as to progress (Aug. 11, 2012). Aug. 15, 2012 sent status request with 20 days to respond. 9/4/12 rec'd status report from appellant. 9/6/12 issued hearing officers order for an updated status report to be submitted by Dec. 3, 2012. 12/3/12 rec'd status report from appellant requesting to submit another status report in 60 days. 12/4/12 issued hearing officer's order for an updated status report be filed by Feb. 2, 2013. February 4, 2013 received appellant's status report requesting to submit another status report in 60 days. 2/8/13 issued Hearing Officer's order for an updated status report to be filed by April 5, 2013.

5. New Business -

a. Wetlands Bureau Report –

Collis Adams, Wetlands Bureau Administrator

Staffing: Now conducting interviews for the open Env III position.

Funding: Wetlands and Shorelands fee accounts are in the black.

Rule Making: Discussion to follow.

Legislation: Chairman Kimball HB 416 – eliminates Wetlands reconsideration process, Ought to Pass.

Atty. Hamel noted HB 663 is to set up a board for all appeals, this has been retained.

b. Discussion of letter

Collis Adams was asked by Commissioner Burack to comment on the January 22, 2013 letter. 3rd paragraph was read regarding grandfathered structures. The permitting of these structures was discussed. Atty. Hamel noted the Wetlands' Council jurisdiction is maintenance and repair of structure. The concern is whether the encroachment into the water is a property rights or a grandfathered structure issue.

The 2nd paragraph points out the concern for the abutter in the situations of dock appeals. 482:11(2) was cited. The 20 ft. set back is considered when permitting.

c. Draft rules for Env-Wt 900 Certified Culvert Maintainer Program

Gretchen Hamel, Legal Unit Administrator and Collis Adams, Wetlands Bureau Administrator

The proposed rules were distributed. They are embarking on this program so that when a Certified Installer is involved a permit is not needed from the Department for the project. This is to maintain, replace or repair of culverts. These rules supplement the statute and have been worked on along with stakeholders and UNH. Just State and municipal employees can certify. Discussion was held. Please send comments to Collis by March 20th so they can be incorporated as they are moving forward.

d. Rule Re-Adoption Discussion of Env 200 and Env 300-700

Gretchen Hamel, Legal Unit Administrator and Collis Adams, Wetlands Bureau Administrator

The goal is to go the through process to readopt the Wetlands 200 rules bringing them into alignment with statutory changes.

Env-Wt 300 – 700 to be adopted with no changes along with just the rules that are expiring while they are working to finish the overhauled draft that will be taken to stakeholder groups. Sept. 2013 – February 2014 taking all the comments and working towards a draft to begin rulemaking a year from now. 5 public hearings are to be held. A few statutory changes have been made. The goal is to have adopted a completely overhauled set of Wetland rules by 2014.

First goal is to pull all applications procedure into the 300s. Establish avoidance and minimization criteria more clearly. Then group items according to projects such as beaches, docks, etc. with the intent make it easier to determine if a permit if needed and if so – how do you do it? The over-all goal is clarity and user-friendly. Make the rules resource type and project type. Also simplify terms and make revisions to definitions. Definitions are non-expiring. Rules pertaining to docks will be a focus.

Timeline for Env-Wt 200s: File fiscal impact request by end of week. Rule making notice out by March 29 and published on April 4. Public comment and hearing to be set up so that a final proposal can be submitted by the middle of June. We will know what happened with the HB 416 by that time. Direct any comments to Atty. Hamel.

4. Old Business -

Council appeals docket log for 2007-2012 was reviewed. There were 2,178 total Wetland Permit Applications in 2012 with only 5 appeals. Total Shoreland Permit Applications were 915 with only 2 appeals. This shows a lot of work is being done to people's satisfaction. Only about 3% of applications are denied. The annual report goes to Governor & Council, Commissioner Burack, Resources, Recreation & Development Committee, and Energy & Natural Resources Committee.

- ***Motion to adopt the Annual Report with the Appeals Docket Log made by Councilor Snelling, second by Councilor Henderson. Motion passed unanimously.***

On Feb 7, 2013 Town of Newbury and the Lake Sunapee Protection Association vs. NH Wetlands Council went before the NH Supreme Court. Chairman Kimball attended, reviewed the argument, and noted there were hardly any comments from the Supreme Court regarding the Wetlands Council.

6. **Next Meeting** –
8 a.m. on April 9, 2013 with the Joseph DeVelis hearing at 9 a.m.

7. **Adjournment**

- ***Councilor Henderson made a motion to adjourn, second by Councilor Crosbie. Motion passed unanimously.***

Meeting adjourned at 10:33 a.m.