

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WETLANDS COUNCIL

Docket No. 03-21 WtC
(Appeal from Wetlands Bureau decision relating to
File No. 2003-1143 and DES Order No. WD 03-22)

Location: Alton Bay - Alton

Blair ~~Blair~~ *Final*
~~PROPOSED ORDER~~
APPEAL OF LEE MASERIAN

On June 22, 2004, the Wetlands Council, at its regularly scheduled meeting, issues the following decision and order.

PROCEDURAL HISTORY

The following facts are not to be considered findings of fact by the Wetlands Council or an "Agreed Upon Statement of Facts" by the parties. The following facts shall not be binding upon the parties in this matter for purposes of negotiation, resolution, or further litigation.

The land involved is located at Route 28, Alton Bay, New Hampshire, including a pre-existing boathouse located over the bed of Alton Bay ("Boathouse"). The parcel is further identified on Alton Tax Map 33, Lot 29-A, "Parcel B" ("Property"). The Boathouse is a grandfathered structure.

Mr. Lee Maserian ("Appellant") appeals, pursuant to RSA 482-A:10, the decision of the Department of Environmental Services ("DES") on September 17, 2003, as amended on November 24, 2003, finding the Appellant in violation of RSA ch. 482-A and ordered the Appellant to "cease and desist" the repair and replacement of his existing Boathouse roof and provided specifications for the restoration of the roof.

On October 6, 2003, the Appellant filed a Motion for Reconsideration with DES in accordance with RSA 482-A:10 requesting that DES: 1) grant a stay of the cease and desist and restoration Order dated September 17, 2003; and 2) grant the Petitioner a permit to complete the repair and replacement of the existing Boathouse roof to prevent any potential weather damage.

On November 24, 2003, DES issued a decision on the Appellant's Motion for Reconsideration (Administrative Order No. WD 03-022 *amended*) stating, among other things, that the Appellant had violated RSA-A:3, I by modifying and expanding a Boathouse over the bed of the Lake Winnepesaukee without a permit from DES.

On December 18, 2003, the Appellant filed a Petition for Appeal of DES's decision to the Wetlands Council. A prehearing conference was held on April 13, 2004.

DECISION AND ORDER

The Appellant has requested that the Wetlands Council waive any further administrative remedies in order to proceed directly to Superior Court. The State does not object to the Appellant's request and agrees not to use such waiver as a defense in Superior Court.

The rule requiring administrative remedies to be exhausted prior to appealing to the courts ". . . is designed to encourage the exercise of administrative expertise, preserve agency autonomy and promote judicial efficiency. We have recognized that the exhaustion of administrative remedies doctrine is flexible, and that exhaustion is not required under certain circumstances." Porter v. City of Manchester, No. 03-099, Slip Op at ___ (May 14, 2004) (citation omitted). The doctrine "is not . . . a jurisdictional requirement, but is rather a question to be decided by the [court] under the facts of each case." Hamby v. Adams, 117 N.H. 606, 608 (1977).

Furthermore, the supreme court has held that where, ". . . the issue involves a question of law rather than an exercise of administrative discretion, a court will usually resolve the matter regardless of the administrative posture. Id. at 609.

Therefore, without consideration of the issues on appeal and supporting argument, the New Hampshire Wetlands Council approves the waiver of any further administrative remedy, including reconsideration, to allow the parties to proceed directly to Superior Court.

22 June 2004
Date

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Brian Fowler, Chairperson
New Hampshire Wetlands Council