



McLane, Graf,
Raulerson &
Middleton

Professional Association

FIFTEEN NORTH MAIN STREET • CONCORD, NH 03301-4945
TELEPHONE (603) 226-0400 • FACSIMILE (603) 230-4448

GREGORY H. SMITH
Internet: greg.smith@mcclane.com

RECEIVED

OFFICES IN:
MANCHESTER
CONCORD
PORTSMOUTH

July 26, 2006

JUL 26 2006

Via Hand Delivery

Michael Sclafani, Appeals Clerk
Wetlands Council
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

06-09 WTC

**Re: Christopher and Christine Collins, DES FILE #2005-02857
Denial of Amendment to Standard Dredge and Fill Permit Application**

Dear Mr. Sclafani:

Enclosed is the original and fifteen (15) copies of the Christopher and Christine Collins' Notice of Appeal to the Wetlands Council of the Department's decision in the above-referenced matter.

Please accept this letter as our "Appearance" for Christopher and Christine Collins in connection with this appeal.

Thank you for your assistance.

Respectfully submitted,
COPY
Gregory H. Smith

Enclosures

- cc: Mr. and Mrs. Collins
- Michael P. Nolin, Commissioner
- Harry Stewart, Director, Water Division
- Collis Adams, Administrator
- Town of Meredith Conservation Commission
- Town of Meredith Board of Selectmen

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WETLANDS COUNCIL**

**IN RE: CHRISTOPHER AND CHRISTINE COLLINS
DES FILE #2005-02857
MEREDITH, NH**

**DENIAL OF
STANDARD DREDGE AND FILL PERMIT
TO BURY WATERLINE AND TO BUILD PERCHED BEACH**

NOTICE OF APPEAL

This is an appeal by Christopher and Christine Collins ("Collins") from the Department of Environmental Services ("Department") decision dated June 27, 2006, denying a Standard Dredge and Fill Permit that sought to bury an existing water line and to install a perched beach.

I. APPELLANT'S REPRESENTATIVE

Gregory H. Smith
McLane, Graf, Raulerson & Middleton, P.A.
15 North Main Street
Concord, NH 03301
Telephone: 603-226-0400
FAX: 603-230-4448
greg.smith@mclane.com

II. APPELLANT IS THE APPLICANT FOR THE AMENDMENT TO PERMIT.

Christopher and Christine Collins

III. DESCRIPTION OF UPLAND

31 Lovejoy Lane
Meredith, NH 03 03253-6921
Town of Meredith Tax Map U-34, Lot 12

IV. DEPARTMENT'S DENIAL OF RECONSIDERATION: 6/27/06

Parties: Christopher and Christine Collins
DEPARTMENT File Number and Name: 2005-02857 – Christopher and Christine Collins
Copy attached

V. STATEMENT OF RELIEF SOUGHT

1. Collins seeks reversal of the Department's decision because it is unreasonable and unlawful as described below.

2. The Collins project plan complies with all lawful regulatory requirements governing the installation of a perched beach.

3. Collins seeks reversal of the Department's decision and seeks approval to bury an existing above-grade waterline (that has been damaged by freezing and wave action at the bank) to protect it from freezing, by dredging and filling an area 3' x 24' into Lake Winnepesaukee with no net impact (i.e. no net dredge/fill).

4. Collins seeks reversal of the Department's decision and seeks approval to install a perched beach landward of the top of the bank with dimensions of 25' wide and 11' deep. Steps from the top of the bank to the lake would be built over the buried waterline. The proposed beach fully complies with existing DES guidelines and sample beach plan.

5. The Department has made mistakes of fact in connection with its assessment of the water line, the natural conditions at the site, and the nature of the slope of the land.

6. Collins seeks reversal of the Department's decision and a determination that a beach is a water-dependent structure, not an accessory structure.

7. There is no lawful regulatory or statutory limitation on the percent of slope of land on which a water-dependent structure can be constructed.¹

8. Collins seeks reversal of the Department's decision and a determination that, even if the slope of the land requirement were applicable (which it is not), the Wetlands Bureau's determination of the slope was a mistake or misapprehension of fact, inconsistent with the Department's past practice and inconsistent with the overwhelming weight of the evidence.

¹ Env-Ws 1400 regulations are not applicable because they were not validly and lawfully adopted. Furthermore, the Department lacks authority to adopt Env-Ws 1405.08 (the regulation providing that water dependent structures cannot be built on land with a slope of greater than 25%)

9. The Department must continue to approve perched beaches on the basis it has approved them in the past, and not to do so is constitutional and statutory error that is arbitrary, capricious, unreasonable and unlawful.

- A. The Department has approved numerous perched beaches and has used only the slope of the land on which the beach was installed in its calculation of slope. See, for example, DES # 2003-00141, Bitsack; #2006-00160 Letendre; #2006-00582 Petrillo; #2006-00393 Vincent.²
- B. The Department has in the past determined that a beach landward of the top of the bank is not within its jurisdiction, having not included it in the fee calculation. See, for example, DES# 2006-00338 Kreick.

10. The Department has acted arbitrarily and inconsistently with the law regarding the rights of owners of shoreland, who have private littoral rights that are separate from, and property rights that are more extensive than, the rights of the public. Sundell v. Town of New London, 119 N.H. 839 (1979). These rights include but are not limited to use and occupying the waters adjacent to Applicant's shore, the right to access and even wharf out into the water. Hoban v. Bucklin, 88 N.H. 73 (1936); State v. Stafford Company, 99 N.H. 92 (1954); Sundell v. Town of New London, 119 N.H. 839 (1979). To deny Applicant's right to make reasonable use of the water when Applicant has investment-backed expectations to get approval of the permit to construct stairs and a beach, given the law, amounts to an unconstitutional taking by inverse condemnation because the Department's action substantially interferes with Collins' use of the property. Sundell v. Town of New London, 119 N.H. 839 (1979).

11. The Department's duty is to assist applicants and that includes giving notice to applicants as to the Department's objections to a project are so that applicant have a fair opportunity to respond and to confront such objections.

² The Department has approved perched beaches in cases where the plan is devoid of any description of slope or lacks sufficient information to accurately determine slope. See, for example, DES #2006-00606 Paskell; #2006-00393 Vincent.

12. The Department did not comply with the command of RSA 482-A:10,III in that it did not respond to a request for reconsideration within 30 days, and such delay deprives Collins of the full enjoyment of their property rights in a manner that is burdensome and violates due process.

VI. STATEMENT OF FACTS

13. On November 30, 2005 the Department received Collins' Application for a Standard Dredge and Fill Permit to bury an existing water line and to install a perched beach on a slope of less than 25% (as clearly shown on the plan).

14. On February 14, 2006 the Department issued an RFMI (that did not mention the waterline) and (in mistaken reliance on a Department decision in a different 2004 wetlands permit application by Collins for a more extensive beach) the Department described the slope on which the beach was proposed as greater than 25% and instructed Collins to remove the beach from the plans.

15. On March 16, 2006 the Department received a letter dated March 15, 2006 from an agent of Collins again explaining that the slope of the land is less than 25% and thus the perched beach would not be removed from the plan.

16. On March 24, 2006, the Department denied Collins' Application for a Standard Dredge and Fill Permit, finding that pursuant to RSA 483-B and Env-Ws 1405.05 the Department will not issue a permit "for any project adjacent to surface waters that would modify an average grade of 25% or greater," and that the proposed project "is for the construction of a structure within the bank of the waterbody with an average slope of more than 25 percent and therefore is not approvable."

17. With a letter dated March 26, 2006, the Department sent the March 24, 2006 permit decision to Collins.

18. On April 10, 2006 Collins requested reconsideration of the Department's denial of the wetlands permit and proposed revising the beach plans by moving the lakeward edge of the beach to a line several feet landward of the top of the bank (outside wetlands jurisdiction) and again clearly demonstrating and explaining that the slope of the land is less than 25%.

19. According to RSA 482-A:10,III the Department's response to the request for reconsideration was due on May 10, 2006 (30 days).

20. From April 26, 2006 until May 11, the Department was unable to locate the request for reconsideration, and on May 11 photographs Applicants' agent had submitted with the request were electronically re-submitted to the Department and a hard copy of the original April 10, 2006 request for reconsideration was mailed to the Department.

21. On May 17, 2006, 7 days after the statutory deadline for its decision on the request for reconsideration had passed, the Department sent a letter to Collins advising that it would need until June 10, 2006 to respond to the request for reconsideration.

22. On June 27, 2006 the Department reaffirmed its denial of Collins' wetlands permit application.

23. This Notice of Appeal is timely filed.

VII. APPLICABLE STATUTES

The statutes that Collins believes are applicable include:
RSA 482-A (including 482-A:3,I and 482-A:10)
RSA 483-B (including 483-B:4, 483-B:17)
RSA 21-O:5-a

VIII. BRIEF STATEMENT re. COMPLEXITY OF ISSUES & VOLUME OF RECORD BELOW

The issues raised by this Appeal are as stated above. The Record is not expected to be voluminous and it includes, but is not limited to, documents such as applications, approvals, requests for reconsideration, plan sheets and photos. Applicant expects that the Record will include the Department's file on the Collins 2004 permit application (DES No. 2004-01995).

WHEREFORE, the Applicant respectfully requests that the Department's decision, dated June 27, 2006, be reversed because it is clearly unreasonable and unlawful and that the permit application be granted.

Respectfully submitted,


Christopher and Christine Collins

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: July 26, 2006

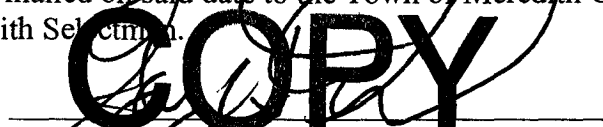
By:

COPY


Gregory H. Smith
Claudia C. Damon
15 North Main Street
Concord, NH 03301
Telephone (603) 226-0400
FAX: (603) 230-4448

Certificate of Service

I, Gregory H. Smith, hereby certify that on the 26th day of July, 2006, I caused to be hand delivered an original and fifteen (15) copies of the foregoing Notice of Appeal to Michael Sclafani, Appeals Clerk of the Wetlands Council, Harry Stewart, Director Water Division, Collis Adams, DES Wetlands Bureau Administrator and Michael Nolin, Commissioner. Copies of the Notice of Appeal were mailed on said date to the Town of Meredith Conservation Commission and the Town of Meredith Selectmen.

COPY

Gregory H. Smith



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

June 27, 2006

Christopher & Christine Collins
15 Fairmont Ave
Lincoln, RI 02865

Re: File #2005-02857 Tax Map/Lot #U34/12

Dear Mr. & Mrs. Collins:

The Department of Environmental Services (DES) Wetlands Bureau has completed its review of your request for reconsideration of the above referenced application. Based on this review DES reaffirms the March 23, 2006 denial of the application to construct a 351 sq ft perched beach and bury an existing waterline on 145 ft of frontage on Lake Winnepesaukee, Meredith with the following findings:

Grounds for Reconsideration

1. The Applicant maintains that Rule Env-Ws 1405.05 does not apply to the proposed beach because the Beach is a "water dependent structure".
2. The Applicant maintains that the Bureau has no basis for maintaining that the slope to be impacted is steeper than 25 percent based on the information submitted to the file.
3. The Applicant maintains that the response to the February 14, 2006, Request for More Information letter was complete due to the fact that the Bureau's request for the removal of the beach was unjustified.
4. The Applicant maintains that "RSA 483-B:3 does not have anything to do with Rule Env-Ws 1405.05."
5. The Applicant maintains that the proposed construction will be "in" the bank and not "on" the bank and therefore the slope restrictions found in Rule Env-WS 1405.05 do not apply.
6. The applicant maintains that failure to specifically include the term "water dependent structure" in RSA 483-B:4, II should be interpreted to mean that these structures are not accessory structures.
7. The Applicant maintains that RSA 483-B:17 does not have give the Department the authority to regulate water dependent structures under the Comprehensive Shoreland Protection Act.

Standards for Approval

8. In accordance with RSA 483-B:2, Minimum Standards Required, " the development standards provided in this chapter shall be the minimum standards necessary to:" "II. Provide for the wise utilization of water and related land resources," "V. Protect buildings and lands from flooding and accelerated erosion," and "IX. Control building sites, placement of structures, and land uses."
9. In accordance with RSA 483-B:3, Consistency Required, " all state agencies shall perform their responsibilities in a manner consistent with the intent of this chapter. State and local permits for work within the protected shorelands shall be issued only when consistent with the policies of this chapter."
10. In accordance with RSA 483-B:6, I, (b), Prior Approval; Permits, any person intending to " construct a water dependent structure, alter the bank, or construct or replenish a beach shall obtain approval and all necessary permits pursuant to RSA 482-A."
11. In accordance with RSA 483-B:9, II, (c), Minimum Shoreland Protection Standards, " a water dependent structure, meaning one which is a dock, wharf, pier, breakwater, or other similar structure, or any part thereof, built over, on, or in the waters of the state, shall be constructed only as approved by the department, pursuant to RSA 482-A."
12. In accordance with RSA 482-A:3, I, "No person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from the department."
13. In accordance with RSA 483-B:6, II, Prior Approval; Permits, " in applying for these approvals and permits, such persons shall demonstrate to the satisfaction of the department that the proposal meets or exceeds the development standards of this chapter."

14. In accordance with RSA 483-B:4, II, Definitions, " accessory structure means a structure on the same lot and 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."

15. In accordance with Rule Wt 302.03, Avoidance and Minimization, applicants shall provide evidence that their proposal is the least impacting alternative solution.

16. In accordance with Env-Ws 1405.05, Placement, states that no structure shall be built on a slope greater than 25%.

17. In accordance with Env-Ws 1405.08, Slope Limitation for Water-Dependent Structures, states that no structure shall be built on a slope greater than 25%.

Findings of Fact

18. The Department received an application on November 30, 2005 for the construction of a perched beach on 145 ft of frontage on Lake Winnepesaukee.

19. The Department sent a More Information letter dated February 14, 2006 stating the proposed beach was not approvable since it impacted slopes exceeding 25% and requesting revised plans removing the beach impacts.

20. The Department's determination that the slope to be impacted by the project is steeper than 25% is based on the information provided on the plans submitted with the application, plans submitted with previous application (2004-1995), and photos submitted with both applications.

21. The Department received a response to the Request for More Information dated February 14, 2006 on March 16, 2006. The response did not include the revised plans removing the proposed beach as requested.

22. The Department conducted a field inspection of the site on May 31, 2006. Field inspection found the waterline installed in the bank and steep slopes on the frontage.

23. The proposed beach is an improved surface intended for the recreational use of the resident(s) of the property and is therefore incidental and subordinate to the primary residential use of the property and by definition is an accessory structure.

24. There is no language in RSA 483-B specifically exempting any accessory structures, including water dependent structures, from the requirements developed under RSA 483-B:17. Furthermore RSA 483-B:3 requires the Wetlands Bureau to maintain consistency with the intent and policies of RSA 483-B in its application of RSA 482-A.

25. RSA 483-B:9, II, (c), identifies water dependent structures as those structures similar to docks, piers, wharfs and breakwaters which are constructed "over, on or in the waters of the state" for permitting pursuant RSA 482-A. This section refers only to structures that are located lakeward of the reference line and not within the protected shoreland where the minimum standards developed under RSA 483-B would apply.

26. The language of RSA 483-B:6, I distinguishes beaches separately from water dependent structures which are by the definition of RSA 483-B:9, II, (c), constructed, "over, on, or in the waters of the state."

27. The proposed beach is located landward of the reference line and within the protected shorelands subject to RSA 483-B.

28. The applicant notes that the proposed structure will be constructed "in" a slope greater than 25% while Rules Env-Ws 1405.05 and Env-Ws 1405.08 prohibits construction "on" said slopes and concludes that excavating and constructing within these slopes is therefore permitted.

29. The construction of a structure in the grade or slope, which requires excavation, is inherently more impacting than the construction of a structure on the surface of the grade or slope.


Findings in Support of Denial

30. Pursuant to RSA 483-B:3, Env-Ws 1405.05, and Env-Ws 1405.08 the Bureau shall not issue a permit for any project adjacent to surface waters that would modify an average grade of 25% or greater.

31. Based on the information available to the Wetlands Bureau the average slope through the area to be impacted is greater than 25%. The Applicant has failed to submit evidence to refute this determination.

32. The proposed plan is for the construction of a structure within the bank of the waterbody with an average slope of more than 25 percent and therefore is not approvable.
33. A permit is required for the construction of this structure per RSA 482-A. In accordance with RSA 483-B:3 the permit shall be issued only if the project complies with the intent and policies of RSA 483-B.
34. Water dependent structures are accessory structures and those accessory structures located between the reference line and the primary building line are subject to the rules developed under RSA 483-B:17.
35. Rule Env-Ws 1405.05 prohibits construction "on" slopes greater than 25% and the act of excavating to construct "in" the slope would cause greater instability and exposure of soils to erosion than constructing "on" the surface, therefore it would not be consistent with the intent of RSA 483-B:2, V to allow the construction of a structure "in" a slope greater than 25%.
36. The applicant has failed to demonstrate to the satisfaction of the department that the proposal meets or exceeds the development standards of RSA 483-B.
37. The issuance of a permit for this project as proposed would not be consistent with the goals of the minimum standards listed in RSA 483-B:2, and therefore is prohibited per RSA 483-B:3.

You are hereby informed that further appeal of this decision is to the New Hampshire Wetlands Council. Appeal must be made within 30 days of the date of this letter, in accordance with RSA 482-A:10, IV. Filing of the appeal shall be made by certified mail to the chairperson of the council, with a copy to the Department, and shall set forth fully every ground upon which it is claimed that the Department's decision is unlawful or unreasonable.

Sincerely,

COPY
Darlene Forst
Shoreland Program Supervisor
DES Wetlands Bureau

MAT/jeh

cc: Meredith Conservation Commission
Meredith Selectmen
Watermark Marine Construction