THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Merrymeeting Lake Association and Nancy A. Bryant and Eleanor G. Bryant

v.

New Hampshire Department of Environmental Services, Wetlands Council

Docket No.: 01-E-162

Merrymeeting Lake Association

v.

New Hampshire Fish and Game Department and
Wayne E. Vetter, Executive Director

Docket No.: 99-E-160

ORDER ON STATE OF NEW HAMPSHIRE FISH AND GAME DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

The State of New Hampshire Fish and Game Department ("the State") moves for summary judgment in Docket No. 01-E-162, in which the Merrymeeting Lake Association and Nancy and Eleanor Bryant (collectively, "the plaintiffs") appeal from the New Hampshire Department of Environmental Services, Wetlands Council's denial of their Motion for Reconsideration. The plaintiffs object.[1]

The court may grant summary judgment only if the moving party has demonstrated

[1] Nancy and Eleanor Bryant adopted Merrymeeting Lake Association's objection to the State's motion for summary judgment.

that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See RSA 491:8-a; Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 450 (1994). The court must consider the evidence in the light most favorable to the non-moving party and give that party the benefit of all favorable inferences. See id.

The following facts are undisputed. The Merrymeeting Lake Association ("the Association") is a voluntary non-profit corporation consisting of individuals owning property on or near Merrymeeting Lake ("the lake") in New Durham, New Hampshire. Nancy A. and Eleanor G. Bryant own property located at 256 South Shore Road, New Durham. The State owns real estate abutting the lake and property across the street from the lake, which is the site of the Powder Hill Fish Hatchery.

Sometime prior to December, 1997, the State commissioned the consulting firm of Dubois & King to produce a study of real estate which abuts the lake so the State could obtain federal funding for a public boat access facility project ("the project"). The study and addenda prepared by Dubois & King was submitted to the United States Fish and Wildlife Service ("the Wildlife Service") for review. The Wildlife Service concluded that no substantial impacts on the environment would result from the project. Because the Wildlife Service concluded that the environment would not be substantially affected by the project, the State was not required to prepare a comprehensive environmental impact statement prior to commencing the project.

On December 5, 1997, the State applied to the New Hampshire Department of Environmental Services, Wetlands Bureau ("the Wetlands Bureau" or "the Bureau") for a non site-specific permit. On August 4, 1999, the Wetlands Bureau approved the State's application and issued permit number 1998-00072 authorizing the State's project. Specifically, the permit authorized the State to

> [d]redge and fill approximately 2100 square feet to replace an existing, deteriorated boat ramp with concrete planks and construct a 6 ft. by 20 ft. seasonal dock with attached 5 ft. by 15 ft. access ramp and 6 ft. concrete approach walk on 600 linear feet of frontage.

The permit approval was subject to, *inter alia*, both the provision that "[a]ll activity . . . be in accordance with the Shoreland Protection Act, RSA 483-B," and the provision that "[a]ll other applicable local, State and Federal permits must be obtained prior to [the] start [of] construction."

The current public access site to the lake consists of a gravel parking lot which can accommodate approximately 14 vehicles with trailers attached, and a boat ramp which is in a state of disrepair. The State's project, in its entirety, involves the following: bulldozing and removing a portion of land south of the existing boat launch ramp ("the south knoll") and replacing it with a paved parking lot; removing a stand of large trees; installing a concrete block retaining wall, a chain-link fence, guard rails, granite curbing and three catch basins; pouring a 6 ft. by 6 ft. concrete pad for portable toilets; constructing a 6 ft. by 20 ft. handicapped accessible dock with a 5 ft. by 15 ft. access ramp and handrails; installing a kiosk and signs; relocating a private septic system serving an abutter from the area of the proposed new parking lot to the abutter's property; and constructing a new boat ramp to replace the existing one. The estimated cost for the project is $180,000.

On August 24, 1999, the plaintiffs filed a Motion for Reconsideration and Request for Stay with the Wetlands Bureau, asserting that the Bureau, in addition to failing to recognize certain procedural errors committed by the State, erred as a matter of law in issuing the permit because 1) the project as proposed cannot comply with RSA 483-B; 2) the project as carried out will violate RSA 483-B; 3) the project as proposed cannot comply with RSA 485-A:17, RSA 674:54(II-a) and the Town of New Durham Zoning and Land Use

Ordinance; 4) the project as carried out will violate RSA 485-A:17, RSA 674:54(II-a) and the Town of New Durham Zoning and Land Use Ordinance; 5) the Wetlands Bureau failed to address and respond to the plaintiffs' requests for findings of fact and rulings of law, but rather responded to the plaintiffs' much more abbreviated supplemental requests for findings of fact and rulings of law; and 6) the individual who responded to the plaintiffs' supplemental requests for findings and rulings and signed the permit was not present at the public hearing held on August 4, 1998, and therefore could not have heard testimony and judged the demeanor of the various witnesses who spoke at the hearing.[2]

On September 24, 1999, the Bureau denied the plaintiffs' motion. Specifically, the Wetlands Bureau stated that

> [t]he [Bureau] denies reconsideration, and affirms its decision to grant the Permit. In considering whether to grant a permit under RSA 482-A:3 the [Bureau] considers the proposal's impact to areas within its jurisdiction under the wetlands statute – i.e., any excavation, filling, dredging or construction in or on the bank of public waters. The [Bureau] has fully considered the project's wetlands impacts, and included appropriate conditions to ensure protection of the state's waters. All of [the plaintiffs'] substantive arguments relate to upland areas outside of the [Bureau's] wetlands jurisdiction. The [Bureau] finds no merit in [the plaintiffs'] procedural arguments.

Recognizing that it had indeed failed to respond to the plaintiffs' earlier, detailed requests for findings of fact and rulings of law, the Bureau set forth its responses in its denial of the plaintiffs' motion for reconsideration.

On October 21, 1999, pursuant to the Wetland Bureau's directive, the plaintiffs appealed to the New Hampshire Department of Environmental Services, Wetlands Council ("the Wetlands Council" or "the Council"). In their appeal to the Wetlands Council, the plaintiffs argued that the permit should be revoked because the Wetlands Bureau

[2] The plaintiffs also offered new and additional evidence they alleged the Wetlands Bureau should consider.

unreasonably and unlawfully denied their motion for reconsideration. Specifically, the plaintiffs asserted that

> [b]y excluding from its consideration on appeal the uplands aspect of the Permit and appeal, while simultaneously stating that the Permit appealed from is also a Non-Site Specific Permit issued under RSA 485-A:17, the [Bureau] has unlawfully and unreasonably precluded [the plaintiffs] from effectively appealing the major issues, and legal flaws, in the Permit. [The plaintiffs] have appealed the issuance of Permit No. 1998-00072, which authorizes both the wetlands actions and terrain alterations in the upland portion of the project area. [The plaintiffs] did not appeal just the wetlands portion of the Permit. It is unlawful and unreasonable for the [Bureau] to limit [the plaintiffs'] appeal to the wetlands issues alone.

(Emphasis in original). The plaintiffs also alleged several ways in which the Permit violates RSA 483-B, the Shoreland Protection Act.

The Wetlands Council held a hearing on January 11, 2000. According to a November 9, 1999 letter accompanying the Council's Notice of Appeals Proceedings, the "appeal process is non-evidentiary, which means the Council cannot – by law – entertain or consider any new information, testimony, or exhibits which were not previously submitted to the Wetlands Bureau under earlier reconsideration." Assistant Attorney General Jennifer Patterson ("Attorney Patterson") attended the hearing as counsel for the New Hampshire Department of Environmental Services ("DES"). Attorney Patterson was accompanied to the hearing by Collis Adams, a DES employee who had reviewed the State's permit application. Mr. Adams responded to various questions from the Wetlands Council during the hearing.

On January 27, 2000, Attorney Patterson wrote to the Wetlands Council, stating that

> [d]uring the hearing, several Council members asked questions of Mr. Adams. No objection was made to any of these questions, and Mr. Adams answered all of the questions fully and directly. However, at least one series of questions called for answers that went beyond

> the contents of the certified record. Specifically, there were inquiries about Mr. Adams' internal thought processes in drafting the decision on reconsideration.
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> In case the extensive nature of the Council's questioning caused any confusion, I want to reiterate that the Council's decision in this matter must be based on the contents of the certified record. The hearing was not an evidentiary hearing. Mr. Adams' statements were not sworn testimony, but rather were intended to guide the Council through the lengthy record of events before the [Council]. In particular, the Council should disregard Mr. Adams' responses to the questions about his beliefs and intentions in drafting the decision on reconsideration.

On April 16, 2001, the Wetlands Council denied the plaintiffs' appeal based on its finding that the Wetlands Bureau had acted reasonably and lawfully in issuing a permit for the project. In addition to denying the plaintiffs' appeal,

> [t]he NH Wetlands Council voted to assert no jurisdiction over the south knoll location of the area; an area having many large trees and rock outcroppings because the photographs (00691, 00693), trees to be cut (00700), and plans submitted (00637, 00638, 00640), and the Wetlands Permit #1998-00072 (00742, 00743) do not indicate any wetlands in this specific area.

On June 7, 2000, the State had filed a Motion to Stay Proceedings at the Wetlands Council, based on its representation that it was "actively exploring the feasibility of revising the Merrymeeting Lake boat ramp project parking lot configuration to address the concerns of the Merrymeeting Lake Association and the New Durham Conservation Commission." The State explained that

> [i]f the [State] and [the plaintiffs] can reach agreement on a revised plan, the [State] will withdraw and resubmit Permit No. 1998-00072 for review of the revised plans by the DES wetlands, terrain alteration and shoreland protection programs. Alternatively, if agreement cannot be reached on project revisions, the [State] intends to withdraw and resubmit Permit No. 1998-00072 for further review of the current project design's consistency with state wetlands, terrain alteration and shoreland protection requirements.
>
> In either case, the [State] will request that DES issue a revised permit that complies with RSA 483-B:6 by acknowledging that the application has demonstrated to the satisfaction of DES that the

> project meets or exceeds the development standards of the Shoreland Protection Act. The [State] will request that the revised permit clearly articulate the construction conditions required to implement the requirements of the Comprehensive Shoreland Protection Act, in addition to the wetlands and terrain alteration statutes.

In its April 16, 2001 decision the Wetlands Council neither granted nor denied the State's motion to stay, as the Council's decision on reconsideration was issued "well beyond the 60 day requested period." Subsequent to filing its motion to stay, the State did not either resubmit the permit to the Wetlands Bureau or request a revised permit.

Both the plaintiffs and the State filed motions for reconsideration.[3] On August 14, 2001, the Wetlands Council denied both motions, stating that

> the New Hampshire Wetlands Council reaffirms its original decision of no jurisdiction over the natural vegetated hill just south of the existing boat ramp and known as the south knoll. The wetlands council has not accepted jurisdiction on matters arising under RSA 485-A Drainage Alteration Permit or RSA 483-B Shoreland Protection Act, as noted in the Motion for Reconsideration filed by Merrymeeting Lake. The statute cited above (RSA 21-O:7) clearly states those are not areas within the wetland council's jurisdiction. The New Hampshire Wetlands Council functions solely under RSA 21-O:5-a(I-V) and RSA 482-A:10 **Appeals**.

On September 10, 2001, the plaintiffs appealed the Council's denial of their Motion for Reconsideration to this court, asserting that 1) the Council unlawfully and unreasonably failed to provide any findings of fact or rulings of law in its decision to deny their Motion for Reconsideration; 2) the Council unlawfully and unreasonably refused to assert or accept jurisdiction over the south knoll, and refused to consider the plaintiffs' appeal pursuant to both RSA 483-B, the Shoreland Protection Act ("the Act"), and RSA 485-A; and 3) the

[3] The State now takes the position that the Wetlands Council's decision was reasonable and lawful. It took a contrary position, however, in its Motion for Reconsideration. Specifically, in its Motion for Reconsideration, although the State contended that the Wetlands Council's conclusion to uphold the issuance of the Permit was correct, it asserted that the Bureau had acted unreasonably and unlawfully in concluding it had no jurisdiction over the south knoll and related Shoreland Protection Act issues.

Council violated ENV-WtC 205.13(e) by accepting unsworn testimony from Collis Adams of the New Hampshire Department of Environmental Services ("DES") at what was supposed to be a non-evidentiary hearing.

The State moves for summary judgment, asserting that all three of the plaintiffs' claims lack merit. With respect to the plaintiffs' first claim, regarding the lack of findings and rulings on reconsideration, the State argues that the Council's order provides the court with a sufficient basis to review the Council's decision to uphold the Wetland Bureau's issuance of the wetlands permit. The State also asserts that the plaintiffs' first claim is undercut by the fact that they failed to request findings of fact and rulings of law on appeal to the Council.

The plaintiffs appealed to this court from the Wetland Council's denial of their Motion for Reconsideration. Accordingly, in determining whether the Council made sufficient findings and rulings, the court considers only the issues the plaintiffs raised in their Motion for Reconsideration and the Council's findings in its decision on that motion. RSA 541:4; see also Appeal of Coffey, 144 N.H. 531, 533 (1999) ("Issues not raised in the motion for rehearing cannot be raised on appeal.") (citation omitted).

RSA 482-A:10(VI) states that

> [o]n appeal, the [Wetlands Council] may affirm the decision of the [Wetlands Bureau] or may remand to the [Bureau] with a determination that the decision complained of is unlawful or unreasonable. The [C]ouncil shall specify the factual and legal basis for its determination and shall identify the evidence in the record that supports its decision.

"[A]n agency is required to set forth findings which will enable meaningful judicial review." Appeal of Psychiatric Institutes of America, 132 N.H. 177, 184 (1989).

According to the plaintiffs, when the legislature has directed an agency to hold a non-evidentiary hearing, RSA 482-A:10(VI) does not require parties to submit requests for

findings of fact and rulings of law to trigger the agency's obligation to make such findings and rulings. The court agrees. There is no language in the statute indicating that the Council is only obligated to specify the factual and legal basis for its determination when it has first received requests for findings and rulings. The Council, however, can only make findings and rulings on that which is properly before it for consideration.

In their Motion for Reconsideration, the plaintiffs allege, in pertinent part, that "[t]he Decision [of the Wetlands Council on appeal from the Wetlands Bureau] is legally and constitutionally deficient, because it fails to provide any findings of fact or rulings of law on each of the alleged errors of law and the requests for findings and rulings . . . ." Thus, the plaintiffs did not expressly request that the Council issue findings and rulings with respect to either RSA 674:54 or the New Durham Zoning and Land Use Ordinance on reconsideration. Rather, the plaintiffs incorporated the specific reference to those issues made in their Petition for Appeal to the Council by alleging generally, on reconsideration, that the Council previously erred by failing to consider those issues.

The court finds that the plaintiffs' general allegation on reconsideration provided the Council with a sufficient basis upon which to issue findings and rulings. The Council had previously received, reviewed and issued an order on the plaintiffs' Petition for Appeal. The plaintiffs' general reference to the Council's failure to issue findings and rulings in response to the plaintiffs' arguments in that Petition certainly placed the Council on notice as to what issues it needed to address in its order on reconsideration, and provided the Council the opportunity to correct any errors it may have made in its order on the plaintiffs' Petition for Appeal.

Because the court concludes that the Council did not satisfy the standards set forth in RSA 482-A:10(VI) in that it failed to even discuss certain issues raised by the plaintiffs,

the State's Motion for Summary Judgment is **DENIED** as it pertains to the plaintiffs' first claim.

The court now addresses the State's contentions with respect to the plaintiffs' second claim, that the Council unlawfully and unreasonably refused to assert or accept jurisdiction over the south knoll,[4] and refused to consider the plaintiffs' appeal pursuant to both RSA 483-B, the Shoreland Protection Act and RSA 485-A. The State argues that the Council did not err by refusing to assert jurisdiction over alleged violations of the Shoreland Protection Act. The State asserts that the Wetlands Bureau and Wetlands Council do not make substantive determinations regarding potential violations of the Act when they are issuing and reviewing wetlands permits both because the Act is not enforced through the wetlands permitting process and because the Wetlands Bureau cannot predict future violations of the Act; according to the State, violations of the Act may only be adjudicated after the violation has occurred, and then only in accordance with one of the three statutorily permitted processes, none of which allow for enforcement by a private plaintiff.

RSA 483-B:3(I) of the Shoreland Protection Act states that

> [a]ll state agencies shall perform their responsibilities in a manner consistent with the intent of this chapter. State and local permits for work with the protected shorelands shall be issued only when consistent with the policies of this chapter.

RSA 483-B:6(I)(b) provides that

> [w]ithin the protected shoreland, any person intending to . . . [c]onstruct a water-dependent structure, alter the bank, or construct or replenish a beach shall obtain approval and

[4] The plaintiffs argue that by refusing to accept jurisdiction over the south knoll, the Council erroneously declined to consider the plaintiffs' arguments under the Shoreland Protection Act. Thus, answering the question of whether the Council should have accepted jurisdiction over matters arising under the Shoreland Protection Act necessarily addresses the plaintiffs' arguments regarding the south knoll. Accordingly, the court's discussion focuses on matters arising under the Shoreland Protection Act generally, without specific reference to the south knoll.

all necessary permits pursuant to RSA 482-A.

Permit approval in this case was subject to the express condition, set forth on the permit itself, that "all activity shall be in accordance with the Shoreland Protection Act . . . ."

The plaintiffs contend that when, as in this case, one project is an integrated whole which falls under RSA 483-B's definition of a shoreland, RSA 483-B requires that the Wetlands Bureau make a substantive determination as to whether the project will violate the Shoreland Protection Act before issuing a permit. The court agrees. RSA 483-B:3(I) directs *all* state agencies to comply with the Shoreland Protection Act, and RSA 483-B:6(I)(b) mandates that all persons, including the state, see RSA 483-B:4(XII), obtain the necessary permits from DES before conducting certain activities within the protected shoreland. These provisions, on their face, indicate that all persons are required to demonstrate compliance with the Shoreland Protection Act in order to obtain a permit. Moreover, there is nothing in the Act itself which indicates it is only concerned with compliance after the fact.

Furthermore, the express condition in the State's permit would be meaningless if it didn't require actual compliance with the Shoreland Protection Act in the performance of a project, but merely served as a warning that any violations thereof would have to be remedied after the violations occurred. Were that the case, a permittee could simply calculate the cost of compliance versus the cost to remedy a violation, and choose to violate the Act because doing so would be more cost effective than complying. The court declines to adopt such a reading of the permit conditions, for doing so would contradict the express purpose of the Shoreland Protection Act. See RSA 483-B:1 and 2.

Therefore, the court rules that, as a matter of law, the Council erred by affirming its original decision in which it refused to assert jurisdiction over alleged violations of the

Shoreland Protection Act in the State's project. It is hardly enough for DES to say, simply, that in constructing this project, the State must comply with the Shoreland Protection Act. Furthermore, the court disagrees with the State's contention that, based on RSA 483-B:18, the Shoreland Protection Act cannot be enforced by a private plaintiff. See 27A Am.Jur.2d Equity §85 (1996) (unless statute expressly restricts court's equity jurisdiction or inescapably leads to that conclusion, full scope of equity jurisdiction applies). RSA 483-B:18, while indicating that certain penalties will result from violations brought to the court's attention by petition of the attorney general or a municipality, cannot, in its entirety be read to foreclose actions brought by private plaintiffs.

The State also contends that RSA 485-A is not applicable to the project. Specifically, the State asserts that because the project will not result in a contiguous disturbed area exceeding 50,000 square feet, a site specific permit is not required. The plaintiffs argue that RSA 485-A:17 requires a terrain alteration permit for the project.

RSA 483-B:6(I)(d) states that

> [w]ithin the protected shoreland, any person intending to . . . [c]onduct an activity resulting in a contiguous disturbed area exceeding 50,000 square feet shall obtain a permit pursuant to RSA 485-A:17.[5]

[5] RSA 485-A:17 provides, in pertinent part, that

> [a]ny person proposing to dredge, excavate, place fill, mine, transport forest products or undertake construction in or on the border of the surface waters of the state, and any person proposing to significantly alter the characteristics of the terrain, in such a manner as to impede the natural runoff or create an unnatural runoff, shall be directly responsible to submit to the department detailed plans concerning such proposal and any additional relevant information requested by the department, at least 30 days prior to undertaking any such activity. The operations shall not be undertaken unless and until the applicant receives a permit from the department.

In its order on the plaintiffs' Motion for Reconsideration, the Wetlands Council stated that it "has not accepted jurisdiction on matters arising under RSA 485-A Drainage Alteration Permit . . . as noted in the Motion for Reconsideration filed by Merrymeeting Lake."

The court finds that the Council erred in refusing to accept jurisdiction on matters arising under RSA 485-A. Specifically, because the Council, as discussed above, should have asserted jurisdiction over alleged violations of the Shoreland Protection Act, and because RSA 483-B:6(I)(d) necessitates jurisdiction over the question of whether a permit was required under RSA 485-A:17, it follows that the Council should have accepted jurisdiction over the plaintiffs' claims under RSA 485-A.

Accordingly, the State's Motion for Summary Judgment is **DENIED** with respect to the plaintiffs' second claim.

The court next addresses the State's assertions regarding the plaintiffs' third claim, namely, that the Council erred by taking Collis Adams' unsworn testimony at the January 11, 2000 hearing. The State argues that the plaintiffs failed to preserve this issue for review both by failing to object to the testimony at the hearing, and by failing to raise the issue in their Motion for Reconsideration. The State also contends that even assuming the issue has been preserved, the plaintiffs' claim is without merit. Specifically, the State asserts that pursuant to ENV-WtC 204.01(d), it was both proper and consistent with the Council's rules to hear testimony from Mr. Adams at the hearing, as Mr. Adams was the DES staff person assigned to the matter. The State also claims that pursuant to ENV-WtC 205.08(e), Mr. Adams's testimony was properly admitted at the hearing because although his testimony was additional evidence, it either reflected that which was already in the record before the Council, or was evidence considered by the Wetlands Bureau in permitting the State's project.

The plaintiffs assert that according to RSA 482A:10 and ENV-WtC 205.13(e) and 16(b), Mr. Adams, who was not sworn in, was prohibited from testifying at what was supposed to be a non-evidentiary hearing. While conceding that they "probably" did not object to Mr. Adams's testimony at the Council hearing, the plaintiffs argue that they subsequently raised the issue of Mr. Adams's testimony in their Motion for Reconsideration. The plaintiffs also contend that although Attorney Patterson from the Attorney General's Office apparently recognized her error in bringing Mr. Adams to the hearing and allowing him to testify, and indeed wrote a letter to the Council and requested that certain portions of Mr. Adams's testimony be disregarded, there is no evidence in the Council's decision that they in fact disregarded any of Mr. Adams's testimony.

As a threshold matter, the court finds that although the plaintiffs did not object to Mr. Adams' testimony at the hearing, the issue has been preserved. Specifically, in their Motion for Reconsideration, the plaintiffs asserted that

> [t]he Wetlands Council acted in direct violation of Env-WtC 205.13(e), which states that appeal hearings are non-evidentiary, by taking testimony from Collis Adams, an employee of the Department of Environmental Services, at the January 11, 200 hearing on this appeal. The Wetlands Council acted improperly and illegally in hearing such testimony, thus meriting a de novo hearing on this matter.
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> . . .
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> Nowhere in its letters of April 16, 2001 or May 15, 2001 does the Wetlands Council state that it has based its decision solely on the contents of the certified record, or that it has entirely ignored the testimony of Collis Adams. Therefore, it is inescapable that the Wetlands Council improperly and illegally relied on the testimony of Collis Adams, thus rendering the Council's entire decision invalid.

The court rejects the State's argument that Mr. Adams' testimony was properly admitted at the hearing because the evidence either reflected that which was already in

the record before the Council or that which was considered by the Wetlands Bureau in permitting the project. Assistant Attorney General Patterson, then-counsel for DES, disagreed with the State's current position on this matter when she wrote to the Council after the hearing for the express purpose of advising them to disregard certain portions of Mr. Adams' testimony as it was *not* representative of evidence already in the record before the Council. Furthermore, the Council itself noticed the hearing as a non-evidentiary hearing. Thus, to the extent the Council considered portions of Mr. Adams' testimony which was not reflective of evidence already in the record before the Council, the Council erred.

It is not possible, however, to discern what portions of Mr. Adams' testimony, if any, the Council did consider, as the Council failed to discuss the plaintiffs' argument on this issue in its order on the plaintiffs' Motion for Reconsideration. Absent any such discussion the court cannot conduct a meaningful review and determine whether the Council in fact violated Env-WtC 205.13(e). Appeal of Psychiatric Institutes of America, 132 N.H. at 184. Because a question of fact remains as to what portions of Mr. Adams' testimony, if any, the Council considered, summary judgment is not appropriate on the plaintiffs' third claim. Accordingly, as to the plaintiffs' third claim, the State's Motion for Summary Judgment is **DENIED**.

So Ordered.

May 24, 2002

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Bruce E. Mohl
Presiding Justice