

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

**GORDON BLAKENEY, JR. AND LESLIE LUDTKE, ET AL.**

**V.**

**CITY OF CONCORD**

**NO. 03-E-263**

**OPINION AND ORDER**

LYNN, C.J.

This is an appeal by the Petitioners, six residents of Concord and Bow, New Hampshire, from the decision of the New Hampshire Wetlands Council (Council), affirming the issuance by the Wetlands Bureau of the Department of Environmental Services (DES) of a permit to the City of Concord (City) to fill approximately 3.56 acres of wetlands in connection with the construction of Phase II of the Northwest Bypass, the so-called Langley Parkway. Presently before the court is the City's Motion for Summary Judgment. I heard oral argument on the motion and the Petitioners' objections on March 16, 2004. I conclude that the City is entitled to summary judgment dismissing the appeal.

**I. LEGAL STANDARD**

Although the City has styled its motion as one seeking summary judgment, the pleading might more appropriately have been labeled as a motion to affirm the decision of the Council or a motion to dismiss the appeal. The standard of review in this case is set forth by statute and the question before me

is simply whether there is any genuine issue of material fact as to whether the decision below meets that standard. See RSA 491:8-a (1997).

RSA 482-A:10 (2001), provides, in pertinent part:

XI. On appeal to the superior court, the burden of proof shall be upon the party seeking to set aside the decision of the council to show that the decision is unlawful or unreasonable. The council's decision shall not be set aside or vacated, except for errors of law, unless the court is persuaded, by a preponderance of the evidence before it, that said decision is unjust or unreasonable.

## **II. BACKGROUND**

On April 30, 1993 the Wetlands Board (predecessor of the Council) issued a wetlands permit (#92-01642) to the City to construct what has come to be known as the "Langley Parkway". The construction of the Langley Parkway was to be completed in three phases, with the final phase being to connect the south end of Clinton Street to North Main Street. The goals of the Langley Parkway are to reduce traffic congestion on certain main roads in the City, to enhance pedestrian safety and, finally, to improve emergency access to Concord Hospital. Phase I of the project was completed in 1995. Currently at issue is Phase II, which consists of the construction of a road between Clinton Street and Pleasant Street at or near the point on the Pleasant Street where Concord Hospital is located. The wetlands permit issued in 1993 expired in April, 1999, and the City was required to apply for a new permit. The City applied for a new permit in December 2000. Pursuant to RSA 482-A:8, DES held a public hearing on the application. Various members of the public, including Petitioners, were present to provide comment on the proposal made by the City. The hearing was

presided over by DES representative Frank Richardson. On March 12, 2002, DES issued a second wetlands permit to the City (#00-02714).

Pursuant to RSA 482-A:10, I, Petitioners first moved DES for reconsideration, alleging numerous deficiencies in the City's application. DES denied the Petitioners request. Petitioners next appealed to the Council. See RSA 482-A:10, I, IV. Again they alleged deficiencies in the City's application and claimed that the decision of DES was unlawful and unreasonable. On April 8, 2003, the Council held a hearing on Petitioners' appeal. Following the hearing, the Council issued an order denying the appeal. Petitioners then commenced the present action in this court.

### **III. ANALYSIS**

The City first argues that Petitioners lack standing to challenge the Council's decision to grant the permit because Petitioners do not have a particularized injury different from that of the general public. Although I believe the issue of Petitioners' standing presents a close question, because I conclude that the decision of the Council must be sustained on the merits, I find it unnecessary to address this issue. For purposes of the analysis which follows, therefore, I assume without deciding that Petitioners do have standing to seek judicial review of the Council's order.

Petitioners allege that the decision of the Council affirming the issuance a wetlands permit to the City is unlawful and unreasonable because: (1) there was insufficient evidence presented by the City to support DES' decision to grant the permit; (2) the Council employed an erroneous standard of review in affirming the

DES decision; and (3) DES violated Petitioners' due process rights in various ways. I examine these arguments in turn, mindful of the limitation that my role is not to conduct a de novo review of the actions of the administrative agency charged with responsibility for enforcing the wetlands regulatory scheme. See Conservation Law Foundation v. N.H. Wetlands Council, 150 N.H. 1, (2003).

In its June 5, 2003 order affirming DES' decision to grant the wetlands permit, the Council found that Petitioners had failed to prove by a preponderance of the evidence that the decision of DES was unlawful or unreasonable. The decision of DES was based on its consideration of many factors and upon its rendition of the following findings:

1. This is a major impact project per NH Administrative Rule 303.02(c), as the project proposes to impact more than 20,000 square feet of wetlands in the aggregate.
2. The applicant has adequately demonstrated the need for the proposed impacts relative to traffic, essential police and emergency services, and public safety per Rule Wt 302.01, and has provided evidence that demonstrates that its proposal is the alternative with the least adverse impact to areas and environments under the Department's jurisdiction per Rule Wt 302.03.
3. The applicant has demonstrated by plan and example that each factor listed in Rule Wt 302.04(a), Requirements for Application Evaluation, was considered in the design of the project.
4. DES staff conducted field inspections of the proposed project on May 2, 2001. . . based on which DES determined that the project as proposed has significant, albeit unavoidable, wetlands impacts.
5. The Department finds that impacts to wetlands can be offset by the execution of an appropriate mitigation strategy. As a condition of this permit, the Department requires the City to submit a final mitigation plan that adequately compensates for all wetlands impacts resulting from this project.

. . . .

In New Hampshire, "[n]o 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 [DES]." RSA 482-A:3. DES promulgates Wetlands Rules to effectuate the public purposes set forth in RSA 482-A:1. See Wt 102.01; 302.02. Before the DES can issue a permit to fill wetlands, the applicant must demonstrate, by plan and example, that it has considered certain factors in designing the proposed project and assessing its impacts on wetlands. See generally Wt 302.04. The applicant must demonstrate, among other things:

- (1) The need for the proposed impact;
- (2) The alternative proposed by the applicant is the one with the least impact to wetlands or surface waters on site;
- (3) The types/classifications of the wetlands involved;
- (4) The relationship of the proposed wetlands to be impacted relative to nearby wetlands and surface waters;
- . . . .
- (7) The impact on plants, fish, and wildlife . . . .

Wt 302.04(a). If "[t]here is a practicable alternative that would have a less adverse impact on the area and environments . . . ," a permit shall not issue. Wt 302.04(d)(1). Moreover, if an applicant fails to document consideration of any of the factors listed in Wt 302.04(a), (b) and (c), DES is required to deny the requested permit. See Wt 302.04(d)(5).

Petitioners assert that the City failed to comply with these regulations because it did not show: (1) the necessity of its proposed wetlands impact; (2) that its proposed project design is the least-impacting alternative; (3) the types/classifications of the wetlands it seeks to impact; (4) the project's impacts on wildlife; (5) the project's secondary impacts on wetlands; and (6) the project's

impacts on the functions and values of residual wetlands. Because of these alleged deficiencies, Petitioners claim that the record contained insufficient evidence for DES to make the findings necessary to issue the permit.

### **1. Necessity of the Proposed Wetlands Impact**

Petitioners argue that the City failed to satisfy this requirement because its proposed design for the connector road was created for the benefit of two private parties, St. Paul's School and Concord Hospital, and not for the benefit of the community as a whole. Petitioners also argue that the City did not conduct traffic studies to assess the public need for the connector road or the road's potential impact on traffic flow. Instead, Petitioners claim the City's traffic studies were aimed only at determining the sizing and capacity of the road. The City counters that DES' finding that the City adequately demonstrated the need for the proposed wetlands impact was overwhelmingly supported by the record.

The problem which the proposed project is intended to remedy is the traffic congestion that occurs as a result of citizens attempting to gain access to Concord Hospital and St. Paul's School. The City presented DES and the Council with six separate traffic studies prepared by three different consultants. Each of these traffic studies concluded that the construction of the Langley Parkway would serve to relieve traffic congestion in and around Pleasant Street, Fruit Street, Warren Street and Clinton Street. See id. I hold that this evidence was sufficient to show the need for the proposed wetlands impact.

## **2. Least-Impacting Alternative**

Petitioners' view is that the least-impacting alternative is not to build Langley Parkway at all. Petitioners point to what they call the "no-build" plan – an alternative whereby, instead of constructing a new road, the City would improve and widen the existing five-pronged intersection at Pleasant and Fruit Streets as well as the roadways which feed this intersection. This alternative, Petitioners argue, was ignored by the City due to the influence of St. Paul's School and Concord Hospital. I find this argument unconvincing.

The City presented evidence that it had retained the services of the Kimball Chase Company and Smart Associates Environmental Consultants to conduct environmental studies of the effects of the construction of Langley Parkway and to examine various alternatives. A report was prepared by Kimball Chase and Smart Associates and submitted to DES. This report outlines the existence of nine alternatives that were considered by the City, including the "no-build" option. The report concludes, however, that none of the alternatives provides a permanent solution to the problem that the City was seeking to address. Further, the report concludes that "[o]f the alternatives to fulfill [the] purposes and needs, Corridor 2-B [Northwest Bypass] . . . is deemed to fully meet these purposes and needs with the least impact to aquatic and other resources. Corridor 2-B is therefore the proposed action." This evidence was sufficient to support the Council's view that DES did not err in finding that Langley Parkway is the least-impacting alternative.

### **3. Types/Classifications of Wetlands**

Petitioners argue that the City failed to consider the types/classifications of wetlands that will be impacted by the construction of Langley Parkway. To the contrary, the City presented two studies to DES, one conducted in 1992, entitled "Wetland Impact Assessment and Mitigation Planning for Concord Northwest Bypass," and the second conducted in 2001, entitled "Analysis of Wetlands Impacts." Through these studies, the City sufficiently addressed the issue of the types/classifications of wetlands that would be impacted by the construction of Langley Parkway. The fact that there may have been contrary evidence presented by Petitioners at the hearing does not make the decision of DES unlawful and unreasonable.

### **4. Impacts on Wildlife**

The City was required to consider:

The [project's] impact on plants, fish, and wildlife including:

- a. Rare, special concern species;
- b. State and federally listed threatened and endangered species;
- c. Species at the extremities of their ranges;
- d. Migratory fish and wildlife; and
- e. Exemplary natural communities identified by New Hampshire Natural Heritage Inventory (NHI) -- Department of Resources and Economic Development.

Wt 302.04(a)(7).

Petitioners contend that the City's consideration of the impacts on wildlife was deficient because its application failed to identify the presence of endangered bird species which could potentially be affected. In addition, Petitioners claim that the City failed to adequately consider the impacts on vernal



pools and the wetlands complex as a whole. Again, I am unpersuaded. Review of the record reflects that the City presented sufficient evidence assessing the impacts that the project would have on wildlife. For example, on June 8, 2001 an ecologist from the Department of Fish and Game raised concerns that the construction of a detention pond, which was included as part of the City's proposal, would result in wildlife fragmentation. In response, the City modified its proposal to eliminate the detention pond. In addition, the City retained Gove Environmental Services to conduct an analysis of potential habitat fragmentation that might occur as a result of the construction. The analysis concluded that "of the various alternatives that were explored to connect Pleasant Street to Clinton Street, the new proposed alignment has the least amount of fragmentation of wildlife habitat." Gove found that "[b]y incorporating two wildlife crossings, by having virtually no curbing, and by having only a two lane road of low speed limits, the road does not pose a significant barrier to wildlife movement."

I also find no merit in Petitioners' argument that the presence of vernal pools was not considered. In its decision on Petitioners' motion for reconsideration, DES discussed the fact that on May 30, 2002, DES personnel conducted a field inspection and "found vernal pool habitat of atypical conformation . . . ." DES concluded however, that:

the location of the vernal pool in the landscape . . . was found to be over 300 feet from the roadway, separated by a dense vegetated buffer and, most importantly, hydrologically disconnected from the roadway by a large drainage ditch which would intercept the runoff from the roadway prior to reaching the vernal pool. Petitioners also identified a wind-throw and one other area as potential vernal pool habitats. Petitioners did not provide documentation or evidence that the two other areas meet the criteria of vernal pools.

DES also considered the presence of species of turtles, specifically the spotted turtle and the wooded turtle, in the area. With regard to these two species, DES concluded that:

[t]he evidence before the Department is that the Spotted Turtle was last observed in 1934. The proposed layout does not impact the Spotted Turtle habitat. The Wood Turtle is the most terrestrial of all turtles in New Hampshire. Based on information in the record, there is no evidence that Wood Turtles have been observed in Concord.

The above recitation amply demonstrates that sufficient consideration was given to the projects potential impacts on wildlife.

## **5. Secondary Impacts on Wetlands**

Petitioners claim that the City failed to assess secondary or cumulative development which may occur as a result of the construction of Langley Parkway. They argue that the City's guarantee that that the connector road will be a limited access road which would prevent secondary development cannot be regarded as adequate in light of the fact that the same guarantee was made in 1993, during Phase I of the bypass, and was not kept. The City responds that it addressed this concern in its 1992 wetlands delineation and it further asserts that, because a limited access roadway is a condition of the permit, any concern of cumulative development has been resolved.

In its decision, DES found that "[t]his issue has been addressed by conditioning the permit, consistent with the City's written commitments contained in the application and related documents, to limit additional secondary vehicular access to this roadway to only one point . . . . This requirement will limit

secondary impact to wetlands and habitat resulting from construction of this roadway.” In addition, in its order on Petitioners’ motion for reconsideration, DES specifically found that “[p]etitioners have not met their burden of proof that the permitted roadway will operate in a manner other than as a limited access roadway.”

I find, based on the above evidence, that DES adequately considered the potential secondary impacts of the proposed project.

#### **6. Impacts on Functions and Values of Residual Wetlands**

Petitioners argue that the City failed to provide any assessment of the impacts on wetlands which will be indirectly affected by the project. However, Petitioners fail to identify any specific issue or concern regarding residual impacts that DES or the Council overlooked or failed to consider. Inasmuch as it is the Petitioners’ burden to show that the decision of the Council is unlawful or unreasonable, the absence of developed argumentation on this point is fatal. See Thomas Tool Services v. Town of Croydon, 145 N.H. 218, 221 (2000).

#### **7. Additional Errors Alleged By Petitioners**

The hearings which preceded issuance of the wetlands permit were conducted by hearings officer Frank Richardson of DES. However, the permit itself was signed by DES permitting officer Peter Walker. Because, just prior to the time he signed the permit, Walker had accepted an offer of future employment with the City’s traffic consultant for the project, Petitioners allege that Walker was biased and that this bias taints the agency’s decision to issue the permit. Whether sufficient interest or bias exists to require the disqualification

of a public official from participating in a judicial or quasi-judicial decision depends on the facts and circumstances of the particular case. N.H. Milk Dealers Assoc. v. Milk Control Board, 107 N.H. 335, 339 (1966). I reject Petitioners' argument for three reasons. First, because both Petitioners and the City relied on the traffic study to support their conflicting positions on the merits, it is far from clear that Walker's acceptance of an employment offer from the consultant who prepared the study would naturally tend to make him partial to one side or the other in the dispute between the parties. See State ex rel Thomson v. State Bd. of Parole, 115 N.H. 414, 422 (1975) (to require disqualification, bias or interest must be "immediate, definite and capable of demonstration; not remote, uncertain, contingent, and speculative"); Atherton v. Concord, 109 N.H. 164, 165 (1968) (same). Second, I agree with the City that, under the applicable law and regulations, the permit was issued by DES as an agency rather than by any particular individual employee. Aside from the fact that Walker performed the function of signing the permit, Petitioners have adduced no evidence showing that Walker himself was the decision maker. Indeed, given Richardson's role as the hearings officer, it seems quite likely that insofar as the agency's decision may have been influenced by the judgment of any one agency employee, Richardson was that person. Third and most important, owing to Petitioners' claim of bias, DES excluded Walker from any participation in ruling on Petitioners' motion for reconsideration. That DES reached the same decision without any involvement by Walker is sufficient to

demonstrate to my satisfaction that Walker's alleged bias played no role in issuance of the permit.

Next Petitioners argue that DES unlawfully issued the permit without first approving a final mitigation plan. Petitioners claim that because the permit has already been issued, the final mitigation plan will never be seen by the public for comment before it is accepted by DES. The City argues that the conditions imposed by DES in issuing the permit were very specific with respect to what the final mitigation plan must contain. The City further argues that they have submitted a final mitigation plan that exceeds the conditions set forth by DES. Finally, the City argues that Petitioners are not entitled to an opportunity to comment on the final mitigation plan. I agree with the City.

Petitioners have cited no authority for the proposition that DES is precluded from issuing a permit until after it has approved a final mitigation plan. RSA 482-A:11, II states: "[i]f a permit is granted, the decision of the department may contain reasonable conditions to protect the public good." The language of this statute authorizes DES to attach conditions to a permit where it feels the same are necessary to protect the public. There is no requirement that the public be given an opportunity to comment on these conditions subsequent. See Nestor v. Town of Meredith, 138 N.H. 632, 635 (1994).

Lastly, Petitioners allege that the Council applied an erroneous standard in reviewing the decision of DES. In support of this claim, Petitioners rely on the following language used in the Council's decision: "per Env-WtC 205.17, the Appellants failed to prove, by a preponderance of clear and concise evidence,

that DES' decision in the matter was unreasonable or unlawful . . . ." Seizing on the terms "clear" and "concise," to the exclusion of the term "preponderance," Petitioners contend, in effect, that the Council required them to demonstrate by clear and convincing evidence that the DES decision was unlawful or unreasonable. While it is unfortunate that the lay members of the Council employed terms that are similar to those which lawyers identify with a heightened burden of proof, Petitioners have failed to demonstrate that the Council either intended to or did in fact employ the wrong legal standard. Rather, the Council's decision specifically cited the preponderance standard, and its reference to the absence of clear and concise evidence appears merely to have reflected the Council's view that the evidence offered by Petitioners in attacking the DES ruling was lacking in clarity and focus.

#### **IV. CONCLUSION**

For the reasons stated above, the City's motion for summary judgment is granted and Petitioners' appeal is hereby dismissed.

BY THE COURT:

April 15, 2004

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ROBERT J. LYNN  
Chief Justice