

**MINUTES OF THE NEW CASTLE JOINT SELECT BOARD AND
PLANNING BOARD MEETING
Wednesday, March 24th, 2021 – 5:30 p.m. (via Zoom)**

NHDES Presentation – Wetlands Application Process.

Members Present: Darcy Horgan, Planning Board Chair; Lorne Jones, Planning Board; David McGuckin, Select Board; Margaret Sofio, Planning Board; Bill Stewart, Select Board Chair.

Members Absent: Tom Hammer, Planning Board; Tom Maher, Select Board; Iain Moodie, Planning Board; Kate Murray, Planning Board.

Others Present: Beth Barnhorst; Ellen and Randy Bryan; Mary Ann Driscoll; Jane Finn; Eben Lewis, NHDES SE Region Supervisor; Keriann Roman, Town Counsel; Conni White.

Chair Stewart called the joint meeting between the Select Board and Planning Board to order at 5:32 p.m. and informed attendees that the public body is holding an emergency meeting electronically pursuant to Executive Order 2020-04, Section 8, and Emergency Order #12, Section 3.

1. NHDES Wetlands Application Process – Eben Lewis, NHDES SE Region Supervisor.

Chair Stewart announced that this is an informational meeting regarding how the NH Department of Environmental Services (DES) handles applications for docks. The meeting is being held because many people in town have expressed interest in how applications are processed, what information is used, how the Town interacts with the DES, and what statutes are in place that govern how the Town and DES work. The purpose of the meeting is not to discuss proposed changes to Town Ordinances; this will be covered at the 7:00 p.m. Planning Board public hearing.

Eben Lewis, the Southeast Region Supervisor of the NHDES, introduced himself. He works out of the DES office in Portsmouth and has been with DES for nearly 17 years. In December 2019, there was a massive overhaul of rules. Mr. Lewis explained that with the new rules, freshwater and tidal wetlands are in DES jurisdiction. The DES went from having little to no tidal resource rules to having numerous rules. The main goal is to address key issues in applications that were previously brushed over. The DES uses a mosaic of tools, with sea level rise being the biggest factor taken into consideration with the new rules.

Keriann Roman, Counsel for the Town of New Castle, spoke about relevant statutes. She stated that NH is not a home rule state, and towns are only allowed to do what they are expressly permitted in the law. RSA 482-A gives Conservation Commissions the authority to intervene and be party to an application. State law requires towns to be notified about all dock applications. The Conservation Commission can weigh in and provide recommendations to the DES. For more complicated projects, the Commission can do an investigation of its own and have a public

hearing or site inspection and draft a recommendation or non-recommendation. If the Commission wants to do a recommendation for approval, they are allowed to have suggested conditions for the approval. Attorney Roman noted the role of towns is limited, and RSA 482-A is the only rule, other than appeal rights, where the Town can weigh in. Appeals go to the Wetlands Council. If the Conservation Commission seeks to appeal a decision made by the DES, the Commission must notify the State Attorney General, who has the right to take over the appeal. Attorney Roman added that the state has an interest in protecting public waters and having overall comprehensive requirements for public waters. The state has taken over control because towns bordering on public waters could have differing ordinances and requirements, which could create issues with enforcement.

Mary Ann Driscoll shared that she read the new wetlands application and noticed that there were function points that should be answered by the Town rather than a permitting, for-profit company. She wondered how this works for other communities because it seems like New Castle has not been addressing these points and this is a missed opportunity for the Town. Mr. Lewis responded that DES instructs applicants to retain a coastal professional in some cases. A lot of municipalities have retained their own professional wetlands scientist or coastal professional, which is an opportunity for these towns to get a second opinion on cases that are being reviewed. Chair Stewart stated that the Town has retained its own third-party professional in the past, such as for wetland delineations, but does not do so for every application. The Conservation Commission also flags concerns during their review of each application. Chair Stewart added that the plans submitted to DES are stamped by licensed professionals who put their credentials on the line by certifying the plans. Mr. Lewis pointed out that the applications are public documents so anything in them would likely be reviewed by municipalities as well. There are times when the information on plans or wetland delineations may be questioned, in which case DES will request a second opinion. The applicant would have to reach out to a professional through the Rockingham County Conservation District or the town could reach out to get a separate professional review.

Mr. Jones asked what recourse people have if a neighbor is putting in a dock and it impacts an abutter's property value or visibility. Mr. Lewis stated that there have been challenges to the Wetlands Council and those cases have been litigated. Attorney Roman added that DES is prohibited from contemplating infringement of property rights. The Town Select Board can weigh in on applications and submit a letter for or against the application on a limited, case-by-case basis. There are nuisance common laws which also provide mechanisms where if an abutter is suffering a detriment from a neighboring property, the abutter can have recourse. Also, if the application is for a commercial dock, the Planning Board could consider abutting property values. Attorney Roman stated that the Conservation Commission's role is generally limited to conservation matters, plantings, and invasive species. It is her legal opinion that it would not be appropriate for the Commission to weigh in on property values for applications.

Ms. Sofio questioned whether the Select Board or Planning Board could weigh in or use the Town's Master Plan given that heritage is one of the criterium reviewed for DES applications. Attorney Roman responded that there is no authority in the law for the Planning Board to weigh in on this piece. Mr. Lewis added that the heritage is reviewed through the Natural Heritage Bureau, which looks at threatened and endangered species in water resources over which DES

has jurisdiction.

Mr. McGuckin stated that for him, it seems that the Town has less and less say about docks. He felt that DES is overwhelmed with cases and expressed concern that there is no local control over docks and the environment. Attorney Roman pointed out that the avenue for change is legislature and proposing bills to change state law. The Town could also talk to the NH Municipal Association (NHMA), which is a lobbying group. Attorney Roman explained that water is an area where the State has traditionally expressed its authority, as water is a public resource. For example, the Great Bay is a state water resource, and if there were no state control, there would be numerous towns conveying their own rules and ordinances over what happens in and around the water. It would be difficult to control how these rules are regulated and enforced, and the water resource would suffer as a result. The State regulates control so there are no competing interests between towns.

Randy Bryan asked about the Town having rights up to 100 feet into the water from the shoreline. Attorney Roman cited RSA 483-B, the Shoreland Water Quality Protection Act, which is a law that allows towns to exercise greater restrictions over shoreland. She explained that RSA 482-A excludes docks and boating from municipalities' areas of control. Mr. Lewis added that property lines are established at the mean high water mark. RSA 482-A lays out where applicants need to keep their proposed docking structure at least 20 feet away from the abutting property line extension over the water. Otherwise, an applicant can obtain written, notarized permission from the abutter to put a dock within the 20 foot buffer. Mr. Bryan asked how light and noise coming from docks and boats is regulated. Mr. Lewis responded that DES regulates how docks are structured, and any maintenance issues that arise must be corrected by the dock owner. DES does not have the legal authority to order applicants to maintain their docks. DES authority is strictly over the dock construction. If a docking structure becomes a hazard, Mr. Lewis suggested reaching out to the Town Building Inspector or local Port Authority.

Beth Barnhorst questioned how much the Town can do to protect its environment. She felt that even in cases where there was an endangered species in an area where someone wanted a dock, the Conservation Commission did not seem to have much of a say. Ms. Barnhorst asked how towns along Squam Lake are able to have stricter regulations. Attorney Roman responded that she looked at several examples of towns in the Lakes Region and did not find that they have stricter regulations, and even if they did, the restrictions likely are not enforceable. Ms. Barnhorst asked if the Town has the authority to restrict the length of docks. Attorney Roman stated that the Town does not have this authority, and Mr. Lewis added that the DES has rules about how long docks can be.

Mary Ann Driscoll commented that part of the issue is about the heritage of the island community of New Castle. Mr. Lewis responded that DES looks holistically at the plans and all parts of the application. Ms. Driscoll asked how the Town can have a voice in a meaningful way. Mr. Lewis said that the best way to convey concerns is through the Conservation Commission. Ms. Driscoll felt that the Commission does not have clear guidelines to know what to look for and lacked the training to properly evaluate applications.

Conni White, Chair of the Conservation Commission, stated that the Commission reviews the

environmental impact on what is specific to New Castle, but the Commission cannot deal with visual, aesthetic, or historical features because it is not within their purview. Attorney Roman agreed and pointed out that it is an open process, so if there are concerns with a particular application and its impact on the Town, the Select Board can submit its feedback for DES to review.

Jane Finn questioned how DES weighs input of engineering firms. Mr. Lewis responded that the DES can engage with the Natural Heritage Bureau, NH Fish and Game, and the Marine Division to ensure that they are satisfied with the proposal.

Attorney Roman asked how DES handles RSA 482-A, which states that a permit is not granted by DES if it infringes on property rights, yet DES does not specifically contemplate this. She asked Mr. Lewis how he deals with infringement on property rights. Mr. Lewis stated that DES looks at whether an application would adversely impact the general interest of the public. It is outside of DES purview to get a property owner's consent if there is a possible impact on an abutting property. Attorney Roman commented that the statute does not clarify or help with this aspect.

2. Adjourn.

There being no further business, Chair Stewart adjourned the meeting at 6:35 p.m.

Respectfully Submitted,

Meghan Rumph
Recording Secretary