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Water Council
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STATE OF NEW HAMPSHIRE

WATER COUNCIL

Decision & Order
On Motion for Rehearing

Docket No. 03-10 WC

Appeal of The Conservation Law Foundation
In Re: Water Quality Certificate No. 2003-001

Background

On July 17, 2003 the Department of Environmental Services, Watershed Management Bureau ("DES") issued Section 401 Water Quality Certificate No. 2003.001 ("the Certificate") to Endicott General Partnership ("the Applicant"), for a proposed subdivision in Greenland, NH known as the Falls Way Subdivision ("the project").

On August 18, 2003 Attorney Thomas F. Irwin filed a Notice of Appeal ("the Notice") with the NH Water Council ("the Council") on behalf of the Conservation Law Foundation ("the Appellant"). The subject of the Appeal was the DES decision to issue Section 401 Water Quality Certificate No. 2003.001. The Appeal was assigned Docket No. 03-10 WC by the Council.

On September 10, 2003 the Council voted to accept the Appeal.

On September 10, 2003 Attorney Malcolm McNeill, Jr., filed an Appearance with the Council on behalf of the Applicant.

On October 2, 2003 Attorney Jennifer J. Patterson filed an Appearance with the Council on behalf of DES.

On October 7, 2003 the Appellant filed a Motion to Stay Appeal pending the outcome of a Wetlands Appeal involving the same parties and project.

On November 4, 2003 the Council granted the Appellant's October 7, 2003 Motion to Stay Appeal.

On May 12, 2005 the Appellant filed an Assented-to Motion to Lift Stay and Schedule Pre-hearing Conference.

A Pre-hearing Conference was convened on June 13, 2005. An Appeal Hearing was scheduled for August 10, 2005.

On July 18, 2005 the Appellant filed a Motion for Continuance of Hearing.

On August 2, 2005 the Council granted the Appellant's Motion for Continuance of Hearing. The hearing was rescheduled for September 14, 2005.

On September 2, 2005 the Appellant filed a Motion to Continue Hearing.

On September 6, 2005 the Council granted the Appellant's Motion to Continue Hearing. The hearing was rescheduled for November 9, 2005.

On November 9, 2005, following proper notice to all parties, the Council held an evidentiary hearing on the subject appeal in accordance with RSA 21-O:5-a, and Env-WC 200. The Council listened to testimony, presentation, and argument by the Appellant, DES, and the Applicant. Immediately following the appeal hearing, the Council decided to deliberate and vote on the appeal. By majority vote the Council denied the appeal.

On January 30, 2006 the Council issued a written Decision & Order to deny the appeal ("the order"). In the order the Council made the following finding and conclusions:

- At the hearing Attorney Irwin questioned Dr. David Burdick of UNH as its first witness. The Council finds that Dr. Burdick's extensive testimony did not provided facts or science to support with any certainty that water quality would be adversely affected by the operation of the subdivision. He agreed that it is not possible to accurately assess water quality impacts until the subdivision was in operation, which at the time of the hearing was not the case. Dr. Burock testified to a concern that a stand of Atlantic White Cedar could be affected. Cross examination revealed that Atlantic White Cedar is not a protected or endangered species. Cross examination also revealed that Dr. Burdick had never visited the site and that he relied solely upon information that was provided to him by the Appellant, not via his on his own research.
- Attorney Irwin called Laura Deming, a wildlife biologist from the NH Audubon Society. Ms. Deming testified that she visited the site on May 20, 2005 and found the habitat to be in good condition. Her testimony consisted of what might happen or could happen to indigenous species should the subdivision be built, but offered no facts or science to support her statements. Ms. Deming voiced concern about vernal pools and the breeding of species that happen there in the spring. Cross examination revealed that the reports about which she testified were prepared for an earlier NH Wetlands Council appeal of the issuance of a Wetland Permit, not for the NH Water Council appeal proceeding at issue. The issuance of the Wetlands permit was upheld by the Wetland Council. Upon being questioned by the Council Ms. Deming admitted that as a wildlife biologist she was not qualified to speak to the water quality issues that were the subject of this appeal. Relative to vernal pools, the Council finds that the Applicant reduced the number of buildable lots in the subdivision to further protect said pools.
- Attorney Irwin next questioned Paul Piszczek, Water Quality Bureau scientist. Mr. Piszczek testified to the process upon which DES relies to grant or deny a water quality certificate. He testified that DES applied stricter standards than required by law at that time, mostly because of concerns voiced by CLF.
- Attorney Irwin next questioned Paul Currier, Administrator, DES Watershed Control Bureau. Mr. Currier's signature is on the Water Quality Certificate in question. He testified that DES did everything required by statute and more to protect the water quality

at the proposed subdivision. Cross examination revealed that there is stricter language, and more protective devices in the certificate to protect the water quality. Constant monitoring at several sites is required. Since there is no way to tell if there will be any adverse impact until the project is underway the certificate can be withdrawn if adverse impact to the water quality is found.

- Attorney Irwin next questioned Ridgeley Mauck, DES Water Division Sanitary Engineer. Mr. Mauck testified that the applicant met all criteria in place when the certificate was issued. He testified that there was no way to tell if water quality would be affected until the project was underway, but as a condition of the certificate it could be withdrawn if adverse impact was found.
- Attorneys for DES and the Applicant moved that the appeal be denied because the Appellant hadn't proved by a preponderance of the evidence, that DES was either arbitrary, capricious, or unlawful in it' issuance of the water quality certificate.
- The Council voted and found by a clear majority that the Appellant failed to prove by a preponderance of the evidence, that DES was either arbitrary, capricious, or unlawful in it' issuance of the water quality certificate.
- The Council finds that the Appellant failed to offer convincing evidence that water quality would actually be adversely affected by operation of the subdivision.
- The Council felt that the developers seemed to be genuinely concerned about protecting the water quality as shown by their reduction of lots at an aggregate cost of approximately one million dollars when considering what the lots or completed homes would have brought at sale.
- The Council finds that DES had in fact been very careful and had performed due diligence far beyond what was required by statute before issuing the certificate, even placing language in the certificate that required shutdown of the project if an of the many water quality monitoring sites detected adverse impact to the groundwater or North Brook.
- Councilors Densberger and Cowan commented individually to the Council during deliberation. Their comments spoke to the diligence of DES in their research before they issued the certificate. They agreed that DES had gone above and beyond what the

statutes required in order to address concerns raised by the Appellant prior to the issuance of the Water Quality Certificate.

- There was one dissenting vote in the decision. The dissenting councilor did not disagree with the decision, but stated that he would have liked to have heard the cases presented by DES and the Applicant.

On February 27, 2006 the Appellant filed a Motion for Rehearing with the Council.

On March 3, 2006 the Applicant filed an Objection to the Appellant's Motion for Rehearing.

On May 10, 2006, at it's regularly scheduled meeting on May 10, 2006 the Council unanimously dismissed the Appellants Motion for Rehearing.

Findings & Conclusions

At the May 10, 2006 Council meeting, the Council deliberated at length each and every point raised by the Appellant in its Motion for Rehearing.

Env-WC 203.21 states in part that all motions shall contain a clear and concise statement of the facts and law which support the motion and that the moving party shall have the burden of persuasion on all matters raised in the motion.

The Council finds that while the Appellants Motion for Rehearing does express dissatisfaction and disagreement with the Councils written Decision & Order to deny this appeal, the Appellant failed in its burden of persuasion on any of the matters raised in the motion. The Appellant failed to persuade the Council that it had erred in its Decision & Order to deny the appeal.

Decision & Order

Motion for Rehearing is **DENIED.**

Reconsideration

Pursuant to RSA 541:6, within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the Supreme Court.

So Ordered for the Council by: COPY May 30, 2006

Michael P. Selafani, Appeals Clerk