

THE STATE OF NEW HAMPSHIRE  
Rockingham Superior Court  
PO Box 1258  
Kingston, NH 03848 1258  
603 642-5256

12/05

NOTICE OF DECISION

SHERILYN YOUNG  
RATH YOUNG AND PIGNATELLI  
PO BOX 1500 1 CAPITAL PLAZA  
CONCORD NH 03302-1500

04-E-0651 Maud Anderson, et al vs. Motorsports Holdings, LLC

Please be advised that on 12/05/2005 Judge McHugh made the following order relative to:

Court Order ; Issued  
(copy enclosed)

12/05/2005

Raymond Taylor  
Clerk of Court

cc: Kenneth Bartholomew, Esq.  
Thomas Quarles  
Viginia C. Thomas  
Rebecca Silver  
Ossipee Mountain Land co., LLC  
Saint Andrews Episcopal Church  
Bruce C. Grace  
Carol Grace  
Town of Tamworth  
Chocorua Forestland, LLC  
Glenn M. Davis  
Andrew W Serell

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Maud Anderson, et al.

v.

Motorsports Holdings, LLC

04-E-651

ORDER

Petitioners Maud Anderson, et al. ("Petitioners") have filed the instant action against Respondent Motorsports Holdings, LLC ("Respondent") for declaratory relief. Specifically, Petitioners request an order requiring the Respondent to comply with two ordinances of the Town of Tamworth prior to constructing a private raceway on a 250+ acre parcel in that town. The parties have filed cross-motions for summary judgment with the Court that will be addressed together in this order. After reviewing the arguments of counsel, and the applicable law, summary judgment is granted in part for the Petitioners, and in part for the Respondent, as outlined herein.

The following facts are relevant. Respondent is the owner of approximately 250 acres in Tamworth. Its property lies just south of Route 25, near that highway's junction with Route 16, at the base of the north-facing slope of Mount Whittier. The Bear Camp River runs parallel to Route 25, approximately 300 to 500 feet from the northern edge of the road, opposite the property in question. Motorsports Holdings proposes to build a "private driving

instructional facility and motorsports country club” on the parcel – essentially, a private racetrack. The project plans call for a 3.1-mile European-style road course, with associated support structures for the repair, servicing, and garaging of vehicles. Additionally, the Respondent’s plans call for a hotel and restaurant, with an access road and parking facilities. N.H. Dept. of Env’tl. Servs. (“DES”) Wetlands Permit, Ex. A, Pet’rs Obj. to Resp’t Mot. for Summ. J.

According to DES, construction of Respondent’s project would involve dredging and filling 14,759 square feet of palustrine forested/scrub shrub/emergent wetlands and impact 16,952 square feet (1,510 linear feet) of intermittent streams. Id. Construction will impact seventeen different wetland areas; thirteen impact areas would result from construction of the raceway and support structures, and four would result from installation of the access road. Aff. of Erickson Van De Poll, Ph.D., Ex. E, Pet’rs Obj. The Petitioners also present evidence that harm to wetlands and wetland buffer areas at the project site could cause damage to surrounding properties through erosion and sedimentation, flooding, and contamination of groundwater and drinking water supplies. Id. at ¶ 10. The site is located directly over primary and secondary recharge areas for the Ossipee Aquifer, a source of drinking water for Tamworth and 27 other towns in New Hampshire and Maine. Cert. R. at 1122, 1123, Waste Mgmt. Council Hr’g, Ex. D, Pet’rs Obj.

The Respondent acknowledges that its facility will generate hazardous wastes, and be subject to both federal oil pollution control regulations and state hazardous waste management regulations. It engaged ESS Group, Inc. of

Wellesley, Massachusetts, to draft a "Spill Prevention, Control, and Countermeasure Plan" for the raceway that outlined procedures for the proposed use of the following hazardous substances: motor oil, hydraulic oil, waste oil, greases, and other lubricants; heating oil or propane; and high performance motor fuel. Attach. C to Aff. of Muriel Robinette, Ex. E, Pet'rs Mot. for Summ. J. These hazardous wastes will be stored, collected, processed, treated, recovered, and/or disposed of at the project site. Id. The ESS plan lists the Bear Camp River as the "sensitive receptor" of any waste runoff from the Respondent's track; the river is directly down-slope from the raceway. Id.

In March of 1981, the Town of Tamworth enacted a hazardous waste ordinance that states, in pertinent part:

Hazardous Wastes shall not be dumped, buried, stored, collected, received, processed, treated, recovered, separated or disposed of in any way on any land in, or in any building, in the Town of Tamworth, except by prior permission of the voters of the Town obtained at an annual or special Town Meeting.

Ex. D, Pet'rs Mot. for Summ. J.

In March of 1992, the Town of Tamworth enacted a Wetlands Conservation Ordinance that states, in pertinent part:

**A. Purpose and Intent**

It is intended that this Ordinance shall:

1. Prevent the development of structures and land uses on naturally occurring wetlands which will contribute to pollution of surface and ground water by sewage, sediment, or noxious substances.
2. Prevent the destruction of, or significant changes to natural wetlands which provide flood protection.
- ...
4. Protect wildlife habitats and maintain ecological balances.
5. Protect water supplies and existing aquifers (water-bearing stratum) and aquifer recharge areas.
- ...

**D. Permitted Uses Within the Wetlands Conservation District**

1. The construction or maintenance of single-family dwellings ...
2. The following uses are permitted which will not require the erection of any structures of [sic] buildings ...

(d) Parks and Recreation Uses, consistent with the purpose and intent of this ordinance.

...

3. No person shall conduct or maintain another activity without first obtaining a Special Use Permit as described in Section E.

**E. Special Use Permits**

1. Special Use Permits may be issued by the [Planning] Board, after proper public notice and public hearing, for undertaking the following uses ...

...

(c) The undertaking of a use not otherwise permitted in the Wetlands Conservation District, if it can be shown that such proposed use is not in conflict with any and all of the purposes and intentions listed in Section A of this ordinance.

...

5. The Board shall consider all relevant facts and circumstances in making its decision on an application for a Special Use Permit including but not limited to the following:

(a) The environmental impact of the proposed action, including the effects on the wetland's capacity to support fish and wildlife, prevent flooding, supply and protect surface and ground waters, control sediment, control pollution, support recreational activities, and promote public health and safety.

(b) The character and degree of injury to, or interferences with ... the reasonable use of property, including abutting or downstream property ... This includes ... the destruction of the economic, aesthetic, recreational, and other public and private uses and values of wetlands to the community.

**I. Conflict With Other Regulations**

Where any provision of this ordinance is in conflict with State or Federal law or regulation, or other Town ordinance, the more stringent provision shall apply.

Ex. C, Pet'r's Mot. for Summ. J. (emphasis original).

The Respondent's project has been given the following State and Federal approvals: (1) a dredge and fill wetlands permit from New Hampshire DES (RSA 482-A:3 (Supp. 2005)); (2) a site specific alteration of terrain permit from New Hampshire DES (RSA 485-A:17 (Supp. 2005)); (3) a wetlands permit from the

Army Corps of Engineers pursuant to § 404 of the Clean Water Act (33 U.S.C. § 1251, et seq.); (4) a water quality certificate under § 401 of the Clean Water Act, issued on behalf of the U.S. Environmental Protection Agency by DES (33 U.S.C. § 1341). DES required the Respondent to provide a conservation easement on 107 acres of land in Sandwich to mitigate negative environmental impacts of the project; because the impact of this project was considered regional by state officials, a mitigation site in a town other than Tamworth proved acceptable. Ex. A, Pet'rs Obj.; Tamworth Conservation Comm'n Mins. at 10, Attach. E to Aff. of John Mersfelder, Ex. H, Pet'rs Obj.

The Petitioners seek a declaratory judgment from the Court pursuant to RSA 491:22 (1997) regarding the application of the Hazardous Waste and Wetlands Conservation Ordinances to the Respondent's project. A third issue raised in the original petition regarding subdivision approval appears to have become moot since the time of filing. Resp't Mot. for Summ. J. at ¶ 38; Pet'rs Mot. for Summ. J. at fn. 1. The facts outlined above being undisputed, the issues raised by the parties in moving for summary judgment include the following questions of law: (1) whether the Petitioners have standing to bring this declaratory action; (2) whether the Wetlands Conservation Ordinance (hereinafter "WCO") yields by its own terms and past usage to state and federal wetlands regulations; and (3) whether the Hazardous Waste Ordinance has been preempted by State law. Resolution of these legal issues shall determine whether Motorsports Holdings must apply for a Special Use Permit from the Tamworth Planning Board under the WCO, and whether the company must seek

voter approval of its project under the Hazardous Waste Ordinance.

### I. Standing

The Respondent asserts that only one Petitioner, namely Virginia Thomas, has standing to bring the instant declaratory action. Ms. Thomas was the sole direct abutter of Motorsports Holdings' Tamworth property among the Petitioners at the time of filing.<sup>1</sup> The Respondent argues that the Petitioners have not made a particularized showing that each of their members have "characteristics or interests above that of a regular citizen or taxpayer," which would give them standing here. Resp't Mot. for Summ. J. at ¶ 32, citing Nautilus of Exeter v. Town of Exeter and Exeter Hospital, 139 N.H. 450 (1995).

In a declaratory action, "any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties." RSA 491:22. "If the controversy be one that would be justiciable under the law, provided either party had violated the right claimed by the other, it is justiciable under the [declaratory judgment] act as soon as the essential facts arise." Faulkner v. Keene, 85 N.H. 147, 155 (1931). The Petitioners claim a right to force compliance with town zoning laws; conversely, the Respondent has taken the position that compliance with local ordinances is unnecessary as a matter of law in this instance. The Petitioners will have standing in the instant declaratory action if they would have standing to challenge the Respondent's alleged failure to comply with town zoning ordinances had construction already begun.

In New Hampshire, only "persons aggrieved" have standing to challenge

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<sup>1</sup> Since this time, other direct abutters have joined the Petitioners' suit.

perceived violations of zoning ordinances. Nautilus of Exeter, 139 N.H. at 452. “[F]actors such as the proximity of the plaintiff’s property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff’s participation in the administrative hearings” are considered in making a standing determination. Id. “Standing exists when these factors lead the trier of fact to conclude that the plaintiff has sufficient interest in the outcome of the proposed zoning decision,” but it will not be extended to all persons who might feel hurt by a decision on a site plan pertaining to land “quite remote” from their own. Id.

The Court is satisfied that several of the Petitioners fit into the general category of “persons aggrieved,” and consequently have standing to bring the instant declaratory action. The Petitioners have presented evidence that construction of the racetrack would result in significant impact to wetlands beyond the border of the proposed site, potentially contaminating drinking water supplies in and around Tamworth, contaminating the Bear Camp River, and disrupting wildlife habitats; said impacts would impair the use, enjoyment, and value of many of the Petitioners’ properties. The Petitioners also presented evidence of significant impacts to a large number of their properties (19 parcels in all) from noise emanating from the racetrack at levels greater than 55 dB. Attach. B to Aff. of Christopher Menge, Ex. F, Pet’rs Obj. A number of Petitioners live in close proximity to the proposed site, including one direct abutter to the east (Ms. Thomas), and an abutter across Route 25 (St. Andrews-in-the-Valley Episcopal Church); numerous others have property adjacent to the Bear Camp

River (Petitioners Liakos, Wroblewski, Littlefield, Moore, Johnson, Thompson, among others). All Petitioners are also Tamworth taxpayers, and have been active in state and federal administrative proceedings regarding the Respondent's project through involvement in the Focus: Tamworth organization, which is spearheading this lawsuit. Finally, it goes without saying that this project would effectuate a significant change from the land's present use.

Petitioners are the non-moving party on this issue for summary judgment purposes. Viewing the evidence presented in a light most favorable to them, see *Panciocco v. Lawyer's Title Ins. Corp.*, 147 N.H. 610, 613 (2002), a satisfactory showing has been made to establish their sufficient collective interest in the outcome of a future zoning decision on this project to claim standing. Although the Petitioners did not enumerate the specific criteria making each of their members a person potentially aggrieved, such a showing would be futile, as certain of their members can claim all of the impacts listed above. The Respondent's Motion for Summary Judgment is accordingly **DENIED** insofar as it rests on a challenge to this finding.

## II. Tamworth Wetlands Conservation Ordinance

The Respondent next argues that it need not apply for a Special Use Permit ("SUP") under the Tamworth WCO because the ordinance, by its own terms, yields to allegedly more stringent state and federal wetlands regulations. The Respondent relies on Section I of the WCO, which states that "Where any provision of [the WCO] is in conflict with State or Federal law or regulation, or other Town ordinance, the more stringent provision shall apply." The

Respondent does *not* argue (contrary to the Petitioners' recasting of this issue) that state law has preempted local wetlands regulation, making the WCO a legal nullity. Instead, the Respondent asks the Court to compare the WCO with state and federal permitting requirements, and find the WCO less stringent and therefore inapplicable. In essence, it seeks a declaration that should the Tamworth Planning Board deny them a SUP in the future, the Board would be making an error of law. Being forced to appear before a Board that could potentially interpret the WCO as being more stringently protective of wetlands, the Respondent argues, would therefore be "unfairly disruptive and chaotic" to its project. Resp't Mot. for Summ. J. at ¶ 49.

In New Hampshire, a municipality is not estopped from creating more restrictive rules on wetlands issues than those set out by the state Wetlands Board. Cherry v. Town of Hampton Falls, 150 N.H. 720, 725 (2004); accord P. Loughlin, New Hampshire Practice: Land Use Planning and Zoning, § 37.05, n.40.1 (2000 & Supp. 2004). The Town of Tamworth, which has no general zoning ordinance, enacted the WCO as an "Innovative Land Use Control" pursuant to RSA 674:21 (1996 & Supp. 2005). The WCO is a narrative ordinance that can be read to unilaterally block all development that will negatively affect a wetland or aquifer in the Town of Tamworth unless a SUP is issued by the Planning Board. See TAMWORTH WETLANDS CONSERVATION ORDINANCE §§ A, D.

It is the simplicity of the WCO – its plain language of intent to "[p]revent the development of structures ... on naturally occurring wetlands" and "[p]rotect

water supplies and existing aquifers" – that persuades the Court that the ordinance could prove, once applied to this project, to be far more stringent than state or federal wetlands law. The Respondent places great emphasis on facts like the volume of pages the DES produced making findings on its project, Resp'd't Mot. for Summ. J. at ¶ 41, and the complexity of the Army Corps of Engineers' inquiry into potential environmental impacts, id. at ¶ 44. However comprehensive the investigation of those entities may have been, state and federal authorities ultimately decided to allow the Respondent's project to go forward. Since Sections A, D(3), and E(1)(c) of the WCO can be read to prohibit the racetrack's construction altogether, regardless of state and federal approval, the local ordinance must therefore set a different, and more stringent, standard for wetlands protection than its state or federal counterparts.

Accordingly, the Court finds that the WCO does not yield by its own terms to state and federal law. The Respondent's Motion for Summary Judgment is **DENIED** insofar as it requests a finding that, as a matter of law, the WCO is legally inapplicable to the racetrack project.

The Respondent next points out that in the fifteen years since the enactment of the WCO, the Tamworth Planning Board has not once required issuance of a SUP, even where wetlands were clearly impacted and state wetlands permits had been applied for. This, the Respondent argues, is indicative of an "administrative gloss" that the Town of Tamworth has given the WCO, and undermines the ordinance's purported authority. "An administrative gloss is placed on an ambiguous clause of a zoning ordinance when those

responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference.” Nash Family Inv. Props. v. Town of Hudson, 139 N.H. 595, 602 (1995). “If an administrative gloss is indeed found to have been placed on a clause, the municipality may not change such a *de facto* policy, in the absence of legislative action, because to do so would presumably violate legislative intent.” Id. (citing Hansel v. City of Keene, 138 N.H. 99, 104 (1993)).

The Respondent’s argument fails for two reasons. One, it has not alleged any ambiguity in the WCO. See id. Two, the Respondent is not similarly situated to other project applicants having sought approval from the Town since the enactment of the WCO. On the record before the Court, its project seems to exceed all other developments in Tamworth since 1992 in both size and scope. The Respondents cite the Tamworth Planning Board’s approval of a pedestrian footbridge through a wetlands waterfowl preserve without a SUP as evidence that it is being now treated differently under the WCO than prior applicants. This is insufficient to persuade the Court to view the Respondent as similarly situated to prior applicants. Nor has the Respondent presented any evidence that prior applicants were situated on a major aquifer, surrounded by tens of thousands of acres of forested conservation lands, seeking to build on over 250 acres. Accordingly, the Respondent’s Motion for Summary Judgment is **DENIED** insofar as it requests a finding that the WCO would be illegally applied to its project because of an administrative gloss the law has been given by town authorities.

Finally, the Court finds that as a matter of law, the Respondent’s project

falls within the purview of the Tamworth WCO. Undisputed facts show that the proposed racecourse is a development requiring the erection of structures that will impact wetlands in the Town of Tamworth. The Petitioners' Motion for Summary Judgment is **GRANTED** insofar as it seeks a determination on the applicability of the WCO to the Respondent's project. Furthermore, the plain terms of the WCO indicate that the Respondent must be granted a SUP in order to proceed with construction. The Respondent is consequently ordered to apply to and obtain from the Tamworth Planning Board a Special Use Permit if it wishes to proceed with its motorsports park. Said order does not impact the rights of either party to appeal a decision of the Planning Board on this project for either errors of law and/or unreasonableness in reaching its decision, whatever that decision may be, pursuant to RSA 677:15 (1996 & Supp. 2005).

### III. Hazardous Waste Ordinance

The Respondent next argues that the Petitioner's invocation of the Tamworth Hazardous Waste Ordinance is erroneous, as state law has completely preempted the field of hazardous waste regulation. In Stablex Corp. v. Town of Hooksett, 122 N.H. 1091, 1104 (1982), the New Hampshire Supreme Court made just such a determination: "The State program embodied in RSA chapters 147-A, 147-B, 147-C, and 147-D (Supp. 1981) represents a comprehensive plan [for hazardous waste regulation] intended to be implemented on a statewide basis. As such, *it completely preempts the field of hazardous waste legislation in this state.*" Id. (emphasis added). RSA 147-A:2(VIII) (1996) presently defines "hazardous waste management," the field that

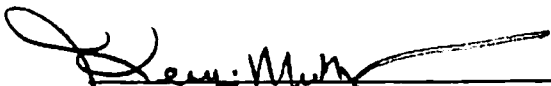
Chapter 147-A regulates, as the “systematic control of the generation, collection, sorting, storage, processing, treatment, recovery, and disposal of hazardous wastes.”

Stablex’ own language, especially when that case is viewed in conjunction with RSA 147-A:2(VIII), contradicts the Petitioners’ assertion that the State has preempted only the citing of hazardous waste *disposal* facilities. Presently, a town may neither invoke any regulation “with exclusionary effect” in the field of hazardous waste management, Applied Chemical Tech., Inc. v. Town of Merrimack, 126 N.H. 45, 46 (1985), nor can a town regulate a field that the State has preempted. Stablex, 122 N.H. at 1104 (citing J.E.D. Assoc., Inc. v. Town of Sandown, 121 N.H. 317, 319 (1981)). The Tamworth Hazardous Waste Ordinance is therefore a legal nullity. The Respondent’s Motion for Summary Judgment is **GRANTED** as to the inability of the Town to regulate hazardous wastes; its project may proceed without approval by Tamworth voters as the Hazardous Waste Ordinance would require.

Finally, the Court orders the parties to comply with the page limits outlined in Superior Court Rules 58-A and 59 for all further filings in this matter.

So **ORDERED**.

December 5, 2005  
DATE

  
KENNETH R. McHUGH  
Presiding Justice