



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

May 12, 2004

DAWN R. GALLAGHER
COMMISSIONER

David Thombs, Chairman
Board of Appeals
Town of Phippsburg
1042 Main Road
Phippsburg, ME 04562

Re: Chester property/ Silver Lake

Dear Mr. Thombs:

The purpose of this letter is to summarize the Department's interpretation of the normal high water line of Silver Lake at the above-referenced parcel, according to the Town of Phippsburg Shoreland Zoning Ordinance (Ordinance).

First, I would like to explain to the Board of Appeals (Board) the reason for the Department's involvement in this matter. The Department is currently reviewing a Tier 1 wetland alteration application under the Natural Resources Protection Act (NRPA). Although the NRPA is a distinctly separate law from the Mandatory Shoreland Zoning Act, which is administered by the Town of Phippsburg (Town), there are some similarities between the two laws. Department staff reviewing the application inquired whether the 250-foot Resource Protection District depicted on an application site plan, hence representing the setback from the normal high water line (NHWL), was accurate. Evidently a concern of such accuracy was raised to the licensing staff due to freshwater wetlands extending from Silver Lake into the Chester parcel. After an extensive discussion it appeared evident that a site visit by a staff person in the Shoreland Zoning Unit was warranted.

I visited the site on May 4, 2004, with Doug Burdick, DEP Licensing Project Manager, Will Cook, DEP Field Services & Enforcement, Lee Rainey, Town CEO, and various other interested parties. I subsequently returned to the site with Rich Baker, State Shoreland Zoning Coordinator, on May 7, 2004. Based on these visits to the site and lengthy review and discussion pertaining to the provisions in the Town's Ordinance, it appears that the Town and most recently the Board of Appeals may have erred in their determination of the NHWL of Silver Lake. In order for you to follow the reasoning behind the Department's opinion I provide the following text from the Town's Ordinance:

1. Section 3 of the Ordinance states "[t]his Ordinance applies to all land areas within 250 feet, horizontal distance, of the *normal high-water line* of any mapped pond..." (emphasis added).
2. Normal High-Water Line is defined in Section 17 as follows: "that line which is apparent... .In the case of wetlands adjacent to rivers and mapped ponds, the normal high-water line is the upland edge of the wetland, and not the edge of the open water."
3. "Wetlands associated with great ponds and rivers- wetlands contiguous with or adjacent to a mapped pond or river, and which during normal high water, are connected by surface water to the mapped

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pond or river. Also included are wetlands which are separated from the mapped pond or river by a berm, causeway, or similar feature less than 100 feet in width, and which have a surface elevation at or below the normal high water line of the mapped pond or river. Wetlands associated with mapped ponds or rivers are considered to be part of that mapped pond or river."

Although the wetlands delineated by Sweet Associates, and as shown on the site plan being considered by DEP licensing staff, are not shown as necessarily being directly connected to Silver Lake, the site visit revealed that clearly the wetlands are directly connected to the lake, including the berm. Simply, the delineation was not completed to the lake, which is not uncommon in this sort of instance. The fact that the wetland is directly connected to the lake is not in dispute.

The language in Section 3 and the definition of Normal High-Water Line, above, is the foundation for our interpretation and opinion. The wetland is clearly adjacent to Silver Lake and therefore the NHWL should be considered as the upland edge of the wetland and not the edge of the open water. The fact that there allegedly has been mischievous activity that might have caused an effective lowering of the berm is irrelevant, as according to the definition there merely needs to be a wetland adjacent to the lake and not necessarily standing water.

While the Department, after conferring with the Department of Attorney General, feels the third bulleted paragraph above should also apply, there has been some discussion as to whether it is germane to this matter. However, the Department's opinion is that it is not essential to consider this language in order to make a reasonable determination that technically the NHWL should begin at the upland edge of the adjacent wetland.

While the Department views the Town's normal high water line determination of Silver Lake to be flawed, the Department does not intend to ask the Board to reconsider its recent decision in this matter.

If you, other members of the Board or any other Town official have questions or concerns, please feel free to contact me at 822-6328.

Sincerely,



Mike Morse
Assistant Shoreland Zoning Coordinator
Bureau of Land and Water Quality

cc: Board of Appeals members
Lee Rainey, Code Enforcement Officer
Bill Ferdinand, Eaton Peabody
Chris Neagle, Verrill & Dana, LLP
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