



State of New Hampshire

Department of Safety

James H. Hayes Safety Building, 33 Hazen Drive, Concord, NH 03305

JOHN J. BARTHELMES
COMMISSIONER OF SAFETY

DECISION & ORDER

In the Matter of:

Springfield Cove on Lake Winnepesaukee Wolfeboro, New Hampshire

Attorney Christopher Casco, Administrator, Bureau of Hearings, conducted a public hearing as designee for Commissioner John J. Barthelmes, Commissioner of Safety.

HISTORY:

The Department of Safety received a petition requesting the establishment of a No Rafting Zone within an area known as Springfield Cove, on Lake Winnepesaukee, Wolfeboro, New Hampshire. The petition was submitted by Mr. John Rich in accordance with Saf-C 409.01 and was received on September 25, 2015. The petition presented the reasons by which the request was put forward stating that rafting in this small cove area occurs with oftentimes up to 7 boats side by side coming into this area causing pollution, noise, and disruptive and lewd behavior. Some individuals have been observed sitting on the raft of a shorefront property owner, while others have been observed looking into the homes with binoculars and cameras spying on residents, who at times are young women.

Moreover, operators of the rafting boats often dump trash into the water, and since the boats often lack sanitary restroom facilities, individuals urinate in the water. The petitioner requests the ban in order to protect the environment and property owners from improper

behavior of people from rafting boats and is an effort to encourage rafters to go to larger areas for rafting. The Petitioner suggests that this area is of insufficient size for rafting and that there are more appropriate areas for that activity on the lake.

In contrast, several individuals presented public comment in opposition to the petition. The opponents have drawn on approximately 20 years of experience going by boat to this area and have never observed any of the complained-of behavior. Their position is that this is an attempt by a relatively new property owner to keep people away from the property and deprive the public of the use of this area. They are doubtful of the environmental and milfoil concern and opine that rafting boats are less likely to cause a problem because a raft of boats utilizes fewer anchors than individual boats.

Pursuant to RSA 270:12, RSA 270:43 and the New Hampshire Code of Administrative Rules Saf-C 407 and Saf-C 409, a public hearing was conducted on Monday, June 13, 2016 at 10:00 a.m. at the Wolfeboro Library, 259 S. Main Street, Wolfeboro, New Hampshire.

OPENING REMARKS:

Everyone present was informed:

- ➡ The public hearing was recorded;
- ➡ The recording would be preserved for seventy-five (75) days and an explanation of the procedure by which to receive a copy of the recording;
- ➡ The opportunity to sign the appropriate "sign-up sheet" to present comment on the petition;
- ➡ They could review the legal notice from the newspaper, along with the original petition and any other documents;
- ➡ How and where to submit written comment that must be received within seven (7) days from the hearing date by the Department of Safety;
- ➡ That proper abutter notification had been made by certified mail; and
- ➡ The petition and hearing notice were posted on the Department of Safety web site at least 2 weeks before the public hearing on or about May 9, 2016.

STATISTICS:

Thirteen (13) people recorded their support of the petition, with nine speaking in favor. No one appeared against the petition. Four (4) people signed-up but chose not to speak. Written comment was submitted prior to/and or after the hearing from 6 people, all against the petition.

The hearing was closed to public comment at the conclusion of the business day on Tuesday, June 21, 2016.

EXHIBITS:

Two photographs of trash.

SYNOPSIS OF LETTERS RECEIVED:

Six statements strongly opposed to the petition were submitted. They summarized that a no rafting ban is unnecessary and unwarranted, and that the proof introduced is insufficient to justify a prohibition on rafting. The opponents feel that misconduct should be reported to the Wolfeboro Police or NH Marine Patrol and dealt with on an individual basis rather than by enacting a ban on rafting. They also suggest that the absence of reports to law enforcement in the hearing record supports denial of the petition due to insufficient factual basis.

Richard Bono wrote that the petition fails to provide sufficient evidence of rafting causing an environmental or safety concern. His position is that the petition contains only 2 sentences related to environmental and safety concerns, and therefore, is insufficient to justify a rafting ban. He states that there is no data or evidence from the New Hampshire Department of Environmental Services to support a milfoil problem in the area. In addition, rafting boats use fewer anchors because they are tied together, and therefore, there is no evidence that dropping and pulling up anchors causes milfoil.

As to littering, Mr. Bono suggests that the creation of a no rafting zone will not prohibit littering, and that littering by boaters should be reported to the police and punished accordingly. He also states that there is no evidence of a rafting problem in the area, and that the Petitioners have only supplied opinion in support of the petition, which should not be considered. Moreover, issues related to filming of property owners was never reported to police to address, and is unrelated to rafting. Finally, he disputed that the statutory factors were met, and argued that there is insufficient evidence to establish the no rafting zone based on such factors.

Next, Robert and Jillian Terry submitted a statement that mirrors that submitted by Richard Bono as above-mentioned, and therefore, need not be further described. They object for the same reasons.

Charron Sundman has been renting property in the area for 14 years and has spent a significant amount of time in Springfield Cove. She is part of a group of people that has been using the cove for 20 years, while she has been using it with her husband for over 10 years. The cove is ideal for anchoring single boats and/or rafting because the cove protects boats from high waves and boat traffic that is more prevalent in other parts of the lake.

She disputes the behavior outlined by the Petitioner and has never witnessed anyone throwing trash, using binoculars to spy, climbing onto property, or engaging in sex on their boats. She suggested that if the claims of misconduct had occurred, they would have been reported to the Marine Patrol at the time, and therefore, been verifiable. The absence of such reports suggests that the evidence is insufficient to support the claims. She also theorizes that the petition is an attempt to gain control of the water in front of homes, rather than to address misbehavior, something that she has not witnessed. She is in favor of penalizing misconduct when it occurs rather than establishing a ban of all rafting.

Rick Sundman disputes the facts cited in the petition and has never witnessed littering, lewd acts, or people yelling obscenities. He opines that individual misconduct should be reported to the Wolfeboro Police and addressed by the police. He has frequented the area and never observed improper conduct. His view is that the petition is an attempt by a property owner to keep boaters away from his property. He also disputes the environmental concern of milfoil and states that rafting is less harmful than many single boats dropping anchor.

Finally, Daniel Traynor submitted a statement that mirrors that submitted by Richard Bono, and Robert and Jillian Terry as above-mentioned, and therefore, need not be reiterated. He objects for the same reasons.

OFFICIAL NOTICE:

Official notice is taken of the Petition submitted by Mr. John Rich as it references the requested prohibition of rafting along with the forty two (42) signers.

SYNOPSIS OF TESTIMONY:

John Rich, Petitioner, spoke in support of the petition. He stated that while single boats don't cause problems in Springfield Cove, because this area is a narrow bay, only 150 feet wide, boats rafting create a mob scene with loud music, and lewd behavior including sex acts. He described incidents that occurred last year. As many as 7 boats are tied together. He described an incident reported to the Marine Patrol

where boats were blocking his boat house. Marine patrol responded and told the boaters to move but they then returned after the Marine Patrol left. The boaters then played a song entitled "F-You" very loudly and dropped their pants in an effort to "moon," him.

Young children have been harassed by rafting boaters. There was an incident last year where a kayaker was looking at a scantily clad woman on a boat which led to a confrontation during which a man threw a can of beer at the kayaker. They called the Marine Patrol several times and they are supportive of what the Petitioners are trying to do. Every Monday morning they have to clean trash from the water.

Moreover, property owners have found trash in the water including diapers, cans, and bottles. One resident collected 3 trash bags of trash from the water. He hired a professional dive company to clean up the area, and the trash removed was depicted in the photographs submitted as exhibits.

Moreover, several others spoke about the negative impact of the rafting, supporting many of the reasons for the ban discussed by the Petitioner. Some residents fear leaving their homes during times of rafting because of people being in the water close to the boating lane for fear of striking swimmers. As a result, they are unable to leave their property in their boats due to the boat traffic congestion. There is loud noise from jet skis and music and due to the small space, the noise carries to shorefront property and disrupts property owners. Calls have been placed to 911. For example, when rafting boats blocked a boat house, a call was placed to the police.

DISCUSSION:

In gathering findings of fact, the following legal authority is given consideration and is provided for reference.

RSA 270:12. Operating Restrictions.

- I. The commissioner of safety shall, after receiving a petition signed by 25 or more residents or property owners of each affected town or towns in which a lake, pond or river is located and after notice and hearing, at which it appears that the public interest requires, adopt rules governing the maximum horsepower of boat engines and outboard motors or prescribe maximum speed limits for the operation of such boats or outboard motors applicable to or upon all or any portion of the public waters of this state. The commissioner of safety shall, in like manner and after notice and hearing, prohibit the use of motorboats and outboard motors on bodies of public water having an area of 35 acres or less; provided, that said prohibition shall not be construed as affecting the bodies of water covered by RSA 270:75 through 270:132. Hearings under this section shall be held in the vicinity of the body of water

under consideration during the months of June, July, August, and September following the date of the petition.

- II. Notwithstanding the provisions of RSA 270:12, I, any hearings regarding the closing or restricting of any body of water to seaplanes shall be addressed to and heard by the commissioner of safety or his designee. Prior to issuing a decision, the commissioner shall consult with the director of aeronautics, rail, and transit, department of transportation.
- III. Persons petitioning the commissioner requesting a change of use or restriction of the use of any public waters shall notify, by certified mail, all abutters with deeded waterfront property or deeded water access rights of the proposed change or restriction and the department shall post the petition on its official website at least 2 weeks prior to a public hearing scheduled by the department.
- IV. In this section, "abutter" means any person who owns property immediately adjacent and contiguous to the area on which the change of use or restriction of use will take place. If the change of use or restriction of use is located in an area which by its configuration would cause the change or restriction to affect noncontiguous properties, owners of those properties are considered as abutters. The term does not include the owner of a parcel of land located more than 1/4 mile from the limits of the proposed change or restriction.

Saf-C 409.04 Criteria for Review.

(a) The commissioner shall, after the hearing, adopt rules of the type authorized by RSA 270:12 if it appears that, consistent with RSA 270:1, II, the rule shall provide for the safe and mutual enjoyment of a variety of uses, taking into consideration the factors in (b) below.

(b) In determining whether to adopt such rules the commissioner shall consider the following:

- (1) The size of the body of water or portion thereof for which action is being considered;
- (2) The effect that adopting or not adopting the rule(s) would have upon:
 - a. Public safety;
 - b. The maintenance of residential, recreational and scenic values;
 - c. The variety of uses of the body of water or portion thereof;
 - d. The environment and water quality; and

e. Threatened and endangered species;

(3) The number of people affected, either directly or indirectly, by adopting or not adopting the rule(s); and

(4) The availability and practicality of enforcement of the rule(s).

The Commissioner of the Department of Safety, pursuant to RSA 541-A, and New Hampshire Code of Administrative Rules Saf-C 407 and 409 (*et seq.*) defines and regulates the practice of rafting of boats. RSA 270:43 Rules; Enforcement further defines designation of prohibited locations or times during which the size of rafts is limited and a minimum distance is required between the boats and rafts in accordance with the provisions of RSA 270:44.

The Petitioner provided concern for public safety, the maintenance of residential, recreational and scenic values due to noise and improper behavior of rafting boaters, the environment and water quality. Testimony describing noise levels, reduced sanitation practices, and observed disorderly conduct practiced by those in the cove rafting showed a concern for the continued use of the cove for rafting.

Due to the narrow channel in this area, when several boats are attached they increase congestion. In addition, rafting boats have blocked the Petitioner's boat house, and after being asked to move by Marine Patrol, returned and engaged in loud unruly conduct playing a song entitled "F-You" and mooning the petitioner. This type of incident, however, is a law enforcement concern which was appropriately addressed by Marine Patrol at the time, and a rafting ban would not necessarily prevent it from happening.

Also, the Petitioner introduced evidence of trash removed from the water during a 2 week period by a professional dive company and depicted in Exhibits 1 and 2. The Petitioner, however, introduced only anecdotal evidence in support of the petition. As the opponents indicated, while there was testimony that some individual incidents of misbehavior were reported to the Marine Patrol, and that the Petitioner indicated that Marine Patrol is supportive of their efforts in filing, there was no documentation introduced as to the number of incidents as reflected by calls to Marine Patrol.

Moreover, the Marine Patrol did not submit any formal position, as they have in other cases, which reflects their opinion. For example, in the matter of Johnson Cove on Lake Winnepesaukee, in Wolfeboro, New

Hampshire in 2008, then Director of Safety Services David Barrett submitted a letter which expressed concerns about the petition. Director Barrett indicated that while the rights of shorefront property owners should be respected and considered, granting a no rafting petition acts to take public waters from the public, and must be carefully scrutinized. Moreover, granting a petition only causes rafting to be displaced to another part of Lake Winnepesaukee. In that hearing, there was evidence of 50 to 70 boats being in that small cove at a time. Based on the evidence presented, Commissioner Barthelmes denied the petition.

Likewise, in 2013, in the matter of Camp Starfish Cove on Lake Monomonac in Rindge, Sgt. Robertson of the Marine Patrol conducted a site investigation of the area and submitted a report for consideration at the hearing. The report documented complaints of disorderly conduct, excessive drinking, urinating, and defecating and a general disregard for others that went back to 2010. Also, there was a camp for troubled children negatively impacted by the behaviors. Sgt. Robertson concluded that rafting frustrated the camp's use of its property and that a rafting prohibition was a necessary enforcement tool. Efforts to patrol the area and address the behaviors were first attempted but proved to be unsuccessful. Commissioner Barthelmes granted the petition.

The number of people in attendance at the hearing and the numbers of persons recorded for or against the proposed petition are given weight in determining findings, however, greater significance is given to the specific laws that govern the practice of rafting and the variety of uses by the public of Lake Winnepesaukee. The Commissioner of Safety balances the petition and governing law with the variety of uses of the lake. Within RSA 270:1 the language for deliberation speaks to competing uses for the enjoyment of the waters; regulating that use for the benefit of all users, keeping in mind what may diminish the value to be derived from them.

In addition, the public waters of New Hampshire shall be maintained and regulated in such way as to provide for the safe and mutual enjoyment of a variety of uses, both from the shore and from water-borne conveyances. The law places the responsibility on the Commissioner of Safety to consider: the variety of special uses appropriate to our lakes, public safety, protection of environment and water quality, and the continued nurture of New Hampshire's threatened and endangered species. The intent of the legislature to recognize in RSA 270:42-46 that the cumulative effect of boats congregated as "rafts" differs from that of the same number of boats

separated, and therefore, requires specific appropriate regulation in certain instances where a problem has been established.

The exhibits and public comment at the hearing each provided the fact-finder with information in reference to the size and configuration of the area being considered. The petition presented a map of the area and described it as a small area, although no exact measurements were introduced.

All of the persons present were in favor of the petition. All of the public comment submitted was against the petition. This testimony and public comment must be weighed considering the statutory factors in determining whether there is sufficient evidence, based on a preponderance of the evidence, to grant the petition.

Based upon the testimony and totality of public comment considered, balanced with the intent of the legislature established within the reviewed laws, the Commissioner needs to measure the variety of uses that Lake Winnepesaukee in the area identified as Springfield Cove provides. That measurement includes the noise level, unsanitary observations, and, sometimes boisterous, unruly behavior. In addition, the Petitioner provided proof of trash removed from the water during a 2 week period, and testified that after every weekend during the summer, trash thrown into the water by rafting boaters needs to be collected and at times fills several trash bags.

This must be balanced against the statements of the opponents which presented the opinions of 6 people who indicated that they have never witnessed the negative behavior. The petition's concerns must also be balanced against the interests and right to this area for rafting of the general public. The opposition group represents information from a group of people who have been rafting in the area for 20 years. Two of the opponents have been going to the area for approximately 10 years.

Based on all of the evidence presented, more specific proof of a widespread, longstanding problem is required in order to justify depriving the public of rafting in the area. Moreover, instances of lewd behavior, trespass on property, and littering are police issues that must first be reported and addressed by the police on a case by case basis rather than by a rafting ban. If such law enforcement efforts are unsuccessful, at that point, a rafting prohibition may be considered at that time.

The Petitioners failed to provide sufficient evidence of persuasive reasons under the law that meet a preponderance standard to allow the

Department of Safety to issue a permanent rafting ban, as such is defined in RSA 270:44, taking into consideration the exceptions to rafting provided in RSA 270:45.

After carefully considering all of the evidence, exhibits, testimony and all public comment presented, Findings of Fact are issued.

FINDINGS OF FACT:

1. That pursuant to RSA 270:12, twenty-five (25) or more residents or property owners petitioned John J. Barthelmes, Commissioner of the Department of Safety to conduct a public hearing to regulate motor boat usage by a ban on rafting within an area identified as Springfield Cove on Lake Winnepesaukee, Wolfeboro, New Hampshire.
2. The specific area requested was identified as the area of the property map submitted with the petition with coordinates 43.56 N 7.19 W Cove and waterfront area in the vicinity of Springfield Point Road.
3. That official notice for the hearing was published in a newspaper of statewide circulation, The Union Leader, Manchester, NH on May 9, 2016.
4. The petition and notice of hearing were posted on the Department of Safety web site pursuant to RSA 270:12-III for more than 2 weeks before the hearing date on or about May 9, 2016.
5. The Petitioner notified all abutters by certified mail and provided the return receipts before the hearing pursuant to RSA 270:12-III and RSA 270:12-IV and in compliance with the statutory requirement.
6. That a public hearing was held at 10:00 AM on Monday, June 13, 2016 for public comment regarding the issue and was conducted pursuant to RSA 541, RSA 270:12, RSA 270:43 and Administrative Rules Saf-C 407, and Saf-C 409 at the Wolfeboro Library, 259 S. Main Street, Wolfeboro, NH.
7. That the petition seeks to adopt a rule to prohibit rafting within an area known as Springfield Cove, Lake Winnepesaukee in Wolfeboro, New Hampshire, as identified

in the map submitted with the petition, and described above in paragraph 2.

8. That the effect which adopting or not adopting the rule(s) would have upon the public safety is considered. The law requiring banning watercraft from rafting or limiting the location and times is as defined within RSA 270:12, RSA 270:43, RSA 270:44 and administrative rule, Saf-C 407, Saf-C 409 is taken into account and given weight. There is insufficient evidence that not adopting the rule would compromise public safety.
9. That testimony was received from the Petitioner, a resident, and several other residents describing loud, lewd, and boisterous behavior by individuals rafting in the cove, but there was an equal number of public comment from individuals who indicated that they have been going to the cove for approximately 10 years and have not witnessed any improper conduct or littering. The lack of documented calls to the Marine Patrol of such incidents over a long time period is indicative that a ban is unnecessary.
10. That little public comment was received in reference to recreational and scenic values. There was no evidence that rafting has devalued property in Springfield Cove.
11. That no testimony was received referencing the maintenance of residential values.
12. That public comment was received referencing the variety of uses of the waters within Springfield Cove on the environment and water quality, although there was no direct proof that rafting has a negative environmental impact. The lack of evidence of a problem from the Department of Environmental Services or other expert is indicative that a ban is unnecessary to protect the environment.
13. The number of people affected, either directly or indirectly, by adopting or not adopting the rule(s) was discussed from the standpoint of the negative impact on property owners due to noise and trash left in the area that residents then must pick up after a weekend.
14. There was testimony concerning negative impact on animals including an otter that died, although there was no

evidence as to whether this animal is a threatened or endangered species. Also, there was no evidence to link this death to rafting activity, and no direct evidence that rafting activity threatens animal life in Springfield Cove.

15. The availability and practicality of enforcement of the rule(s) was presented. Law enforcement presence is available and ongoing by the Marine Patrol, and there is no evidence that a ban is required to address problems that the agency is unable to address.
16. That the Department of Safety, Division of Safety Services, Marine Patrol enforces the statutes and rules governing the public waters within this area and navigational law is enforced through that agency.

I recommend that the following Conclusion of Law and Disposition be approved based upon the Findings of Fact listed within this report.

Respectfully,



Christopher Casco, Administrator
Bureau of Hearings

CONCLUSION OF LAW:

The evidence demonstrates that the petition is not in the public interest fulfilling the purpose of law. There is insufficient attestation that the petitioners have met a burden of proof by a preponderance of the evidence showing cause that a "No Rafting Prohibition" be adopted for Springfield Cove in Wolfeboro pursuant to RSA 270:12 and Administrative Rules Saf-C 407; 409.

DISPOSITION:

It is hereby Ordered that the petition be respectfully **DENIED**.




John J. Barthelmes
Commissioner of Safety

RSA 541:3 Motion for Rehearing.

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

I certify that a copy of the order has been forwarded to the below named via first-class mail or electronic mailing (as applicable).



Christopher Casco, Administrator

Date of mailing: 8/5/16

A copy of this order was sent to the following:

Petitioner Designee, Mr. John Rich

Town Clerk/Administrator
Wolfeboro, New Hampshire

Colonel Robert Quinn, Director
NH State Police/Marine Patrol
Unit and Captain Timothy
Dunleavy

CC: File