

Mean high water mark set at Silver Lake

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The New Hampshire Department of Environmental Services (DES) last week reaffirmed that the "natural mean high water mark" at Silver Lake in Belmont and Tilton is 468 feet above sea level. The agency has used the figure at least since the late 1980s, but in 2005 agreed to review it after shorefront property owners, whose lots would be impacted, questioned it. Paul O'Connell, president of the Silver Lake Association, said yesterday that the association has retained an attorney with intention of appealing the "notice of determination," which effectively transfers stretches of shoreline from private owners to the state. The Comprehensive Shoreline Protection Act (RSA 483-B:4 XI-a.) defines the natural mean or ordinary high water mark as the elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence on the landscape, such as a clear, natural line impressed on the immediate bank, shelving, changes in the character of soil, changes in natural vegetation from predominantly aquatic to predominantly terrestrial, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." Under the public trust doctrine, the state owns public water bodies up the natural mean high water mark and, in the case of lakes of ten acres or more, owns not only the water but also the land beneath it. The state's ownership is automatic and does not require a deed. Furthermore, the state's rights trump the metes and bounds in deeds to private property. O'Connell said that before 2004 residents of Belmont who submitted site plans and sought building permits applied a natural mean high water mark of 465 feet. However, in 2004 applicants were informed by town officials that DES had raised the standard to 468 feet. In June 2005 a group of landowners petitioned DES to reconsider. O'Connell said yesterday that with the natural mean high water mark at 468 feet, some 125 shorefront property owners find that, depending on the terrain, between one and 49 feet of their lots belongs to the state. "At 468 feet, I have a dotted line across my lot," O'Connell said. "The lot has shrunk from 32-acres to .23-acres. The land we've been paying taxes on, we don't own." He said that in the future he will taxed on the smaller lot size, but asked "what about all those years?" By reducing the size of lots, the ruling will also weigh on dimensional requirements, especially setbacks, to restrict the ability of property owners to alter their homes. O'Connell said that there is at least one home that is completely surrounded by water and an island in the lake, assessed at \$12,500 on the municipal tax rolls, that is covered by water when the level of the lake reaches 468 feet. Jim Gallagher of the Dam Bureau of DES prepared the report setting the natural mean high water mark. He opens by noting that because there is no dam at the outlet of Silver Lake, its level varies with the flows in the Winnepesaukee River, which have been managed by dams for the past 175 years. Consequently, he concludes that "the determination of high water levels by natural conditions becomes nearly impossible." Gallagher reports that observations in the field of vegetation and shelving were consistent with a natural mean high water mark of 468 feet. Likewise, the average of annual high water levels at Silver Lake between 1982 and 2007 was calculated at 467.9 feet and exceeded 468 feet in 10 of the 26 years. Documents bearing on Silver Lake confirm that DES and its predecessor, the Water Resources Board, relied on a natural mean high water mark of 468 feet for decades, a conclusion supported by the New Hampshire Attorney General's Office. Finally, Gallagher suggests that 468 feet corresponds to the 100-year flood level of 471 feet calculated by the Federal Emergency Management Agency. Meanwhile, O'Connell said that property owners have deeds referring to pins set anywhere between 465 feet and 470 feet while others have structures built at elevations below 468 feet. Candace Daigle, the Belmont Town Planner, said that the DES's decision would not affect her department, which has applied a natural mean high water mark of 468 feet for some time. She said that most of the houses around Silver Lake were within the 50-foot setback from the shoreline and that setting the natural mean high water mark at 468 feet limited homeowners' options for further developing their property. But, she stressed that "it would not make any sense to set the natural mean high water mark lower, to give more land nearer the water for people to build on. They are already in the flood plain."

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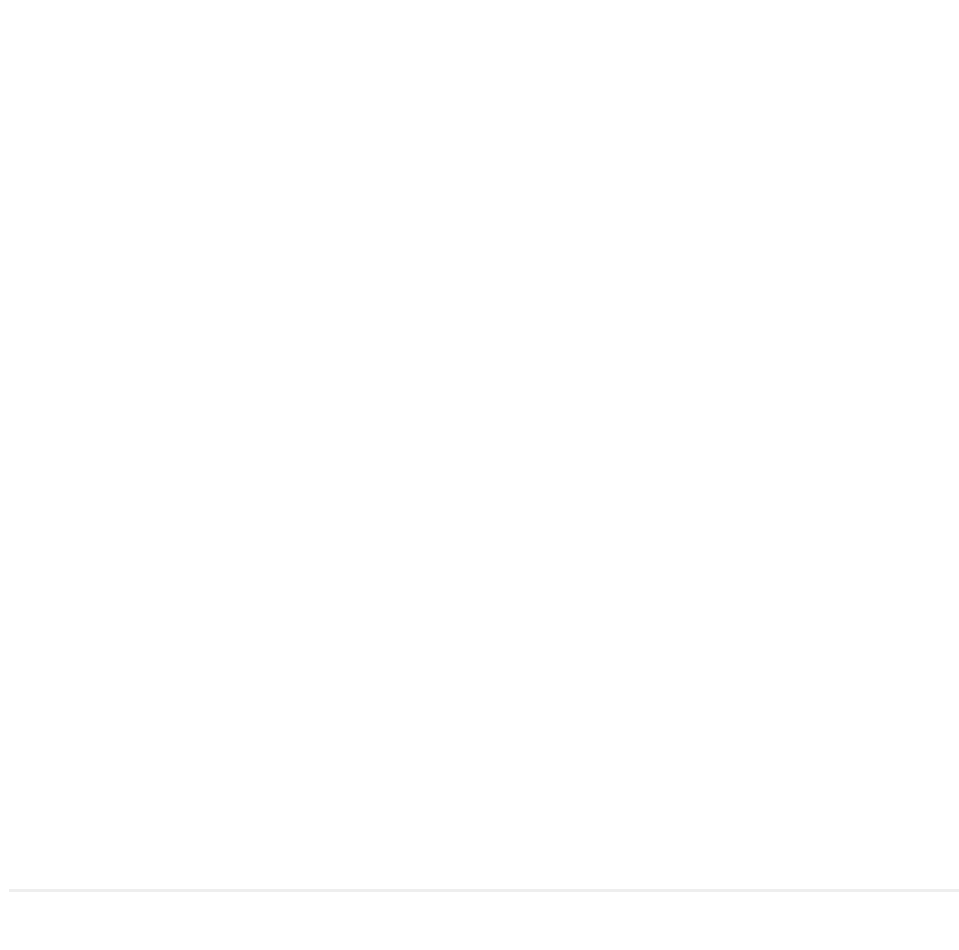
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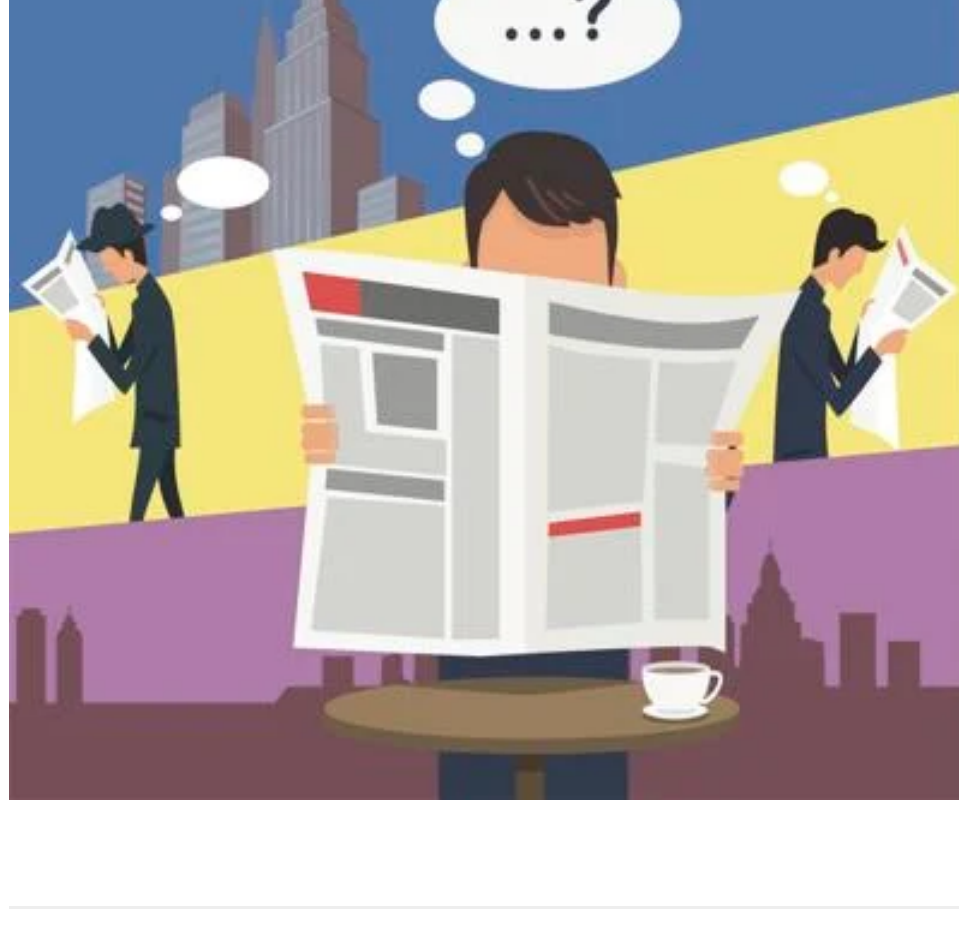
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