

JOINT STATEMENT OF THE RYE SELECT BOARD AND CONSERVATION
COMMISSION (UNADOPTED BY THE SELECT BOARD)

120 GARLAND ROAD

The Town has received several inquiries related to actions undertaken by the Rye Select Board and the Rye Conservation Commission (“the Commission”) related to 120 Garland Road (“the Property”). Specifically, the Select Board and Commission have received inquiries associated with the costs and expenditures associated with litigation initiated by both bodies and the public purposes served by that litigation. The purpose of this statement is to provide a history of this matter that has spanned over five years to address those inquiries.

Roles of the Select Board and Conservation Commission

At the outset, it is important to identify the respective roles of both the Select Board and the Commission. Under the Town’s Zoning Ordinance, RSA chapter 155-A, and RSA chapter 676, the Select Board is responsible for ensuring that properties are used and developed in a manner consistent with the New Hampshire State Building Code and the Town’s Zoning Ordinance. This is to ensure that structures are safely constructed for human use and occupation and that properties are used in a manner that is not detrimental to the Town, the environment, or abutting properties.

The Commission has a similar responsibility to ensure the “proper utilization and protection of the natural resources and for the protection of watershed resources,” see RSA 36-A:2. In exercising that responsibility, the Conservation Commission is responsible for reviewing and investigating applications filed with the New Hampshire Department of Environmental Services (“DES”) related to wetland permits, see RSA 482-A:11.

Background

The Property is located within the Single-Family Residential Zoning District. The Property is also located in the Rye Water District Wellhead Protection Area and in proximity to the Garland Well that serves as the primary source of drinking water for the Rye Water District. The Property has a portion of Bailey Brook that runs through it. Bailey Brook is one of the Town’s seven watershed and wetland ecosystems. That watershed contains an endangered Atlantic White Cedar Forest, Burke’s Pond, and Eel Pond.

In 2013, a culvert/weir (referred to throughout as a dam) was built on the Property where a woods road crosses Bailey Brook. No permits were obtained from either the Town or DES for this dam. The dam created a pond and flooded at least an acre of the existing free flowing stream and wetland area.

In 2018, during a septic inspection of the Property, the Town’s Building Inspector ascertained that the Property had a dam across the stream for which there was no special exception from the Zoning Board of Adjustment as is required by Section 301 of the Town’s Zoning Ordinance. At the time, the dam was less than six feet in height. The inspection also revealed that the current owner of the Property had constructed eight buildings on the Property without obtaining building permits.

On June 7, 2018, the Town's Building Inspector issued a Notice of Violation to the owner informing him of the need to apply for and obtain building permits for the unpermitted structures and to apply for and obtain a special exception from the ZBA for unpermitted dam. Concerned about the impact to wetlands, the Building Inspector also submitted a Complaint Form to the Water Division of DES regarding the unpermitted dam that same day.

The Court Litigation

Action was not taken on the Notice of Violation in a timely manner. Due to the Town's concerns regarding the watershed, the Town initiated a civil action against the owner related to the non-compliant conditions on October 16, 2018. The Town sought fines and penalties, injunctive relief requiring the owner to comply with the Zoning Ordinance and the State Building Code, and pay the Town's costs and attorney's fees.

The Town's filing of legal action brought about some immediate results because by December 12, 2018, the owner had submitted applications for building permits for those eight unpermitted structures. By December 18, 2018, the Building Inspector had responded to those applications informing the owner that four of the structures were located within the side setbacks under the Zoning Ordinance and would either need to be removed or would require variance relief. The owner, shortly thereafter, moved two of those structures and obtained the necessary variances for the remaining two. Those actions resolved a portion of the non-compliant conditions.

Concerns remained, however, regarding the unpermitted dam. The Town remained concerned that the dam and the impoundment of water that it caused would adversely impact the aquifer that fed the Garland Well by potentially forcing heavy metals into the water supply and changing water flows that would be detrimental to the downstream watershed. Therefore, the litigation proceeded to try to have the owner obtain the requisite permits and approvals needed to maintain the dam or otherwise have it removed.

Early in the litigation, the owner asserted that the Town did not have the authority to regulate dams. The Rockingham County Superior Court issued an order on October 15, 2019, ruling in favor of the Town that the Town did in fact have the authority to regulate dams under six feet in height. The owner asked the Court to reconsider that ruling, to which the Town objected, and on January 4, 2020, the Court ruled in the Town's favor and confirmed the Town's ability to regulate dams under six feet in height.

In February 2020, the owner applied for an after-the-fact wetlands permit for the dam from DES. Separately, the owner also engaged in voluminous correspondence with the DES Bureau to propose raising the road (and what DES considered to be the dam) over six feet in height, which would bring the matter under DES's jurisdiction. The Commission timely submitted to DES its written notice of intent to investigate the wetlands application (discussed in greater detail below). Shortly after, and while the litigation was pending, the Town, the Commission, and Mr. Malpass engaged in global settlement discussions.

Initially, those settlement efforts were not successful in resolving the dispute between the Town, the Commission, and Mr. Malpass. On July 22, 2021, the Town sought to have the Court rule that

the dam violated the Town's Zoning Ordinance. The Town also asked the Court to rule that the Town was entitled to an award of its costs and attorney's fees, that the owner be ordered to pay a civil penalty of \$25,000.00, and that the owner be ordered by an injunction to apply for a special exception with the Zoning Board of Adjustment to keep the dam. The owner objected.

On December 13, 2021, the Court ordered that the owner violated the Zoning Ordinance in constructing the dam without a special exception and ordered the owner to pay the Town's costs and attorney's fees. The Court, however, also ordered that it wanted to conduct a further hearing on the civil penalty to determine the propriety of the amount of the penalty. The Court also determined that it would re-address the need for the owner to obtain a special exception at a later date because the need for a special exception would be dependent on whether DES would authorize the dam to be raised over six feet. If the dam were to remain under six feet, the matter would properly be within the review of the Zoning Board of Adjustment, but if it were to be allowed to go over six feet, it would be within the sole review of DES.

Both the owner and the Town asked the court to clarify and/or reconsider aspects of its December 13, 2021 decision. Around that time, the owner filed a variety of submittals with the Court related to the litigation, to which the Town was required to respond. The Town did so. On March 20, 2022, the Court confirmed its position that if the dam were raised to six feet in height, the Zoning Board of Adjustment would have no authority to review that dam, but if it were not raised, the dam would remain within the Zoning Board of Adjustment's purview. The Court also confirmed its determination that the owner did not address the non-compliance related to the dam in a timely manner but would consider the extent to which any delay was reasonable at a later date. The Court, therefore, ordered a further hearing regarding whether the Court should award a civil penalty associated with Mr. Malpass' violation of the Zoning Ordinance and required the Town and Mr. Malpass to provide regular reports to the Court on the status of the DES permitting process.

The Court Settlement

On June 23, 2022, the Town and the owner entered into a Stipulation that settled the Court action. That Stipulation entailed that the owner would provide the Town with an Operations and Management Plan related to the weir. This Operations and Maintenance Plan was negotiated to ensure that the water from the impoundment was monitored and appropriately released during times of storm or drought. The Operations and Maintenance Plan was also negotiated to ensure that the water flows into the downstream habitat would not be impaired by the weir by monitoring the water coming out of the impoundment to make sure that it equaled the water entering the impoundment. The Operations and Maintenance Plan also ensured that the dam would be regularly inspected and appropriately maintained.

In addition, the owner agreed to provide the Town with a Conservation Easement over his property should DES issue the after-the-fact wetlands permit. This Conservation Easement would keep a portion of the Property as a natural habitat that conserved the Property's open space and scenic values, as well as adding further protection for Bailey Brook.

Additionally, the owner agreed to pay the Town \$75,000.00 in periodic, quarterly installments for the Town's attorney's fees associated with the Superior Court litigation.

For its part, the Town waived any claims for civil penalties that it was seeking from the owner. The Town also agreed that, if DES were to issue a permit for the six foot dam, there would be no further obligation to obtain a special exception from the Zoning Board of Adjustment. The Stipulation makes clear, however, that if the DES permit was denied, the dam would be promptly removed. The Stipulation also expressly reserved the right for the Commission to challenge any DES permit.

The DES Process

While the Court litigation proceeded, the Commission reviewed the application for the DES permit. Given the sensitive resources implicated by the dam, most notably the Atlantic White Cedar Forest and the wellhead, the Commission wanted to ensure that the application was appropriately and thoroughly vetted. For that reason, the Commission invested in hiring environmental consultants to assist in investigation of the impacts of the dam.

The Commission's experts expressed that the dam and its impoundment created over ten (10) times the direct wetland impacts than the application to DES stated and impacted wetland function and values—including wildlife habitat, flood storage, and groundwater recharge. The Commission's expert also expressed concern that these impacts were not adequately addressed in the permit application. The experts also identified other deficiencies in the application, including that the underlying justification for the dam and impoundment – phragmites management – lacked substantiation or scientific support and that the application ignored that the weir and impoundment might adversely affect drinking water quality and quantity in the wellhead.

In December of 2021, DES granted the after-the-fact wetlands permit. Based upon its experts' observations and the recent decision of DES in a similar unpermitted pond in Rye that had to be returned to its previous state, the Commission appealed the DES granting of the permit application, seeking to have the Property also returned to its previous state. The Commission appealed through the routine appeal process, which is to the Wetlands Council.

The case before the Wetlands Council involved the owner and the Commission filing a variety of pleadings prior to being heard on the merits of the appeal. One of those issues involved the admissibility of drone imagery taken by the Commission, which was excluded by the Wetlands Council and which the Supreme Court declined to address at that time. As with the Court process involving the Town, throughout the DES wetlands permitting and appeal process, the owner filed a variety of submittals, to which the Commission was required to respond, and the Commission did so.

A full hearing was held at the Wetlands Council where Mr. Malpass and the Commission were able to present their experts and arguments for the Council's consideration. The case is now procedurally over, the Wetlands Council, having determined by decision dated December 21, 2023 that DES did not improperly grant the after-the-fact wetlands permit application.

Conclusion

While the Wetlands Council ruled in favor of the owner on this issue, the Select Board and the Commission believe strongly that their respective efforts to date have been consistent with their

statutory obligations. Not all current members of the Select Board or Conservation Commission participated in the original decisions made regarding this matter. Actions taken have ensured that:

- structures are safe for use and occupation and are properly located on the Property;
- that the dam will be appropriately operated, monitored, and managed;
- that the land around the impoundment will be preserved for the betterment of the Town and natural resources; and
- that a portion of the Town's out-of-pocket legal expenses will be reimbursed.

Most importantly, however, these efforts ensured that DES and the Wetlands Council thoroughly vetted the owner's proposal. That proposal, which involves natural resources that extend beyond the Property, the degradation of which would impact the Town, has now been scrutinized and analyzed appropriately in a manner that had not occurred when the unpermitted dam was originally discovered in 2018.