

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DW 22-082

AGAPE COMMUNITY CHURCH SEWER SYSTEM

BRIEF OF THE RESIDENTS OF COLONIAL DRIVE

April 26, 2023

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A. INTRODUCTION

The residents of Colonial Drive (Residents), pursuant to the N.H. Public Utilities Commission's (Commission) directive from the prehearing conference held on April 5, 2023, hereby submit the following legal brief on the noticed issues.

B. ISSUES PRESENTED

- (1) Whether the sewer system is owned or operated by an entity that constitutes a 'public utility' under RSA 362:2 and RSA 362:4 that is subject to Commission regulation and, if so, whether the Complaint must first be filed with DOE, served upon the utility, and investigated under RSA chapter 365, as amended.
- (2) Whether the sewer system is a public utility regulated by the Commission under RSA 374:41-47 and therefore subject to receivership under RSA 374:47-a.
- (3) Whether, if the sewer system is a public utility, it is providing safe and adequate and just and reasonable service under RSA 541-A:31.
- (4) Whether the deeds of transfer for the Residents' individual lots on Colonial Drive carry forward the provisions of: Article III – Reserved Easement and Rights, section 3.2; and Article VII – Miscellaneous, section 7.1, which provides that:
 1. [t]he covenants and Restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by an Association of the Lot owners, or the Owners of any land subject to this Declaration or any Declaration supplemental hereto, their respective legal representatives, heirs, successors and assigns.
- (5) What entities or persons bear responsibility for the operation and maintenance of the sewer system that serves the Residents.
- (6) Whether the Colonial Drive development is part of the Winnepesaukee River Basin Program.
- (7) Whether there are alternative remedies or potential guidance and/or assistance available through: (a) NHDES, (b) Bay District Sewer, (c) the Bay District Sewer Commission, (d) an appropriate department or committee of the Town of Moultonborough, or (e) any other entity. Given the current nature of the issues and the lack of clear Commission jurisdiction, the parties may wish to consider expeditiously resolving the ongoing sewerage concerns while concurrently participating in this proceeding. Beneficial alternative avenues to pursue outside of the Commission's jurisdiction, may include:

- (a) Reviewing applicable municipal requirements, for more cost-effective solutions than upkeep and operation of the sewer system and pump station, such as alternative qualified service providers, the installation of individual septic systems, and/or the establishment of a homeowners' association;
- (b) Considering the services of a mediator to assist in identifying relevant documentation, applicable municipal and state laws and regulations, and potential avenues for resolution of the issues raised with respect to legal and financial responsibility and assistance for the operation and maintenance of the sewer system mains, the pump station, and related elements of the system;
- (c) Working with other agencies, such as NHDES, to receive information concerning potential sources of assistance – financial, regulatory, or otherwise – with respect to the issues raised in their Complaint; and
- (d) Considering recourse through the court system for resolution of any issues raised in the Complaint.

C. LEGAL ANALYSIS OF EACH ISSUE

ISSUE #1

Whether the sewer system is owned or operated by an entity that constitutes a 'public utility' under RSA 362:2 and RSA 362:4 that is subject to Commission regulation and, if so, whether the Complaint must first be filed with DOE, served upon the utility, and investigated under RSA chapter 365, as amended.

Answering whether jurisdiction exists involves both questions of law and fact.

With respect to the legal analysis, the residents of Colonial Drive incorporate herein the substance of its petition located at Tab 1 of the Commission's Docket Book. In that petition, the residents set forth at pages 2-3 that pursuant to RSA 362:2 and RSA 362:4, the Commission jurisdiction is triggered when a corporation, company, association, partnership and person owns any plant or equipment for the conveyance of sewage disposal for the public.

Who constitutes the "for the public" has been well litigated before the Commission. In the seminal case of *Appeal of Zimmerman*, 141 N.H. 605, 612 (1997), the New Hampshire Supreme Court established that only when a special relationship existed between the provider

and customer, the service was not within the Commission's jurisdiction. In the *Zimmerman* example, there was a landlord-tenant relationship that differentiated the customers from the general public, the landlord only provided utility service to the tenants, and therefore, the Commission's jurisdiction did not apply.

However, in matters involving residential subdivisions similar to the instant Colonial Drive matter, the Commission has routinely for years extended jurisdiction. In *Petition of Peter St. James, et al*, Docket No. DW 006-001, Order No. 24,649 at 12, the Commission affirmed that it has jurisdiction over "market entry and market exit" even when the entity providing the utility service had not previously been regulated. In *Petition of St. James*, the Warner Village District had been providing water service to 4 customers outside its corporate boundary for many years. The Warner Village District proposed to disconnect the customers which caused the customers to petition the Commission for jurisdiction and oversight of the situation. In Order No. 24,625 (May 18, 2006), the Commission granted temporary jurisdiction and ordered Warner Village District to not disconnect the residential customers while the parties litigated whether the Commission had jurisdiction. Ultimately, in Order No. 24,649 (July 18, 2006), the Commission found that it had jurisdiction.

Petition of St. James is not the only fact pattern similar to Colonial Drive where the Commission has exercised jurisdiction.

The Commission exercises jurisdiction over even more analogous residential subdivision fact patterns. For example, Mill Brook Village Water System is another developer utility system regulated by the Commission even though the water system serves substantially less than the 75 threshold for exemption contained in RSA 362:4.

Other examples exist. Although these systems no longer exist as stand-alone systems, the orders pertaining to them are relevant as illustrations of how the Commission has exercised jurisdiction over developer utility systems and over owners reluctant to submit to such jurisdiction.

- Bachelor Mountain Estates (Order No. 20,662 dated November 9, 1992 granting franchise to serve 22 customers)
- Beaver Village Realty Trust (Order No. 20,795 dated March 225, 1993 re PUC RFP for receivership for recalcitrant owner.)
- Carleton Water Supply Company (Order No. 19,387 dated May 2, 1989 ordering operator/developer to obtain franchise approval and imposing fine)
- Daniels lake Water Works (Order No. 21,875 dated October 24, 1995 re franchise and initial rates for 22 customers)
- Holiday Ridge Supply Company (Order No. 17,326 dated November 21, 1984 franchise for 39 chalets with marginal service)
- Quin Let Trust (Order No. 19,579 dated October 25, 1989 re found to be charging unauthorized rates, franchise required)

All of these utility systems served residences in subdivisions and the Commission exercised jurisdiction over the service which is the same residential subdivision fact pattern as presented by the Colonial Drive matter.

With respect to the factual basis of ownership, the residents of Colonial Drive retained NH Brown Law, PLLC to conduct title research regarding the development and sale of lots and infrastructure associated with the Colonial Drive subdivision. That research produced the facts set forth at pages 1 and 2 of the petition.

In 1992, the Center Harbor Christian Church purchased its 3.20 acre parcel from ERB Realty (Book 1497, Page 805). This lot is depicted on ERB Realty's plan recorded at Plan Book 131, Page 29 and is the lot occupied by the church buildings. In January 2000, the church recorded its purchase of the 18.98-acre parcel denoted on ERB's Plan as Remaining Lot 1 (Book 1846, Page 338). In 2006, the church recorded its subdivision plan (Plan Book 213, Pages 27-

28, “Subdivision Plan – Lands of Center Harbor Christian Church (Tax Map 40, Lots 38 & 38F) Bean Road, Moultonborough, Carroll County, NH” dated 22 November 2004”). The Plan shows Colonial Drive entering the church’s 3.20 acre lot from Bean Road and proceeding into the 18-acre back parcel. The Plan also shows the plans for a pump station, sewer facilities, and sewer easements within the development.

Specific to the sewer system, the Plan Notes state:

Note #1, the property boundaries are as shown on the Plan.

Note #3, “Owner of Record: Tax map 40 Lot 38 [and Map 40 Lot 38F] Center Harbor Christian Church”

Note #6, “Lots are to be serviced by municipal (off-site) sewer and individual on-site wells.”

Note #7, “Lot 13 is subject to an (sic) permanent easement for the construction and maintenance of the sewer pump station and associated sewer lines and/or utility lines.”

Note #8, “Lots 11, 13 & 14 and tax map 40 lot 38 are subject to (sic) an easement for the construction and maintenance of sewer lines.”¹

In summary, the following documents show the owner of record for the utility easements and pump station, as well as for Colonial Drive, is the church:

1. the 1992 purchase of Lot 2;
2. the 2000 purchase of Lot 1;
3. the November 2004 dated subdivision Plan (recorded in January 2006);
4. the January 2006 Declarations; and
5. November 2006 First Amendment.

In 2006, the church recorded a *Declaration of Covenants, Restrictions and Easements* (Book 2498, Page 533) but the document did not reference a subdivision plan. The church corrected this by recording a First Amendment at Book 2584, Page 407 to specifically reference that the intended reference was to the Plan at Plan Book 213, Pages 27-28.

¹ Lots 11, 13, and 14 are the only lots where the sewer line was constructed outside of an access right of way.

The *Declaration* defines the Center Harbor Christian Church as the Developer and reserved the following property rights under Article III:

3.1 The Developer reserves in all Lots, and all Lots shall be conveyed subject to easements for all or any of the following uses and purposes: ...

(b) Ditches, pipes and culverts for surface water drainage and sewer, water and gas mains and pipes; ...

(d) Any other method of conducting and performing any public or quasi-public utility or service function over or beneath the surface of the ground; ...

(f) Installing, replacing, repairing, and servicing any of the foregoing.

Although under Section 3.2, the church reserved the right of assignment, the Carroll County Registry of Deeds show no such assignments.

Additionally, although under Article V, *Water*, the *Declaration* states owners are responsible for their own water supply, which is consistent with Env-DW 504.07 that water supply infrastructure within the lot is the responsibility of the property owner, there was no analogous statement for sewer or any statement that would change the usual convention that property owners are responsible for only the service line tying into the sewer main.

Between late 2006, in 2009, 2010, 2011, 2012, and 2015, the church sold lots in the development. The residents, or their predecessor purchasers, constructed homes on those lots.

On December 19, 2006, the church filed a Corporate Resolutions authorizing the sale of Lot 13 (see, Book 2590, Page 913). See Attachment A, page 29. Lot 13, as noted in Plan Note #7, is the lot burdened by the sewer easement and pump station. Note #7 unequivocally states that the church retains the permanent easement for the “construction and maintenance of the sewer pump station and associated sewer lines and/or utility lines”.

The church sold Lot 13 to Donald Dodge (Book 2590, Page 911). The conveyance was subject to all easements and conditions of record. The property is now owned by Albert and Susan Solomon (Book 3584, page 287).

Throughout these conveyances of lots, the church retained fee simple ownership of the footprint of Colonial Drive. It also retained easements over Lot 8 (Map 140-11.07) and over Lot 13 (Map 140-11.12).

It is known, and the land records reflect, that the church filed for bankruptcy. The bankruptcy did not change the reserved rights or the outcome that the Colonial Drive residents do not own the sewer system. The only conveyance of record resulting from the bankruptcy was for the sale of Lot 9 (Book 3189, Page 270, March 3, 2015, Trustee Deed) as part of a settlement. No utility easements or the street were conveyed out or abandoned.

As of November 19, 2022, there was no record that the reserved ownership of the street and utility easements/assets having been conveyed out from the church.

With respect to the church as a legal entity, Center Harbor Christian Fellowship was created in 1983 and changed its name to Center Harbor Christian Church in 1994. As Agape Community Church corroborated in its April 2023 dated Statement filed at Tab 22 of the Commission's Docket Book, Agape purchased the "debt and assets of Center Harbor Christian Fellowship." Although a "purchase" is not registered with the N.H. Secretary of State, the N.H. Secretary of State filings establish that there was a name change at about the time Agape states it made its "purchase". The records indicate the church renamed itself on February 9, 2018 to Agape. Therefore, according to the N.H. Secretary of State records, there is a continuity of ownership from the establishment of the church in 1983, its purchase, development, and sale of

lots within the subdivision, and its present-day ownership of those assets, regardless of the name changes it has undergone. The N.H. Secretary of State filings are attached as Attachment B.

Although Agape Community Church states in its Statement found at Docket Book Tab 22 that “[a]ll homes and rights to the road, water and sewer systems were transferred to the individual owners”, the records of the registry of deeds do not corroborate that. If such deeds exist, they have not been recorded at the registry of deeds.

For these legal and factual reasons, the residents believe they have demonstrated a prima facie case that the Commission has jurisdiction under RSA 362:2 and RSA 362:4 over the Colonial Drive sewer system by virtue of the church’s continued ownership of the utility assets and that those assets are providing sewage disposal service to the residences of Colonial Drive subdivision.

With respect to the second issue within Issue #1, whether the Complaint must first be filed with DOE, served upon the utility, and investigated under RSA chapter 365; RSA 365:5 provides the Commission with the authority to investigate in the first instance. RSA 365:1-4 also provides DOE with investigative powers.

Before applying RSA 365:1 (which provides that any person may make a complaint to DOE concerning any public utility in violation of any provision of law), RSA 365:2 (which requires DOE to provide the public utility with a copy of the complaint)², and RSA 365:3 (regarding reparations), a determination on whether the utility is a public utility must first be made.

However, there are exceptions to first determining whether an entity is a public utility. As seen with *Petition of St. James*, the Commission used its plenary authority to deem an entity

² Here, Agape received a copy of the petition which could also be viewed as a complaint.

to be a public utility on an interim basis so as to impose a temporary moratorium on disconnections while the Commission conducted an adjudicative proceeding on the issue of whether the entity was in fact a utility subject to its jurisdiction.

The matter of whether the Commission or DOE must act first as far as an investigation of complaints is concerned may be moot in light of RSA 365:5 which authorizes both DOE and the Commission on their “own motion” to investigate a matter involving a public utility. But again, as with RSA 365:1, 2, and 3, RSA 365:5 references public utilities which is a factual that must be determined.

ISSUE #2

Whether the sewer system is a public utility regulated by the Commission under RSA 374:41-47 and therefore subject to receivership under RSA 374:47-a.

The residents incorporate their response to Issue #1 in their response to this Issue #2.

It is a well-established legal principle that specific statutes control over general statutes, when the statutes conflict. Here, RSA 374:47-a is more specific than RSA Chapter 365. The difference between 365 and 374:47-a is in terms of the sense of urgency which makes RSA 374:47-a available under the circumstances. RSA Chapter 365’s complaint process is a general complaint process whereas 374:47-a is a specific statute to address failures that present a serious and imminent threat to health and welfare.

The Town and NHDES deficiency letters established that the system was in failure and that it posed a threat to health and welfare. Although the immediate threat to the health and welfare may be addressed in that the residents paid to have pumps replaced in the pump station, the condition of the system is unknown and it is not clear that the threat is over. No one, to the resident’s knowledge, has provided the maintenance records requested by NHDES. The residents are aware of a second sewage release on the Town-owned property not far from the

pump station. It is not known if this leak is on an individual service line or part of the development's sewer system but the fact remains, there is a second leak that, to the resident's knowledge, has not been corrected.

Even if this second leak does not present a serious and imminent threat to health and welfare, the Commission has extended receiverships in the past to promote an orderly disposition of the proceeding. See e.g., *Rolling Ridge Water System*, Docket No. DW 01-196 which lasted from October 4, 2001 to December 11, 2006. The residents advocate for the same here so that a path forward is established that ensures safe and adequate service.

ISSUE #3

Whether, if the sewer system is a public utility, it is providing safe and adequate and just and reasonable service under RSA 541-A:31.

Although RSA 374:1 requires regulated utilities to provide safe and adequate service, it is the New Hampshire Department of Environmental Services (NHDES) which has primary jurisdiction over regulating water quality, and in this case, wastewater. Municipal officials can also make health and safety-based findings. To that end, both the Town of Moultonborough and NHDES have found deficiencies in the Colonial Drive sewer system that the residents of Colonial Drive aver support a Commission finding that safe and adequate service is not being provided.

The NHDES Notice of Findings is located at Tab 14 of the Commission's Docket Book. It is attached hereto as Attachment C. At a site visit conducted on August 12, 2022, NHDES found evidence of a sewage release. As such, NHDES requested an inventory of the equipment in the pump station and the operational status of the equipment; maintenance records associated with the equipment in the pump station; dates and descriptions of any overflow events and measures taken to abate the overflows; and all correspondence related to the pump station since

its inception. It is the resident's understanding that NHDES has not received any of this information. The residents are aware of some maintenance having been done by the Town of Moultonborough but the residents do not believe that information has been provided to NHDES by the Town.

The Town of Moultonborough's Letter of Deficiency is also located at Docket Book Tab 14 and is attached hereto as Attachment D. The Town's Health Officer found the sewer system was in failure as defined in RSA 485-A:2, IV. As with NHDES Notice of Findings, the residents aver that the Town's letter also supports a finding that the system is not providing safe and adequate service, particularly given that no one is taking responsibility for the sewer system. It is axiomatic that if no one is managing the system, there can be no confirmation that the system satisfies RSA 374:1.

ISSUE #4

Whether the deeds of transfer for the Residents' individual lots on Colonial Drive carry forward the provisions of: Article III – Reserved Easement and Rights, section 3.2; and Article VII – Miscellaneous, section 7.1, which provides that: [t]he covenants and Restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by an Association of the Lot owners, or the Owners of any land subject to this Declaration or any Declaration supplemental hereto, their respective legal representatives, heirs, successors and assigns.

The deeds for the residents either specifically reference the Declaration or in the alternative reference that the conveyance is subject to restrictions of record.

Section 3.2 states:

“All the rights, easements, privileges and powers reserved to and retained by the Developer under the terms of this Declaration shall be assignable by it to an Association, or to any person or entity who has acquired title to all or part of the real property owned by the Developer in Article 1 for the purpose of completing the construction of the planned residential neighborhood intended by the Developer, or to any person or entity who has undertaken to furnish services such as water, sewer, power and telephone services to the Owners, but in such latter case only those rights and easements essential to the providing of such services shall be assignable.”

The records of the registry of deeds do not show that the Developer assigned any of these reserved rights or easements to any other entity. Agape's statement that the "rights to the ...water and sewer systems were transferred to the individual owners" is not supported by records recorded at the registry of deeds. If such deeds exist, they have not been recorded.

Article VII, Section 7.1 states:

"The Covenants and Restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by an Association of the Lot owners, or the Owners of any land subject to this Declaration or any Declaration supplemental hereto, their respective legal representatives, heirs, successors and assigns, for a term of ten (10) years from the date of this Declaration is recorded..."

The enforceable restrictions are contained in Section 2.1 of Article II of the Declaration. Subsection "(s)" of Section 2.1 requires each lot to have a septic tank connected to Bay District and that each residences' septic tank be properly proportioned and that it comply with State Laws and local ordinances and regulations. Thus, Section 7.1 allows residences to enforce against other individual lot owners as to their individual septic tanks among the other restrictions enumerated in Section 2.1. Section 7.1 does not give residents the ability to enforce against the church to provide safe and adequate sewer service in the event the Commission were to somehow find that it is in the public interest to exempt the church from regulation under RSA 362:4.

ISSUE #5

What entities or persons bear responsibility for the operation and maintenance of the sewer system that serves the Residents.

The records of the N.H. Secretary of State and the recorded instruments at the registry of deeds show that the church remains as the owner of the sewer system. Please see Attachment A (deeds) and Attachment B (NHSOS). The church was initially named Center Harbor Christian

Fellowship, then the church changed its name to Center Harbor Christian Church, and then the church changed its name to Agape.

ISSUE #6

Whether the Colonial Drive development is part of the Winnepesaukee River Basin Program.

NHDES represented at the preliminary hearing held on January 12, 2023 that the Colonial Drive development is served by Bay District Sewer Commission and that the Bay District Sewer Commission is a co-permittee for the Winnepesaukee River Basin Program's regional sewer system. See Hearing Transcript of January 12, 2023 at page 35.

ISSUE #7

Whether there are alternative remedies or potential guidance and/or assistance available through: (a) NHDES, (b) Bay District Sewer, (c) the Bay District Sewer Commission, (d) an appropriate department or committee of the Town of Moultonborough, or (e) any other entity. Given the current nature of the issues and the lack of clear Commission jurisdiction, the parties may wish to consider expeditiously resolving the ongoing sewerage concerns while concurrently participating in this proceeding. Beneficial alternative avenues to pursue outside of the Commission's jurisdiction, may include:

The residents aver that in light of the attached recorded deeds, attached filings from the N.H. Secretary of State, and past Commission practice of exercising jurisdiction over similar residential subdivisions with neglectful owners of utility systems serving those residential subdivisions, the Commission will find that its jurisdiction is clear.

Bay District Sewer Commission has not been receptive to date to taking ownership of the Colonial Drive sewer system even if the sewer system were to be brought into compliance with NHDES regulations.

The residents are aware that the Town of Moultonborough is not interested in taking over the sewer system.

(a) reviewing applicable municipal requirements, for more cost-effective solutions than upkeep and operation of the sewer system and pump station, such as alternative qualified service providers, the installation of individual septic systems, and/or the establishment of a homeowners' association.

The Colonial Drive subdivision was authorized by NHDES on the condition that the subdivision be served by a public sewer system. Individual septic systems were not authorized for this development. See Attachment E which consists of all approval records currently available and located at NHDES.

There is no unanimity among the residents to form a homeowners association and acquire the sewer system assets. There is no financial benefit to them in terms of financing sources. The risks and liabilities associated with a sewer system that has not been maintained are unknown and could be expensive. As the pump station repairs demonstrated, the project costs for that project were much higher than otherwise because the pumps were not timely replaced and the pump station was not regularly maintained. Those increased costs were the result of negligence by the owner of the sewer system. The residents are not interested in taking on those negligence costs. The Commission is required to disallow imprudent utility costs under RSA 378:28 and has a long record of denying recovery of imprudent costs. See e.g., *Public Service Company of New Hampshire*, Order No. 22,847 (February 10, 1998) in Docket No. DR 97-014 (Commission denied recovery of imprudently incurred costs). Taking over the sewer system with the unknown risks and liabilities would be contrary to that long-standing tenet that customers should not bear imprudent costs.

(b) considering the services of a mediator to assist in identifying relevant documentation, applicable municipal and state laws and regulations, and potential avenues for resolution of the issues raised with respect to legal and financial responsibility and assistance for the operation and maintenance of the sewer system mains, the pump station, and related elements of the system.

The residents have not used the mediation options under Puc 1203.17 because of the severity of the system's neglect under Center Harbor Christian Church and Agape, the possible need for fines for the conveyance of a public sewer system without prior Commission approval if indeed Agape "purchased" the church's debts and assets, and the possible need to order the church to obtain financing to evaluate the sewer system and conduct any additional repairs and maintenance. The Colonial Drive situation is similar to the system needs addressed by the Commission in *Beaver Village Realty Trust* (Docket No. DR 92-226) and in *Rolling Ridge Water System* (Docket No. DW 01-196).

(c) working with other agencies, such as NHDES, to receive information concerning potential sources of assistance – financial, regulatory, or otherwise – with respect to the issues raised in their Complaint.

The residents inquired of financial assistance and learned from NHDES that grants and low interest loans are authorized to municipal entities and are not awarded to private entities such as the church or a homeowners association, should a homeowners association be formed and acquire the liabilities (the extent of which remain unknown) of the sewer system.

(d) considering recourse through the court system for resolution of any issues raised in the Complaint.

The petition, *Customer Complaint for Receivership*, seeks to remedy a sewer utility owned by an entity other than the residents that is in failure, in service to the public, and that is a serious and imminent threat to health and welfare such that it needs a receiver appointed. This remedy is within the sole jurisdiction of the Commission under RSA 374:47-a and not the Courts, therefore, the residents have not pursued judicial resolution.

Respectfully submitted,

Residents of Colonial Drive

By its Attorney,

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I hereby certify that a copy of the foregoing brief has been emailed this day to the Docket Related Service List for this docket.

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