

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DW 22-082

RESIDENTS OF COLONIAL DRIVE

Complaint and Petition Against Agape Community Church for Receivership

PARTIALLY ASSENTED-TO AMENDED PETITION TO
PERMANENTLY SUSPEND RECEIVERSHIP PROCEEDING
AND
APPROVE THE TRANSFER OF SEWER SYSTEM ASSETS AND FRANCHISE TO THE
COLONIAL DRIVE SEWER ASSOCIATION
AND
EXEMPT THE COLONIAL DRIVE SEWER ASSOCIATION FROM REGULATION

The Residents of Colonial Drive (Residents), in accordance with N.H. Admin. Rule Puc 203.05 and Puc 203.06 hereby requests the New Hampshire Public Utilities Commission (Commission) to suspend and close the receivership portion of this proceeding, without prejudice, and grant further relief as noted below. In support of this amended petition, the Residents state:

Procedural History

1. On December 2, 2022, the Residents filed a complaint and petition with the Commission requesting that the Commission place Agape Community Church in receivership given the then-present complete failure of the sewer system serving the Residents in Colonial Drive in Moultonborough.
2. On December 7, 2022, the Commission acknowledged the filing and on December 9, 2022, the Commission issued a procedural order scheduling a hearing on preliminary issues for January 12, 2023. The Commission also ordered the Residents to notify stakeholders of the hearing, and on December 12, 2022, the Residents filed evidence of that notice.

3. On January 9, 2023, Agape filed a motion to continue the hearing. On January 9, 2023, the Residents objected to the motion. On January 11, 2023, the Commission denied the motion. The duly noticed hearing was held on January 12, 2023.

4. On January 31, 2023, the Residents filed with the Commission findings made by the Department of Environmental Services (DES) that the sewer system was in failure.

5. On February 1, 2023, the Commission opened an adjudicative proceeding to consider the issues, which were subsequently briefed by the parties. The Commission set a prehearing for February 23, 2023. On February 3, 2023, the Residents filed an affidavit of publication of the Commission's February 1, 2023 order.

6. On February 21, 2023, the Commission issued an order rescheduling the prehearing to March 3, 2023. On February 22, 2023, the Residents requested the new prehearing be rescheduled to a date available to the Residents. On February 23, 2023, the Commission rescheduled the prehearing to April 5, 2023.

7. On March 30, 2023, Lamprey Suburban Septic, Inc. (Lamprey) filed a petition to intervene.

8. On April 5, 2023, the Commission held its duly noticed prehearing. The Residents stated that Lamprey was holding their pump replacement payments hostage to pressure Residents to pay the pumping bill. The Residents stated they had since retained and paid a new company to obtain and install the sewer pumps.

9. On April 11, 2023, Agape filed a position statement stating that it was unaware of the failed sewer system and that it had not ordered the emergency pumping. Agape stated that it "had no idea that apparently the system belongs to [Agape]". Lastly, Agape expressed its desire to "turn over the land and the system to whomever will manage it correctly."

10. On April 26, 2023, Lamprey filed a legal brief averring that the Commission had jurisdiction over the matter. Lamprey requested the Commission join the Town of Moultonborough, DES, Bay District Sewer Commission, and the Winnepesaukee River Basin Program as parties to the proceeding. Lamprey stated that he had incurred expenses totaling \$53,862.50 in rendering near daily pumping services to the sewer system. Lamprey alleged that it had begun pumping at the behest of the DES as well as by a resident of Colonial Drive. Lamprey discussed ordering pumps, which some Residents paid for, in anticipation of performing the pump replacement job but that it never took possession of the pumps because Residents began withdrawing payment. Lamprey requested the Commission join the named governmental entities as parties to the proceeding so that Lamprey could recover the expenses it had incurred to pump the sewer system.

11. On April 26, 2023, the Commission issued a prehearing order granting Lamprey's intervention request. The Commission also set a briefing deadline of April 28, 2023.

12. On April 26, 2023, the Residents filed their brief addressing the issues raised in the Commission's February 1, 2023 order. Those issues included whether Agape was a public utility under RSA 362:2 and :4; whether the sewer system was subject to the receivership statute RSA 374:47-a; whether the sewer system was providing safe and adequate service; who is responsible for operating and maintaining the sewer system; and whether alternative remedies outside of the Commission's jurisdiction were available. On April 28, 2023, the Residents supplemented their brief.

13. On May 24, 2023, the Residents filed an assented to motion to temporarily stay the proceeding while the parties explored resolution of the issues.

14. On June 2, 2023, the DES filed a limited motion to intervene to respond and object to Lamprey's request that the Commission force the Department to become a party. The Department also denied it requested Lamprey to commence pumping the sewer system.

15. On June 8, 2023, the Commission approved the motion to stay the proceeding. The Commission cited to evidence that the sewer emergency and that need for receivership no longer existed. The Commission cited the Residents argument that if the Residents acquired the sewer system assets, the Residents would be exempt from Commission jurisdiction and thereby render any further proceeding unnecessary. The Commission also urged the potentially responsible parties involved in this matter to work together to negotiate a fair and equitable resolution of Lamprey's expenses.

16. On September 6, 2023, the Residents filed a Status Update that a settlement had been reached among the parties. The Residents provided a copy of a title opinion on Agape's ownership of the sewer assets. The Residents provided evidence of its formation of a homeowners association. The Residents also stated that they would provide the Commission with a pleading regarding the issue of Commission approval of any transfer of assets.

17. On September 7, 2023, the Commission set a deadline of October 9, 2023 for the filing of that pleading.

Settlement

18. As noted in the Residents' September 6, 2023 Status Update, Lamprey, the Residents, and Agape reached a settlement agreement resolving payment of Lamprey's expenses and resolving the future ownership of the sewer assets. Relevant to the Commission's jurisdiction is Term #4:

"Residents will commit to forming an HOA to acquire the sewer system and will use best efforts to file conveyance documents and a certificate of title with the PUC

no later than a desired date of September 8th; the parties will negotiate in good faith for an extension if needed.”

19. To date, to poise itself to acquire the sewer assets, the Residents have:

- (1) arranged for and paid in full to have the failed pumps in the pump station replaced;
- (2) arranged for periodic maintenance and inspection of the sewer system;
- (3) formed a homeowners association (Colonial Drive Sewer Association) for the specific purpose of owning and operating the Colonial Drive sewer system;
- (4) registered the association with the New Hampshire Secretary of State as a non-profit (see Attachment A to September 6, 2023 Status Update);
- (5) adopted bylaws to govern the homeowners association (Attachment A);
- (6) entered into an Asset Transfer Agreement with Agape (Attachment B); and
- (7) adopted and recorded with the Carroll County Registry of Deeds Declarations of Covenants and Restrictions pertaining to the operation and maintenance of the sewer system within the Colonial Drive subdivision and pertaining to the financial obligation of Residents to support the homeowners association (Attachment C).

The Residents have yet to:

- (8) record the individually signed Declarations and Acceptance which apply the Declaration of Covenants and Restrictions to the individual lots and the Residents expect to complete that task soon (see, Attachment D, sample of the Declaration and Acceptance); and
- (9) the Residents and Agape also have yet to sign the deed transferring the Colonial Drive sewer assets to the homeowners association (see, Attachment E).

Issue of Whether the Asset Transfer Requires Commission Assent

20. This proceeding was not noticed as an asset transfer docket. This proceeding was noticed for receivership concerning the then-immediate issue of safe and adequate sewer service because the system was in complete failure. The Commission has urged the parties to resolve the issue through alternative means than the Commission, which the parties have done. The settlement reached among the settling parties resolves the receivership issue. The settlement also resolves Lamprey’s compensation issue even though the Commission found that it did not have jurisdiction over that issue. Order No. 26,841, dated June 8, 2023 at 9. The Residents believe, however, that

before they can effectuate the settlement term of acquiring the sewer assets, they need Commission approval.¹

21. The Residents hold this view because under RSA 374:30, a public utility may transfer its works when the Commission finds that it will be “for the public good” and “shall make an order assenting thereto”, but not otherwise. The statute does not require a public hearing, which is distinguishable from RSA 374:47-a which requires notice and hearing prior to placing a public utility under receivership.

22. Here, although the Commission has not formally ruled on this issue, the record includes a title opinion that Agape owns the sewer assets, thereby triggering RSA 362:2 and RSA 362:4 as to whether Agape is a public utility. The record also reflects that the DES-approved Colonial Drive sewer system serves the Residents who are members of the undifferentiated public², thereby providing evidence that Agape is providing sewer service to the public and making it a public utility.³ As such, even though the Commission has not made a formal finding that Agape is a public utility, the transfer between Agape (a public utility) and Colonial Drive Sewer Association arguably triggers the Commission’s review under RSA 374:30. For this reason, the Residents do not think they can simply withdraw their receivership petition and have the Commission close the docket. The Residents aver, however, that the Commission can make the requested findings necessary based on the record before it.

¹ The Residents have confirmed that no approval is needed from the N.H. Department of Justice-Charitable Trusts Division (see Attachment F).

² See, e.g., Lamplighter Mobile Home Park, Order No. 25,224 at 8-9 (May 19, 2011) in Docket No. DW 09-267 where the Commission distinguished the differentiated public as having another relationship such as a landlord-tenant relationship. Here, any member of the public can purchase the lots within Colonial Drive independent of any relationship with Agape and thus constitute the undifferentiated public.

³ See Attachment E to Residents Brief dated April 26, 2023.

Summary of Relief Requested

23. Therefore, given the facts in the record⁴ and the applicable statutes, the Residents respectfully request that the Commission:

- (1) suspend and close the receivership portion of this proceeding because there is no longer a justiciable issue in that the issue of safe and adequate service has been resolved and there is no further need to place the sewer system in receivership; but also
- (2) issue an order assenting to the transfer of the Colonial Drive sewer assets from Agape to the Colonial Drive Sewer Association per RSA 374:30 and per the settlement agreed to by the relevant parties;
- (3) find that the Colonial Drive Sewer Association possesses the requisite managerial, technical, financial, and legal capabilities to own and operate the sewer system and associated franchise per RSA 374:22; and
- (4) find that the Colonial Drive Sewer Association is exempt from Commission regulation per RSA 362:4, VII.

24. The Residents acknowledge that these requested findings and orders have not yet been noticed in this instant proceeding. The Residents respectfully suggest that notice can be cured by an order *nisi* which is then distributed as the Commission required at page 6 of its February 1, 2023 Order commencing this proceeding. The Residents and Agape wish to not incur the expense of a formal hearing to adjudicate their agreement to resolve their dispute by transferring the assets.

Evidence Supporting Public Good

25. The Residents believe these requested orders and findings are “for the public good” and comply with the Commission’s obligation to assent to the transfer of utility works under RSA 374:30 and franchise under RSA 374:22. To support a finding that this outcome and transfer of the sewer assets to the Colonial Drive Sewer Association is “for the public good”, there is evidence that the Residents have: arranged for repairs to the sewer system; paid for the repairs; and arranged for the future operation, inspection, and maintenance of the sewer system.

⁴ Record as defined by RSA 541-A:31, VI.

26. Regarding whether the Colonial Drive Sewer Association has the requisite managerial, technical, financial, and legal expertise to own and operate the sewer system, which is the Commission’s franchise transfer analysis under RSA 374:22⁵, the Colonial Drive Sewer Association has the legal ability to acquire the assets because it has:

- (1) registered as a non-profit with the New Hampshire Secretary of State (see, Attachment A to the September 6, 2023 Status Update);
- (2) adopted bylaws to govern the association (see, Attachment A hereto);
- (3) adopted and recorded Declarations of Covenants and Restrictions (see, Attachment C);
- (4) is in the process of recording Declaration and Acceptance deeds in the Carroll County Registry of Deeds (see, Attachment D);
- (5) entered into an Asset Transfer Agreement with Agape (see, Attachment B); and
- (6) plans to acquire the sewer assets through a deed from Agape which will be recorded with the Carroll County Registry of Deeds (see, Attachment E).

Further, the Colonial Drive Sewer Association has the financial expertise to own and operate the sewer system as evidenced by the Residents’ ability to pay for repairs. Hearing Transcript of April 5, 2023 at 9 lines 16-19 and at 22. The Colonial Drive Sewer Association has the managerial and technical expertise because, as stated at the prehearing, the Residents retained a sewer maintenance company to assist it in operating and maintaining the sewer system. *Id.* at 22. From this evidence in the record, the Residents aver that the Commission can find, without the further expense of a hearing or a separate formal proceeding, that the transfer of the sewer assets to the Colonial Drive Sewer Association is for the public good.

27. Pursuant to RSA 541-A:31, V(a), informal disposition may be made of a contested case at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order, or default. The Commission “encourage parties to settle issues through negotiation and compromise because it is an opportunity for creative problem solving, allows the parties to reach a result in line with their expectations, and is often a better alternative to litigation.” *Gas and*

⁵ See, *Abenaki Water Company, Inc. and Aquarion Company*, Docket No. DW 21-090, Order No. 26,549 (November 12, 2021).

Electric Utilities, Order No. 25,932 (August 2, 2016) at 49 citing, *Granite State Electric Co.*, Order No. 23,966 at 10 (May 8, 2002) and RSA 541-A:31, V(a) (“informal disposition may be made of any contested case ... by stipulation [or] agreed settlement”). Also, pursuant to RSA 374:47-a, the Commission has broad authority to fashion a response to a public utility failing to provide safe and adequate service. See e.g., *West Epping Water Company*, Order No. 23,909 (January 29, 2002) in Docket No. DW 01-054⁶ (the Commission approved resolution of a receivership complaint by assenting to the transfer of utility assets to a homeowners association). See also, e.g., *Rolling Ridge Water System*, Order No. 24,707 (December 8, 2006) in Docket No. DW 01-196 (the Commission terminated a five-year receivership by transferring the utility assets to the homeowners association, seeing it as the “only feasible option to assure the continued operation of” the water system)⁷.

Homeowner Association Exemption

28. Also relevant to the Residents’ requested findings and orders is that the Colonial Drive Sewer Association is a homeowners association. The Commission has historically exempted homeowners associations from the Commission’s jurisdiction and this policy was formally adopted in RSA 362:4, VII⁸ in 2007. See, *Property Owners Association at Suissevale, Inc.*, Order No. 24,698 (November 8, 2006) in Docket No. DW 06-106 at 3 (The “Commission has consistently concluded that a homeowners association is not subject to regulation as a public utility” and the

⁶ The *West Epping* proceeding is slightly distinguishable from the instant *Agape* proceeding because West Epping Water Company had previously been found to be a public utility. Here, the Commission has yet to formally find *Agape* as a public utility. The outcome remains the same: the receivership complaint was resolved by transferring the utility assets to a homeowners association.

⁷ The *Rolling Ridge* proceeding is also slightly distinguishable in that the homeowners association did not request to receive the utility assets, rather, the Commission directed that outcome.

⁸ RSA 362:4, VII: (a) A homeowners association, including but not limited to a condominium unit owners association, shall not be considered a public utility under this title by virtue of providing water service if:

(1) The service is furnished only to members of the association or the occupants of their residential units; and

(2) The association is organized on a not-for-profit basis and is democratically controlled by the owners of the residential units and not the developer or subdivider thereof.

number of members is not germane to the analysis.) (Decided under prior law prior to the formal adoption of this policy in 2007.)

29. The Residents aver that the Colonial Drive Sewer Association meets the statutory exemption criteria through documents in the record of this proceeding: the association is organized as a not-for-profit (see, Attachment A of September 6, 2023 Status Update); the association is democratically controlled by the owners of the residential units (see, Attachment A (Bylaws)); the service to be furnished is only to members (see, Attachment A (Bylaws) and Attachment C (Declaration of Covenants and Restrictions) and Attachment D (Declaration and Acceptance)). In light of these documents, the Residents believe the Commission can make a finding that the Colonial Drive Sewer Association is exempt from regulation.

30. The Residents have reached out to the parties in this matter for their position. The Department of Energy takes no position at this time. Agape Community Church assents. The Residents had not yet heard back from Lamprey Suburban Septic. The Residents also reached out to non-party stakeholders and the Department of Environmental Services takes no position and the Town of Moultonborough did not respond by the time of this filing.

WHEREFORE, the Residents of Colonial Drive respectfully requests the Commission:

- A. Grant this amended petition; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

Residents of Colonial Drive

By Their Attorney,

Date: October 9, 2023

By: *Marcia A. Brown*
Marcia A. Brown, NH Bar #11249
NH Brown Law, P.L.L.C.
20 Noble Street
Somersworth, NH 03878
(603) 219-4911
mab@nhbrownlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been forwarded this day by electronic transmission to the Docket-Related Service List for DW 22-082.

Dated: October 9, 2023

Marcia A. Brown
Marcia A. Brown