

DW 00-214

**HAMPSTEAD AREA WATER COMPANY, INC.**

**Petition for Exemption Pursuant to RSA 674:30, III**

**Order Denying Motion for Rehearing**

**O R D E R   N O.   23,871**

**December 14, 2001**

**APPEARANCES:** Robert H. Fryer, Esq. for Hampstead Area Water Company, Inc.; Donahue, Tucker & Ciandella by Robert D. Ciandella, Esq. and Susan W. Chamberlin, Esq. for the Town of Kingston, E. Barclay Jackson, Esq. for the Staff of the New Hampshire Public Utilities Commission.

**I.    PROCEDURAL HISTORY AND BACKGROUND**

Following a hearing conducted on April 3 and 4, 2001, the New Hampshire Public Utilities Commission (Commission) issued Order No. 23,759 (the Order) on August 7, 2001 granting the petition of the Hampstead Area Water Company, Inc. (HAWC) for exemption from the Town of Kingston's (Kingston's) land use regulations, including its Zoning Ordinance and Site Plan Regulations, as to three bedrock wells and associated pump house and water lines and mains (the Bartlett Brook Condominium water facilities or facilities), pursuant to RSA 674:30,III. The facilities are located in Kingston but serve residents of the Bartlett Brook Condominium and other customers in the adjoining Town of Hampstead. Our Order was made subject to HAWC's implementation of its "Well Owners Response Plan."

The Order sets forth the procedural history and

background of the case, and the positions of the parties, in some detail. In particular, the Order discussed the arguments of HAWC and Kingston regarding the requirements of RSA 674:30,III as interpreted and applied (in its former iteration as RSA 31:62) by the New Hampshire Supreme Court in *Appeal of Milford Water Works, Inc.*, 126 N.H. 127 (1985). The Order further analyzes the need for the Bartlett Brook condominium water facilities and Kingston's interest in open space as explicated in its ordinances.

RSA 674:30, III allows a utility in circumstances such as those present here to petition the Commission to be exempted from local land use regulations if the Commission decides that the present or proposed situation of the structure in question is "reasonably necessary for the convenience or welfare of the public." In the *Milford* case, the Court observed that the exemption statute's purpose of subordinating local zoning interests to the public interests served by the utility did not mean that local interests are not to be taken into account by the Commission in applying the exemption statute. *Id.*, at 131.

In support of this observation, the Court quoted the following passage from a New Jersey case, *In re Monmouth Consolidated Water Co.*, 220 A.2d 189 (1966), regarding seven factors the New Jersey Board of Public Utility Commissioners were authorized and obligated to study in applying a statute analogous

to RSA 674:30, III:

"In passing upon the application the board [of Public Utility Commissioners] has ample authority as well as the duty to study the suitability of the locus chosen for the utility structure, the physical character of the uses in the neighborhood, the proximity of the site to residential development, the effect on abutting owners, its relative advantages and disadvantages from the standpoint of public convenience and welfare, whether other and equally serviceable sites are reasonably available by purchase or condemnation which would have less impact on the local zoning scheme, and last, but by no means least, whether any resulting injury to abutting or neighboring owners can be minimized by reasonable requirements relating to the physical appearance of the structure, adequate lot size, front and rear set back lines as well as appropriate side lines regulating the positioning of the structure on the lot, and by proper screening of the facility by trees, evergreens, or other suitable means. The board [of Public Utility Commissioners] should weigh all of these factors and while no controlling weight should be given to purely local considerations, they should not be ignored."

*Id.* at 131-32 (citation and emphasis omitted).

On September 6, 2001, Kingston filed a motion for rehearing pursuant to RSA 541 and Puc Rule 203:15. On September 11, 2001, HAWC filed an objection and answer to Kingston's motion for rehearing. Both Kingston's motion for rehearing and HAWC's objection were timely filed.

## II. POSITIONS OF THE PARTIES

### A. Town of Kingston

Kingston alleges three grounds for rehearing, namely,

(i) the Commission's failure to apply the requirements of the *Milford* and *Monmouth* cases correctly, (ii) the Commission's failure to enforce RSA 374:22, I requiring public utilities to obtain prior Commission approval to construct certain facilities in towns in which they are not already engaged in such business, and (iii) "new evidence" about the continuance of HAWC's alleged "unlawful excursions" into Kingston's water supply.

Kingston makes several related arguments regarding the first ground for rehearing, the Commission's failure to correctly apply the requirements of the *Milford* and *Monmouth* cases. Specifically, Kingston states that (i) the Commission's failure to make findings on the seven factors is unlawful and unreasonable, (ii) the Order ignores the *Milford* case since it does not cite the case in the Analysis section and does not consider the sixth factor, "whether other and equally serviceable sites are reasonably available by purchase or condemnation which would have less impact on the local zoning scheme," and (iii) the Commission's finding that "the use of the property at issue here will not be materially inconsistent with either the spirit or the letter of the applicable zoning ordinance" is insufficient under the *Milford* standard and is an unauthorized interpretation of Kingston's zoning ordinance.

**B. Hampstead Area Water Company, Inc.**

Regarding the issue of the application of the *Town of*

*Milford* case, HAWC argues that it addressed each and every factor in its submissions to the Commission and says that Kingston based its entire attack on only one factor, whether other and equally serviceable sites were reasonably available to HAWC. HAWC further argues that the Commission took careful account of local interests as evidenced by its imposition of a reasonable "Well Owner's Response Policy" as a condition of its approval of HAWC's operation of the wells.

HAWC asserts that Kingston did not raise the issue of the Commission's failure to enforce RSA 374:22,I in the prior proceedings although all the facts were obvious to Kingston. Pointing to a similar situation countenanced by the Court in the *Town of Milford* case, where the utility had not sought the Commission's prior approval to begin construction outside its service territory, HAWC further argues that any failure to enforce RSA 374:22,I does not constitute an error of law which would invalidate the Commission's approval of the exemption.

Finally, regarding Kingston's allegation of "new evidence" about the continuance of HAWC's "unlawful excursions" into Kingston's water supply, HAWC asserts that the Bartlett Brook Condominium water facilities are located five miles from Kingston's center and are not economically situated to supply any water to the Kingston town center. HAWC says it has not proposed

in these proceedings to be allowed to expand its Hampstead franchise to use the Bartlett Brook condominium water facilities to service any part of Kingston.

HAWC further contends that neither it nor any entity owned by its president, Peter A. Lewis, have any interest in or is proposing to purchase or build any development in Kingston, with one exception. HAWC states that it is in the process of applying for a franchise to be limited to one development in Kingston for which an on-site public water supply not connected to the Bartlett Brook Condominium water facilities was approved by Kingston's Planning Board on November 30, 1999, a year before these proceedings. According to HAWC, when the request for franchise approval is made to the Commission, Kingston will have full rights to comment on the franchise application before the Commission. HAWC notes that the water system was just completed and the final NHDES permits received in the last few months.

HAWC argues that all of this information was known or should have been known by Kingston at the time of the hearing on this matter.

### **III. COMMISSION ANALYSIS**

#### **A. Standard of Review**

Motions for rehearing are governed by RSA 541:3. We may grant such a motion when we are of the opinion that the

rehearing is requested for "good reason." The purpose of proceedings on rehearing is to "direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus [a rehearing motion] invites reconsideration upon the record upon which that decision rested." *Dumais v. State Personnel Comm'n*, 118 NH 309, 312 (1975) (citations omitted).

**B. Application of the *Town of Milford* Case**

The relevant issue in the *Milford* case was whether the Commission had authority to grant an exemption under RSA 31:62 with conditions protecting the interests of local residents or whether its authority only extended to granting or denying the request for exemption. The Court held that the Commission rightfully considered the concerns of local residents when it granted the utility's request for exemption and the Commission did have authority to grant an exemption with such conditions. *Id.* at 132.

In explaining its reasoning, the Court referred to the *Monmouth* case, which had interpreted a statute similar to New Hampshire's. The Court treated *Monmouth* as standing for the proposition that "the purpose of the exemption provision was to ensure that a variety of conflicting local interests will not impede services provided by public utilities to consumers, particularly in other municipalities, to the detriment of the best interests of the public as a whole." *Id.* at 131. The Court

went on to note that "the fact that the exemption statute 'makes clear the legislative purpose that local zoning regulations . . . shall be subordinate to the broader public interest served by the utility' does not mean that local interests are not to be taken into account." *Id.* The Court then recited the passage from *Monmouth* quoted in Section I regarding the seven factors.

Strictly speaking, the holding in the *Milford* case involved the scope of the Commission's authority, and not its duties, under the statutory ancestor of RSA 674:30, III. *Milford* upholds the Commission's broad discretion in applying the statute. It is fair to say, however, that *Milford* indicates the Commission is to take both the interests served by the public utility and local interests into account when it applies the statute. It is also fair to say that *Milford* is supportive of the Commission's review of the seven factors set forth in *Monmouth* in reaching a decision on an exemption request. Nevertheless, *Milford* does not require the Commission to make findings of fact on the seven factors and it does not require the Commission to analyze or weigh the factors in any particular fashion. Moreover, the Court upheld the exemption proceedings even though, as here, the project had been substantially completed by the time the proceedings were commenced. See *id.* at 129.

In the present proceeding, there was considerable



testimony and argument for and against the site of the Bartlett Brook Condominium water facilities. Kingston was allowed full opportunity to be heard. We considered all the evidence and ruled in favor of the exemption.

Regarding the first factor set forth in *Monmouth*, locus suitability, we heard testimony from, *inter alia*, the Department of Environmental Services that the locus was suitable for the purpose proposed. We noted that Kingston's ordinance permits necessary utility structures. Order, slip op. at 11.

Regarding factors two and three, the physical character of the uses in the neighborhood and proximity of the site to residential development, we recognized that the uses in the neighborhood are "rural in nature" and ruled that the proposed use would not have a material impact. We viewed photographs and noted that the construction is negligible. *Id.*

Regarding factor number four, the effect on abutting owners, we said that traffic will be light, and no customers will come to the property for service. *Id.* at 12.

Regarding factor number five, the relative advantages and disadvantages to the public convenience, we based our Order on "the totality of the record" and considered the burden imposed on Kingston against the reasonable necessity of water for the health and safety needs of New Hampshire customers. *Id.* at 10.

Regarding factor number six, whether other equally

serviceable sites are reasonably available by purchase or condemnation which would have less impact on the local zoning scheme, we heard testimony about possible alternate sites for the wells. For example, Danna Truslow, a hydrologist-geologist for Kingston, testified about other sites in the area which, according to her preliminary, map-based data, had the potential for containing underground water sources. *See generally* Transcript of Hearing, April 3, 2001, at 10-71. Nevertheless, her testimony did not specifically demonstrate the existence of suitable and available alternate sites. Stephen Noury, the Comptroller of HAWC, mentioned three parcels in Hampstead that might conceivably have been used. *See* Transcript of Hearing, April 3, 2001, at 116-118. However, the parcels were all relatively expensive parcels compared to the site used by HAWC, the rights to which were acquired at no financial cost to either the Company or its ratepayers.

There was, moreover, no evidence about suitable and available alternate sites with less impact on the zoning scheme. Kevin Burke, a Selectman from Kingston, testified that Kingston's substantive objections to the facilities in Kingston were that they were built on land dedicated to open space and they set a bad precedent for putting a commercial operation on town open space. *See* Transcript of Hearing, April 4, 2001, at 18. Mr. Burke testified that Kingston's land use ordinances would have

permitted the facilities to be built in dedicated open space if they served exclusively the residents of the Bartlett Brook Condominium and not other HAWC customers in Hampstead. *Id.* at 25-26, 45-46. However, there was no evidence that the facilities would have been constructed any differently or would have had less impact on the open space if only condominium residents would be served. On the contrary, we found that the intrusion into the rural nature of the property is minimal.

We considered all the testimony, and our decision to grant the exemption was a decision that, under all the circumstances, there was insufficient evidence of suitable, available alternative sites with less impact on the zoning scheme so as to warrant denial of the exemption.

Regarding factor number seven, whether injury to abutters can be minimized by physical requirements, the Order notes and approves HAWC's proposed a Well Owners' Response Plan to protect the water rights of the residents of Kingston. *Id.* at 11.

Our decision expressly took account of local interests. Although we did not make findings of fact on each of the seven factors, our ruling in favor of the exemption is a decision that the local interests did not outweigh the public interest served by the utility. We believe we correctly followed and applied the law established in the *Milford* case. After further reflection

upon our Order prompted by Kingston's motion for rehearing, we remain convinced that we struck the right balance between the interests of HAWC's customers and the interests of local citizens in local regulation of land use. We do not believe our Order is based on an unauthorized interpretation of Kingston's zoning ordinance.

**C. Enforcement of RSA 374:22,I**

In its motion for rehearing, Kingston raised for the first time the issue of the Commission's failure to enforce RSA 374:22,I, requiring public utilities to obtain prior Commission approval to construct certain facilities in towns in which they are not already engaged in such business. However, HAWC's failure to obtain prior Commission approval was known or should have been known to Kingston during the prior proceedings. Accordingly, this assertion is not a valid ground for rehearing. Even assuming the issue was timely raised, however, we have found that the facilities constructed by HAWC are reasonably necessary for the public welfare, and under these circumstances we would be reluctant to enforce the statute in a way that would penalize HAWC's customers by denying the exemption on this basis. We are, nevertheless, concerned that the public utility statutes be properly enforced and we will take appropriate action in this regard, as set forth below.

**D. New Evidence**

Kingston's third ground for rehearing is "new" evidence about the continuance of HAWC's alleged "unlawful excursions" into Kingston's water supply. Based on the information in the motion for rehearing and HAWC's answer and objection, we do not think there is sufficient "new" evidence to warrant a rehearing on this ground. Moreover, for the reasons expressed in subsection B. above, we decline to use a denial of the exemption as the means of enforcing RSA 374:22.

HAWC admits "it is in the process of" applying for a franchise for a recently constructed water system serving a development in Kingston. Given this and the circumstances of HAWC's construction of the Bartlett Brook Condominium water facilities prior to Commission approval in a town not in its approved service territory, we will use our authority under RSA 365:5 to investigate HAWC's construction and operational activities in any towns not in its approved service territory to determine whether enforcement action is warranted.

**Based upon the foregoing, it is hereby**

**ORDERED**, that Kingston's motion for rehearing is denied; and it is

**FURTHER ORDERED**, that pursuant to RSA 365:5 the Commission Staff is to investigate and inquire into HAWC's past, present and contemplated construction and operational activities and actions in any town not in its approved service territory and report back to the Commission.

By order of the Public Utilities Commission of New  
Hampshire this fourteenth day of December, 2001.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary