

DW 00-214

**HAMPSTEAD AREA WATER COMPANY, INC.**

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

**Order Approving Waiver**

**O R D E R    N O.    23,759**

**August 7, 2001**

**APPEARANCES:** Robert H. Fryer, Esq. for Hampstead Water Company, Inc.; Donahue, Tucker & Ciandella by John J. Ratigan for the Town of Kingston, E. Barclay Jackson, Esq. for the Staff of the New Hampshire Public Utilities Commission.

**I. PROCEDURAL HISTORY**

On September 29, 2000, Hampstead Area Water Company, Inc. (HAWC) petitioned the New Hampshire Public Utilities Commission (Commission) for exemption from the Town of Kingston's (Kingston's) Zoning Ordinance and Site Plan Regulations as to three new wells and associated pump house and water mains, pursuant to RSA 674:30,III.

At a duly noticed Prehearing Conference held at the Commission offices on December 19, 2000, the Commission granted the Town's petition to intervene and heard preliminary statements. By Order No. 23,610, issued December 27, 2000, the Commission approved a procedural schedule for this docket and ruled that the time for interventions be extended in order to provide the public notice required by Puc 203.01. The Commission directed that a second prehearing conference would

be held if additional intervenors appeared as a result of the extended time. No additional intervenors came forward during the extended period of time.

Based on the approved procedural schedule, the parties and Staff exchanged discovery and Kingston filed testimony. On February 20, 2001, HAWC objected to certain Data Requests propounded by Kingston. The parties resolved that issue without further Commission action. On March 23, 2001, Kingston objected to the addition of two witnesses proposed by HAWC, asserting their testimony would be redundant. At the hearings held on April 3 and 4, 2001, Kingston withdrew its objection. Pursuant to a record request during the hearings, on April 9, 2001, HAWC filed an exhibit containing photographs of the wells and pumphouse at issue.

## **II. BACKGROUND**

HAWC proposes to operate the three new wells (the Hunt Road wells), the pumphouse and related water mains, all located in Kingston, for the benefit of 650 customers located in the Town of Hampstead. The wells are located in a portion of the Bartlett Brook Condominium, a real estate development that straddles the Hampstead-Kingston town line. In 1998, the Town of Hampstead granted residential construction approval to the Bartlett Brook condominium developers, subject to a

condition requiring 12 acres of open space in Kingston. Subsequently, HAWC obtained a water supply easement deed, at no financial cost, from the developers of the condominiums. In May, 2000, after several bedrock drilling tests on the property subject to the easement appeared successful, HAWC hired a waterworks engineering design company, Lewis Companies, to complete the requisite testing and mapping and obtain permits from the New Hampshire Department of Environmental Services (DES) for the Hunt Road wells. Lewis Companies had no regulatory obligation to notify Kingston of the proposed wells because of the wells' small size (less than 57,600 gallons estimated output per day).

HAWC installed the Hunt Road wells and associated piping and began construction of the pump house in 2000, without obtaining permits from Kingston. Upon learning of the activity, the Kingston Building Inspector instructed HAWC to cease construction. HAWC then applied to the Kingston Planning Board for site plan approval for the Hunt Road wells and pumphouse.

In September, 2000, the Kingston Planning Board denied HAWC's request for a waiver of particular elements of Kingston's zoning ordinance and for site plan approval. According to the Planning Board's decision, because the wells

and pumphouse are planned to serve more than the condominium residents, they are inconsistent with residential zoning. The Planning Board also found that the wells and pumphouse are inappropriate in land dedicated for open space purposes. Specifically, Kingston's zoning ordinance section 5.a. at page 56, requires that 33% of the total project area shall be set aside as:

"common open space intended for the use and enjoyment of the residents of the development. This common open space shall be permanently restricted for recreation, open space or conservation uses. It shall not be resubdivided but may contain accessory or utility structures and improvements necessary for the development or for educational or recreational uses."

Pursuant to RSA 674:30,III, HAWC sought Commission approval of an exemption from Kingston's zoning and site plan approval requirements which restrict the use of the wells and pumphouse. RSA 674:30,III, as amended in 1998, states:

"A public utility which uses or proposes to use a structure which does not fit the criteria described in paragraph I, or fits those criteria and has been denied a waiver, or has been granted a waiver with conditions unacceptable to the utility when the waiver was applied for pursuant to paragraph I, may petition the public utilities commission to be exempted from the operation of any local ordinance, code, or regulation enacted under this title. The public utilities commission, following a public hearing, may grant such an exemption if it decides that the present or

proposed situation of the structure in question is reasonably necessary for the convenience or welfare of the public and, if the purpose of the structure related to water supply withdrawal, the exemption is recommended by the department of environmental services."

In a memorandum to this Commission dated October 23, 2000, the Department of Environmental Services recommended that the water withdrawal structures be exempted from local zoning ordinances if they are deemed necessary by the Commission.

### **III. POSITIONS OF THE PARTIES AND STAFF**

#### **A. Hampstead Water Company, Inc.**

According to HAWC, it obtained the water rights easement because it anticipated the need for additional, supplemental, or replacement wells. HAWC argues that RSA 674:14,III applies to the easement. RSA 674:14,III states that easements in gross to public utilities for underground facilities, including small unstaffed structures, do not create new divisions of land. Thus, HAWC avers, Kingston's Planning Board has no authority over the easement and its approval is not necessary. Therefore, this case does not turn on the validity of the easement but on 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, 126 NH 127 (1985).

HAWC argues that the present and proposed situation of the structures in question is reasonably necessary for the convenience and welfare of the public as required by the statute because it meets the tests articulated in Milford. The tests articulated in Milford include: (1) locus suitability; (2) physical character of the uses in the neighborhood; (3) proximity of the site to residential development; (4) effect on abutters; (5) relative advantages and disadvantages to the public convenience; (6) whether other, equally serviceable sites are reasonably available; and (7) whether injury to abutters can be minimized by physical requirements. HAWC addresses each of these seven Milford tests, claiming that: the water is suitable and available at the site; the water was obtained without cost to other customers; the site is well located and has good access; the DES sanitary protection radius can be located almost entirely on the site; and the Open Space restrictions protect the site from detrimental development.

As to need, HAWC points out that its system experienced water shortages in the summers of 1998 and 1999 and that its water resources, even with the new wells on line, are insufficient to meet DES design standards. HAWC supports its claim with the clarifications of "reasonably necessary"

put forward in Town of Rumney v. Edward Bonel, Trustee et al., 118 NH 786 (1978). In that case, the New Hampshire Supreme Court rejected the claim that the Town of Rumney failed to show that it was reasonably necessary to take the particular land as opposed to someone else's. The Court found that the Town did not have to prove that it was reasonably necessary to take the subject land over alternative parcels of land by conducting soil suitability tests on the other parcels. According to HAWC, the rationale in Town of Rumney means that the Commission need not find that the site in question is the only suitable site or the "best" site.

#### **B. Town of Kingston**

The Town of Kingston argues that even if HAWC needs water, it may not sink wells at the first likely spot. HAWC, according to Kingston, has an obligation to investigate other sites, giving due deference to the municipality's statutorily created interest in local land use, and the orderly and planned growth of development.

The Kingston Planning Board exercised its ordinance authority when it rejected HAWC's after the fact application for planning approval. The Planning Board ruled that the particular location was not suited for three commercial wells. Kingston argues that the Commission must balance the Town's

interest in land use versus the utility's interest in using that particular location. According to Kingston, the utility's interest in using the particular location for a structure is tied to a requirement in RSA 674:30, I that the siting options for the structure are "limited by virtue of said structure being a physically integrated component of the utility's transmission or distribution apparatus." HAWC, Kingston claims, has made no such showing. Further, Kingston cites to two cases decided by the Commission in the 1980's for the proposition that a balancing of interests between a utility and the utility's customers involves whether there are alternative sources for water supply.

Kingston interprets the ruling in Milford to support its position that the subject site must be analyzed with reference to alternative sites. In Milford, Kingston argues that the utility faced a drastic reduction to water supply. Rationing was implemented and immediate investigations of several potential sites for additional supply were undertaken. The investigations resulted in a conclusion that only one site was suitable, a crucial factor in Kingston's view.

Kingston argues that no opinion regarding the suitability of the locus, the first Milford test, can be made without comparison to other sites. As for the other Milford

tests Kingston asserts that: the physical character of the uses in the neighborhood is that of open space; the proposed use is commercial; necessity is not shown; purchase or condemnation has not been pursued; and conditions on use should not be considered until other alternatives are explored.

Kingston objects to the lack of regard for process displayed by HAWC. The Town's regulations require that waivers are permissible only when the structure is necessary to the particular customers living or working upon the subject development or property. Kingston argues that granting a waiver to HAWC would reward the scofflaw.

Kingston also argues that the annual cost to HAWC customers of purchasing land for locating the wells elsewhere in Hampstead is de minimus compared to the scale of harm represented by HAWC's treatment of municipal rights and regulations.

#### **IV. COMMISSION ANALYSIS**

RSA 674:30,III (hereinafter, paragraph III) confers authority on the Commission to waive a local ordinance, code or regulation when a utility structure either does not fit the criteria contained in RSA 674:30,I (hereinafter, paragraph I)

to permit waiver of a local ordinance, or fits the criteria in paragraph I but was denied a requested waiver<sup>1</sup>. When the Commission exercises the authority granted in paragraph III, the applicable standard is that the present or proposed situation of the structure is "reasonably necessary for the convenience or welfare of the public." This standard is distinct from that propounded in paragraph I, which applies to a planning board or its designee. Therefore, contrary to Kingston's assertion, we need not examine the square footage, the necessity for public health and safety, or the limited siting options enumerated in paragraph I.

Addressing ourselves to the standard contained in paragraph III, we examine whether the subject structures are reasonably necessary for the convenience or welfare of the public, a less stringent standard. We are presented with a utility with a demonstrable need for additional water resources. The utility is not in conformance with the state's water resource design standard; there is testimony to the effect that the subject wells will produce additional capacity but still fall 40% short of the design standard contained in Env.Ws 372. The DES standard, requiring a 2.0 safety factor,

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<sup>1</sup> The authority also pertains when a waiver is granted but with conditions unacceptable to the utility, thus commensurate with denial.

was developed with the welfare of the public in mind. A DES representative testified as to the various considerations contemplated when estimating the adequacy of a well or a well field's production capacity. In addition to the fact that HAWC does not conform to the DES design standards for adequate water supply to protect the public absolutely, other evidence is found in the record<sup>2</sup> with respect to the need for additional water resources. For example, during the summers of 1998 and 1999, water shortages necessitated that customers limit their outdoor usage to every other day.

We are convinced by the totality of the record before us that the additional resources obtainable from the Hunt Road wells are reasonably necessary to provide protection against abrogation of the water quality and quantity from HAWC's existing wells. In conjunction with the vagaries of New England weather, the shortfall could mean insufficient water for the health and safety needs of New Hampshire customers.

We are cognizant of the Town of Kingston's interest in the preservation of open space, an interest that serves the public good and adds to the quality of life in New Hampshire.

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<sup>2</sup> See Exhibit 1, pp. 15-16, Attachments to Exhibit 1: D, G, and O; Exhibit 2, Attachment BL-3.

We therefore look carefully at the effect that can be anticipated by granting the waiver HAWC seeks. At the outset we note that the open space ordinance from which HAWC seeks an exemption explicitly allows such open space to contain utility structures and improvements necessary for building developments that are subject to that ordinance. In this case, the Hunt Road Wells will be supplying water to the adjacent building development as well as to other HAWC customers. Accordingly, 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. In addition, we have reviewed the photographs of the wells and pumphouse as well as the proposed access and service projected for maintenance. We find the intrusion into the rural nature of the property is minimal. Traffic for maintenance by the company will be light; no customers come to the property for service; the construction is negligible within the wooded space. We further find that the DES requirements for a sanitary buffer zone will protect the property from other, more extensive, intrusion. In addition, we note that HAWC has proposed as part of its petition a "Well Owners Response Plan" intended to protect those residents of Kingston whose wells might be adversely affected by the Hunt Road wells. We find

the plan to be appropriate and will therefore approve it.

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

**ORDERED**, that waiver from Kingston's Land Use Ordinance and Regulations in order to locate three production wells within the subject property is hereby GRANTED subject to HAWC's implementation of the "Well Owners Response Program."

By order of the Public Utilities Commission of New  
Hampshire this seventh day of August, 2001.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Thomas B. Getz  
Executive Director and Secretary