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May 25, 2017

Kelley A. Collins
Town Administrator
Town of Wakefield
2 High Street
Sanbornville, NH 03872

Re: 2017 Annual Meeting Article 20 – Drew Mill Dam Appropriation

Dear Kelley:

This letter summarizes my legal research and thoughts regarding whether the appropriation approved at the 2017 annual meeting for repairs to the Drew Mill Dam should be released by the selectmen, or whether it is an invalid, and therefore illegal, purpose under New Hampshire law. This letter encapsulates the substance of my April 24, 2017 letter to you on this topic, and is provided at the selectmen's request that my legal opinion be disclosed to the public.

In summary, my opinion is that the warrant article does not meet the test for being a justifiable "public purpose," and therefore the funds should be withheld.

The article itself, which was placed on the warrant by petition, reads as follows:

To see if the Town will vote to raise and appropriate the sum of Thirty-Four Thousand Five Hundred Dollars (\$34,500) to aid the Union Village Community Association in the Engineering Design and Repair of the Emergency Spillway and Abutments of the Drew Mill Dam, thus ensuring the continuation of the Drew Mill Pond for Recreational Use and Fire Protection. (Majority vote required).

The article was approved without amendment by a ballot vote of 290 in favor, 205 opposed.

Legal Analysis

Whether the Town of Wakefield (“Town”) or any governmental entity can expend funds on a particular project boils down to essentially one issue, namely whether the expenditure is for a “public purpose.”

“All appropriations or expenditures of public monies by municipalities must be for a public purpose. The concept of just what is or is not a public purpose is neither static nor stationary. What constituted a public purpose in the last century does not necessarily set the outer limits of that public purpose in this century.”¹ “It is an underlying principal of our government that the money raised by taxation can be used only for public purposes and not for the advantage of individuals. Public expenditures must be for some public service or some object that concerns the public welfare.”² “A promotion of the general welfare which incidentally benefits certain individuals is not improper.”³ However, and conversely, “[t]he promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare is, in its essential character, a private and not a public object.”⁴

So in essence, a public purpose is a rather non-specific notion that I, as Town counsel, cannot define for you. What I can tell you from my research, as summarized above, is:

1. Public expenditures cannot solely be for the benefit of one or more individuals;
2. Public expenditures can incidentally benefit individuals if the public expenditure also benefits the public at large;
3. If a public expenditure benefits one or more individuals, it must also benefit the public welfare more than just incidentally; and
4. Public expenditures must be for some public service or some object that concerns the public welfare.

Public Benefit

Article 20 proponents argue there is no question but that having a pond or a lake confers some level of public benefit. As they point out, open water attracts birds and other wildlife, and the pond has scenic value. It also aids in fire protection, being a source of water to draw from in case of fire. Having a pond abutting properties also theoretically increases property values and tax revenues, thereby reducing the need for tax revenues from other sources. Not maintaining the dam

¹ 16-1 NH Practice Series: Municipal Taxation & Road Law § 1.02.

² Id., citing Opinion of the Justices, 88 N.H. 484 (1937).

³ Id., citing Opinion of the Justices, 99 N.H. 528 (1955).

⁴ Opinion of the Justices, 88 N.H. 484, 486.

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in place could negatively affect community spirit, property values and economic viability in Union Village.⁵

Assuming the pond/dam does benefit the public, the question becomes exactly *how much* does it benefit the public?

Opponents argue the benefit to the public is minimal. There are only a few parcels on the pond, most of which are privately owned, and none of which are assessed for waterfront. The fire chief has, to date, not sought the installation of a dry hydrant in case of a need for water in the area. If the dam were to breach, there would likely be no adverse effects downstream, and if there were adverse effects, they would all be in Milton. Milton was not requested to raise funds for this project. Opponents also question whether losing the dam and the pond would have any effect whatsoever on Union's community spirit, property values, or economy. It is also pointed out the public has no access to the pond.⁶

Individuals Benefitted

It goes without saying that individuals will benefit from this expenditure. As stated above, the NH Supreme Court does not seek to veto a project because it incidentally, or perhaps even directly, benefits individuals. If a public expenditure benefits one or more individuals, it must also benefit the public welfare more than just incidentally.

I count 10 properties that abut Drew Mill Pond, of various types and sizes. Two are extremely small parcels – one of which the Town owns (an antique mill-type building, if I remember correctly) – and the neighborhood is perhaps best described as a mixed use – residential and light commercial.

It seems inescapable that the owners of properties surrounding the pond would benefit the most by keeping it as a pond. It is not clear to me the pond is visible from any public vantage point other than the Chapel Street bridge, due to the amount of trees and other foliage surrounding the pond and the entire area.

Establishing Precedent

There are a number of dams throughout the Town. I have not attempted to count how many. But I know of at least one, the dam at Belleau Lake, which is also privately owned. Belleau Lake is a

⁵ Minutes, Wakefield Board of Selectmen, December 13, 2016.

⁶ Various minutes, including minutes of the 2017 Wakefield Annual Town Meeting 2017.

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much larger lake than Drew Mill Pond, and benefits hundreds of property owners, not just a handful.

Politically, it would be difficult to argue that the Belleau Lake Dam doesn't have a much greater public benefit – orders of magnitude greater – than the Drew Mill Pond Dam. Although I don't believe voting in favor of expending the money for the Drew Mill Pond Dam necessarily establishes any *legal* precedent, it certainly establishes a precedent insofar as the Town's interpretation of "public welfare," an interpretation that will likely apply not only to dams and ponds, but to anything that might have a public component. Precedent can be a long, slippery slope.

Summary and Conclusion

How to determine whether a public expenditure is legal or illegal is always a matter of weighing the facts. Public expenditures can *incidentally* benefit individuals if the public expenditure also *benefits the public at large*.

It is not my job to determine when a public expenditure is legal or not, but in anticipation this exact question is being sought from me, I will do my best to answer it.

Based upon everything I have heard and seen – town meeting, minutes, tax maps, Google Earth maps – I find there to be insufficient evidence to satisfy the "public benefit" component under New Hampshire law. Likewise, the evidence I reviewed suggests the private benefit to be greater than the public benefit, which would render illegal the spending of this money on the dam repairs. Thus, my opinion is that the expenditure of public funds to effect repairs to this privately-owned dam would be contrary to prevailing New Hampshire law. If repairs to the dam are indeed required, New Hampshire law requires such repairs to be privately funded, which would be the same situation with other privately-owned dams in Town.

I am not an elected official, and the choice is ultimately up to the board to determine whether there exist sufficient facts to justify the expenditure of public funds. There would be nothing wrong with the selectmen holding a public hearing to obtain additional input, if the selectmen believed that would be helpful. I am not advocating that a public hearing be held, as I conclude from my review of the available materials this issue has been discussed at considerable length.

Finally, I feel compelled to state I have no personal interest in whether the dam at Drew Mill Pond is repaired or not. Until the article on the warrant was provided to me for review in anticipation of finalizing the 2017 Town Warrant, I didn't know the Drew Mill Pond Dam existed. However, as with every article that seeks to expend public funds on matters of private concern, an enhanced

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examination of the underlying facts is required to ensure expenditure of public funds does not run afoul of New Hampshire law. I cannot, in good conscience based upon the facts and law, recommend such expenditure despite the vote in favor of it on Election Day. And of course, the selectmen can feel free to obtain a second legal opinion if they deem it necessary.

If I can provide any additional information or assistance on this matter, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to be 'RDS', written in a cursive style.

Richard D. Sager (NHBA# 2236)
RDS/rs