

THE STATE OF NEW HAMPSHIRE

Department of Environmental Services

Wetlands Council

2005 Term

No. 05-12WtC

MEMORANDUM OF
GARRISON PLACE REAL ESTATE INVESTMENT TRUST

The intervener, Garrison Place Real Estate Investment Trust, submits this memorandum as an aid to the Wetlands Council's consideration of the appeal by the Town of Barrington of the New Hampshire Department of Environmental Service's decision in File #2004-02817.

I. INTRODUCTION

Barrington's appeal presents a question of statutory interpretation. Distilled to its essence, Barrington's position is that RSA 482-A:11 required the Wetlands Bureau, in determining whether to approve six monitoring devices located in and around Barrington Prime Wetland #40, to undertake an independent review of a Large Groundwater Withdrawal Permit issued to USA Springs by the Water Supply Engineering Bureau pursuant to RSA 485-C ("LGWP"). As discussed in detail below, such an interpretation of RSA 482-A:11 would violate every applicable canon of statutory interpretation and, therefore, must be rejected.

To begin with, the phraseology in RSA 482-A:11 that Barrington claims compels a review of the LGWP –“that the proposed activity, either alone or in conjunction with

other human activity”– does not apply to the LGWP. The LGWP and the monitoring devices do not operate in conjunction, as that term is used in the statute, because the effect of the monitoring devices on Barrington Prime Wetlands #40 is completely unaffected by the LGWP. Thus, under Barrington’s proposed interpretation of the statute, an activity that has no effect whatsoever on the monitoring devices’ effect on the BPW would determine whether the monitoring devices affect the BPW. Such a construction is totally absurd as it ignores the effect of the “proposed activity” on the BPW. Therefore, it must be rejected.

Assuming for the sake of argument that the phrase “in conjunction with” means, as Barrington claims, that the Wetlands Bureau must consider the LGWP in determining whether the monitoring devices affect the BPW, Barrington’s position still fails because RSA 482-A:11 must be read as incorporating the conclusions reached under the Department of Environmental Service’s (“DES”) analysis of the LGWP under RSA 485-C. Any other interpretation would be illogical and would read into the statutory scheme language that the legislature chose not to include and, therefore, must be rejected.

II. DISCUSSION

A. Standard of Review

Statutory interpretation begins with the language of the statute. Estate of Gordon-Couture v. Brown, 152 N.H. 265, 266 (2005). However, words and phrases cannot be looked at in isolation; the statute must be considered as a whole and the statute itself

cannot be interpreted in isolation, but must be viewed in the context of the overall statutory scheme. Lower Bartlett Water Precinct v. Murnik, 150 N.H. 690, 692 (2004). The goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. Estate of Gordon-Couture, supra.

To the extent that statutory language is ambiguous, it is presumed that the legislature would not pass an act that would lead to an absurd or illogical result. Estate of Gordon-Couture, supra.

Statutes cannot be interpreted to add language that the legislature chose not to include. Lower Bartlett Water Precinct v. Murnik, supra.

B. Barrington's Proposed Construction of RSA 482-A:11 Would Lead to an Absurd Result and, Therefore, Must be Rejected.

In relevant part, RSA 482-A:11 provides that the permit shall not be issued unless DES finds that "the proposed activity, either alone or in conjunction with other human activity, will not result in the significant net loss" of any RSA 482-A:11 values.

The obvious intent of the statute is to determine whether the activity to be permitted would cause a significant loss of the RSA 482-A:11 values. Thus, "in conjunction with" cannot be read to apply to an activity that does not effect the proposed activity's effect on the prime wetland as that would mean the permitting decision would not be based on whether the proposed activity caused a significant loss of RSA 482-A:11 values.

Barrington argues that the monitoring devices constitute “other human activity” under RSA 482-A:11 because “if there was no groundwater withdrawal, there would be no need for the monitoring devices.” *Petition for Appeal* at ¶14. However, why the monitoring devices are present does not establish whether they are “in conjunction” with the LGWP. That is determined by whether the LGWP affects the monitoring devices’ effect on the BPW. And not even Barrington is brazen enough to claim that such a relationship exists.

Under Barrington’s proposed construction of RSA 482-A:11, “in conjunction” means any nexus. Under this construction, the LGWP would determine whether the monitoring devices affect the BPW, even though the LGWP has no effect whatsoever on the monitoring devices’ effect on the BPW. Such a construction is totally absurd, as it ignores the monitoring devices’ effect on the BPW. Therefore, it must be rejected.

The LGWP and the monitoring devices do not operate in conjunction, as that term is used in the statute, because the effect of the monitoring devices on Barrington Prime Wetlands #40 is completely unaffected by the LGWP. Therefore, the Wetlands Bureau properly interpreted RSA 482-A:11.

C. **Barrington’s Proposed Construction Must be Rejected Because to the Extent that the Wetlands Bureau Considers the LGWP it is Bound by the RSA 485-C Findings.**

Assuming for the sake of argument, that the “other human activity” in RSA 482-A:11 refers to the LGWP, the question then becomes how does the Wetlands Bureau determine the effect of the LGWP on BPW #40. Barrington simply ignores this question,

and with good reason. It leads to precisely the opposite answer that Barrington wants the Wetlands Council to reach.

The legislature provided a comprehensive statutory scheme for the regulation of large groundwater withdrawals in RSA 485-C. RSA 485-C:21, which is titled "Approval for Large Groundwater Withdrawals," provides as follows:

- I. No person may withdraw 57,600 gallons or more of water in any 24-hour period from a well sited after the effective date of this section without the prior approval of the department.
- II. Applications for approval of water withdrawals of 57,600 gallons or more per day shall be filed with the department in a form approved by the department. A preliminary report submitted by a public water system pursuant to department rules shall be an application for purposes of this section. Copies of the application shall be forwarded by certified mail by the applicant to the governing bodies of each municipality and each supplier of water within the anticipated zone of contribution to the well.
- III. Following the submission of the application, the department shall hold a public hearing on the application in the municipality in which the proposed withdrawal is to be made upon the request of the governing body of any municipality or supplier of water within the anticipated zone of contribution, provided that such a hearing is requested within 15 days of receipt of the application.
- IV. The department shall hold the public hearing within 30 days after the request of the governing body of the municipality or the supplier of water made pursuant to paragraph III. Notice of the hearing shall be made by the applicant and shall be published twice in 2 different weeks, the last publication to be 7 days before the hearing, in one newspaper of general circulation throughout the state and another newspaper of general circulation in the municipality. The notice shall also be posted in 2 public places in the municipality.
- V. The applicant and the governing body of each municipality and each supplier of water within the anticipated zone of contribution to the well may submit comments to the department relative to the proposed withdrawal within 45 days after the public hearing in the municipality or, if no hearing is requested, within 45 days after the receipt of the application. If the comments relative to the application make recommendations to the department, the department shall specifically consider such recommendations and shall issue written findings with respect to each issue raised that is contrary to the decision of the department.
- VI. Rehearings and appeals from a decision of the department under this section shall be in accordance with RSA 541.

Thus, the legislature clearly identified the parties it wanted to receive notice of potential large groundwater withdrawals: the “governing bodies of each municipality and each supplier of water within the anticipated zone of contribution to the well.” It was clear about how these parties could obtain a public hearing. And it was clear about how these parties could submit comments and that DES must “issue written findings with respect to each issue raised that is contrary to the decision of the department.”

RSA 485-C:4, XII, which governs rule-making involving large groundwater withdrawals provides as follows:

XII. All new groundwater withdrawals of 57,600 gallons or more in any 24-hour period. Such rules shall include:

- (a) Criteria and procedures for requiring persons to identify and address impacts of withdrawals on surface waters, subsurface waters, water-related natural resources, and public, private, residential, and farm wells within the anticipated zone of contribution to the withdrawal.
- (b) Requirements relative to conservation management plans which demonstrate the need for the proposed withdrawals, to be submitted by the persons seeking approval for a withdrawal.
- (c) Procedures by which the department may deny permission for withdrawals or order the applicant to provide a response policy, as provided by department rules, for provision of alternative water supply at no initial capital cost to persons whose wells are adversely affected by the proposed withdrawal or order reduced withdrawals if hydrogeologic data indicate that water-related resources are being adversely affected by the withdrawals.

Thus, the legislature was clear about what it wanted DES to consider: the “impacts of withdrawals on surface waters, subsurface waters, water-related natural resources, and public, private, residential, and farm wells within the anticipated zone of contribution to the withdrawal.”

DES has enacted a comprehensive regulatory scheme to effectuate this legislative intent, Env-Ws 388. Pursuant to the applicable statutes and regulations, the Water Supply Engineering Bureau undertook a lengthy and comprehensive review of USA Springs’

application for a LGWP and issued a detailed and thorough statement of “Decisions and Findings” that was 78 pages long.

Among the issues and topics addresses in the “Decisions and Findings” was every issue raised by Barrington in this proceeding. Moreover, the Water Supply Engineering Bureau specifically found that there would be no net loss of the RSA 482-A:11 values:

The requirements of RSA 485-C and Env-Ws 388 are much more extensive than what Barrington has described and include comprehensive protection to all water resources and water users as described in detail in Section 3.0. The Department finds that the large groundwater withdrawal permit issued to USA Springs in accordance with the requirements of Env-Ws 388 ensures that no adverse impacts as described by Env-Ws 388.18, including no net loss of values and functions of Barrington’s prime wetland, will occur.

Decision and Findings at 54-55. Barrington, however, wants the Wetlands Bureau to simply ignore these findings and undertake its own analysis.

It is inconceivable that the legislature would establish a comprehensive statutory and regulatory scheme to evaluate groundwater withdrawals, only to have the Wetlands Bureau ignore this scheme. Such a construction would be illogical as it would lead to –at best– redundancy, and creates the potential for conflicting results. Thus, to the extent that “other human activity” in RSA 482-A:11 encompasses the LGWP, the Wetlands Bureau is bound by the findings made pursuant to RSA 485-C.

Barrington’s construction also would leave the Wetlands Bureau with no guidance as to how to consider the LGWP. RSA 482-A:11 contains none of the guidance contained in RSA 485-C, which requires, among other things, that DES establish through the rule-making process “criteria and procedures for requiring persons to identify and address impacts of withdrawals on surface waters, subsurface waters, water-related

natural resources, and public, private, residential, and farm wells within the anticipated zone of contribution to the withdrawal.” *RSA 485-C:4, XII*. Consequently, Barrington’s proposed construction of RSA 482-A:11 would require the Wetlands Bureau to add language to RSA 482-A:11 that the legislature chose not to include. For this reason as well it must be rejected. See *Lower Bartlett Water Precinct v. Murnik*, supra.

For the reasons stated, to the extent that “other human activity” in RSA 482-A:11 encompasses the LGWP, the Wetlands Bureau is bound by the findings made pursuant to RSA 485-C. Therefore, the Wetlands Bureau reached the correct result.

III. CONCLUSION

For the reasons stated above, Barrington’s appeal should be denied.

Respectfully submitted,
Garrison Place Real Estate Investment Trust,
By its attorney,
Edward C. Mosca

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Sottani/Mosca PLLC
PO Box 457
Epsom, NH 03234
(63) 736-3320

CERTIFICATE OF SERVICE

I, Edward C. Mosca, hereby certify that a copy of the foregoing was mailed, first-class, postage paid, to Brian K. Fowler, Chairman, NH Wetlands Council, Michael P. Nolin, Commissioner, DES, Harry T. Stewart, P.E., Director, DES Water Division, Kerry D. Barnsley, DES Legal Unit, Mark E. Beliveau, Esquire, Collis Adams, Administrator, and Jennifer J. Patterson, NH DOJ on this 2nd day of Feb, 2006.

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Edward C. Mosca