

## Another Solution ...

In my last piece I argued that Town ownership of Johnson Pond via eminent domain is the best long term solution to the problem Johnson Pond residents now face. While I still believe this is the best solution there is another, almost as good, solution found in Rhode Island General Laws § 42-62 et. seq. “Dam Management Districts”. The Dam Management District Act (DMDA) is short and attached for your review. Only the first three sections are important to this discussion.

I suggest that the DMDA gives the Town of Coventry the authority to create a Dam Management District (DMD) which would have the power to both monitor the condition of the dam and ensure it remains in a safe condition for perpetuity, and also take control of the water level from Soscia Holdings. (A DMD could also own the whole pond and dam in fee simple, but for this article I am assuming only the water rights are seized.) I hope the following questions and answers will explain why this is the case.

### **Can a Dam Management District (a public, quasi government entity) take control of a privately owned dam?**

The answer to this is “Yes” and an examination of the statute and currently operating DMDs will explain why. There are two DMDs in Rhode Island, one at Pascoag/Echo Lake in Burrillville/Glocester and another at Boone Lake in Exeter ([boonelakeri.org](http://boonelakeri.org)). Pascoag Reservoir is owned by the Towns of Burrillville and Glocester (although probably subject to a right of redemption by the previous owner) and is managed by Pascoag Reservoir DMD ([prdmd.org](http://prdmd.org)). While today this is a public body of water controlled by a public DMD, this was not the original configuration. The Pascoag Reservoir DMD was created by Town Ordinance in 2009 but Burrillville did not acquire title (via tax sale) to the reservoir until 2011. Thus, for the first two years of the DMD’s existence, it was controlling a privately owned dam and reservoir.

The Boone Lake DMD is another, express example of the same. Boone Lake is a privately owned reservoir which is overseen by the Boone Lake DMD, as created by the Exeter Town Council. It should be noted that the Boone Lake DMD seems to have been created at the will of the people it serves and was not a creation born out of animosity. It seems to have been a peaceful rather than hostile takeover. However, that distinction is legally irrelevant as the statute does not require any particular level of community or dam owner consent for the creation of a DMD.

A look at the statute also tells us that a DMD can be authorized to enter upon private property to fulfill the functions authorized by the Rhode Island Legislature when it enacted the DMDA. See specifically, §45-62-3 (b)(1)&(2).

### **Can a Dam Management District take control of both the dam maintenance obligations and control the water level of a private dam?**

The answer to this is “Yes” because the DMDA is quite specific about the values it sets out to protect via the creation of DMDs. If a DMD could not control both the maintenance and water level, the very purpose of the Act would be defeated. Here’s why.

§45-62-1(2) states in pertinent part:

“In order to protect the values that dams provide, . . . dams must be properly operated, maintained, (and) repaired . . .”

(I’ve omitted the wording having to do with risk mitigation via dam removal).

The “values” that dams provide and must be protected are listed in §45-62-1(1) and include:

- Protection of public safety and private property;
- Protection of drinking water supplies;
- Protection of recreational opportunities;
- Protection of electrical supplies;
- Preservation and enhancement of scenic beauty;
- Conservation of fish and wildlife resources.

§45-62-2 explains that Towns are authorized to protect the above listed values by enacting ordinances that govern the repair, maintenance, management, and/or removal of dams.

Fortunately, any question as to whether or not a Town has the authority to enact ordinances to govern the level of a particular reservoir has been answered by Soscia Holdings. Through its actions this summer, Soscia Holdings directly destroyed recreational opportunities, ruined the scenic beauty of the area, killed fish and other aquatic life, harmed wildlife resources and quite possibly contributed to the end of season blue-green algae bloom. All of these harms were the result of Soscia Holdings highly questionable control of the water level during this past season.

**Would taking control of dam repairs and water level by a quasi-governmental Dam Management District constitute a taking that Soscia Holdings would have to be compensated for?**

The safest bet is to assume the answer is “Yes”.

Look at the two rights and obligations a DMD would be taking away from Soscia Holdings: 1) The freedom to inspect and repair the dam in the manner of its choosing; and 2) Control of the water level. As to the first, Soscia Holdings already has a legal obligation to maintain the dam in a safe manner and make necessary repairs. While a DMD would likely be more attentive to the dam under its jurisdiction than D.E.M. has been, there is no additional burden being placed on Soscia Holdings and thus nothing to compensate.

Seizing control of the water rights is a bit more interesting. The ability to control the level of the water behind a dam is a property right appurtenant to ownership of the dam. Thus, the removal of that right from the dam owner would be considered a “taking” subject to “just compensation”.

So what is the value of this property right?

For starters, the right to raise and lower the water is not absolute; it is already regulated by D.E.M.. (Although admittedly D.E.M. seems to be a.w.o.l. as to its responsibility to enforce its regulations. I'm still trying to figure out how D.E.M. just shrugged its shoulders at the removal of 3.5 million gallons of water from a wetland resulting in dead fish, etc.).

Further, Soscia Holdings cannot sell water to downstream abutters. Downstream abutters to a natural stream are entitled to use the water that would naturally flow by their property. Besides, who downstream would want to buy extra water? Soscia Holdings also cannot sell the water as drinking water. And, I don't think Soscia Holdings is going to argue that the value of controlling the water level is to threaten harm to the property values of the abutters for its financial gain. There's that pesky extortion problem again. Thus, there is no inherent value in the right to control the level of the water as there is no legitimate, legal business opportunity associated with such a right. This would place the fair market value for the taking of the water rights at \$0.

Alternatively, it has been rumored that Quidnick Reservoir Co. added an additional \$300k to the purchase price to include the water rights with the dam and reservoir. Take this number for what it is worth, it's just a rumor I heard. *If* correct, then one could argue that this was an arm's length transaction and thus represents what a seller was willing to sell for and what a buyer was willing to pay. This is the definition of fair market value.

The best argument Soscia Holdings could make for the value of the water rights is that the current lease establishes the value of these rights. The argument would be that the Town entered into an agreement presently worth about \$110,000/yr. (between tax abatements and direct monetary payments) and that the only real benefit the Town gets in exchange for this payment is the right to rely on certain water levels throughout the year. Thus, the value of the water rights has been established though decades of past precedent and currently sits at approximately \$110k/yr. For the sake of argument, let's assume that is true. What would the present value of \$110k/yr. forever be? What would this cost the Town, if the argument is correct?

How one calculates the present value to be paid for future lost profits is open to interpretation by accountants, but I'll take a stab at it using what I think are very conservative numbers. To calculate the current value of future lost profits you need to know how far into the future the profits would exist, and then apply a discount rate to recognize that a payout today is worth more than waiting for the money over time, the costs associated with ownership of the dam, and the risk that future profits are not guaranteed. Typically, future lost profits are capped at a period of five to ten years since the future is uncertain. For my calculations I am going to assume \$110k/yr. forever (no cap) with a 5% discount rate representing mortgage interest, insurance and other costs. This yields a current value of a \$110k/yr. lease running forever at about \$1.2 million.

This is the absolutely best case scenario for Soscia Holdings. Why? Because the 5% discount rate applied above is way too low. It fails to account for risks such as:

The costs of any significant repairs to the dam or gates;

Cost of any future modifications demanded by D.E.M. (ie. improved spillway);

The cost of legal fees to fight any number of adverse possession and prescriptive easement claims or to argue about any taking;

D.E.M. fines (probably not).

Any of the above would either eat into any potential profit or risk there not being any future profit at all. If you apply a more standard discount rate of 15% then the present value of the water rights drops to \$480,000. If repairs and legal fees ever equal or exceed \$1.2mil then the future value of the lease is \$0.00.

This assumes that the lease represents the true value of the right to control the water level. The Town would likely argue that the cost of the current lease represents an amount to settle differences and avoid litigation and has nothing to do with any fair market value of the water rights. If the lease was entered into to avoid litigation between Quidnick Reservoir Co. and the Town, so that such value determinations could be avoided, then the lease should not be used to establish any particular value. Further, there is no obligation for the Town to enter into the lease at all. That makes the value of the lease payments going forward far from certain. So again, that \$1.2mil. figure is based on an unrealistic, absolute best case scenario.

Why go through all this? Well, we now have a range of what the potential value of the water rights are: Somewhere between \$0 and \$1.2mil with the most likely number being somewhere around \$300k. Notice that this range of \$0 to \$1.2mil is very similar to the valuation numbers I came up with in my last piece. In my last piece I used a comparable sales approach, this time an income approach. Both methods yield the same range and both suggest a value south of \$500k. But keep in mind that the actual cost to the Town would be much lower since it would no longer have to pay for the lease and about \$60k in new tax revenue would come in each year. Over time, the cost to the Town would be nothing.

(You might be saying, “Wait a minute, this time you were looking at the value of the water rights and last time it was for the whole pond and dam, how can they be the same?” My answer is that if you take the water rights away from the pond and dam, all you have left is: 1) the dam, which has no independent value separate from the water rights and is otherwise just a liability; and 2) a large puddle of water full of fish that has virtually no value as there is no market for the water or the fish. How you apportion the total value between the dam, reservoir and water rights is somewhat arbitrary.)

### **Benefits of Establishing a Dam Management District**

If a DMD took over the water rights, the games that were played this past summer would never happen again. A system would be established to ensure that the dam was properly maintained in perpetuity. Further, the Town would never have to enter into another lease, ending

the associated yearly payment, and about \$2,400,000 worth of real estate would be returned to the tax rolls. Residents around the pond, and in Coventry as a whole, would be in a better position than they are now.

### **The Downside**

Cost: The cost of any taking would be assessed to the abutting land owners. (Divided by 700 and paid over 20 years or so).

A DMD will have associated costs of operation. The Pascoag Reservoir DMD 2019-20 budget was \$4,000. I believe the costs associated with a Johnson Pond DMD would be higher than that.

But the biggest problem is that Soscia Holdings would still own the reservoir and would likely try to find other ways to torment the abutters. For example, anyone seeking to build a new dock will still need Soscia Holding's approval. This solution does not remove the cancer it just keeps it under control.

Whether seizing the reservoir and dam via eminent domain or just taking control of the water level via a dam management district, the Town Council has the unilateral power to end all this.

Chris Anderson, Esq.

For an interesting article about how the Boone Lake DMD works see,  
[https://www.casaly.com/barbara/samples/Boone\\_Lake\\_article\\_in\\_LakeLine.pdf](https://www.casaly.com/barbara/samples/Boone_Lake_article_in_LakeLine.pdf)

## **CHAPTER 45-62**

### **Dam Management Districts**

#### **§ 45-62-1. Legislative findings.**

The general assembly recognizes and declares that:

- (1) Many man-made dams in Rhode Island provide important values to local communities, including the protection of public safety and private property; the protection of drinking water supplies, recreational opportunities, and electrical supplies; the preservation and enhancement of scenic beauty; and the conservation of fish and wildlife resources.
- (2) In order to protect the values that dams provide, or mitigate the risk posed by dams that no longer serve any useful purpose, dams must be properly operated, maintained, repaired and/or removed.
- (3) The costs of properly operating, maintaining, repairing and/or removing dams are often significant and recurring in nature. In order to meet these costs, local communities should be able to form dam management districts as one of several financial tools available to them.

#### **§ 45-62-2. Declaration of purpose.**

The purpose of this chapter is to authorize the cities and towns of the state to adopt ordinances creating dam management districts ("district") for dams, the boundaries of which may include all or part of a city or town as specified by the ordinance. These ordinances shall be designed to prevent threats to public safety and public and private property caused by the failure or breach of dams and to protect the values associated with dams through the implementation of dam repairs, maintenance, management and/or removal. Dam management districts created pursuant to this chapter shall be bodies corporate and politic, having an existence separate and apart from the town or city and from the state, for the purpose of managing dams and providing for dam safety within the boundaries of the district.

#### **§ 45-62-3. Power of councils.**

- (a) The council of any city or town is authorized and empowered to establish by ordinance one or more dam management districts within the city or town; if the need for the management of a dam or dams is multi-municipal, a multi-municipal dam management district may be established by the concurrent adoption of an ordinance by the city or town councils of the municipalities in which the dam management district will be located. The ordinance shall set forth the boundaries of the district, provide for the governance and administration of the district, and require for annual reporting by the district, as a minimum, to each city and town with area within the district and the department of environmental management.
- (b) Except as restricted or limited by ordinance, a dam management district shall have the power to:
  - (1) Provide for entry of city, town, state or district officials in a manner equivalent to the provisions of § 23-27.3-112.0, onto private property within the district when necessary for the periodic inspection, maintenance and/or repair of dams and appurtenant facilities;
  - (2) Provide for the supervision, control, maintenance, repair and/or reconstruction of dams, including activities relating to dam removal;
  - (3) Establish a public education program to educate new residents and update members of the district on new information or procedures for proper maintenance and operation of dams and the implications for failing to operate and maintain dams in a manner that meets generally accepted dam safety practices;

(4) Raise and expend funds for the administration, operations, contractual obligations, and services of the district, and fix and collect rates, fees, and charges within the district for the provision of dam management services by the district;

(5) Employ staff, counsel, and consultants as necessary to carry out the functions of the district and purposes of this chapter;

(6) Acquire, hold, use, sell, transfer and lease real or personal property, and to own, operate, maintain, repair, improve any property acquired;

(7) Apply for, contract for, receive, and expend grants and loans for the maintenance, repair, removal and/or reconstruction of dams, and for other activities authorized by this chapter; and

(8) Adopt a common seal, sue and be sued, and enjoy the powers generally incident to corporations.

(c) Any dam owned and furnished by any municipality, water district, fire district or any other municipal or quasi-municipal corporation that is regulated as a water supplier by the Rhode Island public utilities commission under chapter 1 of title 39 and subject to the provisions of chapter 15.6 of title 46 shall be exempt from the provisions of this chapter.

(d) With respect to the towns of Burriville and Glocester, collection of Dam Management District fees shall be in the same manner as provided by law for the collection of taxes by municipalities and the collector of fees for the said Management District shall, for the purposes of collecting fees assessed by said Management District, have the same powers and authority as are by law conferred on collection of taxes for towns in the state.

#### **§ 45-62-4. Lien of district fees.**

All fees and charges assessed against any person in any district pursuant to this chapter shall constitute a lien upon that person's real estate in the district for the space of three (3) years after the assessment, and, if the real estate is not alienated, then until the fees are collected.

#### **§ 45-62-5. Indemnification.**

Any elected or appointed district official, employee, or member of the district is entitled to all the rights and benefits of indemnification, as provided by § 45-15-16.

#### **§ 45-62-6. Powers of department and responsibilities of dam owners retained.**

Nothing in this chapter shall be construed to affect the powers and duties of the department of environmental management, as they relate to dams, established pursuant to other provisions of law; nor shall this chapter be construed to affect the responsibilities of dam owners, established pursuant to chapter 19 of title 46, absent the establishment of a district.

#### **§ 45-62-7. Exemption from real and personal property taxes.**

The towns of Burriville and Glocester are authorized to enact ordinances which exempt from taxation real and personal property owned by a Dam Management District created pursuant to this chapter, said exemption to be limited to property that consists of the lake bed of the Pascoag Reservoir, also known as Echo Lake and property on which any dam, spillway and any appurtenant structures may be located as the same relate to the Pascoag Reservoir, also known as Echo Lake.