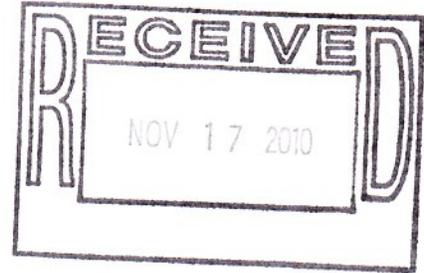




November 15, 2010



Judith E. Whitelaw, Esq.
Mitchell Municipal Group, PA
25 Beacon Street East, Suite 2
Laconia, NH 03246-3445

Re: Town of Durham, ownership of the Oyster River Dam.

Dear Jae,

We recently completed title work on property of Stephen K. Burns and Andrea F. Bodo on Newmarket Road in Durham. Their property abuts the Oyster River Dam. You have requested further research into the ownership of the dam, and we conclude that title is vested in the Town of Durham, possibly subject to rights of Burns/Bodo, based on the following narrative:

In 1912, Samuel Runlett deeds to Edith A. Onderdonk land of approximately one-eighth acre on the north side of the Oyster River "together with all my rights in the water fall, mill, dam, mill yard, water privileges and rights of flowage which I have in and to the mill privilege on or adjoining the above described property." (SCRD 366/146.)

In 1913, Fred E. Jenkins deeds to Edith A. Onderdonk the right to build and maintain a dam. The full text of the deed follows: (We are quoting the full text in this instance, because the old deed is handwritten, and difficult to read.)

"The right to build and maintain and rebuild a dam at the mill privilege upon my land near the bridge in Durham Village upon the Newmarket Road so-called. Also the right to flow by such dam any and all land that I own or have a right thus far to flow. Also the right to regulate and manage the flow of the water over and through such dam, as she or they may see fit, provided however that whenever I or my heirs or assigns shall have a mill for the purpose of any and all kinds of manufacture including the generating of electricity and each and every kind of power at said mill privilege and the right to have such mill is hereby reserved.

Meaning to reserve every use for power of any kind that can be produced by water. I or they shall have the right to regulate and manage such flow for the purpose of using the power thereof to run the machinery in such mill said dam shall be on or about the site of the old dam and shall not be more than six inches higher than such old dam. The further right is reserved to myself my heirs and assigns to build a dam or repair any dam that may be built under the rights conveyed in this deed as freely as I might have done had this deed never been made, whenever the said Edith A Onderdonk her heirs and assigns shall fail to build and maintain a dam of at

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least the height of the old dam, after reasonable notice of the necessity of such dam for the actual operation of a mill at said mill privilege. And I further reserve to myself my heirs and assigns the right to lay pipes into and draw water from the waters above said dam for domestic uses upon the real estate I now own adjoining said waters and any additional real estate that I may acquire by purchase which at the giving of this conveyance adjoins my present holdings of real estate and for the protection of the same from fire.

I further grant and give to the said grantee such stone and rocks and other material now on or about said old dam and mill privilege which are not now otherwise used in the support or enhancement of my property as she may see fit to use in the construction of said dam. The general purpose of this deed and the deed of even date from said Onderdonk to said Jenkins, is to enable the said Onderdonk her heirs and assigns to build and maintain a dam at said mill privilege so that certain lowlands may be covered in the interests of health and scenic effects and at same time enable the said Jenkins his heirs and assigns to use the water power created by said dam in running a mill.” (SCRD 369/269)

Several upstream owners, Joshua Pinkham, et al, deed Edith Onderdonk flowage rights in a deed dated 1913, but not recorded until February 19, 1919. (SCRD 386/415.)

In 1969, Alice H.O. van da Linda, as heir of Edith A. Onderdonk, deeds the one-eighth acre to the Town of Durham, together with all rights as enumerated in the above three deeds. (SCRD 854/436.)

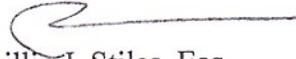
On April 27, 1984, a deed from Edith A. Onderdonk to Fred M. Jenkins is recorded. (SCRD 1130/72.) This deed, dated December 5, 1913, appears to be the reciprocal deed to the 1913 transaction between Jenkins and Onderdonk. It repeats as a grant those items reserved by Jenkins in the deed at 369/269.

As between Onderdonk and Jenkins the intent seems clear. Onderdonk is to build and maintain a new dam for “health and scenic effects,” while Jenkins has the right to use water power in the operation of a mill. The Town of Durham has the rights previously acquired by Onderdonk.

We note that the successors to Jenkins, including the present owners, were not specifically deeded the mill privilege. Whether those rights have been lost by abandonment, or persist in some form under RSA 477:26 would depend on facts outside the record. If the successors to Jenkins were actively using the mill privilege for purposes of powering a mill or electrical generation, there would be a good argument for assessing them for costs of repair. However, it is my understanding that those rights have not been exercised for many years, and may have been abandoned, while the Town of Durham has continued to maintain the dam for Onderdonk’s original purposes of “health and scenic effects.” On the abandonment of mill rights, see Brentwood Volunteer Fireman's Ass'n v. Musso, 159 N.H. 461, 986 A.2d 588 (N.H. 2009.) On that basis, I conclude that the town is the owner of the dam.

Please feel free to call for further discussion of these findings.

Sincerely yours,

A handwritten signature in black ink, consisting of a stylized, cursive 'P' followed by a horizontal line that extends to the right.

Phillip J. Stiles, Esq.