From: John Richard Hucksam
To: Katherine Malgieri
Cc: Christopher Dillon; Robert Maynard; mdx254@hotmail.com; Paul R. DeRensis; Gregory Moreira; Jillian Pavidis
Subject: Talbot Dam Response
Date: Wednesday, June 4, 2025 1:42:10 PM

[EXTERNAL EMAIL]

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This message is in response to your request for advice concerning the CRT Development Realty, LLC ("CRT") Application for Historic Districts Commission Review/Certificate for the Talbot Mills Dam Removal/Concord River Restoration Project (the "Application"). You have asked that we review the supplemental materials dated May 28, 2025 (the "supplemental materials") submitted to the Historic Districts Commission (the "BHDC") by CRT and have asked several questions, which we have answered individually below.

Question No. 1

Does this matter fall under the control of the BHDC?

Answer No. 1

The By-law To Establish Billerica Historic Districts Commission (the "By-law") states:

"[e]xcept as this By-Law may otherwise provide, no person shall alter or construct any building or structure within an historic district in any way that affects exterior architectural features unless the Commission shall first have issued a certificate of appropriateness, a certificate of nonapplicability or a certificate of hardship with respect to such construction or alteration. No building permit for construction of a building or structure or for alteration of an exterior architectural feature and no demolition permit for demolition or removal of a building or structure within an historic district shall be issued by any Town department until the certificate required by this section has been issued by the Commission."

The Historic Districts Act (the "Act"), M.G.L. c.40C, §6 states:

"[e]xcept as the ordinance or by-law may otherwise provide in accordance with section eight or said section eight or nine, no building or structure within an historic district shall be constructed or altered in any way that affects exterior architectural features unless the commission shall first have issued a certificate of appropriateness, a certificate of non-applicability or a certificate of hardship with respect to such construction or alteration.

Any person who desires to obtain a certificate from the commission shall file with the commission an application for a certificate of appropriateness, a certificate of non-applicability or a certificate of hardship, as the case may be, in such form as the commission may reasonably determine, together with such plans, elevations, specifications, material and other information, including in the case of demolition or removal a statement of the proposed condition and appearance of the property thereafter, as may be reasonably deemed necessary by the commission to enable it to make a determination on the application. ...”

We understand that the dam is located in an historic district. As is explained below, in our opinion the dam is a “structure” as that word is defined in the By-law.

Section 2 of the By-law states: “Altered: Includes the words “rebuilt”, “reconstructed” “restored”, “removed” and “demolished”.

Section 2 of the By-law also states:

“Exterior Architectural Feature: Such portion of the exterior of a building or structure as is open to view from a public street, public way, public park, or public body of water, including but not limited to the architectural style and general arrangement and setting thereof: the kind, color and texture of exterior building materials; the color of the paint or other materials applied to exterior surfaces; and the type and style of windows, doors, lights, signs, and other appurtenant exterior features, but does not include items excluded under Section 8 of this by-law.”

Section 8 of the By-law excludes from BHDC review certain categories of treatments to buildings, structures, or exterior architectural features located within the historic districts. None of these exclusions are applicable to the instant matter in my opinion.

CRT argues in the supplemental materials that a dam does not fit within the BHDC’s statutory authority because a dam is not a structure and because dams are highly regulated by state agencies with expertise in dealing with complex issues that arise with dams. We have addressed the “structure” issue in Answer No. 2 below. In our opinion, concurrent jurisdiction of various boards and agencies over projects is common and is not in itself a basis for concluding that any particular board or agency does not have jurisdiction over a project.

In our opinion, the available facts indicate that this project would involve alteration by demolition of a structure, the dam, in an historic district that would affect the exterior architectural features of the dam. Therefore, in our opinion the BHDC has jurisdiction over the project pursuant to the authorities cited above.

<u>Question No. 2</u>

Does a dam fall under “structures” as defined in the By-law?

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Answer No. 2

The By-law includes the following definition: "Structure: Combination of materials other than a building, including but not limited to a sign, fence, wall, terrace, walk or driveway."

The Act, M.G.L. c.40C, §5 states: "the word "structure" means a combination of materials other than a building, including a sign, fence, wall, terrace, walk or driveway."

Section 2.C. of the Town's Zoning By-laws states:

"STRUCTURE: A combination of materials assembled at a fixed location to give support or shelter, such as a building, framework, retaining wall over four (4) feet, tent, reviewing stand, or platform bin. Fences over six feet height, sign, flagpole, recreational tramway, mast for radio antenna, or the like including in-ground swimming pools, are structures. The word 'structure' shall be construed, where the context requires, as though followed by the words, 'or part or parts thereof.'"

M.G.L. C.143, §1 states:

"Structure", a combination of materials assembled at a fixed location to give support or shelter, such as a building, framework, retaining wall, tent, reviewing stand, platform, bin, fence, sign, flagpole, recreational tramway, mast for radio antenna or the like. The word "structure" shall be construed, where the context allows, as though followed by the words "or part or parts thereof".

It has been held that street furniture such as news racks were structures that could be reviewed by the Beacon Hill Architectural Commission in the Historic Beacon Hill District. Globe Newspaper Company v. Beacon Hill Architectural Commission, 421 Mass, 570, 590 (1996).

CRT argues in the supplemental materials that a dam is not within the statutory authority of the BHDC because the word "dam" is not specifically mentioned in M.G.L. c.40C. In our opinion, this is an incorrect reading of the Act and the By-law. In our opinion, a dam is within the authority of the BHDC if it is a structure as that word is defined in the By-law. In our opinion, a dam is a combination of materials other than a building. In our opinion, the authorities cited above indicate that a dam is a "structure" as that word is defined in the By-law.

Question No. 3

Would CRT be able to file for a hardship in this case?

Answer No. 3

Section 12(d) of the By-law states:

“(d) Certificates of Hardship

If the Commission determines that, owing to conditions specific to a particular building or structure, failure to approve an application will result in substantial hardship, whether financial or otherwise, to the applicant, and that granting the application will not involve substantial detriment to the public welfare or substantial derogation from the intent and purpose of this By-Law, the Commission shall grant a Certificate of Hardship.”

Section 6.0 of the Review Standards of the Billerica Historic Districts Commission (the “Review Standards”) states:

“6.1 Where the Historic Districts Commission finds that extraordinary and unnecessary hardships may result from strict compliance with these standards, or where there are exceptional circumstances, it may vary these standards so that substantial justice may be done. In order to issue a Certificate of Hardship, the Commission shall make specific factual findings demonstrating that:

6.10 Owing to conditions specific to a particular building or structure, failure to approve an application will result in substantial hardship, whether financial or otherwise, to the applicant, and

6.11 That granting the application will not involve substantial detriment to the public welfare or substantial derogation from the intent and purpose of the Historic Districts By-Law.

6.2 In granting waivers, the Historic Districts Commission may require such conditions as will, in its judgment, secure substantially the objectives of the standards which have been waived. A Certificate of Hardship shall then be issued.”

The Appendix to the Review Standards (the “Appendix”) sets out the requirements for an application for a Certificate of Hardship.

CRT states in the supplemental materials that “we do believe that the project would qualify for a hardship exemption under the BHDC’s bylaws. The dam provides no value to the owner or the town. The cost to improve fish passage at the site through means other than removal, such as a fish ladder, would be prohibitively expensive and would involve decades of commitment by the owner to maintain, monitor and improve the fish ladder as necessary. The fish ladder alone would not address the necessary improvements to achieve the Commonwealth’s standards for dam safety, which would require additional upfront costs, as well as ongoing maintenance costs.”

In our opinion, CRT could file an application for a Certificate of Hardship on the form prepared by the BHDC as required pursuant to the Appendix. The BHDC could then hold a public hearing on the application and determine whether CRT has satisfied the criteria stated above for grant of a Certificate of Hardship.

We hope this is helpful. Please contact us if you have any other questions regarding this matter.

Rich

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