



January 6, 2010

William Nicholson, Superintendent
Water and Sewer Department
19 County Road
P.O. Box 474
Mattapoisett, MA 02739

Re: Sewer Line Extension
Our File No. 2009-756-2

Dear Mr. Nicholson:

You have posed additional questions relative to the financing of the sewer line extension planned for Mattapoisett Neck, beyond the issue addressed in this Bureau's letter to you of October 7, 2009. In that letter, we opined that the Sewer Commissioners' authority under Chapter 73 of the Acts of 2002 to allocate limited sewerage treatment capacity could be exercised so as to extinguish the right of property owners outside the designated "Sewerage Service Areas" to connect to the system. Moreover, we observed that some abutting landowners would be unable to connect to the planned high-pressure line for engineering or topographical reasons. Given that such lack of access to the sewer system would preclude any benefit from the sewer line extension for the properties outside the "Sewerage Service Areas," those parcels would not be subject to the sewer assessment to be imposed upon completion.

By an email dated June 19, 2009, you query whether landowners outside the "Sewer Service Areas" may be charged an entrance fee to connect to the sewer system under G.L. c. 83, § 17, if in the future it is found that additional capacity is available. You indicate that the entrance fee would be "equal to the proportional cost of the project charged to lot owners who were previously charged betterments for the project." Additionally, you ask whether the amounts realized from charging the entrance fee could be used to lower sewer assessments on property owners within the "Sewerage Service Areas," or to issue rebates to those lot owners who had already paid their assessments. We assume your question contemplates the reallocation of the costs of the presently planned sewer line extension, and assumes no additional costs associated with the hypothetical increase in capacity.

We note that if sewerage capacity is deemed to be available to allow connections for some landowners outside the "Sewerage Service Areas," their parcels should be assessed a pro rata share of the extension project costs at the outset for that right of access. It is more difficult to reallocate costs once the sewer assessments have been made. It is not clear from your inquiry when or how additional sewer capacity would become available, so as to allow for sewer connections outside the "Sewerage Service Areas" which are precluded by current capacity levels. If the additional sewer capacity were to become available during the period over which the assessments were apportioned, one theoretical possibility for adjusting the cost burden would be redetermination of the amounts of the assessments pursuant to G.L. c. 83, § 15A. Indeed, it is conceivable that this section might allow for rebates of assessments even after amounts due are paid in full. However, the meaning and intended application of

G.L. c. 83, § 15A are very problematic. We think that G.L. c. 83, § 15A was intended to address more limited circumstances such as changes in the amount of available grant funding, or a failure to fully capture applicable costs in the original determination of the amount of assessments. Effecting a retroactive redistribution of capital costs onto landowners not originally benefited by the improvement would likely exceed the limited scope of G.L. c. 83, § 15A. In the absence of case law to elucidate the intent of G.L. c. 83, § 15A, we doubt whether the redetermination procedure affords a viable legal mechanism for shifting the burden of capital costs or rebating a portion of a fully paid sewer assessment.

We view the question of whether the Sewer Commissioners have authority to retroactively redetermine or rebate sewer assessments as intertwined with the question of whether landowners taking advantage of a hypothetical increase in sewer capacity to connect to the town system may be charged a permanent privilege assessment under G.L. c. 83, § 17 or a connection fee under G.L. c. 83, § 16. Presumably the amount of forthcoming sewer assessments to property owners in the "Sewerage Coverage Area" benefiting from the extension project will be adequate to cover 100% of the costs. Accordingly, there would be no remaining capital costs from the planned extension to be recouped at a hypothetical future point when sewer capacity somehow increases. Communities may use any combination of benefit assessments (sewer and permanent privilege assessments), connection fees and user charges to recover sewer capital costs, but the combination cannot be designed to recover more than 100% of those costs, i.e., to generate revenue. Moreover, a valid connection fee cannot exceed "an amount that reasonably relates to the incremental cost of the additional facilities needed to provide [new customers] service [and] pa[y] 'for only those improvements to the system necessitated by [them], and hence will benefit them alone'" *Berry v. Danvers*, 34 Mass. App. Ct. 507, 511 (1993), quoting *Bertone v. Department of Public Utilities*, 411 Mass. 536, 546 (1992). To charge new customers in the future a connection fee to reflect the costs of the planned capital improvements, when those improvements have been fully provided for by the contemplated sewer assessments, would render the fee an impermissible tax under the doctrine of *Emerson College v. Boston*, 391 Mass. 415 (1984).

An alternative mechanism for redistributing the cost burden of the planned capital improvements should the scope of the benefits widen would rely on the authority of the Sewer Commissioners "to establish just and equitable annual charges for the use of common sewers" G.L. c. 83, § 16. In the case of *Morton v. Hanover*, 43 Mass. App. Ct. 197 (1997), the Appeals Court upheld a surcharge on certain commercial users of town water against a challenge grounded in the *Emerson College* case. The Court noted that the commercial customers derived a relatively greater and particularized benefit from the cost of certain capital improvements, and it was proper for the town to consider those benefits in setting rates. The Court held that "[s]pecial costs of extending a system and related costs of expansion of a water supply may be considered in determining a reasonable rate." 43 Mass. App. Ct. at 204. However, the *Morton* case recognized a requirement that any gradation in user charges relate to "service benefits which are particularized to" new customers. *Id.* at 205. Accordingly, it is not clear that the Commissioners' authority under G.L. c. 83, § 16 is broad enough to address the anomaly of landowners who are not subject to a sewer assessment given the absence of even a remote benefit from the sewer line extension at present, yet might somehow benefit from the improvement in the event of a hypothetical expansion of sewer capacity in the future. If such landowners are able to connect with no additional capital costs being incurred, a plan to recoup costs already covered in the upcoming round of sewer assessments through either permanent privilege assessments or user charges would impermissibly raise more than 100% of the amount necessary to pay for the improvements.

William Nicholson, Superintendent
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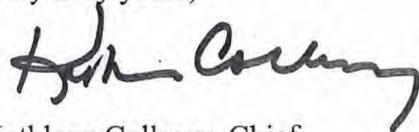
On the other hand, if costs of the sewer work are not fully recovered in the sewer assessments, user charges imposed on landowners who did not pay assessments may appropriately be graduated to recover the unmet expenses. See *Souther v. Gloucester*, 187 Mass. 552 (1905). The case for differential rates to reflect payment of the assessment would be helped if Mattapoisett were simply recovering the full costs for the sewer system upgrade, ideally through an enterprise fund under G.L. c. 44, § 53F1/2, and gave rate relief to the parcels that had paid assessments corresponding to the amounts it was charging the newly-hooked-up parcels.

We assume an increase in sewer capacity allowing for connections not currently feasible cannot be achieved without incurring new capital costs. For example, additional costs might be necessary to provide connections for landowners whose only access would be to high-pressure lines under current plans. Moreover, it is difficult to conceive how Mattapoisett can obtain additional sewerage capacity without added cost when it depends on a neighboring community for the use of sewerage treatment facilities. Either Mattapoisett would have to buy additional sewerage capacity from Fairhaven, or construct its own treatment facility, entailing significant new expense. The incremental cost of acquiring more sewerage capacity would represent a particularized benefit to landowners who are thereby able to connect, and could be recovered by means of a permanent privilege assessment, a sewer use surcharge, or graduated user charges under authority of G.L. c. 83, §§ 16 or 17.

In sum, it is uncertain at best whether Mattapoisett can retroactively redistribute the costs of the currently planned sewer improvements should an increase in sewerage capacity occur in the future at no additional expense. However, in the plausible circumstance that additional expenses are necessary to allow landowners not presently benefited by the planned sewer line extension to connect to the system, those incremental costs can be concentrated on new customers under the *Bertone* and *Morton* cases.

Please do not hesitate to contact us if we can be of further assistance.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC:DG

CC: Gregory M. Downey, Esq