



The Leader in Public Sector Law

T: 617.556.0007 F: 617.654.1735

101 Arch Street, 12th Floor, Boston, MA 02110

By Electronic Mail

To: Jay Grande, Town Administrator

From: David J. Doneski

Re: Wastewater System Capacity and Flow Allocation

Date: May 15, 2019

This memorandum will confirm our recent discussions regarding allocation of capacity within the Service Area of the Town's Wastewater Collection and Treatment System (the "System"). You had inquired about discussions by and with Service Area property owners who were proposing that they be able to re-allocate capacity by transactions among themselves. In my opinion, property owners do not have the authority to unilaterally exchange or re-allocate capacity assigned by the Town pursuant to the Sewer By-law and the Town's associated regulations.

The Sewer By-law and its implementing regulations place authority for re-allocation of flow capacity with the Town. Section 4 of the By-law, entitled "Permitting – Design Wastewater Flow Rate," as originally adopted at the April 11, 2000 Special Town Meeting, specified a maximum design wastewater flow rate for a System connection (the greater of (1) 67% of the amount permitted under DEP's Title 5 regulations at 310 CMR 15.000 as existing on the day of a connection permit grant or (2) the calculated wastewater use in the property list table included in the By-law.) Section 4 further stated that any connection exceeding the allowed limits would require an approving vote of Town Meeting, subject to the availability of capacity. (At the March 30, 2004 Special Town Meeting the Town voted to re-allocate certain flows within the Service Area, under Article 19.)

Section 4 was amended at the March 28, 2006 Special Town Meeting, and now simply states: "Permits for connecting and changing flows to the System shall be issued by the Board of Public Works Commissioners in accordance with rules and regulations adopted pursuant to Section 3 of this By-law." (Section 3 of the By-law authorizes the adoption of rules and regulations "for the operation and management of the System.") Regulations of Sewage and Septage Collection Treatment and Disposal were adopted by the Board of Public Works Commissioners, and those regulations are now administered under the jurisdiction of the Board

of Selectmen as the successor public works authority pursuant to Chapter 93 of the Acts of 2015. The regulations provide as follows:

A SEWAGE REVIEW BOARD shall be established to review requests for increases to the approved FLOWS within the SERVICE AREA. The SEWAGE REVIEW BOARD will recommend to the annual or special Town meeting disposition of requests for increases to flow or increases to the service area. Considerations in making the decisions will include but not be limited to the impact on the WWTF [Waste Water Treatment Facility], with regard to the FLOW and concentration and other wastewater characteristics. (Maintenance, paragraph 8)

It is my understanding that the Sewage Review Board identified in the regulations is now known as the Sewer Advisory Board. A Sewer Connection Policy voted by the Board of Public Works Commissioners on March 20, 2006 establishes procedures for additions to a property's sewer flow and connections to the sewer system. It states: "The Commissioners will have final approval of all requests for additional flow into the central sewer system, and the Town will have final approval for all expansions of the central sewer system by Town vote at a duly assembled Town Meeting. This regulation excludes connections needed to abate a public health threat as determined by the Board of Health."

In accordance with the foregoing, re-allocation of sewer flows or System capacity among or between properties is a matter within the Town's authority. Such re-allocation may not, in my opinion, be accomplished merely by agreement between private property owners.

On the issue of availability of System capacity, I note that you recently brought to my attention an opinion I issued in January of 2005 to the Town of Groton Sewer Commissioners regarding sewer system connection issues. In that letter, I stated the following:

The general rule is that sewer commissioners may not postpone or deny a presently requested connection in order to give precedence to a connection anticipated in the future. Rounds v. Water Commissioners, 347 Mass. 40 (1964). If there are reasonable planning concerns, however, that require the reservation of some capacity and such reservation is applied in like fashion to all similarly situated developers and property owners, it is my opinion that the Sewer Commission may reserve some portion of system capacity. Such a reservation may not, in my opinion, be made for the benefit of a private property owner to the exclusion of other private property owners. Rather, it must be based on a particular, identifiable concern affecting an object of public planning policy or the need to provide for additional capacity in the event of emergencies or other stresses on system capacity.

My opinion on that matter remains the same.

Please contact me if you have any further questions.