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May 8, 2019

VIA EMAIL (clerk@LSDC-MA.com)
AND FIRST CLASS MAIL

Mr. Jonathan Gulliver
Chairman
Lancaster Sewer District Commission
PO Box 773
South Lancaster, MA 015231

Re: Goodridge Brook Estates, Sterling Road, Lancaster, MA

Dear Chairman Gulliver:

Please consider this a follow-up to my letter to you of February 21, 2019. It also responds to correspondence of February 27, 2019 to you from Paul J. Haverty, Esq. ("Attorney Haverty") of Blatman, Bobrowski & Haverty, LLC, which represents Crescent Builders, Inc. and Iqbal Ali, the developer (collectively, the "Developer") of the above referenced project ("the Project"). Attorney Haverty's letter relates to the Developer's efforts to obtain a sewer connection permit for the Project. As before, I write this letter as a concerned private citizen based on my right to petition government.

In summary, this body – the Lancaster Sewer District Commission ("District") – is the only entity that can issue a permit to connect with its sewer system ("the System"). The Lancaster Zoning Board of Appeals ("ZBA") cannot issue any such permit.

Second, the District is constrained from issuing any such permit by the Administrative Consent Order and Notice of Noncompliance ("the ACO") entered into between the District and the Massachusetts Department of Environmental Protection ("DEP") on January 23, 2004. The ACO placed a moratorium upon new connections to the System. New connections must be approved by the DEP, and such approvals cannot be made unless and until the District applies for, and receives, "flow credits" from DEP. Such flow credits can be obtained only through the removal of infiltration and inflow ("I/I") from either the System or the Town of Clinton's sewer system. The ACO allows the District, and only the District, to accomplish such I/I removal and to apply for flow credits. It would be an ACO violation for any third party – including the Developer and the Town of Clinton or the ZBA - to undertake such efforts.

Simply put, the District can only issue a permit after the following actions have occurred:

(1) The District (and not any third party) must accomplish the removal of sufficient I/I from either the System or the Town of Clinton sewer system;

(2) The District must submit an application for flow credits to the DEP;

(3) The DEP must approve a sufficient number of flow credits to support the Project; and

(4) If the District has removed the I/I from the Town of Clinton sewer system, the District must receive a written forfeiture from the Town of Clinton of any resulting flow credits.

I. Only the District Can Issue a Permit allowing a Connection to the System.

As a threshold matter, Attorney Haverty takes the position in his February 27 letter that only the ZBA, rather than the District, can issue a permit to connect to the System. Simply put, this is inaccurate. The ZBA cannot lawfully issue any such permit, as the District is a private nonprofit corporation with no legal relationship to the Town of Lancaster.

Your office has also received a courtesy copy of a memorandum of April 25, 2019 from Adam J. Costa, Esq. ("Attorney Costa") to Jeanne Rich, Chair of the ZBA. The Developer has asked the ZBA to issue a connection permit on the District's behalf, and Attorney Costa's memorandum provides legal advice to the ZBA on this issue.

Notably, Attorney Costa's memorandum concurs in my view, as expressed in my earlier correspondence, that the Developer is powerless to avoid the impact of the ACO, which placed a moratorium upon new connections to the System. This issue is discussed further in Section II of this letter.

Attorney Costa also opines that the ZBA would ordinarily be the appropriate body to issue a permit for a connection to the System. He opines that M.G.L. 40B, Sections 20-23 ("Chapter 40B") allows the ZBA to issue a comprehensive permit that includes within its scope a sewer permit. More specifically, Attorney Costa points to 760 CMR 56, et seq, as vesting the Board with this power. He observes that 760 CMR 56.02 defines "Local Board" as "any local board or official, including…any…sewer, or other commission or district. . ." Attorney Costa points out that this language appears to include a "sewer district" within its scope.

However, Attorney Costa may revise his analysis upon a further understanding of the unique nature of the District, which was created in 1967 by a Special Act of the Massachusetts Legislature, M.G.L. c. 831, as amended. The District is a non-profit corporation, not a town agency. It is governed by its members and the commissioners elected by the members. **Id**. By virtue of the manner in which it was created, the District has powers and authority which are entirely separate from those of the Town of Lancaster and from the ZBA. Neither the Town of Lancaster nor any of its agencies have ever had any involvement in the operations of the District, and those operations are governed solely by the Commissioners subject to their election by the District's members. To be a "Local Board" under the regulation, the District would have to be part of a municipality, which it is not; rather, the District is a separate, discrete and sovereign corporate entity.

There is also a more general problem with the view that Chapter 40B empowers the Board to act on the District's behalf. Specifically, to the extent that 760 CMR 56.02 includes a sewer district with in its scope, that regulation is in facial conflict with its enabling statute, Chapter 40B. M.G.L. c. 40B, Section 20, defines a "Local Board" as "any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen." The plain language of the statute does not embrace private corporate entities, and I have not located any controlling authority indicating otherwise. And Massachusetts appellate courts have made it amply clear that state administrative regulations may not exceed the scope of their enabling statutes. *See, e.g., Tartarini v. DMR*, 82 Mass.App.Ct. 217 (2012) (voiding regulation that exceeded scope of statute).

Attorney Haverty has cited *Dennis Housing Corp. v. Zoning Board of Appeals of Dennis*, 439 Mass. 71, 79 (2003) for the proposition that the District is a "Local Board" within the meaning of Chapter 40B and its regulations. That case is distinguishable in multiple respects. First, it addressed the question of whether an historical commission – not a private sewer district – was a "Local Board." Second, the Court based its ruling on the fact that "the functions of the town historic committee are *directly linked* to those of the building inspector. . ." *Id.*

Because building inspection is facially within the scope of Chapter 40B, Section 20, the Massachusetts Supreme Judicial Court appropriately held that because the historical commission was "directly linked" to the Town of Dennis building inspection department, the Historical Commission fell within the statute. The situation here, however, is the opposite – there is no linkage, direct or otherwise, between the District and the Town of Lancaster building inspector, or any other department of the Town of Lancaster. Again, the District is a unique creature of statute that has always operated autonomously and independently. The

ZBA cannot take the District's property or authority without due process of law. As such, it falls outside the scope of Chapter 40B.[1]

In sum, because the District is not a "Local Board" within the meaning of Chapter 40B, the ZBA is without power to issue a permit to connect to the System. Only the District's Commissioners can issue such a permit. And under the substantive law applicable to this matter, no such connections can be allowed unless and until the District applies for and receives "flow credits" from the DEP, as described further below.

II. The ACO Allows Only the District to Obtain "Flow Credits" from the DEP, and Neither the Developer Nor the Town of Clinton Can Apply for or Obtain such Credits.

The second issue addressed by Attorney Haverty and Attorney Costa in their respective letters – that of the ZBA's authority to compel the Commission to allow the Developer to connect to the System – is disposed of by the existence of the ACO. Notably, Attorney Costa, as the legal advisor to the ZBA, has concluded that the scheme posited by the Developer for obtaining flow credits is legally infeasible, a view consistent with that expressed in my previous correspondence.

The fundamental problem facing the Developer is this: it has chosen to site the Project in a town where there is a moratorium on sewer connections, one imposed by a binding order issued by the DEP, part of the Executive Branch of the Commonwealth, and coextensively arising from a "…National Pollution Discharge Elimination System [permit] … issued jointly by the [DEP] and the United States Environmental Protection Agency … authorizing the discharge of up to 3.01 million gallons per day of treated effluent from the Facility to the South Nashua River." See ACO, §I.D.3. In sum, there is no legal mechanism for the Developer to avoid the operation of the ACO.

Attorney Costa has opined that the ZBA cannot be compelled by the Developer to make commitments on the District's behalf relative to the removal of I/I from the System – removal

[1] There are numerous other facts leading to the irrefutable conclusion that the District is a private corporation. Among them, the District does not use town offices, has no town employees, does not use the town collector or DPW. It, and not the Town of Lancaster, signed the ACO with DEP, part of the Executive Branch of the Commonwealth of Massachusetts. Why would DEP contract with the District if it believed the Selectmen of the Town of Lancaster actually were responsible for the District's operation rather than the District's Commissioners and Members? See also §II.D.1. of the ACO: "The District owns, operates and maintains a sewer system … which collects sewage and other wastes from properties connected thereto."

that, pursuant to the ACO, must occur before any new connections can be made to it. More specifically, Attorney Costa opines as follows:

> .....[T]he authority vested in the District is contractual, i.e. via the ACO; the ACO contemplates I/I removal by the District and vests no right in a third party or parties to undertake removal at their discretion; and, irrespective of the same, the ACO permits the accumulation [] of flow credits through I/I removal activities only where approved by the Department and, if in Clinton, by the Town of Clinton as well.

In light of this, Attorney Costa concludes that "I am doubtful that, as a part of the comprehensive permit process, the Board can be obligated by the Applicant to make commitments on the Sewer District's behalf under the ACO; these are not the 'functional equivalent of permits or approvals' but rather discretionary functions of the Sewer District." (Internal citation omitted.)

Attorney Costa's conclusions come directly in response to Attorney Haverty's February 27th letter. Like Attorney Haverty's earlier letter of December 14, 2018 to the Commission, the February 27th letter posits a scheme in which the Developer would step into the shoes of the Town of Clinton; remove I/I from the Town of Clinton sewer system; and then "donate" the resulting flow credits to the District. None of these actions is permissible under the ACO, and the DEP is legally forestalled from approving any of these activities.[2]

As Attorney Costa notes, the ACO creates a contractual relationship between the DEP and the District. The ACO does not allow a private actor such as the Developer to accomplish I/I removal on behalf of the District or on behalf of the Town of Clinton.

Page 8 of the ACO establishes a mechanism by which the Town of Clinton may "forfeit" claims for flow credit if the District removes I/I from the Clinton system. But Attorney Haverty has posited something entirely different – a process by which the Developer, as the Town of Clinton's proxy, removes I/I from the Clinton system and then "donates" flow credit to the District. There is simply nothing in the ACO that allows this.

By its explicit and unambiguous language, the District and only the District is empowered to undertake I/I and obtain flow credits pursuant to the ACO. Specifically, "[t]he Sewer Bank *allows for the District* to perform I/I removal activities over time and accumulate

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[2] See ACO §III.H., "The District shall not violate this Consent Order and shall not allow or suffer its officers, employees, agents, successors, assignees or contractors to violate this Consent Order." The ACO goes on to discuss the varying and serious penalties in the event the ACO is violated.

flow credit in the Sewer Bank for those I/I removal activities." *ACO*, page 6, Section 3 (emphasis supplied).

Concerning removal of I/I from the Town of Clinton's system, the ACO states that *"[t]he District* may also earn flow credits at the same 1:2 rate described in paragraph L.4.A. above, by removing I/I from the town of Clinton's sewer system...." Here again, this language contemplates I/I removal actions by the District, not by the Town of Clinton or any private actor.[3]

Notably, Attorney Costa's analysis focuses on the fact that the only the DEP can issue flow credits that, when issued, allow the District to approve new connections to the System. His analysis underscores that there is no means for any third party to apply for such flow credits. The ACO establishes a clear procedure through which the District shall apply for flow credits, and through which "[t]he Department shall review *the District's submittal* and either issue a flow credit for all or a portion of the documented I/I removed, request additional documentation to support the amount specified in this request, or deny the request for reasons stated." The ACO does not allow anyone other than the District to make a "submittal" to the DEP, and does not authorize the DEP to issue flow credits to any third party.

III. Conclusion

In sum, the law is clear that the District is indeed the body charged with approving connections to ***its*** System. And, as reflected in the ACO, the law is equally clear that no such permit can issue nor connections occur until I/I is removed either from the System or the Town of Clinton's sewer system. And the ACO unambiguously establishes that only the District can remove I/I, whether from the System or the Town of Clinton sewer system, and that flow credits for such removal must be approved by the DEP. Third parties such as the Developer and the Town of Clinton are strangers to the ACO, and have no rights or obligations under it.

All told, the District and the Commissioners cannot lawfully issue a permit to the Developer unless and until (1) **the District** undertakes the necessary I/I removal; (2) the District submits an application for sufficient flow credits to the DEP; and (3) the DEP approves sufficient flow credits to support the Project. Finally, if the flow credits were predicated on the removal of

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[3] 314 CMR 12.04(2)(d) also states that "[a]ll sewer system authorities shall include provisions in their I/I plan for mitigating impacts from any new connections or extensions where proposed flows exceed 15,000 gallons per day. Such mitigation shall require that four gallons of infiltration and/or inflow be removed for each gallon of new flow to be generated by the new sewer connection or extension, unless otherwise approved by the Department. The sewer system authority or the Department may require a higher removal rate per gallon of new flow in sensitive areas such as where overflows have the potential to impact drinking water supplies or nitrogen sensitive areas." The Project's proposed flows exceed 15,000 gallons per day."

I/I from the Town of Clinton's sewer system, the District must obtain a written forfeiture of those credits from the Town of Clinton.

Again, unless and until these actions occur, the Commission and the District cannot issue a connection permit to the Developer.

I hope this helps set these questions to rest. Of course, please do not hesitate to contact me if you have further questions or concerns.

Very truly yours,

Thomas J. Frain

Cc: Town of Lancaster Board of Appeals (Via Email and First Class Mail)
Michael Antonellis, Town of Lancaster (Via Email and First Class Mail)
Adam J. Costa, Esq. (Via Email and First Class Mail)
Paul J. Haverty, Esq. (Via Email and First Class Mail)
Daniel C. Hill, Esq. (Via Email and First Class Mail)