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VIA EMAIL (clerk@LSDC-MA.com)
AND CERTIFIED MAIL (Article No. 7016 2070 0000 6075 4724)

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

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

Dear Chairman Gulliver:

This letter is sent in response to a letter sent to you on December 14, 2018 by Paul J. Haverty, Esq. 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"). I write this letter as a concerned private citizen based on my right to petition government.

Attorney Haverty's letter takes the position that the Lancaster Sewer District ("the District") is legally obligated to issue a sewer connection permit to the Developer relative to the Project. I believe that the Developer's position is entirely meritless for the reasons set forth herein.

As you are aware, the District was created in 1967 by a Special Act of the Massachusetts Legislature, M.G.L. c. 831, as amended. The District owns, operates and maintains a sewer system ("the Lancaster Sewer System"), which collects sewage and other wastes from properties in the Town of Lancaster. By virtue of the manner in which it was created, the District has powers and authority which are separate from those of the Town of Lancaster and the Lancaster Zoning Board of Appeals.

As Attorney Haverty's correspondence acknowledges, the District and the Massachusetts Department of Environmental Protection ("DEP") entered into an Administrative Consent Order and Notice of Noncompliance ("ACO") on January 23, 2004. The ACO unequivocally effected a moratorium upon new connections to the Lancaster Sewer System as follows:

> Except where expressly exempted in paragraph L.2 below, or where authorized by the Department under the provisions of the Sewer Bank described in paragraph L.3 below, the District *shall not allow any new connections to or extensions of its sewer system. . .* nor shall it allow any increases in flow or changes in the use of existing connections, unless expressly authorized by the Department in writing.

ACO, page 5, Section III-L-1 (emphasis supplied).

The ACO allows the District to avoid the moratorium for new connections or increased flows by obtaining "flow credits" pursuant to the "Sewer Bank" program established by the ACO. The Sewer Bank program "*allows* the District to make new connections to its sewer system provided that a sufficient amount of infiltration and inflow have been removed from either the District's sewer system or the Town of Clinton's sewer system." *ACO*, page 6 (emphasis supplied). The ACO further provides that:

> The Sewer Bank *allows for the District* to perform I/I removal activities over time and accumulate flow credit in the Sewer Bank for those I/I removal activities. The District *may* use the accumulated flow credits in its Sewer Bank to introduce new flows to the Sewer System.

ACO, page 6 (emphases supplied).

Infiltration and inflow ("I/I") is the term for excess water that enters a municipal sewer system in the form of groundwater leaking into such a system ("infiltration") and from exterior sources such as storm water runoff ("inflow"). I/I removal occurs by, without limitation, repairing pipes that are allowing infiltration, and repairing manhole covers that are allowing inflow. Pursuant to the ACO, the District may obtain flow credits for such activities.

The Developer seeks to involve the District in the creation of what amounts to an unwieldy, awkward, and possibly unlawful, process intended to avoid the moratorium created by the ACO. Specifically, Attorney Haverty announces the Developer's intent to (1) obtain flow credits on behalf of the Town of Clinton; (2) involuntarily foist those credits upon the District; and (3) based on those first two actions, require the District to approve a connection between the Project and the Lancaster Sewer System. None of these concepts can lawfully be accomplished, let alone all three. Indeed, the Developer's demands may be unprecedented and in any event I am not aware of any judicial decision that provided similar relief.

As a threshold matter, the ACO does not allow a private actor – or even the Town of Clinton for that matter – to accomplish I/I removal for the District.[1] 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 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…."[2] Here again, this language contemplates I/I removal actions by the District, not by the Town of Clinton or any private actor.

Attorney Haverty's letter states that the Developer has made "preliminary inquiries with the town [sic] of Clinton, and believes that there is ample I&I [sic] to remove to create sufficient credit to allow a connection for the entire project." Assuming that the Developer's intent is to accomplish I/I removal on the Town of Clinton's behalf, this seeks to turn the Developer into a crypto-municipality, one that initiates and oversees a significant public works project outside of the normal process of public bidding and municipal supervision.[3] Putting aside the many other legal obstacles to such an arrangement, the ACO does not allow this, nor does it allow the Town of Clinton to accumulate flow credits on behalf of the District. Again, only the District can undertake I/I removal or accumulate flow credits under the ACO.[4]

Finally, even if the Town of Clinton were to somehow obtain I/I credits as a result of the Developer's actions, and even if those credits were somehow transferred to the District, none of this would obligate the District to do *anything*, let alone to allow the Developer to connect to the Lancaster Sewer System.

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[1] The Town of Clinton is not a party to the ACO.

[2] See also, 314 CMR 12.04(2)(d): "All 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 Goodridge project is estimated to produce 41,580 GPD of new flow to the Lancaster Sewer System.

[3] The Developer, as the party initiating the I/I removal, would also be acting with an extrinsic commercial motive, one unrelated to the interests of the Town of Clinton. Relatedly, the Developer would likely be turning itself and its officers into state actors, create new potential species of liability for themselves relative to the Town of Clinton, the District, and the Town of Lancaster.

[4] Attorney Haverty's letter makes reference to a "Town of Clinton Flow Credit Donation Affidavit" that the Town of Clinton would provide to the District. The ACO makes no reference to any such creature as a "flow credit donation affidavit," and I am not otherwise aware of this mechanism.

The ACO's language relative to the Sewer Bank program is clear – the ACO "allows **the district** to make new connections to its sewer system" when I/I is removed from either the Lancaster Sewer System or from that of the Town of Clinton. Attorney Haverty, ignoring this plain language, attempts to argue that the Sewer Bank program *requires* the District to make new connections when I/I is removed from either Lancaster or Clinton. Nothing in the ACO creates such a requirement, and in fact the plain language confers no positive obligations whatsoever upon the District.

The ACO also states that "the District *may* use the accumulated flow credits in its Sewer Bank to introduce new flows to the Sewer System." (Emphasis supplied.) Here again, the language is permissive rather than mandatory, and the language does not require the District take any positive action.

Attorney Haverty's letter cites two judicial opinions for the proposition that the District is legally obligated, notwithstanding the ACO, to approve a connection between the Lancaster Sewer System and the Project. Neither of these cases controls the current situation, given that neither involved circumstances such as those presented by the ACO. Nor did either case hold that the right of a landowner to connect to a sewer system is inherent or absolute.

The present situation is instead analogous to *Gallo v. Div. of Water Pollution Control*, 374 Mass. 278 (1978), where plaintiff landowners sought to challenge a moratorium on sewer connections imposed by the Massachusetts Division of Water Pollution Control. Importantly, that moratorium contained an exception based on I/I removal. Rejecting the landowners' claims, the SJC found that "[n]one of these [statutory] provisions indicates any intention by the Legislature to grant to private landowners unable to connect to the local sewerage system a right of action against a governmental body obligated by the contract to maintain or construct the system." *See also Billerica Housing Dev. Co., Inc. .v Billerica Board of Appeals*, 1992 WL 12562140 (Mass Housing Appeals Committee 1992), *19 ("[w]ith respect to any existing moratorium on new sewer connections imposed by the Department of Environmental Protection, we do not assert any power to interfere with such moratorium").

In sum, the Developer's convoluted scheme is foreclosed by a myriad of obstacles – including but not limited to, the plain language of ACO, the lack of any authority on the part of the Town of Clinton to remove I/I for the District, the absence of a legal mechanism for involuntary foisting flow credits upon the District or for compelling any positive action by the District under the ACO, and the dearth of caselaw supporting the Developer's position.

I hope this helps address any questions the District may have concerning this matter. Of course, please do not hesitate to contact me if you have further questions or concerns.

Very truly yours,

Thomas J. Frain, Esq.

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