

April 24, 2017

Mr. Christopher Clark
Town Administrator
Harwich Town Hall
732 Main Street
Harwich, MA 02645



John W. Giorgio
jgiorgio@k-plaw.com

Re: Financing of Sewer Connections

Dear Mr. Clark:

You have asked me to outline the options available to the Town for providing financial assistance to residents who will be connecting to the Town's new sewer system in the future.

As I understand the facts, the Town is in the process of planning for the installation of a sewer system in the Pleasant Bay Watershed Area, which will serve approximately 600 properties. The Town is seeking an appropriation at the May 1, 2017, Annual Town Meeting for design funds, and it is anticipated that an appropriation for construction funds will be sought at the May 2018, Annual Town Meeting. I understand that the Town intends to pay for the construction of common sewers and other facilities from the tax levy subject to a Proposition 2 ½ debt exclusion. With regard to the cost of connections of individual properties to the common sewers, the Town is exploring ways to assist homeowners.

In my opinion, there are several options that the Town may consider in order to provide financial assistance to homeowners for the cost of the sewer connections.

Assessment of Betterments

Pursuant to G.L. c. 83, §3, the Town is authorized to appropriate money for the purpose of connecting a property to a public sewer system, but it requires that the land owner reimburse the Town for the actual costs. The statute provides:

The board or officers of a city or town having charge of the repair and maintenance of sewers may, upon request of the owner of land and payment by him of the actual cost thereof, construct a particular sewer from the street line to a house or building. A town may appropriate money for connecting estates within its limits with common sewers, and no estate shall, in any year in which such an appropriation is made, be connected with a common sewer except in the manner hereinafter provided. If bonds or notes are issued to pay the cost of making such connections, the assessments provided for in section twenty-four shall be applied to the payment of such bonds or notes. If the board of health of a town making such appropriation shall order land abutting upon a public or private way in which a common sewer has been laid to be connected with such sewer, or if the owner of such land shall make

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to the board or officer having charge of the maintenance and repair of sewers application to connect his land with a common sewer, such board or officer shall make such connection.

In turn, G.L. c. 83, §24 (referenced above) provides:

The owner of any land benefited by the laying out of a particular sewer from the common sewer to the boundary of the way shall pay to the town for the permanent privilege of using the same such reasonable amount as the aldermen or the sewer commissioners, selectmen or road commissioners determine, which may be fixed at the estimated average cost of all such particular sewers within the territory for which a system of sewers has been built or adopted. The board or officers authorized to lay out sewers shall assess the cost of connecting private land with a common sewer under section three upon the land so connected, and may require that an applicant for a connection of his land with a sewer shall pay in advance an amount equal to the estimated assessment therefor, which shall be applied to the payment of the assessment, and the remainder, if any, shall be repaid to the applicant.

When read together, these two statutes allow the Town to appropriate money to pay the costs of connecting private buildings to the sewer system and to assess the costs of constructing the sewer connection to the building owner as betterment. The betterment may be apportioned over a twenty year period. The Town may charge interest on the betterment assessment by one of the methods found in G.L. c. 80, §13, which provides for an interest rate of 5 per cent per annum or, at the election of the Town, at a rate up to 2 per cent above the rate of interest chargeable to the Town for the borrowing for the project. The most cost effective interest rate for the owner allowed by law would most likely be the actual interest paid by the Town on the bonds issued for the project.

In order to assess a betterment for a sewer project, Town Meeting must authorize the amount of the project cost to be assessed and the method of assessment. I would also recommend that the Town consider the adoption of a General Bylaw that sets forth the details of the betterment assessment for private property connections, including the method for calculating the betterment.

As stated in G.L. c. 83, §3, the Town can only expend money to connect private property to the common sewers "upon the request of owner of land." Therefore, the homeowner would have four options for financing the connection: (1) paying a private contractor to make the connection; (2) paying the full amount of the connection cost to the Town prior to the connection being made by the Town; (3) paying the full amount of the betterment assessed by the Town; or (4) apportioning the betterment over a twenty year period.

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If the Town opts to appropriate funds to make the connection pursuant to G.L. c. 83, §3, in my opinion, the Town would have to follow the Massachusetts Public Construction Laws, including the Prevailing Wage Law. The increment costs associated with the Prevailing Wage Law may be outweighed by the economies of scale with a single contract awarded to the lowest bidder.

Septic System Loan Betterment Program

Pursuant to G.L. c. 111, §127B½, the Town is authorized to appropriate money for the purpose of providing a loan to a homeowner to replace a septic system or to connect a property to a municipal sewer system. Unlike the assessment of a betterment under G.L. c. 83, §3 and §24, this program involves advancing the homeowner the funds necessary to pay for the sewer connection. The Board of Health would enter into an agreement with the homeowner for the disbursement of the funds and would set forth the repayment obligation. A copy of the betterment agreement must be recorded. The lien remains on the property until the loan is repaid in full. While this statute is primarily used to finance a replacement for a failed septic system, the statute may also be used to finance the connection to a municipal sewer system. Similar to betterment assessments under G.L. c. 83, §§ 3 and 24 (discussed above), betterments under G.L. c. 111, §127B½ may be apportioned over a 20 year period at an interest rate of 5 per cent per annum or, at the election of the Town, at a rate up to 2 per cent above the Town's borrowing cost.

In addition, I would point out that the Board of Health has authority under G.L. c. 83, §3 to order that a property which abuts a public or private way in which a common sewer is located to connect, in which case, in my opinion, the Board of Health would have the authority to enter into a betterment agreement with the homeowner under this section. I also understand that the Town's sewer regulations require properties to connect to the sewer system within one year. In my opinion, such a requirement would also trigger the provisions of G.L. c. 111, §127B½ allowing for betterment loans.

While this program is typically financed with a loan to the Town under the State Revolving Fund, I have consulted with the Town's bond counsel who has confirmed that the program may be implemented using non-SRF general obligation bonds. If the Town seeks to borrow funds through the SRF Septic Management Programs, there are significant additional steps that the Town has to complete including the preparation of a septic management plan. There are also income eligibility limitations. I recommend that the Town consult with the DEP regarding the requirements under this program. Furthermore, I understand that Barnstable County administers the septic betterment loan program in behalf of all of the Cape towns.

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Because the Town does not actually contract for the work, in my opinion, the Massachusetts Public Construction Laws, including the Prevailing Wage Law, would not apply to the work contracted for by the homeowner. Furthermore, in order to implement this program, the Board of Health would have to determine that the septic system is in failure or the Board would have to order under G.L. c. 83, §3 that all properties abutting the sewer lines must connect to the Town's sewer system. Obviously, this option has the advantage of simplifying any contract oversight issues.

Deferral and Recovery Agreements

Pursuant to G.L. c. 80, §13, if Town Meeting accepts the statute, the Town can enter into a deferral and recovery agreement that would permit a homeowner to defer the payment of any betterment assessment under either G.L. c. 83, §3 or G.L. c. 111, §127B ½ if the homeowner qualifies for an exemption under G.L. c. 5, §59 (clause 41a) for low income elderly persons. Although there are certain requirements under the statute, in essence, the agreement may provide for the deferral of any betterment payments plus interest until the home is sold or the demise of the homeowner.

Special Legislation

Many communities have sought and obtained special legislation through the Home Rule Petition process to allow certain deviations from the requirements of the General Laws relating to sewer construction and assessment of betterments. This option is open to Harwich should the Board of Selectmen determine that a more tailored program to address the specific needs of the Town would be in the best interests of the Town.

Before making a final decision on how to proceed, I would recommend that the Town consult with the Board of Health and DEP to identify any issues so that special legislation could be considered to adapt either of the options to the Town's specific needs.

Please let me know if you have any questions.

Very truly yours,


John W. Giorgio