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January 26, 2016

Board of Selectmen
Chatham Town Hall
549 Main Street
Chatham, MA 02633

Re: Authority to Adopt, Revise and Rescind Sewer Regulations Pursuant to G.L. c. 83, §10

Dear Chairman Dykens and Members of the Board of Selectmen:

You have requested my opinion on the issue of whether the adoption or amendment of Town of Chatham Rules and Regulations of the Sewer Department ("Sewer Regulations") requires a Town Meeting vote or whether the Board of Selectmen ("Selectmen"), in their capacity as Sewer Commissioners, possesses exclusive authority to adopt and/or amend such regulations. I understand the Selectmen have scheduled a discussion on potential amendment of Article II of the Sewer Regulations on January 26, 2016, and this issue will be discussed at that time. In my opinion, based on the following analysis, the Town Meeting is presently the sewer regulation adopting body in the Town of Chatham.

Historically, the Chatham Town Meeting has served as the sewer regulation authority of the Town, and, by vote of the Town Meeting in 2014 pursuant to a citizen's petition warrant article, the authority to approve any modifications, additions to or rescission of the Town's Sewer Regulations was specifically delegated to the Town Meeting. The affirmative vote on the motion under a warrant article presented at the 2014 Annual Town Meeting provided that: "[m]odification, additions to or rescinding of *these rules and regulations* may take place from time to time as authorized by a Town Meeting *as required by Massachusetts General Laws, Chapter 83, Section 10.*" [Emphasis added.]. The stated purpose of the vote was to confirm a practice that has been conducted in Chatham since 1972 whereby the Town Meeting voted to approve Sewer Regulations and any amendments thereto.

Town Meeting clearly has the statutory authority to enact bylaws regulating "the use of the common sewers and the connections which may be made therewith" pursuant to G.L. c. 40,

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§21(6). Pursuant to the provisions of G.L. c. 83, §10, a “town” is vested with the legal authority to adopt rules and regulations regarding the use of its public sewers; notably, however, with respect to the issue presented here, the statute is silent on the specific body or officer within a town which has the right to adopt such rules and regulations. In fact, the only procedural requirement of the enabling statute authorizing the adoption of sewer regulations is notification by publication. See, Elf Corp. v. Atl. Rd. Assocs., No. V07-P-345, 2008 Mass. App. Unpub. LEXIS 611, at *5-6 (App. Ct. June 19, 2008). “The statute contains a single procedural requirement, specifically, that '[s]uch rules and regulations shall be published once in a newspaper published in the city or town, if there be any, and if not, then in a newspaper published in the county, and shall include a notice that said rules and regulations shall be available for inspection by the public’ G. L. c. 83, § 10.” Id. The intent of the 2014 Chatham Town Meeting vote is clear from its explicit language: i.e., to address the procedure whereby sewer “rules and regulations” are to be modified, added or rescinded “as required by Massachusetts General Laws, Chapter 83, Section 10”. This article neither proposed nor adopted a bylaw to regulate common sewers, nor have I seen any evidence that this Article was presented to and approved as a General Bylaw by the Office of the Attorney General, as would be required by G.L. c.40, §32.

In my opinion, the practice whereby Town Meeting acts on behalf of the Town as a sewer regulation promulgating body is precluded neither by applicable state law nor the Chatham Charter; therefore Town Meeting, as the legislative body of the Town, may legally vote to modify, rescind, supplement or amend the Town of Chatham Rules and Regulations of the Sewer Department. By analogy, such action would be consistent with the scope and subject matter of bylaw adoption authority vested in the Town Meeting by the General Court per G.L. c. 40, §21(6). Further, this practice has apparently been utilized in Chatham for the past forty three years without any assertion of impropriety by the only other potential regulatory body in Town, the Board of Selectmen, acting as Sewer Commissioners.

Relevant to this issue, the Chatham Home Rule Charter, Section 3-2(b) provides:

(b) The executive authority of the town shall be vested in the board of selectmen who shall serve as the chief policy making agency of the town. The board of selectmen shall continue to have and to exercise all the powers and duties vested in boards of selectmen by the laws of the commonwealth, and such additional powers and duties authorized by the charter, by bylaw or by vote of the town, except those powers and duties granted to the town manager under this charter.

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The board of selectmen shall have the powers and duties of a water and sewer commission, unless the board of selectmen chooses to delegate those powers and duties to another town agency. The board of selectmen shall cause the laws and orders for the government of the town to be enforced and shall cause a record of all its official acts to be kept. To administer and implement its policies and aid the board in its official duties, the board of selectmen shall appoint a town manager as provided in Part IV of this charter. [Emphasis added].

This language does not provide that the Board of Selectmen shall maintain *exclusive* authority over water and sewer commission functions, rather it affords the Board the right to delegate such powers and duties to another Town agency, including the Town Meeting, if it so chooses. The legality of the practice whereby Town Meeting adopts sewer regulations under G.L. c. 83, §10 would, thus, be indisputable if the Board of Selectmen, acting in its capacity as a sewer commission, delegated its ‘apparent authority’ to adopt sewer regulations to the Town Meeting in accordance with the above-referenced language. Presumably, the Selectmen have been well aware of the Town Meeting’s regulatory actions in this regard over the years, and the Board’s deference to the Town Meeting may reasonably be viewed as a delegation of its authority to adopt such regulations to the Town Meeting. Accordingly, based on extensive past practice as well as the explicit language of the 2014 vote of Town Meeting regarding its authority to adopt, modify or rescind sewer regulations for the Town, it is my opinion that the Town Meeting has assumed the role of sewer regulation authority for the Town pursuant to G.L. c. 83, §10.

As I have noted in previous correspondence to the Town, Article II and the other Sewer Department Rules and Regulations are, as their title suggests, rules and regulations of the Sewer Department adopted pursuant to G.L. c. 83, §10; they are not Bylaws, nor do they rise to the level of Bylaws in the overall regulatory scheme, notwithstanding the fact that they were adopted/ approved by the Town Meeting. Further, it is my opinion that the Selectmen’s Sewer Bank Policy, by itself, lacks the weight of a Bylaw or Regulation. See *Fieldstone Meadows v. Andover Conservation Commission*, 62 Mass. App. Ct. 265 (2004) (a local board’s denial of a permit based solely on an unwritten 25-foot no-build policy and not on a bylaw or regulation is not valid). The Sewer Bank Policy, however, is consistent with the Sewer Regulations and, when read together, I believe they can be applied harmoniously. Moreover, there has been past discussion whether the expiration of an Administrative Consent Order (ACO) issued by the Department of Environmental Protection (DEP) effects the validity of the Sewer Bank Policy. In

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my opinion, the Sewer Bank Policy remains in effect, notwithstanding the expiration of the prior ACO. There is nothing in the ACO or the Policy which would indicate an intent that the Policy terminate upon dissolution of the ACO; in fact, the Policy is clearly within the regulatory scope of authority possessed by sewer commissioners to regulate the expansion and use of limited sewer/ wastewater treatment capacity by Town facilities and, as such, it continues to advance the public interests underlying the ACO.

While portions of the Sewer Regulations, particularly the language of Section 1 of Article II, may be subject to varying interpretation, there is nothing therein which is clearly inconsistent with the Sewer Bank Policy. In my opinion, there is no reason the Sewer Regulations and Sewer Bank Policy cannot be implemented conjunctively given the level of flexibility that is typically afforded to policies and regulations. On the one hand, Section 1 of Article II provides that "No person shall modify an existing structure or change its use so as to increase its sewage flow"; yet, it also expressly provides that expansion or modification of existing structures which were connected to sewer as of May 10, 2005 that "may result in increased flow" is permitted if it is allowed under Part 1 of the Sewer Bank Policy, which provides a basis for review and allocation of increased sewage flow into the Town's system in a controlled manner. Considering the fact that the Sewer Bank Policy was adopted after the initial edition of the Sewer Regulations, and its provisions were evidently thereafter *expressly incorporated into Section 1 by vote of the Town Meeting*, I believe there is a clear inference of intent to apply these regulatory provisions in conjunction with, rather than exclusive of, one other.

Please let me know if you have any further questions in this regard.

Very truly yours,



Patrick J. Costello