

Shanna Nealy

From: Jill Goldsmith
Sent: Monday, April 01, 2013 1:21 PM
To: Robert Duncanson (rduncanson@chatham-ma.gov); 'Jeff Colby'; Deanna Ruffer (druffer@chatham-ma.gov)
Cc: Shanna Nealy (snealy@chatham-ma.gov)
Subject: FW: sewer bank policy

fyi

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Kindly remember that the Secretary of State has deemed most email a public record.

From: Jay Talerma [mailto:jay@bbmatlaw.com]
Sent: Monday, April 01, 2013 12:10 PM
To: Jill Goldsmith
Subject: sewer bank policy

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Jill:

You have requested my opinion with respect to the application of the Sewer Bank Policy to Article II, Section 1 of the Chatham Sewer Regulations. Particularly, you have asked whether the Sewer Bank Policy may still be applied, given the expiration of the accompanying Administrative Consent Order (ACO). In my opinion, the Selectmen (acting as Sewer Commissioners) may continue to apply the Sewer Bank Policy if they so choose.

As you know, Article II, Section 1 of the Regulations contains a prohibition on modifications to structures that would increase sewer flow. As I have referenced in prior opinions and as is plain in the language, there are several exceptions to the prohibitions of Section 1. Among them are exceptions for increased flow that is allowed under the Town's Sewer Bank Policy for properties that were connected to sewer as of May 10, 2005.

As you also know, the Sewer Bank Policy was adopted as a means by which the Town may administer capacity without violating the restrictions imposed under the ACO. Among the provisions of the Sewer Bank Policy, as amended, are allowances for increased flow in order to advance projects that meet the town's goals for economic development.

Recently, some have suggested that because the ACO has been dissolved by the DEP, the Sewer Bank Policy has dissolved as well and, as a consequence, cannot be applied under Section 1 of Article II. In my opinion, the Selectmen may reasonably continue to apply and utilize the Sewer Bank policy for at least three reasons:

First, despite the lapse of the ACO, the Sewer Bank Policy continues to exist as a separately enacted policy directive of the Sewer Commissioners (i.e. Board of Selectmen). Thus, it continues to have legal existence.

Second, even though the Sewer Bank Policy was adopted under the ACO, it still sets forth a variety of policies that may be applicable in other arenas, including situations arising under Article II, Section 1, where the Selectmen have the opportunity to evaluate exceptions to the prohibitions on increased flow.

Third, public policy supports the continued applicability of the Sewer Bank Policy. To wit, the Sewer Bank Policy was developed, in part, as a means to allow increased flow to foster certain types of projects. The Policy was a valuable tool when capacity was limited under the ACO. Therefore, it stands to reason that, with the dissolution of the ACO and the availability of more capacity, the application of the Sewer Bank Policy carries perhaps more importance than ever as the Town makes decisions on how to allocate its capacity.

I hope this opinion is helpful.

Jay

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