

Maryjane Kenney

From: Stephen Anderson
Sent: Thursday, October 13, 2005 8:36 PM
To: Don Johnson; John Murray
Cc: Doug Halley; Mary Liz Brenninkmeyer
Subject: Acton/Sewer: Draft Abatement Decision - 12 Assabet Crossing

<<Abatement-Decision-12 Assabet Crossing.rtf>>
Don and John:

Attached is a draft of the Abatement Decision for 12 Assabet Crossing. If it appears acceptable to you, please do the following:

- Have the Board review it next Monday night and, if it is acceptable, have the Board execute it.
- Provide a copy to the assessors and Tax Collector. There is no need to adjust the bill if this decision is adopted.
- Mail the **original** to the Owner (by certified mail, RRR). This must be done right away.
- Return a copy to me in Cambridge. There is no need to record it in the Registry if this decision is adopted.

If you have any questions, let me know.

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TOWN OF ACTON
MIDDLE FORT POND BROOK SEWER BETTERMENT AREA
DECISION ON PETITION FOR ABATEMENT OF
FINAL SEWER BETTERMENT ASSESSMENT

Pursuant to Massachusetts General Law Chapters 80 and 83, Chapter 340 of the Acts of 2000, and the Town of Acton Sewer Assessment By-law and regulations promulgated pursuant thereto, the Town of Acton has issued an actual sewer betterment assessment to the Owner of the following land located in the Middle Fort Pond Brook Sewer Betterment Area, and has recorded or registered a lien therefor, as applicable:

Assessors Map and Parcel ID	I3-134-4
Owner	Paul M. Gaboury & Michele A. Gaboury
Number and Street	12 Assabet Crossing
Owner's Deed Reference	Book 20889, Page 252
Date of Owner's Deed	11/29/1990
Property Classification	101- Single Family
Latest Property Valuation	\$670,300.00
Actual Betterment Assessment	\$12,311.52

On June 22, 2005, within six months after notice of such assessment had been sent out by the Acton Collector of Taxes, the Owner filed with the Board of Selectmen as the Sewer Commissioners of the Town of Acton (the "Board") a petition for an abatement thereof (the "Petition").

On October 11, 2005, the Board held a duly noticed public hearing on the Petition. The Owner was in attendance at the hearing and presented information concerning the Petition directly. The Owner presented information about the feasibility of a shared connection to the sewer line with several other properties on Assabet Crossing. He stated that a shared connection is not viable because everyone would have to agree to expend funds at the same time, which is unlikely given that the septic systems on Assabet Crossing are all in good shape.

The Owner stated that the cost to connect to the sewer line is high. The cost to connect his home individually is estimated at \$41,000, and the cost estimate for his portion of a shared connection with other properties on Assabet Crossing is \$13,750. The Owner's lot is a hammerhead lot with 125 feet of frontage on Parker Street, in which the sewer is located. With regard to an individual connection, the Owner indicated that the distance to Parker Street from his dwelling is 870 feet. He indicated in his written submission to the Board that the cost of trenching and installing an 870 foot sewer line, estimated at \$27,000, makes up the bulk of the estimated connection cost. He indicated at the hearing that a connection to Parker Street (a) would require a pump, (b) would require a Notice of Intent due to two wetlands crossings, and (c) would require that the line pass under the cul-de-sac, through a wooded area,

down a gully and then up to Parker Street. He indicated that at Parker Street the elevation is fifteen feet higher than at his dwelling. The Owner stated that the Town would need to install a stub on the Parker Street sewer line at an approximate cost of \$10,000.

The Owner stated that he will not connect to the sewer line because the connection costs are, in his view, excessive. He stated that his property has good soil for a leaching field and that his septic system should work well for many years.

On October 11, 2005, the Board began deliberations and at a duly noticed hearing on October 17, 2005, the Board issued the following Decision, a copy of which is being provided to the petitioner within ten days of this Decision as required by G. L. c. 80, § 5.

For the reasons set forth below, the Board denies the Petition so that the Actual Betterment Assessment in the amount of \$12,311.52 shall stand as the assessment upon the land.

The grounds for this Decision are as follows:

The Town of Acton assessed the Owner pursuant to the Town of Acton's Sewer Assessment By-law, which has been held to be facially valid by the Massachusetts Appeals Court. See Grace v. Acton, 62 Mass. App. Ct. 462, 465 (2004). The Sewer Assessment By-law applies the uniform unit method of assessment. See G.L. c. 83, § 15.¹ The uniform unit method divides the costs incurred in building the Middle Fort Pond Brook Sewer among the total number of existing and potential sewer units to be served. Owners of land used for a single-family residence are each assessed on the basis of one sewer unit. The Owner of the land at issue in this Petition has been assessed one (1) Sewer Betterment Unit.

Chapter 83 reflects a strong statutory policy in favor of a full distribution of sewer betterment assessments to all those who potentially benefit, whether or not they choose to connect to the sewer. Cf. Stepan Chemical v. Wilmington, 8 Mass. App. 880, 881 (1979)(rescript) (invalidating assessment formula that assessed only those immediately benefiting from the sewer system; assessments must be imposed upon all who benefit from the sewer project, which includes those who have no buildings on their lots or who do not wish to connect to the sewer). As the Supreme Judicial Court has made clear, "The tax is not to be assessed according to the immediate necessity for drainage, but according to the opportunity for drainage when the owner may require it." See Snow v. Fitchburg, 136 Mass. 183, 183 (1883).

In the present case, the benefits of connecting to - or having the option to connect to - the public sewer line far outweigh the potential costs incurred by connecting to the sewer and paying the Actual Betterment Assessment. The "value added" to a typical single-family home - including this one - from having the opportunity to connect to a sewer includes a variety of considerations, such as:

1. the availability of the public sewer to provide immediate protection in the event of a failed or failing septic system;

¹ Under Section 15, "A uniform unit method shall be based upon sewerage construction costs divided among the total number of existing and potential sewer units to be served, after having proportioned the cost of special and general benefit facilities. Each sewer unit shall be equal to a single family residence. Potential sewer units shall be calculated on the basis of zoning then in effect. Existing and potential multifamily, commercial, industrial and semipublic uses shall be converted into sewer units on the basis of residential equivalents."

2. the increased useful life of the sewer versus a residential septic system;
3. the increased likelihood of an enforcement action (and potential environmental liability) of a property owner for a home with a septic system versus a home with a sewer connection;
4. the improved environmental and public health protection for the property owner and his/her family from having an actual or potential sewer connection compared to a septic system alone;
5. the increased flexibility to add to or otherwise improve a single family home on a public sewer as opposed to one restricted by the requirements of Title 5;
6. the elimination of septic system setbacks – and the accompanying land use restrictions they impose – afforded by the sewer system compared to the septic system;
7. the ability to choose whether or not to connect to the public sewer at this time and therefore whether or not to pay connection costs at this time; and
8. the improved resale environment created by removing the cloud of a failed Title 5 inspection during Purchase & Sale negotiations by providing the buyer or seller with the immediate option of connecting to the sewer to address the issue.

While difficult to quantify, these and other immediate benefits of the public sewer are tangible and material. In the Board’s view, they add considerable value to the property, consistent with the rules for determining the amount of the benefit from the public sewer:

“The rules for ascertaining as a fact the amount of benefit conferred by a public improvement are the same in principle as these by which the value of property is determined in other connections. The benefit is found by deciding how much has been added to the fair market value of the property, where such property has a fair market value, In reaching such decision, reasonable probabilities for future use, either by the owner or others, if sufficiently near in time and definite in kind to be of practical importance, may be considered. Driscoll v. Northbridge, 210 Mass. 151, 156, 96 N. E. 59; Massachusetts General Hospital v. Belmont, 233 Mass. 190, 208, 124 N. E. 21.”

Union Street Railway v. Mayor of New Bedford, 253 Mass. 304, 309-310 (1925).

In the Board’s view, neither the assessment alone nor the assessment plus the cost of connection (if that cost is relevant)² is “substantially in excess of the benefit received.” Bozenhard v. Town of

² G.L. c. 83, § 15, which states, in part:

. . . no assessment in respect to any such land, which by reason of its grade or level or any other cause cannot be drained into such sewer, shall be made until such incapacity is removed.

Strictly speaking, this language appears in the paragraph of the statute dealing with uniform rate assessments, not the uniform unit method adopted by Acton. Accordingly, the “incapacity” language may not apply to the uniform unit method at all. In any event, the “cannot be drained” standard “is a reference to physical

Shrewsbury, 18 Mass. L. Rptr. 141, 142, citing Seiler v. Board of Sewer Commissioners of Hingham, 353 Mass. 452, 457 (1968). See G.L. c. 80, § 1 (“no such assessment shall exceed the amount of [the] adjudged benefit or advantage” conferred by the public improvement upon the property assessed). See also Phillips v. City of Boston, 209 Mass. 329, 333 (1911).³ As such, there is no basis to grant an abatement here.

Specifically, the Board finds that the “value added” from the Owner having the opportunity to connect to a sewer is greater than:

1. the Actual Betterment Assessment alone (\$12,311.52);
2. the Actual Betterment Assessment (\$12,311.52) plus the shared connection cost if the Owner were to move forward with his neighbors (\$13,750), totaling \$26,061.52; or
3. the Actual Betterment Assessment (\$12,311.52) plus the estimated individual connection costs (\$41,000) totaling \$53,311.52.

In the present case, the Board recognizes the unfortunate history that certain Town officials and the Owner may have originally believed that the Owner and his neighbors on Assabet Crossing could unanimously elect not to join the Middle Fort Pond Brook Sewer District. However, both General Laws Chapter 83 and the Town of Acton Sewer Assessment By-law require that the Town assess all owners of land abutting any way in which there is a public sewer line. In fairness to other property owners in the Middle Fort Pond Brook Sewer District and to other taxpayers in the Town (one or both of which groups would be forced to assume additional costs if the Owner and his neighbors on Assabet Crossing were allowed to avoid paying their share of the sewer system costs), the Board recognizes the well established principle that there is no estoppel against the Town by virtue of this history. See Building Inspector v. Lancaster, 372 Mass. 157, 162 (1977). The betterment statutes and the Town Bylaw were enacted and are enforced for the benefit of the public good. See id. at 162-63. The Actual Betterment Assessment assessed the Owner in this case serves the public good by helping to provide sewer service to the Owner and the Middle Fort Pond Brook Sewer District and by fairly distributing the costs thereof to the benefited parties.

This Decision relates only to the property identified in the above table. No abatement is granted hereby and no decision is made hereby with respect to any other land or property located within the Middle Fort Pond Brook Sewer Betterment Area. Further, sewer betterment assessments are subject to re-determination in accordance with General Laws Chapter 83 as now in force or hereafter amended, and this Decision does not preclude the Board’s right to re-determine any such sewer betterment assessment

impediments blocking drainage into the sewer.” Bozenhard, 18 Mass. L. Rptr. at 143. However, there is no evidence of such impediments here. Rather, the Owner asserts that the cost of connection would be increased, not that the connection would be impossible because of “physical impediments blocking drainage into the sewer.” Accordingly, the Board will consider the issue of connection costs as it may relate to the “not substantially in excess of the benefit” standard of G.L. c. 80, § 1, and the cases cited in the text.

³ The Courts tolerate some degree of approximation in the assessment formula, as long as the “not substantially in excess of the benefit” standard is met. The Courts have noted that “[p]ractically it is impossible to secure exact equality or proportion in the imposition of taxes.” Bettigole, 343 Mass at 231, quoted in Bozenhard, 18 Mass. L. Rptr. at 142 (upholding denial of abatement claimed by reason of a utility easement, which made part of the property undevelopable).

whether or not abated hereby.

Pursuant to G. L. c. 80, § 7, a person who is aggrieved by the refusal of the Board to abate an assessment in whole or in part may within thirty days after notice of this decision appeal therefrom by filing a petition for the abatement of such assessment in the superior court for the county in which the land assessed is situated.

In addition, General Laws c. 80, § 10, provides as follows:

A person who is aggrieved by the refusal of a board of officers of a city, town or district to abate an assessment may, instead of pursuing the remedy provided by section seven, appeal within the time limited therein to the county commissioners of the county in which the land assessed is situated. The person so appealing shall, within ten days after the filing of said appeal, give written notice thereof to such city, town or district. Such notice may be given by mailing a copy of the appeal by registered mail, postage prepaid, to the board which made the assessment or to the clerk of such city, town or district. The county commissioners shall hear the parties, and shall have the same powers and duties with respect to the abatement of such assessment as the board by which it was assessed, and may make an order as to costs. The decision of the county commissioners shall be final.

Middlesex County has been dissolved. See 1997 Mass. Acts c. 48, § 1 and 1998 Mass. Acts c. 300, § 11. The statute concerning the abolition of county government (G.L. c. 34B) provides that “all functions...are hereby transferred from said county to the commonwealth,” G.L. c. 34B, sec. 4, and that the “secretary of administration and finance...shall make such plans and arrangements as may be necessary to ensure the effective transfer of county functions to the commonwealth,” G.L. c. 34B, § 21. In the event that a person who is aggrieved by the refusal of the Board to abate an assessment in whole or in part seeks to appeal to the county commissioners or their successor, the Board recommends that the person should contact counsel to determine whether and how to properly perfect that appeal.

IN WITNESS WHEREOF, the Board has caused this Decision to be moved, seconded, approved, and executed at an open meeting duly called and noticed for the purpose on this 17th day of October, 2005.

TOWN OF ACTON, MASSACHUSETTS,
By its Board of Selectmen acting as the
Board of Sewer Commissioners

Peter K. Ashton, Chairman

Walter M. Foster

Lauren Rosenzweig

F. Dore' Hunter, Clerk

ACKNOWLEDGEMENT

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

On this 17th day of October, 2005, before me, the undersigned Notary Public, personally appeared each of the foregoing named members of the Board of Selectmen of the Town of Acton acting as the Board of Sewer Commissioners, proved to me through satisfactory evidence of identification, which was personal knowledge, to be the persons whose names are signed on the preceding document, and acknowledged to me that each signed it voluntarily for its stated purpose as the foregoing named members of the Board of Selectmen of the Town of Acton, acting as the Board of Sewer Commissioners.

_____ (official signature and seal of notary)

My commission expires _____