Wayland Wastewater Management District Comm'n Meeting

Thursday, May 19, 2011

Presentation by Daniel P. Dain, counsel to Twenty Wayland, LLC

Introduction

In 2009, facing a significant deficit, the Wayland Wastewater Management District Commission changed its sewer use rate formula. The change in formula resulted in an immediate increase in Twenty Wayland's assessment by more than $50,000 per year. When Twenty Wayland learned of the new formula, it immediately voiced its protest, paid the amount charged in good faith under protest, and requested dialogue with the Commission about what would be a fair and equitable way of determining charges.

Under the new formula, the Commission seeks to recover from Twenty Wayland approximately 51 percent of the Commission's total wastewater treatment costs. Here is the fundamental problem with the formula: during this entire time period, Twenty Wayland has had zero usage of the treatment plant and zero actual discharge capacity. The governing statute, General Law chapter 83, requires that any wastewater fee be reasonable. The fee that the Commission is charging Twenty Wayland is not reasonable. Additionally, the Town and the Commission contractually agreed in 1999 not to charge Twenty Wayland for any costs associated with providing wastewater services to other users. Thus, under both the governing statute and the parties' contract, the formula will not stand if challenged in court. Twenty Wayland is prepared to do so. It hopes not to have to and hence appears here before you.

For well over a year Twenty Wayland has attempted to work with the Commission in good faith. The Commission and its counsel have steadfastly refused to engage Twenty Wayland in productive dialogue to resolve this issue. Most recently, I wrote to counsel for the Commission on November 17, 2010. More than two months later, I finally received a response. That January 18, 2011 letter from town counsel (Tab A) did not justify any of the elements of the formula, but merely asserted that 45,000 gallons per day was the correct numerator in the formula because that is the capacity that the Town and the Commission "agreed to provide to Twenty Wayland, LLC's predecessor."

There is, however, a fundamental difference between "agreed to provide", "has provided", or even "is legally able to provide today." The current actual delivered capacity remains zero. At best, the Commission may soon be able to provide 28,000 gallons per day of capacity, assuming that there is no appeal of a potentially favorable upcoming decision by DEP.

Town counsel's letter suggested no resolution to the issue.

Let's step back a minute and examine the 45,000 gallon per day agreement. The obligation to deliver 45,000 gallons per day capacity is contractual.

Breach of Contract

The contractual obligation arises out of a 1999 Memorandum of Agreement (Tab B) between the Town of Wayland, the Commission, and Twenty Wayland's predecessor (Wayland Business Center LLC). Under that agreement, Twenty Wayland's predecessor agreed to transfer to the Town a private wastewater treatment facility. In exchange, the Town and the Commission agreed in part as follows:

> **WMDC shall provide 45,000 GPD of sewage treatment capacity to WBC at a pro-rated cost of operation and amortized acquisition costs, but excluding all costs in any way related to installations made for services to others and services provided to others.**

This was a beneficial deal to the Town and the Commission. Twenty Wayland's predecessor owned a wastewater treatment facility that had excess capacity. By acquiring ownership of the facility, the Town of Wayland and the Commission got access to that excess capacity, specifically 20,000 gallons per day of flow. Yes, the Town and the Commission had to assume the expense of operating the facility, but the 1999 MOA specified that they could charge back the pro-rated cost of operation and amortized acquisition costs. In exchange, Twenty Wayland and its predecessor was guaranteed 45,000 gallons per day capacity and agreement that it could not be charged for any costs associated with installation of services to others and services provided to others.

This Agreement has been repeatedly affirmed by the parties.

- On March 28, 2006, the Town of Wayland and Twenty Wayland, LLC, entered into a Memorandum of Agreement (Tab C), affirmed by Town Meeting. The Agreement stated in relevant part:

  > **Developer and Wayland hereby acknowledge and confirm that each has certain rights and obligations under a August 30, 1999 Memorandum of Agreement by and between Wayland and WWMDC and Wayland Business Center, LLC (Developer's predecessor in interest), as modified by a Supplemental Agreement dated September 24, 1999 (collectively, the "MOA"), including, without limitation, regarding gallons per day of maximum daily design flow (as defined in 310 CMR 15.000) of 20,000 for Wayland and WWMDC and 45,000 for Developer.**

- On February 26, 2007, the Town Administrator wrote to counsel for Twenty Wayland (Tab D), and stated, in relevant part:

  > **I can assure you that the WWMDC has not taken any actions that would effectively abrogate its and the Town's contractual obligation to provide Twenty Wayland, LLC 45,000 gallons per day of wastewater disposal capacity of the maximum**

permitted 65,000 GPD capacity at the Town-owned sewage treatment plant adjacent to 400-440 Boston Post Road.

- On July 2, 2007, the Town Administrator again wrote to counsel for Twenty Wayland (Tab E):

  I am writing to you on behalf of the Town of Wayland in response to your letter to Town Counsel Mark J. Lanza and me dated June 25, 2007 concerning the above-referenced subject. The Board of Selectmen, Town Counsel and I have reviewed this matter with the Wayland Wastewater Management District Commission. After doing so on June 28, 2007, the WWMDC voted to confirm and reaffirm the Town's and the WWMDC's contractual obligation to provide Twenty Wayland, LLC, as successor to Wayland Business Center, LLC, 45,000 GPD of wastewater capacity at the Town's sewage treatment plant in accordance with the Memorandum of Agreement among WBC, the Town and the WWMDC dated August 30, 1999.

  As I stated in my letter to you dated February 26, 2007, the Town and the WWMDC have met, and will continue to meet their obligation to provide the agreed amount of capacity.

- Most recently, on May 6, 2011, the Board of Selectmen posted a letter (Tab F) that stated:

  Under the terms of that 1999 agreement transferring the existing plan to the town, the Town Center property is entitled to 69 percent of the flow [45,000/65,000] that is treated at the plant and discharged into the Sudbury River. The remaining flow is available to nearby businesses, homes and municipal buildings.

So, to sum up, we are all absolutely clear and in agreement, that both the Town and the Commission have a contractual obligation to deliver 45,000 gallons per day of capacity to Twenty Wayland, LLC.

How much has actually been provided to date? The answer is **zero**.

What happened? Well, from a letter to the editor by the Town Administrator dated April 18, 2011 (Tab G), it sounds like the Town views the failure to provide any of the promised 45,000 gallons per day of capacity as Twenty Wayland's and the DEP's fault. That letter stated:

Groundbreaking for the Town Center planned for this month <u>has been delayed by Twenty Wayland</u> because DEP elected to hold a public hearing.

This delay is a big problem for Twenty Wayland. Twenty Wayland has spent 6 years and many millions of dollars permitting its Town Center project. Twenty Wayland's carrying costs on this project are around $150,000 per month. The delay is extremely expensive for Twenty Wayland and jeopardizes phases of the project.

Yet, conspicuously absent from the Town Administrator's April 18 letter is any mention of fault by the Town and the Commission. The facts indicate otherwise. Keep in mind that under the 1999 MOA, providing 45,000 gallons per day of capacity is the Town and the Commission's obligation; it is my client's contractual right. But groundbreaking for the Town Center has been delayed not because DEP elected to hold a public hearing, but because the Town and the Commission have not delivered any sewer capacity to date.

My client, Twenty Wayland, has asked me, their litigation counsel, to appear before you this evening in part to help clarify the public record as to how we arrived at where we are today.

As early as 2004, the Commission took the view that because actual usage is less than allocated usage, the Commission could allocate more usage than the plant's legal capacity. According to a letter from the Commission to the Board of Selectmen, dated March 17, 2004 (Tab H):

> **The Commission has decided to use 60 percent of Title 5 Guidelines as the typical water usage for users of the Sewer System.**
>
> **Using the 60 percent rule and maximum water usage (or input to the Sewer System) of 20,000 gallons per day for users other than the Wayland Business Center [Twenty Wayland's predecessor], the Commission can allocate sewer capacity of 33,333 gallons per day (20,000/.6) without exceeding the flow through the treatment plant.**

In other words, under the 1999 Memorandum of Agreement, the Commission had 20,000 gallons per day of flow to allocate, but then made the unilateral decision in 2004 to treat the 20,000 gallons as if it were 33,333 gallons per day – effectively reducing what was available to Twenty Wayland by more than 13,000 gallons.

And that is what the Commission did. In a May 24, 2005 memo from the Commission to the ZBA (Tab I), the Commission recommended approval of the Wayland Commons 40B project because even though its hookup to the treatment plant would result in allocation greater than the 65,000 capacity, "In the five years of the system's existence, the system has never been required to treat anywhere near the allowable average or maximum amount of wastewater."

The Commission's use of a 60 percent use to allocation methodology was certainly clever. However, it has no basis in engineering or the DEP regulations, specifically 314 CMR 7.15 Calculation of Flows (Tab J). That section provides a chart for calculating system design flows and plant capacity. Those calculations are based on factors like the number of bed rooms, seats in a restaurant, or square feet of retail space. There is no provision allowing the Commission to ignore the regulations and make up its own method of calculation. The

regulations require the use of the chart "unless a variance is authorized by the Department in writing." The Commission never sought a variance from these DEP regulations.

Twenty Wayland has consistently protested this methodology of allocation, including writing several letters to the Commission and the Town (Tab K), noting the methodology was unsupported by the regulations.

We now know that DEP is troubled by the methodology as well. Normally, because 45,000 gallons per day is less than the 50,000 gallons per day threshold under 314 CMR 7.05(1)(h), connecting Twenty Wayland's Town Center Project to the plant would not have required a new sewer connection permit from Mass. DEP. However, exercising its authority under 314 CMR 7.04, where it has concerns about "inadequacies in the design or capacity of a sewer system", DEP is requiring a permit for Twenty Wayland to connect to the treatment plant.

The DEP permit has not been issued yet. Indications are that DEP will approve 28,000 gallons per day for now. That would still leave a 17,000 gallon per day shortfall. On June 9, 2010, Twenty Wayland (Tab L) wrote to counsel to the Commission with a proposal for moving forward together under which Twenty Wayland would agree not to seek the additional 17,000 for more than a year, but in exchange, Twenty Wayland requested:

> **Until such time as WWMDC has issued all local permits and approvals required for Twenty Wayland to discharge 45,000 gallons per day to the plant (as may be replaced by a new plant and/or augmented by new treatment facilities), WWMDC shall not issue any sewer connection permits to existing or new users, nor allow any existing user to increase its allocation or average daily sewage flow rate.**

Three months later, in October 2010, the Commission and the Town rejected Twenty Wayland's proposal, stating that they "strongly disagreed with" "the proposed conditions in the letter." (Tab M) Then, without telling Twenty Wayland, the Commission proceeded to allocate another 7,200 gallons per day of capacity to another user.

These actions by the Commission did not go unnoticed by the DEP. By letter dated November 9, 2010 to the Town (Tab N), DEP wrote:

> **Additionally, it should be noted that the Department still has concern with the past practice of the WWMDC in oversubscribing commitments to projects seeking to connect to the WWTP. MassDEP needs written assurance from both the Town and WWMDC that connections to the WWTP will be more responsibly managed moving forward. Absent some better checks and balances being put in place, the Department may take action to serve as the approving authority for all future connections to the WWTP.**

So, we have a problem right now, and it is not a problem created by Twenty Wayland. Unfortunately, the Commission's options appear somewhat limited. We understand that the EPA

will not allow an increase in the amount of treated wastewater discharged to the river. Town Meeting has turned down plans to buy Sudbury's interest in the decommissioned septage facility, preventing its use as additional leeching fields. In the meantime, we still await the DEP permit for 28,000 gallons per day and whether it will appealed. Counsel to the Commission has come up with creative arguments as to why DEP should then permit additional capacity at the treatment plant, but we do not know if or when DEP will accept these arguments and permit the additional 17,000 gallons to per day that the Commission and the Town contractually owe to Twenty Wayland. To meet its contractual obligation, the Commission may have to disconnect other users. Certainly, until these issues are resolved, Twenty Wayland cautions the Commission not to issue any sewer connection permits to existing or new users, nor allow any existing users to increase their allocation or average daily sewage rate.

And the delay continues to cost Twenty Wayland carrying costs and threatens phases of the project. Twenty Wayland does appreciate, however, that the Commission has been working with it to secure DEP permits for the 45,000 gallons per day that is necessary for Twenty Wayland to complete the Town Center project. But my client has asked me to affirm that Twenty Wayland intends to hold the Town and the Commission to its contractual obligation and reserves the right to seek both an order that other users be disconnected and an award of costs incurred by Twenty Wayland due to the Commission's and the Town's inability to deliver on its obligation.

Improper Calculation of Fees

The Commission is obviously familiar with its current formula for assessing charges for the treatment plant. As noted, it is Twenty Wayland's position that the formula is not valid. What is the framework for assessing the formula?

First, as noted, the 1999 MOA expressly provides that the Commission may charge for the pro-rata cost of operation and amortized acquisition cost, "but excluding all costs in any way related to installations made for service to others and services provided to others."

Second, Massachusetts General Law chapter 83, § 16 (Tab O) provides that any sewer charge must be "fair and equitable." *See also Carson v. Sewerage Commissioners of City of Brockton*, 175 Mass. 242 (1900), in which the SJC wrote: "The charge allowed by the act is a charge for using the sewer – a benefit distinct from that originally conferred by building it. By statute, the charge must be a 'just and equitable' charge… Here the words are applied solely to those who actually use the sewer. Therefore the benefit to the parties assessed is established. The assessment, in order to be equitable, must be proportional to the benefit, and not in excess of it."

And third, in the case of *Spence v. Boston Edison Company and the Department of Public Utilities*, 390 Mass. 604 (1983), the Supreme Judicial Court found, in reference to a utility rate set by a government agency, that "overcharging can rise to the level of an 'unfair practice' under General Law chapter 93A." In other words, attorney's fees and multiple damages may be available where it is found that a rate charged is unfair.

I will now turn to the defects in the formula as applied to Twenty Wayland. They apply to both the numerator and the denominator in the capacity formula, as well as the 80-20 allocation between fixed and variable costs. These defects should not be a surprise to the Commission. Twenty Wayland has spelled them out in detail in the past, including in my letter to the Commission's counsel of November 17, 2010 (Tab P).

- First, the Commission has been using 45,000 in the numerator of the fixed cost portion of the formula applied to Twenty Wayland since that is the promised capacity. However, as we know, the actual delivered capacity to date has been zero. At best, it looks hopeful that DEP will permit 28,000 gallons per day. Either way, using 45,000 gallons per day in the numerator is blatantly unfair to Twenty Wayland, particularly where the Commission's oversubscription on the system has resulted in delay to the project and significant costs to Twenty Wayland in working with DEP.

- Second, the Commission has not been consistent as to what it has included in the denominator. At a minimum, the Commission should be including the 7,200 gallons per day allocation to Wayland Meadows. Additionally, we understand that a number of users have been exceeding their capacity, including Moodz Day Spa, Somersby Hair Salon, Dr. Stacks, and the shopping center at 317 Boston Post Road. This excess usage should also be added to the denominator.

- Finally, we have examined the Commission's historical cost data. Costs such as electricity and routine maintenance have varied widely year to year and should be considered variable costs, not fixed costs. Twenty Wayland also questions why a $50,000 deficit from a prior year was used in the calculations for 2010 and treated entirely as a fixed cost. The decision to place that deficit entirely in the fixed costs bucket results in Twenty Wayland having a disproportionate share of those costs.

The placement of all of these costs on Twenty Wayland, whom the Commission surely sees as having the deepest pockets of its rate payers, is not fair under G.L. c. 83, § 16. Importantly, there can be little doubt that the Commission has been charging Twenty Wayland for costs incurred in "providing services to others," to quote from the 1999 MOA.

We need a resolution.

First, we could just go straight to litigation. We may need to litigate anyway regarding the Commission's contractual obligation to deliver 45,000 gallons per day. If litigation is inevitable, then let's stop wasting our time and start the process through which we ask a third party – a judge – to adjudicate the rights under the 1999 MOA and the statute. Through litigation, Twenty Wayland will press its argument that the Commission has committed an unfair practice in its charges to Twenty Wayland and that the Commission is liable for attorney's fees and multiple damages.

Further, through discovery in litigation, or even a Public Records request, we'll have our forensic accountant examine whether the Commission has indeed charged Twenty Wayland for any costs associated with providing services to others.

Alternatively, we can try to negotiate a settlement now. Looking back, Twenty Wayland would need some concession for the past overcharges. Looking forward, at a minimum, the numerator used for Twenty Wayland on the capacity side of the formula cannot be more than 28,000 gallons until such time as the additional 17,000 gallons have been permitted. Twenty Wayland requests a proposal from the Commission. But this is not the Commission's problem alone. The 1999 MOA was signed by the Town and binds the Town. Twenty Wayland suggests that the Commission work with the Town in formulating a proposal under which all parties can move forward. Note that, given the risk of litigation here, the Commission may want to consult counsel about the appropriateness of going into executive session at some point to discuss possible settlement of this dispute.

But if the Commission and the Town are serious about a settlement, you must get to work now on a good faith proposal. This has dragged on for over a year. It takes months for our letters to be responded to, and even then, the responses avoid the questions we ask. No more delay. It is time for a deal now or we ask a third party – a judge – to resolve this issue for us.