

MEMORANDUM

TO: Greendale Avenue Venture, LLC
FROM: Goulston & Storrs
DATE: June 20, 2013
SUBJECT: Needham Zoning Board of Appeals' Approval of the Relocation of a Sewer Easement Under M.G.L. c. 40B

This memorandum confirms that, pursuant to the authority granted to the Needham Zoning Board of Appeals ("Needham ZBA") under M.G.L. c. 40B, the Needham ZBA may act on behalf of the Needham Board of Selectmen ("Needham Selectmen", in its capacity as the Board of Sewer Commissioners ("Sewer Commissioners")) to grant approval for the relocation of a sewer easement and sewer line within the property located at 692 and 744 Greendale Avenue, Needham, Massachusetts ("Property").

The Property is currently burdened by a sewer easement and sewer line ("Existing Line") in favor of the Town of Needham. A copy of the easement instrument recorded at the Norfolk County Registry of Deeds (the "Registry") at Book 3743, Page 551 is attached hereto as Exhibit A ("Sewer Easement") and the sewer easement area ("Easement Area") is shown on the plot plan attached hereto as Exhibit B. The Existing Line generally travels in a west to east direction across the Property with a slope that exceeds 30% in certain areas and is almost flat in others. Greendale Avenue Venture, LLC, the applicant ("Applicant") for a Comprehensive Permit under M.G.L. c. 40B from the Needham ZBA, has proposed relocating portions of the Existing Line on the Property at the Applicant's sole cost and expense to allow for the construction of affordable housing units on the Property, as contemplated in the Applicant's Comprehensive Permit Application. The relocated sewer line would replace an older line with inconsistent and sub optimal slopes, with a modern pipe constructed in a manner consistent with contemporary engineering best practices.

I. Sewer Related Powers and Duties Granted to the Needham Selectmen by the Massachusetts Legislature

Under Chapter 59 of the Acts of 1924 ("Chapter 59"), the Massachusetts Legislature ("Legislature") authorized the Town of Needham ("Town"), among other things, to lay out, construct, maintain and operate a system of main drains and common sewers over and under land in Needham as the Town deemed necessary. Chapter 59 also provided the Town with the authority to designate the Needham Selectmen as the Sewer Commissioners and conferred upon

the Sewer Commissioners the authority to take by eminent domain under M.G.L. c. 79 any easements in public or private land in the Town necessary for laying out, constructing, maintaining and operating a system of main drains and common sewers. Chapter 59 also conferred upon the Sewer Commissioners the authority to enter upon and dig up any private land and to do any other thing proper or necessary for exercising the powers granted to the Sewer Commissioners by the Legislature.

According to the Sewer Easement the Town exercised its right under Chapter 59 to designate the Needham Selectmen as the Sewer Commissioners by town meeting vote in March of 1933. The Sewer Easement also indicates that the Town voted at that same town meeting to accept Chapter 189 of the Acts of 1932, in which the Legislature conferred upon the Needham Selectmen the authority to act as the Town's Board of Public Works and in that capacity exercise all the powers and duties vested from time to time by the Massachusetts General Laws in the Sewer Commissioners. In Chapter 403 of the Acts of 1971 (also known as the "Needham Special Home Rule Charter Act"), the Legislature confirmed that the powers conferred upon the Needham Selectmen acting as the Board of Public Works, include, among other things, the right to exercise all powers and duties vested by law in the Sewer Commissioners with no requirement for any town meeting approval. The Needham Special Home Rule Charter Act also reconfirmed the Needham Selectmen's power to acquire, by purchase or otherwise, any easements, public or private, in the town necessary for exercising all the powers and duties vested in the Sewer Commissioners again, without any requirement for town meeting approval. The Town's adoption of these legislative acts (together, the "Legislative Acts") clearly shows that the Town delegated broad authority to the Needham Selectmen with regard to easements for main drains and common sewers.

II. *Board of Sewer Commissioner's Taking of Sewer Easement in the Property*

In 1959, the Needham Selectmen, acting on behalf of the Town as the Board of Public Works exercising the powers of the Sewer Commissioners pursuant to the Legislative Acts then in effect, took by eminent domain, in accordance with M.G.L. c. 79, the Sewer Easement in a portion of the Property in order to construct the Existing Line. The Sewer Easement provides that the Easement Area may continue to be used by the Owner "for all legal purposes not inconsistent with the construction, maintenance, operation and repair and renewal of said sewer or drain, except that no building, structure, foundation or building or structure to be used for habitation shall hereafter be erected or maintained upon the [Easement Area] hereby taken except in a manner satisfactory to the [Needham Selectmen]." This language indicates that the Needham Selectmen, acting in the above described capacity, anticipated that the Property would be developed in the future. This language further indicates that, consistent with the Legislative Acts, no Town meeting vote is required for such action by the Needham Selectman. Thus, the Needham Selectmen's action on relocating the Existing Easement Area and the Existing Line and/or approving buildings constructed in the Easement Area is an approval from a local board under M.G.L. c. 40B.

III. *Needham Zoning Board of Appeals' Right to Issue Permits and Approvals Under M.G.L. c. 40B*

Under M.G.L. c. 40B, s. 20 and 21 and the regulations adopted thereunder, the Needham ZBA has the power to issue permits or approvals that any local board or official, including the Needham Selectmen and Sewer Commissioners, would otherwise act upon. The approval to relocate the Easement Area and Existing Line, which the Applicant seeks in connection with its Comprehensive Permit Application under M.G.L. c. 40B, is an approval that the Needham Selectmen, acting as the Board of Public Works exercising the powers of the Sewer Commissioners, would otherwise act upon and therefore the relocation is an approval that the Needham ZBA may grant in lieu of a local board under M.G.L. c.40B. Further, pursuant to M.G.L. c. 40B, § 23, the Needham ZBA's decision to grant or deny the approval must ultimately be reasonable and "consistent with local needs". M.G.L. c. 40B, § 20 provides that requirements and regulations shall be considered "consistent with local needs" if they are reasonable in view of the regional need for low and moderate income housing. The Housing Appeals Committee, Superior Court and the 40B regulations consistently require that local needs which outweigh the regional need for housing to be based on a valid health, safety or environmental concern or the like. No such concerns have been raised in connection with the proposed relocation of the Easement Area and Easement Line. In fact, as noted above, the relocated line would be an improvement over the existing condition.

IV. *Relocation Distinguished from New Easement over Municipal Property*

The Applicant is in receipt of a letter from the Needham Town Manager to the Massachusetts Housing Finance Agency dated June 18, 2013. In that letter, the Town Manager appears to state among other things, that the Needham Selectmen (and therefore the Needham ZBA) cannot grant approval for the proposed relocation under the so-called Groton Case. The facts of the Groton Case are not the same as the facts of the instant proposal.

The Groton Case, *Zoning Board of Appeals of Groton v. Housing Appeals Committee*, 451 Mass. 35 (2008), also involved a 40B development. In *Groton*, the developer petitioned the Housing Appeals Committee ("HAC") to require that the Town of Groton grant an easement over municipal property to allow for the regrading and clearing of vegetation sufficient to provide an appropriate stopping sight distance within the developer's property. The SJC held that HAC could not order a municipality to convey an easement on municipal property, stating "[t]he grant of an easement constitutes the transfer of an interest in land (which in this case, because a town is involved, would require a town meeting vote)." *Groton* 451 Mass. at 39. The SJC went on to say that "[a]n order directing the conveyance of an easement...cannot logically or reasonably derive from, or be equated with, a local board's power to grant 'permits or approvals' [under Chapter 40B]." *Groton*, 451 Mass. at 40. According to the SJC, the phrase "requirements and regulations" in M.G.L. c. 40B, § 20 describes "limitations on an owner's use of his property, not to the use of someone else's property." *Groton*, 451 Mass. at 40 – 41.

The *Groton* case is clearly distinguishable of the facts of proposed relocation. In this case, the Town action in question is to allow the Applicant to relocate on the Sewer Easement on its own, not municipal, property. Therefore, there is not a conveyance of municipal owned property like there was in the *Groton* case. The Applicant is also not asking that the Town abandon the Sewer Easement. Rather, the Applicant is seeking an approval from the Needham ZBA to relocate the Easement Area and Existing Line within another area of the Property. The relocation will not lessen the utility of the easement, increase the burdens on the Town in its use and enjoyment, or frustrate the purpose for which the easement was created. Instead, based on engineering studies of the Existing Line, the relocated easement is likely to increase the utility of the easement, decrease the current and future burdens on the Town in its use and enjoyment, and further the purpose for which the easement was created by making it function better and using newer and better materials consistent with current engineering best practices.

Furthermore, the Needham Selectmen took the Sewer Easement pursuant to state legislative and statutory authority and the Supreme Judicial Court of Massachusetts (“SJC”) has made it clear that a municipality cannot exercise direction or control by town meeting vote over one whose duties have been defined by the Legislature. In *Russell v. Canton*, 361 Mass. 727 (1972), the board of selectmen took by eminent domain less than the number of acres specified in a town meeting vote and the private property owner filed suit to direct the board of selectmen to take all of its land in accordance with the town meeting vote. The SJC held that because the power of eminent domain was conferred upon the board of selectmen by state statute, the selectmen were not bound by the town meeting vote. The SJC held that when exercising powers conferred by the Legislature, the selectmen were acting as public officers and not as agents of the Town and that therefore the selectmen may exercise such powers without reference to the approval or disapproval of town meeting. The SJC cited its previous statement in *Daddario v. Pittsfield*, 301 Mass. 552, 558 (1938), that “[a] municipality can exercise no direction or control over one whose duties have been defined by the Legislature.” *Canton*, 361 Mass. at 731 [FN4].

Similar to the board of selectmen in the *Canton* case and as described above, the Needham Selectmen’s authority, as the Board of Public Works exercising the powers of the Sewer Commissioners, has been defined by the Legislature. Therefore, following the SJC’s reasoning in *Canton*, a town meeting vote directing or controlling the actions of the Needham Selectmen as they pertain to the laying out, construction, maintenance and/or operation of main drains and common sewers, would be void. As the recitals in the Sewer Easement clearly indicate, the Needham Selectmen acted pursuant to the duties defined by the Legislature when the Needham Selectmen originally took the Sewer Easement and would likewise be acting pursuant to the duties defined by the Legislature were they to approve the relocation of the Easement Area and Existing Line.

V. *Conclusion*

As noted above, the Needham ZBA has the right under Chapter 40B to act on behalf of the Needham Selectmen, in their capacity as Sewer Commissioners, to approve the relocation of the Easement Area and Existing Line, because such approval is one that a local board, the Needham Selectmen, would otherwise act upon. The proposed relocation of the Easement Area and Existing Line may be approved without the need for town meeting vote because the relocation is not a conveyance of municipal property, nor is it an abandonment of the Sewer Easement. Furthermore, the authority to lay out, construct, maintain and operate main drains and common sewers was conferred upon the Needham Selectmen by the Legislature and the SJC has made it clear that a municipality cannot exercise direction or control, including by town meeting vote, over one whose duties have been defined by the Legislature. In light of the Town's and region's imputed need for low and moderate income housing, and the lack of a local concern that overrides such need, the Needham ZBA's refusal to approve the relocation of the Easement Area and Existing Line would be inconsistent with local needs.

EXHIBIT A
SEWER EASEMENT

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in said Board hereto enabling, desires to take by eminent domain under the provisions of General Laws, Chapter 79 certain rights and easements for the purpose of making, laying and maintaining a main drain and common sewer,

NOW therefore, the said Board acting for and on behalf of said Town does hereby order, declare and specify that said Board takes by right of eminent domain for said Town of Needham an easement for sewer purposes in the following described parcel of land in Needham, Norfolk County, Massachusetts, as shown on a plan, to be recorded herewith, entitled: "Easement to be acquired in Needham, Mass., Greendale Ave. to Route 128, scale 1 in = 40 ft., H. Gordon Martin, Town Engineer", dated June, 1959, the centerline of said 20.00 ft. wide easement being located and described as follows:

Beginning at a point on the northeasterly sideline of Greendale Ave., said point being 81.75 ft. N52°06'34"W from the northerly end of a curve of 2039.93 ft. radius; thence 212.72 ft. N40°51'43"E, 125.23 ft. N63°33'27"E and 65.16 ft. N82°24'13"E to the southwesterly sideline of the State Circumferential Highway (Rte. 128) as laid out by the Commonwealth of Massachusetts in 1953.

Said rights and easements are hereby taken without prejudice to, or interference with the rights of the public or the rights of any person, corporations, Town of Needham or any authorized agent, over said described premises except in so far as is necessary for the exercise of the rights and easement hereby taken. The surface of the above described premises shall upon completion of any work, be restored as far as can reasonably be done, to the condition at the date of the commencement of said construction and may be used thereafter by the owners of the fee, their heirs, and assigns, for all legal purposes not inconsistent with the construction, maintenance, operation and repair and renewal of said sewer or drain, except that no building, structure, foundation of building or structure to be used for habitation shall hereafter be erected or maintained upon the premises hereby taken except in a manner satisfactory to the Selectmen. Garages of any kind and wooden buildings not used for habitation, less than fourteen (14) feet high, may be erected on the premises hereby taken. Anything to the contrary herein contained notwithstanding said garages and wooden buildings shall be erected in accordance with the building By-Laws of the Town of Needham, which may now or hereafter be in force. In the event of the erection upon said premises of a garage of any kind containing a foundation, or any wooden building, containing a foundation, the bottom of the foundation of any such building shall not be built deeper than three feet from the top of the line of sewer or drain, unless prior to the construction of said foundation a concrete cradle is constructed by the owner of the fee, his heirs or assigns, sufficient in strength to support the weight of the building to be erected, without damage to the pipe of said sewer or drain.

The names of the owners of the land as herein stated are assumed to be accurate, but the aforesaid rights and easement are hereby taken whether the said ownership of such land is as stated or not. The land is taken under the provisions of law authorizing the assessment of betterments and the Selectmen adjudge that none of the abutting owners nor

any other person or corporation has sustained any damage or damages for this taking, and therefore, no damages are awarded.

The following is a list of the owners and mortgagees of the land through which said easement is hereby taken:

<u>Owner</u>	<u>Mortgagee</u>
Vincent P. & Mary D. Boris	No Mortgagee Known

It is ORDERED that a main drain and common sewer be constructed and maintained in that portion of said land as hereby taken; and said Board hereby certifies that it is expected that the parcel or areas adjoining said taking will receive a benefit or advantage other than the general advantage to the community for said improvement, that is, from the construction of said main drain and common sewer but the Board of Selectmen doth hereby adjudge that none of the said owners nor any other person or corporation shall be assessed.

It is further ORDERED that written notices be given to every person having any interest in the said land, whose property is taken by this order or who is otherwise entitled to damages on account of this taking, together with a statement that any person having an interest in said land who is dissatisfied with the award of damages may petition this Board within thirty (30) days from date hereof for an award of damages, and that any person having an interest in said land is allowed one year from the date hereof or such other time as may now or hereafter be provided by statute to bring a petition in the Superior Court, Norfolk County, to have his damages assessed; and

It is further ORDERED that trees or structures on said parcel of land be and the same are hereby not taken and the owners of the land through which said sewer or drain passes be allowed ten (10) days from the date of this order to take off their trees, fences and other structures which may obstruct the construction or operation of said drain or sewer.

It is further ORDERED that a copy hereof together with plan above referred to, be recorded in the Registry of Deeds, Norfolk County, and that a notice of this order be sent forthwith by registered mail to each owner or mortgagee.

IN WITNESS WHEREOF Clarke H. Wertheim, Peter W. Carre, J. Roland Ackroyd, Philip F. Foss and Marian F. Keith, duly elected Board of Selectmen of the Town of Needham acting for and on behalf of said Town of Needham having first read and approved the foregoing, do hereby subscribe our names and cause the Town Seal to be affixed this 14 day of

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EXHIBIT B
PLOT PLAN

