

BOARD OF SEWER APPEALS

FINDINGS AND CONCLUSIONS: Plummer at Ocean View, LP

September 14, 2017

Appellant: Plummer at Ocean View, LP

Property: 192 Middle Road (U27-003-G) (the "Property")

Members Present: Richard Olson, Chair; William Lunt III; Roland Beaudoin; Tim O'Donovan (alternate)

Parties Present: Matt Teare (on behalf of Appellant, Plummer at Ocean View, LP); Pete Clark, Wastewater Superintendent; Amy Tchao, legal counsel (on behalf of Town as Appellee)

Following a public hearing and deliberations held on August 29, 2017, the Town of Falmouth Board of Sewer Appeals makes the following Findings and Conclusions, and renders the following decision:

FINDINGS:

1. The Appellant is Plummer at Ocean View LP, represented at the hearing by its Director of Development, Matt Teare.
2. The Property has a street address of 192 Middle Road, Falmouth; and is identified as Map U027, Lot 003-G on the Municipal Tax Maps.
3. The Property has street frontage on Lunt Road, which is served by public sewer.
4. Located on the Property is the former Plummer School and an addition to the building that has been constructed over the past year or so. The Appellant proposes to convert the Plummer School building, including the new addition, to moderate income senior housing. The development comprises 34 individual apartments consisting of studio, one and two bedroom units.
5. Following informal communications between Mr. Teare and Mr. Clark regarding the applicable sewer connection charges associated with the proposed development, Mr. Clark wrote a letter to Mr. Teare dated April 12, 2017, outlining his position as Town Wastewater Superintendent, that the appropriate sewer connection charge for the proposed development was \$68,000, based on a sewer fee schedule attached to the Town's Sewer Ordinance that imposes a \$2,000 per unit fee for each apartment unit located near an existing public sewer line.

6. Mr. Teare, on behalf of the Appellant, took an appeal of the Wastewater Superintendent's decision pursuant to Section 18-93 of the Sewer Ordinance, and filed a request for a hearing before the Board on May 17, 2017, supplemented by a letter from Mr. Teare dated May 22, 2017, which appeal was deemed timely.
7. In its request for hearing, Appellant provided two grounds for its appeal: (1) "Inaccurate interpretation and application of an apartment fee to a multiplex building," and (2) "Undue hardship for an affordable sewer project."
8. Section 18-91 of the Sewer Ordinance states that the Board of Sewer Appeals has the following powers and duties when an aggrieved party takes a written appeal of a decision by the sewer superintendent:
 - a. To determine whether the decisions of the officers are in conformity with the provisions of this [Ordinance] and to interpret the meaning of this [Ordinance] in cases of uncertainty.
 - b. To grant variances from the terms of this [Ordinance] where there is no substantial departure from the intent of this [Ordinance] and/or where necessary to avoid undue hardship. Construction costs exceeding fifteen (15) percent of the assessed value of the buildings on the land to be served by public sewer shall be considered as prima facie evidence of undue hardship. The owner shall provide at least three (3) estimates of construction costs from reputable contractors.
9. Under Section 18-131 of the Sewer Ordinance, "a schedule of permit fees and connection charges" established for the connection of any building or property to public sewer within the town is kept on file in the town clerks' office, and "the town council may by order readjust the amounts of the connection charges according to the then-prevailing costs of construction and the anticipated number of such connections." Section 18-31(b).
10. The sewer fee schedule, entitled "Town of Falmouth Wastewater, Sewer Ordinance, Fees for Permit, Connections and Sewer Service," which was last amended with respect to connection charges in the late 1980s, includes different connection charges for apartments and multiplexes. Part B(1) of the fee schedule lists the connection charge for a "Single family dwelling and/or each apartment" as \$2,000 per unit (for units located on an existing sewer line). Part B(2) of the fee schedule lists the connection charge for a "Multiplex" as "the greater of (a) \$12 per foot of frontage of the lot to be served by the sewer on the street or public way in which the sewer is located; or (b) \$2,500 for the first 30,000 square feet of lot area plus \$350 for each additional 15,000 square feet of lot area."
11. The terms "apartment" and "multiplex" are not defined in the Sewer Ordinance.
12. Mr. Teare addressed the Board in support of the appeal, and in addition to the written arguments made in support of the Appellant's position in his May 22, 2017 letter, highlighted a number of points, including the following:

- The fee schedule lacks clarity. It provides a markedly different fee for the project if the apartment unit fee is charged (\$68,000) vs. if the multiplex fee is charged (\$3,550), yet there is no definition of either of these terms. The lack of clarity in the sewer fee schedule should be resolved in favor of the Appellant.
 - The \$68,000 fee charged is unreasonable in light of the nature of the proposed development (i.e., 34 units of 600+/- square feet for senior citizens with modest anticipated impact on the public sewer system), and the Board should apply grant a variance from the higher apartment fee due to undue hardship.
 - There are strong public policy reasons, including the public benefit of this particular project on the Town, for applying the lower multiplex connection charge to the project.
13. On behalf of the Town, Ms. Tchao and Mr. Clark also addressed the Board in defense of the Superintendent's decision to apply the apartment unit calculated connection charge. The highlights of the points made on behalf of the Town in support of the higher apartment unit charge include the following:
- The burden is on the Appellant to show the application of the apartment charge to the proposed development is unreasonable and/or is unsupported by the language of the Sewer Ordinance and/or fee schedule established by the Town Council. Although acknowledging the ambiguity of the fee schedule, the Town argues that the apartment charge is reasonable and supported by the provisions of the Ordinance and fee schedule. The fees imposed using the apartment rate most closely represent what the fee would be for this 34-unit building based on a formula staff will soon be proposing to the Town Council which takes into account the value of public sewer assets and the projected flow from the new user for a per-unit sewer connection fee (or "equity buy-in fee").
 - Application of the multiplex rate in this case would lead to an unreasonable and inconsistent result in light of other similarly-situated cases (such as the Avesta project which earlier this year paid a sewer connection charge of \$38,000 for a 19-unit residential building).
 - Since at least the early 2000s, sewer records reflect that the Town has never charged the multiplex formula a sewer connection application. By contrast, the Town presented a spreadsheet to the Board showing that the apartment rate had been charged for one, two- and four-bedroom apartment buildings in approximately a dozen cases over the same period.
 - The Appellant has not presented evidence to support a prima facie showing of undue hardship under the Ordinance, and therefore a variance from the \$68,000 connection charge imposed by the Superintendent should not be granted. According to the Appellant, the project's estimated value is approximately \$7 million, and the building permit application filed with the Town in October 2016 reflects a project cost of \$3.5 million. Based on application of the Ordinance's definition of undue hardship, 15% of the assessed value of the building, or \$525,000 is well in excess of the \$68,000 sewer connect fee charged in this case.
14. In determining whether the decision of Superintendent Clark was in conformity with the provisions of the Sewer Ordinance and fee schedule, the Board acknowledged the

ambiguity in the current fee schedule regarding the terms apartment or multiplex but concluded that its role was to interpret the Ordinance/fee schedule and make an "either/or" determination regarding which rate (apartment vs. multiplex) should be applied in this case.

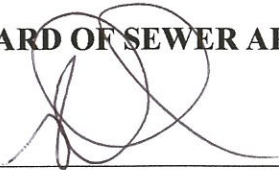
15. The Board declined to impose a different fee as a "compromise" because it is the Town Council who has the exclusive authority to set and readjust the sewer connection charges under Section 18-131, and there was insufficient evidence of an undue hardship that would support the granting of a variance from the \$68,000 connection fee charged.
16. Although the Board would like to see the sewer fee schedule clarified in the future, the Board determined that the sewer connection charge imposed by the Superintendent was not unreasonable, and was in conformity with the provisions of the Sewer Ordinance and fee schedule.

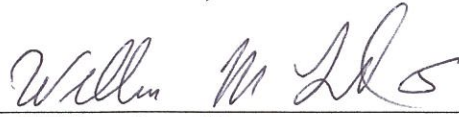
CONCLUSIONS:


The Board concluded that the Town's arguments set forth in finding # 13 were persuasive. The Board concluded that the \$68,000 sewer connection charge imposed by the Wastewater Superintendent for the proposed 34-unit building was not unreasonable, and was in conformity with the provisions of the Sewer Ordinance and fee schedule. The Board also concluded that it would be unreasonable to charge the applicant a fee of \$3,550 for a 34 unit building when the Town charges a fee of \$4,000 for a two unit building.

The Appellant's appeal is DENIED by a vote of 2-1 (Lunt and Beaudoin for, Olson against).

BOARD OF SEWER APPEALS

By: 
Richard Olson, Chair

By: 
William Lunt III

By: 
Roland Beaudoin