

GAY & GAY, P.C.
73 Washington Street
P.O. Box 988
Taunton, Massachusetts 02780

David T. Gay
Thomas P. Gay
John L. Holgerson
Matthew J. Costa
Leo M. Spano
Thomas P. Gay, Jr.

Peter B. Gay
1915-2010
Tel. (508-822-2071
Fax (508-880-2602

March 21, 2018

via email kbuckland@wareham.ma.us & Regular Mail

Wareham Zoning Board of Appeals
Ken Buckland, Town Planner
54 Marion Road
Wareham, MA 02571



COPY



**Re: Application for Comprehensive Permit Under M.G.L. c. 40B of Dakota Partners, Inc.
Property at 3102 Cranberry Highway, Wareham, MA/Our file 3536.14**

Dear Chairman Elkallassi, Members of the Zoning Board of Appeals, and Town Planner Buckland:

This office represents the Board of Water Commissioners of the Onset Fire District regarding the above referenced matter. On behalf our client we provide this input as to the Board's position regarding the relief requested in the petitioner's Comprehensive Permit Application.

As you are aware, the Onset Fire District is a completely separate entity from the Town of Wareham. It is not controlled in any respect by the Wareham Board of Selectmen or Wareham Town Meeting. The Water Department of the Onset Fire District exists for the purpose of providing a water supply within the geographic boundaries of the District. The District is financially self sufficient. The District Water Department has no role with respect to issuing permits or approvals relating to such matters as building height, site plans, development size or shape, or building materials. The role of the District Water Department is limited to providing a public water supply. The source of the District's water are wells which are owned by the District and located on District land. We provide this background information because the Comprehensive Permit application does not clearly refer to the Onset Water Department as being the Water Department of the Onset Fire District, a separate entity from the Town of Wareham.

The concerns of the Board fall into two categories: (1) those arising as a result of the request for waivers under the Ground Water Protection Overlay District requirements of the Wareham Zoning Bylaws; and (2) those arising as a result of the request for waivers from the District's rules, regulations, and fees, and for the grant of a water connection by the Board of Appeals under the Comprehensive Permit. The concerns related to each of those areas are addressed separately below.

1. The Request for Waivers as to the Ground Water Protection Overlay District Requirements of the Zoning Bylaw

The Applicant has requested waivers relating to the limitation of impervious lot coverage to 15% or 2,500 square feet of the project area, whichever is greater, under Zoning Bylaw Section 442.1(B), and/or requiring mitigation for excess runoff in the event a special permit is granted for a project that exceeds the impervious lot coverage requirements, pursuant to Bylaw Section 443.1.

The purpose of the groundwater protection overlay district is to protect the aquifer which supplies water to the District's wells. The Board of Water Commissioners is very concerned that protection of the aquifer is of utmost importance. Therefore, the Board requests that the applicant demonstrate conclusively that this project (a) will not have an adverse impact on the aquifer or ground water recharge area and (b) that the project will not adversely affect the District's water supply. See Zoning Bylaw Section 445.3 and 445.4.

The Board of Water Commissioners submits that applicant's plans must be peer reviewed in order to ensure that the aquifer is protected to the greatest extent possible. The Comprehensive Permit should not be granted unless the aquifer providing water to the District's wells is fully protected.

In the event that the Comprehensive Permit does not adequately protect the aquifer, the Board reserves the right to seek judicial review as a person aggrieved of the decision.¹

2. The Request for a Grant of a Water Connection and for Waivers from the District's Rules, Regulations, and Fees.

The Board of Water Commissioners is opposed to the request for a grant of a water connection permit by the ZBA and for waivers from the District Water Department's rules, regulations, and fees.

In order to connect to the water system, that the Water Department must be satisfied that there is adequate pressure and quantity in the system to serve this new development and the overall needs of the District. Enclosed is a letter from OSD, LLC, Environmental Consultants outlining the information that will be needed from the applicant in order to consider the impact of this project on the District's water distribution and supply systems. The Board will require that the applicant provide the necessary information as outlined in the enclosed letter in order to determine whether the existing water system will be able to meet the needs of this project while continuing to safely provide adequate supply of water to the District as a whole.

¹ See Jebson v. Zoning Board of Appeals of Ipswich, 450 Mass. 81 (2007) (indicating that a Municipal Housing Authority would be deemed a "person" with potential standing to appeal a Chapter 40B decision if it could show that its legal interests were impacted by the issuance of a comprehensive permit).

Additionally, the District must comply with its Massachusetts DEP permit requirements regarding withdrawal volumes from the aquifer before a water connection will be allowed. The District will not be permitted to allow a connection in the event that such connection will cause a violation of the District's permitted withdrawal volumes.

The fundamental concern about the requested waivers from the rules, regulations, and fees of the District is that the District is a separate entity from the Town. The Board of Water Commissioners denies that it, or the District Water Department, is a "local board" for purposes of M.G.L. c. 40B. "Local board" is defined to include "any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector, or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council, or board of selectmen." It must be recognized that the District/Board of Water Commissioners is not a municipal board of the Town of Wareham and does not have similar permitting authority as any of the local boards that are provided as examples in M.G.L. c. 40B, §20. Furthermore, the Supreme Judicial Court of Massachusetts has made clear that the definition of "local board" must be read in the context of the types of "permits and approvals" that the Zoning Board of Appeals has the power to affect under M.G.L. c. 40B, §21, namely those with respect to height, site plan, size or shape, or building materials."² The Supreme Judicial Court has made clear that the purpose of Chapter 40B was directed at exclusionary zoning requirements, and should be understood with respect to that purpose.

The leading case on whether an entity separate from a Town may be deemed a "local board" under M.G.L. c. 40B is Dennis Housing Corp. v. Zoning Board of Appeals of Dennis, 439 Mass. 71 (2003). In that case the Supreme Judicial Court concluded that the Old King's Highway Historic District Committee was a local board because of such factors as: members of the committee being appointed by the Board of Selectmen; other members being elected at the Town's annual election; vacancies during a term being filled by the Board of Selectmen; the Selectmen having the power to remove members; the involvement of the committee in the building permit approval process and its power to regulate building design; and the fact that the Town Building Inspector was the enforcement official for the committee. In applying a functional analysis for deciding whether a board is a "local board" the Supreme Judicial Court relied heavily on the linkage between the committee and its authority over the building design and building permit process, as well as the extensive control by the Town itself over the committee.

See Dennis Housing Corp v. Zoning Board of Appeals of Dennis, 439 Mass. 71 (2003); 135 Wells Avenue, LLC v. Housing Appeals Committee, 478 Mass. 346 (2017) (explain that the meaning of "permit or approval" is tied closely with zoning type concerns such as height, site plan, size, shape, building materials); Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748 (2010) (meaning of "permit or approval" tied to land use/zoning, building construction, zoning and subdivision control, applying to such matters as height, site plan, size or shape, building materials."); Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, 464 Mass. 166 (2013) (necessary sign off of fire chief on building permit could be overridden under Chapter 40B with respect to building height because the fire chief sign off was part of the building permit process and building height was a matter explicitly subject to Chapter 40B).

In contrast to the Old King's Highway Historic District Committee which was at issue in the Dennis Housing Corp. case, the Onset Fire District operates independently from the Town; has no role in regulating building design; does not provide a function similar to any of the agencies referenced in Chapter 40B, §20; and does not issue the type of permit or approval referenced in Chapter 40B, §21. The analysis utilized by the Supreme Judicial Court the Dennis Housing Corp. case leads us to conclude that the Onset Fire District should not be deemed a local board within the meaning of Chapter 40B. Cases decided by the Appeals Court and the Housing Appeals Committee have similarly relied on element of control by the municipality in determining whether an entity is a "local board", and that element is lacking with respect to the Onset Fire District.³

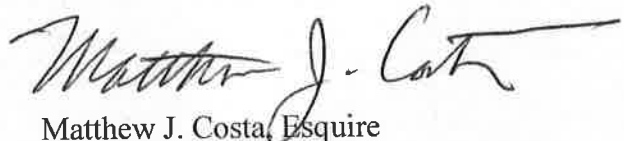
In sum, the Board's position is that the Water Department of the Onset Fire District is not an entity qualifying as a local board under M.G.L. c. 40, §20, and its water connection permit should not be deemed a "permit or approval" within the meaning of M.G.L. c. 40B, §21.

Based on these considerations, the District urges the Zoning Board of Appeals not to grant any purported waivers from the District's rules, regulations or fee requirements and further urges the ZBA to deny the request for an approval of a water connection. In the event that the Comprehensive Permit does purport to grant such waivers or to grant a water connection, the Board of Water Commissioners denies that the District will be bound by those aspects of the Comprehensive permit.

Thank you for your attention and consideration in this matter.

Very truly yours,

GAY & GAY, P.C.



Matthew J. Costa, Esquire

MJC/bd
Enclosure

cc: Onset Fire District/Board of Water Commissioners
Benjamin Hughes, Chairman via email
Kenneth Fontes, Clerk via email
Francis Kowzic, Member via email

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See e.g. Cohasset Water Commission v. Cohasset Zoning Board of Appeals, 68 Mass. App. Ct. 1103 (2007) (holding that town water commission was a "town board" under c. 40B because "the town retains a significant level of control over the commission"); Lever Development LLC v. W. Boylston Zoning Board of Appeals, HAC # 04-10 at p. 20 (12/10/2007) (ruling that West Boylston Water District was a local board but resting said conclusion on belief that "because the District ultimately is controlled by town meeting vote, it is a local board within the meaning of Chapter 40B"). Although 760 CMR 56.02 itemizes "water . . . commission or district" as being a "local board" the CMR also indicates in section 56.01 that the purpose of the regulations is to codify "issues that have been decided by judicial or administrative decisions" and under the case law the control of an entity by the municipality and the extent of the entity's involvement in the municipality's supervision of the building approval process are key factors in determining whether it is a "local board"; those factors are lacking in this case.

OSD LLC
Environmental Consultants

March 19, 2018

Mr. Kevin Sampson
Water Superintendent
Onset Fire District
15 Sand Pond Road
Onset, Mass. 02558

Re: Proposal to Conduct Review of the Proposed Woodland Cove Development
off of Cranberry Highway

Dear Mr. Sampson:

OSD LLC, dba OSD Engineering Consultants in MA, welcomes the opportunity to work with you and the Onset Fire District (OFD) water department staff to review the impacts of the proposed Woodland Cove development on the Onset Fire District's water supply and distribution system.

The review work will include review of preliminary plans and reports, review and development of demand estimates (as required), and evaluation of proposed system demands on the water distribution and supply systems. If the proposed new development significantly impacts the town's ability to deliver adequate water pressure, quality and quantity to its customers, we will recommend modifications to the proposed drainage system and upgrades to the existing water distribution system to mitigate these impacts.

To do this work, we request that the developer provide the following information regarding the new development:

1. Average day demand
2. Maximum day demand
3. Fire flow demand
4. Fire flow test reports
5. Location of any underground storage tanks
6. Location of all drainage system assets in Onset's Zone II
7. Location of all potential hazardous material and fuel storage areas in Onset's Zone II
8. Location of all infiltration BMPs, estimated TSS removal efficacy and proposed pretreatment to removes TSS
9. Rationale for classifying or not classifying infiltration BMPs as Underground Injection Control (UIC) wells
10. Determination of whether or not proposed infiltration BMPs will allow the movement of fluid containing any contaminants into underground sources of water, and whether or not those contaminants may cause a violation of any

238 Bedford St
Suite 9
Lexington, MA 02420

Phone: 781-538-4636
Fax: 781-538-4637
www.osd-ec.com

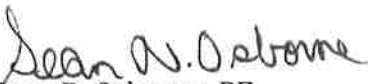
primary drinking water regulations or adversely affect the health of water consumers.

11. Proposed illicit discharge, detection and elimination program, including public education
12. Preliminary plans, including connection to OFD and construction details

The estimated cost for the professional services work is \$12,140. OFD would be billed according to OSD's standard hourly rates. Printing and subcontractors, if required, shall be billed with a 5% surcharge.

If you have any questions, please call me or e-mail me at sosborne@osd-ec.com.

Regards,


Sean D. Osborne, PE
Principal