

# SJC Allows Municipalities to Create Sewer Banks

BY IRA H. ZALEZNIK

In municipal government, the need to address immediate problems can be at odds with long-term solutions. In *Denver Street v. Town of Saugus*, 462 Mass. 651 (2012), the Supreme Judicial Court gave municipalities tools to do both simultaneously.

For decades, the town of Saugus, like many municipalities around the country, was dealing with a deteriorating town sewer system. Heavy rain events frequently would overwhelm the system and cause the discharge of raw sewage into local waterways. In particular, the Saugus system was plagued by the problems of inflow and infiltration (“I/I”). Inflow is extra water coming into the system from public sources like manhole covers and from private sources like roof drains and sump pumps. Infiltration is water that leaks into the system from broken pipes, defective seals and the like. During wet weather events, as a result of inflow and infiltration, the Saugus system could not handle the flow, and excess, untreated waste was discharged into the Saugus River and other nearby waterways.

This unfortunate state of affairs did not escape the attention of the Department of Environmental Protection. Among other issues, the discharge of untreated sewage into the waterways violated the Clean Water Act and other related laws and regulations. To avoid costly and time-consuming DEP enforcement proceedings, in 2005 Saugus entered

into a comprehensive Administrative Consent Order (ACO) with the DEP to address the longstanding problems with the Saugus sewer system. An ACO is a negotiated agreement between the town and the agency that substitutes for legal proceedings to enforce the law. The ACO provided for severe penalties in the case of noncompliance, and outlined the framework for solving the longstanding problems.

First, Saugus produced a comprehensive, long-term plan to address the

and residential development, Saugus and the DEP agreed upon the creation of a “sewer bank” to calculate and account for new inflow into the system to allow for new users to connect to the system before it was completely fixed.

Before the sewer bank could be implemented, Saugus had to perform enough repairs to remove inflow and infiltration to create the capacity for new users to connect to the system. Under the formula devised for implementing the sewer bank, new users could purchase gallons

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problems with the sewer system. The ten-year plan carried a cost of \$27 million. To finance the plan, the town sold bonds, secured some assistance from the state, and increased charges on ratepayers. Second, due to the deficiencies of the existing system, the DEP required Saugus to impose a moratorium on new or expanded connections to the sewer system until the problems were addressed. The effect of this moratorium was to put a halt to all new business and residential development, pending resolution of the sewer system deficiencies. To prevent the moratorium from crippling all business

of new flow by making a contribution to fund some portion of elimination of inflow and infiltration. Thus, the new users, to fund their purchase of one gallon of new capacity, had to finance the cost of removal of ten gallons of inflow and infiltration. As the system improved and more capacity was created, the ratio of ten to one was reduced to four to one, but the ultimate goal was the same. New users, in exchange for receiving immediate access to the sewer system, would finance further repairs to attain the goal of reducing, and then eliminating to the extent possible, the inflow and

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infiltration to the system that was causing it to be overwhelmed.

Not everyone in Saugus was happy with the sewer bank approach. Denver Street, LLC, and three other real estate developers in the town paid the contribution to the sewer bank, but then brought a civil action against Saugus, claiming that the inflow and infiltration reduction contribution constituted an illegal tax under Massachusetts law.

### Legal Framework: Fee or Tax?

Cities and towns have no power to levy, assess or collect taxes, aside from taxes authorized by the Legislature. (See *Silva v. City of Attleboro*, 454 Mass. 165, 168 (2009).) Municipalities do, however, have the ability to charge user fees or fees associated with property ownership. Therefore, if a charge is in the nature of a tax, it will be declared invalid; if it is a fee, it will be upheld and the municipality may collect it.

The Supreme Judicial Court has established a three-part test to determine if a municipal charge is a fee or a tax. To be permissible, a charge must fulfill the following requirements: 1) the charge is imposed in exchange for a government service that benefits the fee-payer in a manner not shared by other members of society; 2) the fee-payer has the option of not using the government service, thereby avoiding the fee; and 3) the collected fees are used by the governmental entity to compensate for the cost of providing the service. (See *Emerson College v. Boston*, 391 Mass. 415, 424-425 (1984).) Although set forth as three separate standards, the Supreme Judicial Court has rejected a formulaic approach with respect to the Emerson College factors. That is, no single factor is conclusive in determining whether a payment is a permissible fee or an illegal tax. While each factor is to be considered, no one factor is determinative in deciding the legality of a payment. (See *Silva v. City of Attleboro*, 454 Mass. 165, 172 (2009); *Nuclear Metals Inc. v. Low-Level Radioactive Waste Mgt. Bd.*, 421 Mass. 196, 206 (1995); *Berry v. Danvers*, 34 Mass. App. Ct. 507, 512 n.6 (1993).) The Supreme Judicial Court applied this test in upholding the Inflow and Infiltration Reduction Contribution in favor of the town of Saugus.



### SJC Decision and Aftermath

Both the Superior Court and the Appeals Court, in written decisions, determined that Saugus's Inflow and Infiltration Reduction Contribution was an illegal tax under Massachusetts law. The Supreme Judicial Court disagreed, and upheld the charge. Chief Justice Ireland, writing for a unanimous court, determined that the Inflow and Infiltration Reduction Contribution benefited the developers in a manner that was different than the benefit to the public. Payment of the fee allowed new users to gain immediate access to the sewer system. Without the sewer bank plan in place, there would have been no mechanism to permit new users to enter the sewer system and ensure that such new users would not contribute to overwhelming the existing system. Otherwise, new users would have had to wait until the entire system was repaired or replaced to the point where it could safely accommodate new users. This speedy access to the system was the type of benefit that the court recognized as a special benefit to the users, as opposed to the public at large.

The effect of the decision is to recognize the ability of cities and towns to deal with and plan for long-term problems,

while also accommodating short-term interests. Without upholding the sewer bank approach, along with the fees to pay for it, Saugus could have maintained a moratorium on all development until the sewer system was repaired. This moratorium could have lasted for as long as a decade, and could have crippled any growth in the town. In the alternative, Saugus could have poured money into short-term fixes, in order to enable some new users to enter the system, but this approach would have prevented a long-term solution to the ongoing problems of the sewer system. By endorsing Saugus's approach, the Supreme Judicial Court has enabled cities and towns to plan for the long-term while accommodating short-term goals.

Today, Saugus has nearly completed its master plan and has one of the best sewer systems in the state. Saugus was able to rebuild its infrastructure, while permitting development to take place within its borders in a normal way. As for the sewer bank, so much progress has been made that Saugus does not even have to track its usage anymore, and the DEP has agreed that Saugus does not need to maintain its sewer bank. It is a win-win, by any standard. 🌟