

W.R. GRACE – PROPOSED SEWER BETTERMENT SETTLEMENT

FREQUENTLY ASKED QUESTIONS

Version 2: March 19th

NOTE: Some details are still being negotiated and answers may change slightly as a result

In 1999, Town Meeting approved the creation of the Middle Fort Pond Brook Sewer District. Most of the property owned by W.R. Grace in Acton is in this sewer district. All the land owners in the sewer district share the cost of the infrastructure required by the sewer system.

Grace has filed an abatement petition to challenge the amount of its betterment assessment. Grace has pressed its abatement challenge aggressively and has proffered testimony from several experts in the fields of real estate appraisal, land use and development, and sewage treatment issues to support its position that it is due a significant abatement.

The court has granted several delays of the trial date in order to allow the two sides to come to a mutually acceptable agreement. The court has now given a final deadline and is unlikely to extend the date for trial again.

I. General Background

1) What is a sewer betterment?

After Town Meeting approved the creation of the sewer district, Acton took out loans to cover the cost of constructing the sewers. These loans are being paid back by the people in the sewer district through charges which are called ‘sewer betterment assessments’. Every parcel of land in the sewer district with frontage on a sewer street has been allocated one or more ‘sewer betterment units’ (SBU). Single family homes have one SBU each. Multi-family dwellings and businesses are assigned more SBUs. Property owners in the district must pay their sewer betterment assessments regardless of whether or not they are currently connected to the sewers or not. Property owners in the district with frontage on a sewer street are legally entitled to connect to the sewer at any time.

2) How is this relevant to W.R.Grace?

W.R.Grace is in the sewer district and its property has been assigned 297.5 sewer betterment units (approximately \$3.66 million). Grace has sued the town to reduce the number of betterment units it has been assigned (and therefore the dollar value it has been assessed).

3) Why are we discussing this issue at this Town Meeting?

The time has come in the court case when the parties (W.R.Grace and the Town of Acton) must either settle this case or go trial. The trial deadline is rapidly approaching, cannot be extended, and both sides agreed that Annual Town Meeting should decide whether the settlement is acceptable or not.

Both the Board of Selectmen and the Finance Committee have unanimously recommended that we accept the proposed settlement. Town Meeting will be presented with two methods to bridge the funding gap that will be created by this settlement, if adopted. Both the Board of Selectmen and the Finance Committee recommend ‘Option 1’ which is codified in Article 49. If Town Meeting rejects both options, the case will go to trial.

II. Finance Questions

4) How large is the funding gap?

Of the \$3.66 million betterment assessment, the settlement requires W.R. Grace to pay a total betterment of \$2.166 million, regardless of whether its property is ever developed and regardless of whether its property is ever tied into the public sewer. The proposed settlement reduces W.R. Grace's SBUs by the equivalent of \$1.5 million dollars. That is the amount of the funding gap.

5) Does this mean we need to come up with \$1.5 million this year?

No. All property owners in the sewer district have the option of paying off their sewer betterment assessments in one lump sum or in quarterly installments over 30 years. Grace has elected the installment plan. Grace's installment payments are up to date on the challenged betterment assessment of approximately \$3.66 million. If this settlement is accepted and Grace's betterment is reduced, Grace will use the overpayment as a credit against future installments until it is used up.

The town will need to cover the difference: approximately \$163,000 per year until Grace has used up its pre-payment credit (around 3 years) and then approximately \$73,000 until the loan is paid off in 2031.

6) How will this funding gap be closed?

Town meeting will consider two options.

- **Option 1 (Article Number 49).** The town will cover the shortfall out of general revenues. This will amount to approximately \$163,000 for approximately 3 years and then \$73,000 per year until 2031. The tax equivalent of this cost is approximately \$22 per average single family home for 11 quarters (around 3 years) and dropping to approximately \$10 per average single family home per year until 2031.
- **Option 2 (Article Number 50).** The town will re-determine the cost of the betterment units in the sewer district, increasing the cost for the current residents of the sewer district. The increase in betterment cost will be approximately \$66 per SBU per year for the life of the loan (unless and until the SBUs are later re-determined downward – see below).

A. Option 1 Questions:

7) The current Town Bylaw states that the cost of sewers should be borne by the property owners in the sewer district. Is it legal to move this cost to general revenues?

Yes. The Town Bylaw that deals with sewer district assessments is Chapter D10 (<http://www.acton-ma.gov/uploadedFiles/About/General%20Bylaws%202007.pdf>). This bylaw states that the capital cost of the system should be "borne by the land benefitted by such system". However, the bylaw also states "by a two-thirds vote," Town Meeting can allocate additional sewer costs "to taxpayers at large."

Article 49 has been placed on the 2009 Annual Town Meeting Warrant to enable Town Meeting to make this allocation should it choose to do so. This Article is described as 'Option 1.'

8) What is the long term cost of Option 1 for the owner of an average value single family home in Acton?

Approximately \$22 a year for the (approximately 3) peak years – falling to approximately \$10 per year for

the rest of the term.

9) If Option 1 is adopted by Town Meeting, does the money need to come from taxes?

No. Option 1 indicates that the funds will come from the general fund. The general fund includes local taxes, local revenues, and reserves including Free Cash and the NESWC funds.

10) If Option 1 is adopted by Town Meeting, what impact will this have on the FY10 Budget?

In FY10, the town will cover this expense within the proposed municipal budget. If Town Meeting approves Option 1 (Article 49), approximately \$163,000 will be transferred from the legal budget line item to the Sewer Enterprise Fund. This will make no significant difference to the municipal budget because the potential court costs of the trial have already been included in the municipal operating budget (approximately \$200,000).

11) If Option 1 is adopted, can any of this money be recovered in the future?

As the sewer district is expanded, the capacity forfeited by Grace essentially can be resold to new users. By vote of Town Meeting, some of this money may be transferred back into general revenue. However, it is unlikely that all of the money will be recovered.

12) Why should people who are not in the sewer district help pay for sewers?

a) All Acton residents benefit if we receive a conservation restriction on part of the Grace land. This will be part of the settlement (as described below) but will not happen if we go to trial.

b) All Acton residents benefit if we don't go to trial because we are likely to get a worse result in court and we will have to pay more legal fees, expert fees and court costs to go to trial.

c) If Grace receives a reduction in the number of betterment units by a court judgment, the town will be forced to reimburse Grace in a lump sum the betterment funds it has overpaid, with interest. In the settlement agreement, by contrast, the overpayment counts as a credit against future betterment payments.

c) All Acton residents benefit if we can expand the sewer district to other areas in town where septic system failures adversely affect the quality of our groundwater, drinking water aquifers, streams and other surface waters in town.

B. Option 2 Questions

13) Is it legal to re-determine betterments for people in the district?

Yes. In August 2006, the Legislature amended Massachusetts General Laws Chapter 83, § 15A, to authorize a town, by majority vote of town meeting, to re-determine the uniform rate charged to the abutters for the construction of sewers. So a statutory basis now exists to re-determine betterments for properties in the sewer district. As this statute is brand new, however, there has been no litigation testing the constitutional, legal, and practical limitations on a town's ability to re-determine final betterments. As a result, there are potentially significant legal risks and commensurate legal costs associated with re-determining final sewer betterments pursuant to Chapter 83, § 15A, in these circumstances.

14) What is the long term 'cost' of Option 2 for a single family home in the sewer district?

Approximately **\$66 a year** per SBU per year for the life of the loan.

15) If Option 2 is adopted, how will this affect people who have pre-paid their betterments and/or moved away?

Redetermination adjusts the charge per SBU for all bettered properties in the sewer district, even if the owner has previously paid the betterment in full or the property has changed ownership. That is one reason why there are significant legal complexities concerning redetermination.

16) If Option 2 is adopted, can any of this money be recovered?

If property owners who are not currently paying sewer betterments join the district (either through expanding the district or increasing density within the district), the additional funds will flow into the sewer district fund. If sufficient funds accumulate to warrant another redetermination, the town could re-determine SBU costs downward.

c. Neither Option

17) What happens if both options are rejected by Town Meeting?

Town Meeting could reject the both Option 1 and Option 2, in which case the matter will proceed to a trial in Middlesex Superior Court followed, if necessary, by an appeal to the Massachusetts Appeals Court and potential proceedings before the Supreme Judicial Court. The trial court proceedings will involve multiple depositions of fact, witnesses and expert witnesses; significant amounts of discovery from the Town and Grace; a number of pre-trial motions; and ultimately a lengthy trial lasting from 5-10 days.

However, there are several reasons *not* to follow this path:

- a. It is likely that a Court-ordered abatement will exceed the negotiated abatement;
- b. Any Court-ordered abatement must be refunded, with interest, to the extent that Grace has overpaid on its betterments to date (which would result in a six figure cash payment by the Town to Grace);
- c. The additional transaction costs to litigate the case will be significant, on the order of \$200,000; and
- d. Unlike the proposed settlement, under no circumstances could a judgment after trial grant a conservation restriction on a portion of Grace's property.

18) What are our chances in court?

As with any litigation there is a possibility that the Town would prevail in its entirety; that Grace would prevail in its entirety; or that a verdict would be returned for some result between the respective positions of the parties.

The Town's best case would be to recover a judgment affirming the sewer betterment assessment of \$3,662,675.99. As Grace is paying its sewer betterments on a current basis, the Town would not recover any additional interest on the judgment.

Grace's best case would be to recover a judgment abating substantially all of the betterment assessment. Grace would then be entitled to a lump sum refund with (6% interest) on all pre-paid amounts over and above the abated assessment. Grace's experts are expected to testify that the value added by the betterment is approximately \$100,000 or less. As a result the delta between the positions of the parties is over \$3.5 million dollars, not including interest.

Neither of these “all or nothing” positions is the likely outcome at trial. Rather, it is likely that a verdict will be returned somewhere between the litigation positions of the parties. Although it is difficult to forecast exactly what a jury or a judge would do, Town Counsel has advised the Selectmen that there is a reasonable likelihood that the verdict returned after a trial will be *less* favorable to the Town than the betterment assessment resulting from the proposed Settlement.

In addition, there is no chance whatsoever that a judgment at trial would grant a conservation restriction to the Town on any portion of Grace’s property.

19) What is the approximate cost of going to court?

In addition to transaction costs already incurred with respect to the Grace sewer betterment litigation, the additional costs for legal fees, expert fees, and associated litigation and transaction costs through the completion of trial are estimated to be approximately \$200,000. This estimate does not include the significant amount of staff time and Board time that would be involved in preparing for and presenting the case in court. This estimate also does not include costs for an appeal, which would likely be in the range of \$50,000-\$60,000.

20) If we settle this case, are we done with litigation with W.R.Grace?

No. While the Settlement will fully and finally resolve Grace’s pending sewer betterment litigation, Grace will continue to own its property in Acton and there remain a number of areas of actual or potential dispute between Grace and the Town. For example, the Town continues to monitor and press for aggressive environmental remediation with respect to the historic contamination from Grace’s property. Grace (or a potential buyer of the Grace property) will eventually bring development plans and/or petitions to re-zone the property to the Town, which may result in litigation depending on how the Town receives or acts upon those plans. Grace (as with any other property owner) retains the ability to challenge future tax assessment. In short, this Settlement will successfully resolve one important piece of litigation, but will not forever resolve all issues pertaining to Grace’s property in the Town of Acton.

III. Potential Expansion of the sewer district

21) If this settlement is accepted, how many SBUs will be returned to the town?

If Option 1 is selected, the town will recover approximately 122 sewer betterment units (SBUs). If Option 2 is selected, the town will recover 140 sewer betterment units. This translates to a flow capacity of approximately 18,000 – 21,000 gallons per day.

22) Why is the number of SBUs different if Option 1 or Option 2 is selected?

The agreement states that W.R. Grace will receive a net abatement worth \$1.5 million dollars. Grace continues to be a member of the sewer district. If the costs are redistributed to the members of the sewer district, W.R.Grace will also be allocated a portion of the costs. To adjust for this increased betterment cost, Grace will return more SBUs in order to have a net abatement worth \$1.5 million.

23) How will this settlement affect the expansion of the sewer district ?

There is currently enough sewer capacity for the Flint / Tuttle neighborhood. This newly recovered capacity would make it possible to add portions of West Acton and/or other needs areas identified in the Water Resources Advisory Committee (WRAC) Report (<http://www.acton-ma.gov/content.aspx?id=576>) and/or other businesses near the sewer district area that would like to expand but are limited by septic system capacity. The discussion about what to do with the extra capacity will continue long past the

decisions that will be made at this Town Meeting. Nothing in either funding option requires a decision at this time on the use of the recaptured SBUs.

24) How will this settlement affect the costs for adding the Flint / Tuttle neighborhood ?

With the possible exception of any increment from a re-determined SBU charge, the Grace settlement will neither increase or decrease the cost for sewerage Flint / Tuttle.

There is enough capacity left in the current system to provide sewers to the Flint / Tuttle neighborhood before Grace's returned capacity is factored in. The Sewer Action Committee is investigating ways to bring down the cost of providing sewers to this neighborhood. The primary cost driver is the amount of underground infra-structure that needs to be constructed.

IV. Future use of W.R.Grace Land in Acton

25) The proposed agreement includes a conservation restriction on approximately 15 acres of land. Where is this land?

As part of this proposed settlement, Grace will grant the Town a perpetual Conservation Restriction on approximately 15.3 acres of natural, forested land owned by Grace, located north of the MBTA tracks, abutting other open space of the Lexington Drive subdivision. (This is the equivalent of approximately 10% of Grace's bettered land in Acton).

This new conservation land has never been the site of Grace's previous industrial operations and is not within the area of Grace's property requiring surface remediation under EPA's Record of Decision. The public will be able to access the new conservation land for passive recreation purposes by means of a pedestrian access easement from Laws Brook Road over a Grace-owned strip of land. The new conservation land will be off limits for future development by Grace or any successor owner of Grace's property. It will provide both a significant open space resource and an important buffer for the Lexington Drive residents from potential effects of any such future development.

(Should include a locus map here).

26) If Town Meeting adopts either Option 1 (article 49) or Option 2(article 50), what impact will that have on the future development of the W.R.Grace land?

The Conservation Restriction will impose a perpetual restriction on 15.3± acres of Grace's property, making it unavailable for development by Grace or its successors and assigns.

All of Grace's property in Acton is zoned in the Technology District. Grace will retain the right to utilize the rest of the property for allowed or permitted uses in the Technology District, where the Floor Area Ratio is limited to 0.20. (<http://doc.acton-ma.gov/dsweb/Get/Document-12979/2006+Zoning+Bylaws+REDUCED.pdf>)

Grace's ability to use the Town sewer will be further limited by removing 18,000 to 21,000 gpd of sewer capacity. If Grace wants to use more sewer capacity than its retained SBUs would allow, Grace must negotiate a Sewer Privilege Fee Agreement with the Board of Selectmen, which the Board is free to accept or reject based on the best interests of the Town at the time.

27) Is this land safe to walk on?

Grace's former organic chemicals plant and Grace's Daramic battery separator plant were both located south of the MBTA tracks; the proposed conservation land is located north of the MBTA tracks. This land has never been the site of Grace's previous active industrial operations and is not within the areas of Grace's property requiring surface remediation under EPA's Record of Decision.

There is one surface impoundment requiring remediation located north of the MBTA tracks called the north lagoon. It is not located within the proposed conservation land and it will be separately remediated under EPA and DEP oversight.

28) What if further contamination is discovered on this property?

W.R. Grace will continue to own the property that will be subject to the conservation restriction. Grace will be responsible to address any contamination associated with its property should it be discovered.