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December 21, 2023

Via E-Mail and Hand Delivery

Moreau Town Board
Moreau Town Hall
351 Reynolds Road
Fort Edward, NY 12828

Re: Town of Moreau – Proposed Amendments to Sewer Use Law and Rate Schedules

Dear Board Members:

As you know, this firm represents Schermerhorn Residential Holdings, LP and its affiliates including Harrison Village, LLC, Bluebird Village, LLC, Harrison Place, LLC, Harrison Quarry Townhomes, LLC and Bluebird Trace, LLC regarding the above-referenced matter. We submit these comments on behalf of our clients in opposition to the proposed Sewer Use Law Amendments and new rate schedules for water and sewer. As set forth in more detail below, the Town Board's latest attempt to increase my clients' sewer rates to fund an ill-advised and costly infrastructure improvement project aimed at spurring new development on the Route 9 corridor is illegal and will be challenged if the proposed amendments are adopted.

Even more troubling, the proposed amendments follow a series of previous, illegal rate increases that appear calculated to use my clients as a source of funding for the Town's sewer expansion project (herein referred to as "Ex. No. 5") and other related actions, including the proposed district consolidation plan that would reallocate over \$14,000,000.00 of debt to property owners who had no say when the debt was incurred and derive no benefit therefrom. Attached to this letter at **TAB 1** is a copy of my prior correspondence, dated December 11, 2023, objecting to the Town Board's proposed joint consolidation agreement. As the Town Board has chosen to segment its review of these related actions, I am submitting my letter of December 11, 2023 to the Town Board again, as a supplement to the comments that are set forth herein and made at the public hearing, so it can be included in the certified record of proceedings on the proposed Sewer Use Law Amendments and proposed new water and sewer rate schedules.

I. A Pattern of Illegal Sewer Rate Increases

A. The Town of Moreau Sewer Use Law

In June 2022, the Town Board adopted Local Law No. 2 of 2022, Repealing and Replacing Chapter 115, “Sewers” of the Code of the Town of Moreau. The local law required the Town to maintain a Sewer Rate Schedule which describes and shows the annual Operation and Maintenance (“O & M”) costs and capital charges “for each Sewer District”. *See* LL No. 2 of 2022, Section 115-70 (A). It also established the method for determining “O&M Charge” and “Capital Project Debt Charge” as follows:

§115-71 – General Billing Provisions

The sewer service charge of each sewer district or consolidated district shall be set by the Town Board on a benefit basis as fairly as possible, in proportion to wastewater generation and capacity needs among all the parcels in the district or consolidated district.

The annual cost of sewer service for parcels within the service area will consist of two components: debt service on the capital costs, and the operation and maintenance charges as follows:

1. Operation and maintenance charge: All parcels within the service area discharging or depositing sewage into the public sewers shall be assessed a connection fee, district costs and treatment fees and any other applicable operations and maintenance fee as set forth in §115-71 D hereof. The connection fee shall be determined by resolution of the Town Board.
2. Capital project debt charge: All parcels within the service area shall be assessed a capital project debt charge based upon the following formulas: 90% of the annual debt service shall be collected on the assessed value within the district, while the remaining 10% shall be based upon the acreage of each parcel within the sewer district. Payment of the capital debt charge must be paid regardless of connection status to the public sewer.

Section 115-71(D) provides in relevant part that annual operation and maintenance charges “will be based upon district costs and treatment costs”. Revenue determined for district costs shall be based upon assessed value and will be billed in January of each year. Revenues for treatment costs will be determined on water consumption at a dollar rate per 1,000 gallons and shall be billed semi-annually on June 30, and December 31 of each year.

As set forth in more detail below, the Town Board has ignored the mandate of this law and has been overcharging my clients monthly for the past year. The instant proposal to increase the sewer rate for the third time in less than 12 months is completely arbitrary, illegal and contrary to the basic tenants of due process and equal protection under the law. The Town Board should be focused on curing its past non-compliance and refunding ill-gotten fees instead of compounding the

problem with more illegal fees. For these reasons, we urge the Town Board to table any further discussion of these proposed amendments.

A. The Town Board Has Failed to Prepare and Adopt Sewer Rolls for Each District Which Sets Forth Each District's Capital Charges and Operation and Maintenance Expenses

The Sewer Use Law adopted in 2022 mandates that O&M costs in each respective district be based on the district costs and treatment costs for that district. In addition, "Capital Project Debt Charge" was to be paid by users in districts for whose benefit the debt had been incurred. To determine these costs, a detailed budget for *each district* is required:

The Town Board shall prepare a sewer budget in accordance with Town Law that will specify debt service charges proposed for the succeeding budget year. In accordance with Town Law, sewer rolls for each sewer district will be prepared and adopted by the Town Board annually which set forth capital charges and operation and maintenance expenses. Adoption of the amount of the annual capital charges and the annual amount of operation and maintenance expenses shall occur at a public hearing noticed in a manner require by the Town Law.

See Local Law No. 2 of 2022, 115-71(C).

Since the adoption of Local Law No. 2 of 2022, the Town Board has not prepared or adopted sewer rolls for each sewer district (i.e., Dist. Ext No. 1, Dist. Ext No. 2, Dist. Ext No. 3, Dist. Ext No. 4, or Dist. Ext No. 5). The Town Board's most recent budget, adopted on November 15, 2023, does not include a sewer budget or sewer roll for each district. Thus, it is impossible for users in each district to confirm what capital charges and operation and maintenance expenses the Town Board is using to establish their rates or how those expenses are being equitably allocated among benefitted users.

Without this information, the Town Board has no way to rationally allocate costs and set rates. The fact that the Town Board has knowingly proceeded with three sewer rate increases in the past twelve months without this basic information is cause for great concern. See Points I (B) and (C) and Point II below.

B. The Town Board Has Been Imposing Illegal Assessments on Users in District Ext. No. 1 through No. 4 Since December 2022

On December 13, 2022, the Town Board adopted Resolution 2022-356 to increase expenditures for Ext. No. 5 improvements pursuant to N. Y. Town Law 202-b from \$16,000,000 to \$18,000,000 after finding the improvements were "for the benefit of Sewer District No. 1, Extension 5". See Town Board Resolution, adopted December 13, 2022 ("Resolution 2022-356"). Resolution 2022-356 also established rates for users in Ext. No. 5 as follows: "\$9.02/\$1,000 of assessed value and \$119.46 per acre for capital charges, and \$1.02/\$1,000 of assessed value and \$5.04 per 1000 gallons for operation and maintenance charges". Resolution 2022-356 was adopted following a public hearing that was held on November 29, 2022.

On the same evening, the Town Board adopted a separate resolution “to approve 2023 Water and Sewer Rates.” See Resolution 2022-360, adopted December 13, 2022 (“Resolution 2022-360”). The minutes recite the resolution as follows: “The 2023 Water Rates will stay the same as they were in 2022, and the 2023 Sewer Rates will match what is in the Map, Plan, and Report for Sewer District No. 1, Extension 5”. The Map, Plan and Report for Sewer Dist. No. 1, Ext. No. 5 allocated O&M costs based on a combination of use as measured by existing water meters and assessed value. This method of assessment was in accord with the mandate of Local Law No. 2 of 2022 and a prior determination of the Town Board which considered and rejected allocation based on equivalent dwelling units or “EDU” which would allow commercial parcels that remained undeveloped to unfairly benefit from receiving sewer service. See Letter from Donald C. Rhodes P.E. to Town Board, dated February 13, 2018. It was also consistent with the methodology mandated by the newly enacted Local Law No. 2 of 2022.

Despite the Town Board’s adoption of Local Law No. 2 of 2022 and Resolution 2022-360, the Town Board proceeded to illegally assess my clients monthly for sewer service based on an EDU rate. Moreover, the Town Board *increased* the rate from \$260 per EDU to \$368 per EDU with no explanation, approval by the Town Board, supporting documentation or adopted budget. There was no public discussion or evidence offered to demonstrate a rate increase was needed to address increased capital costs or O&M expenses that had increased in Ext. No. 1 through Ext. No. 4.

My clients repeatedly challenged the propriety of these charges while still making timely payments “under protest”. By letter dated June 15, 2023, my clients provided documentation to demonstrate the Town was overbilling them and requested that the Town Board refund all unauthorized charges. To date, the Town has refused to refund these illegal charges.¹

C. The Town Board’s September 2023 Rate Increase Was Illegal and Adopted to Conceal Months of Overcharging to Users in Dist. Ext. No. 1 through 4 and an Unauthorized Exemption for Users in Dist. Ext. No. 5

On September 12, 2023, the Town Board *again* voted to amend its water and sewer rates, this time adopting a sewer rate that formally allocated costs per EDU (something the Town had already been doing illegally for months). The rate schedule that was introduced and adopted on September 12, 2023 (“September 2023 Rate Schedule”) was the first time a \$368 EDU rate had been published or “adopted” by the Town Board. However, the proposed rate amendment was not publicly discussed before the September 12, 2023 meeting, placed on the meeting agenda to give residents notice that it was being considered, or included in the supplemental documentation to be discussed by the Town Board in violation of the Open Meetings Law.² It also violated the mandate of Local Law No. 2 of 2022 which did not authorize a rate per EDU.

¹ At the time, my clients provided documentation demonstrating they were owed a refund in the amount of \$77,791.67 for sewer overbillings from 1/1/2023 to 4/30/2023 based on actual usage readings, and \$18,200 billed for Bluebird Trace before the property came online and was, therefore, not consuming water or generating waste. This was after the Town Board overbilled my clients in April 2023, and upon request, issued a partial refund.

² The Town Board buried this proposed new rate change under “Other Business” in the November 28, 2023, agenda materials with no prior notice and no indication that there were water and sewer related matters on the agenda. The

The Town Board also failed to publish notice of the proposed rate change in the newspaper and to hold a public hearing on the matter. This was a further violation of Local Law No. 2 of 2022 which requires a public hearing, with seven (7) days prior public notice, before the sewer rate can be amended.³

The rate schedule adopted on September 12, 2023 also included new rates for Dist. No. 1, Ext. No. 5 which *excluded* those property owners from having to pay an ad valorem and acreage charge for 2023, but kept the \$5.04 per 1,000 gallon O&M Charge and new \$368 EDU charge. This action was in direct violation of Resolution 2022-356 which established rates for users in Ext. No. 5 and the legal requirements of Local Law No. 2 of 2022. The effect was to single out users in Dist. No. 1, Ext. No. 5 for disparate and more favorable treatment, at the expense of users in Dist. No. 1 Ext. No. 1 through 4 who were having their rates increased illegally. There is no rational basis in the record for this disparate treatment and the Town Board made no attempt to explain or justify its actions.

As noted above, the Town Board failed to provide *any* notice of the proposed change and withheld information from the public, presumably, to obfuscate the fact that it had been knowingly overbilling select users for months in violation of applicable law. My clients' representative attended this meeting and only had an opportunity to speak during the privilege of the floor which was opened *after* the new rate schedule was adopted. When she raised objections and questioned the legality of what the Town Board was doing, her time to speak was limited by the Town Supervisor and her comments were not fully recorded in the adopted meeting minutes. This is obviously very troubling.

Even more troubling, the Town Board appears to have used this illegal rate increase to create a "baseline" from which it is now comparing impacts of the proposed sewer district consolidation. The Consolidation Plan for the Map, Plan and Report (a complete copy of which was only posted to the Town's website after November 28, 2023), describes the illegal rate increase as follows: "The Town recently adopted a rate schedule for each district that better shares costs with its customers, but multi-district complexity remains." *See Sewer District Consolidation Map, Plan Report, dated October 2023, at p. 3.*

Town Board failed to make these documents available in advance of the meeting so residents had no way to know that it was being considered or would be discussed by the Town Board.

³ The Town Board amended the Water Rate Schedule at the same meeting to try and justify months of overbilling using a per EDU rate in violation of the Town of Moreau Water Use Law (Chapter 145 of the Town Code, Section 34). The Town Water Use Law also requires a public hearing before rates can be amended. Thus, the Town Board's adoption of revised Water Rates on September 12, 2023, also violated Chapter 145 of the Town Code. The Town Board adopted this resolution after my clients informed the Town they were being billed illegally based on EDU *and* actual flow rates. To date, the Town has not refunded amounts that were illegally billed.

I. The New Proposed Sewer Rate Schedule Includes Another Arbitrary Sewer Rate Increase and Should be Rejected.

A. The Proposed New Rates are Arbitrary and Evidence the Town Board's Intent to Shift Dist. Ext. No. 5's debt burden to other Users

On November 14, 2023 (less than two months after the last illegal rate increase) the Town Board proposed a new rate schedule that would see its third sewer rate increase in less than 12 months. Now, a new "EDU Charge" of \$458 per EDU is proposed (and increase of \$90 per EDU). This is in addition to a treatment charge equal to \$4.24 per 1,000 gallons. The result would be a \$136,954,000 annual increase in the cost of sewer service for my clients in District No. 1, Ext. No. 1 through 4. Again, the Town Board has not provided an explanation or justification for this increase in cost.

The proposed sewer rate schedule also includes a new, reduced rate for Dist. No. 1, Ext. No. 5. Again, there is no explanation or justification given for this disparate treatment. Because the Town has not prepared or adopted separate budgets for each district, it is impossible to know how the Town Board specified the debt service charges, operation and maintenance expenses, or revenues for each district. Therefore, it is impossible to ascertain a rational basis for the proposed rates. Considering the Town Board authorized up to \$16,000,000.00 of debt less than a year ago with the express finding that it was for the benefit of Dist. Ext. No. 5 users, a 2024 rate that reduces the cost to Dist. Ex. No. 5 users simply does not make sense and raises several red flags.

It appears the Town Board is hoping everyone will ignore these red flags and proceed with a district consolidation plan so it can formally authorize the reallocation of Dist. No. 1, Ext. No. 5's debt to users in Ext. No. 1 through 4. In other words, the Town Board intends to shift Dist. No. 1, Ext. 5's debt burden to property owners who are not benefitted by the improvements and have already incurred the cost to construct, operate and maintain existing infrastructure. The new proposed rate schedule includes a new "Consolidated Sewer District" rate. Presumably, this is the rate the Town Board will impose if the district consolidation is approved. The result will be a \$130,068 annual increase in the cost of sewer service to my clients. Over the next thirty (30) years (the length of time it will take to pay off Dist. No. 1. Ext. 5's indebtedness), the cost to my client will exceed \$3,900,000.

The Town Board has not articulated why such an increase for users in Dist. No. Ext. 1 through 4 is needed, or why the cost to Users in Dist. Ex. 5 is being reduced when they voted to approve a district establishment plan that required them to pay more. The Town Board's plan is arbitrary and violates basic tenants of equity and equal protection under the law. Therefore, it should be rejected.

B. The Proposed "Consolidated Sewer District" Rate is Based on Incorrect Information and Flawed Analysis and Therefore Should be Rejected.

Again, it is not clear how the Town Board came up with this rate or what revenues and expenses were considered, or what rate it intends to apply considering the Town does not have a consolidated sewer district. The Town has not prepared or adopted a sewer roll or budget for a "Consolidated Sewer District". To the extent the Town Board intends to rely on the Map, Plan and Report that

was prepared in support of the proposed district consolidation agreement (an agreement that is procedurally and substantively defective), this reliance would be misplaced as the Plan and Report are riddled with inaccuracies and errors and cannot be relied upon. *See* Summary of Errors and Inaccuracies, attached hereto as **TAB 2**. The Town Board has been notified of these inaccuracies and it would be patently arbitrary for it to proceed with this knowledge.

II. The Town Board’s Public Hearing Notices Are Misleading and Do Not Provide the Minimum Notice Required to Afford Affected Residents Due Process

Both the New York State and U.S. Constitution guarantee citizens procedural and substantive due process protections, which requires that “no citizen shall arbitrarily be deprived of his life, liberty or property,” without due process of law. Stuart v. Palmer, 74 NY 183, 190 (1878). In the realm of procedural due process of law in municipal decision-making, Courts will examine whether the municipality provided adequate notice and opportunity to be heard before taking an action which deprived an individual of his or her property. *See, e.g., Norton v. Town of Islip*, 239 F.Supp.2d 264 (EDNY 2003).

As noted in our prior letter, the Town Board failed to properly publish notice of the proposed joint consolidation agreement, thereby failing to provide the minimum due process protections that are afforded to residents under applicable law. The Town Board has exacerbated this flaw with the present public hearing notices which are also legally deficient.

The public hearing on the proposed new sewer rates states the Town Board is “establishing the 2024 sewer rates for the residents in the Moreau Consolidated Sewer District”. However, there is no Moreau Consolidated Sewer District and residents reading this notice would have no way to know if or how they would be impacted by the proposed action. It also gives no notice whatsoever of the proposed new and increased rates for Ext. No. 1 through 4. Thus, the notice is patently defective and does not provide the minimum notice required to afford residents procedural or substantive due process.

The public hearing notice for the proposed Sewer Use Law Amendments is similarly defective. The notice curtly states the Town is considering “the adoption of Local Law No. 4 of 2023” and, if adopted, the law “would amend Chapter 115 of the Twon Code of the Town of Moreau.” The notice does not even mention the word “sewer”. Moreover, the proposed local law that was recently posted on the Town website is a complete repeal and readoption of Chapter 115, which has no accompanying summary or redline showing how the law is being amended. This leaves residents to guess or try and figure out how their Town Board is amending the law and what the resulting impact will be.

III. The Proposed Serwer Use Law Amendments Are Illegal

(A). The Proposed Sewer Use Law Would Change the Method of Assessment for Sewer District Ext. No. 5 in Violation of New York Town Law

When the Town Board decided to establish Dist. No. 1, Ext. No. 5 and increase the amount of indebtedness it could incur, it represented to the public, the New York State Comptroller and its

funding agency, NYSEFC (which approved “hardship financing” based on the representation that users in Distr. Ext. No. 5 would be repaying the loan), that users within Dist. No. 1, Ext. No. 5 would repay its indebtedness through a combination of ad valorem assessment and acreage charges. It also determined that O&M costs would be raised from users within Ext. No. 5 through a combination of actual use measured by existing water meters and an ad valorem rate.

Now, the Town Board is proposing a new Sewer Use Law that would have the users in Dist. No.1, Ext. No. 5 pay O&M charges based on the total number of EDU’s, allowing large undeveloped parcels to pay zero toward operation and maintenance, even though the Town Board already determined they were benefitted by the district creation and expansion project. *See* Proposed Local Law amending Chapter 115 of the Town Code (“Sewer Use Law Amendments”, Section 115-71 (D) enacting a new EDU basis for assessing O&M charges). The Town Board’s attempt to change the method of assessment *after* the district has been created and costs incurred violates the mandate of N. Y. Town Law 202 which provides irrelevant part: “In all districts in which assessments have heretofore been levied upon an ad valorem basis, assessments shall hereinafter be levied upon the same basis. In all districts in which assessments have heretofore been levied upon a benefit basis, assessments shall hereafter be levied upon the same basis.” *See* N.Y. Town Law 202 (4).

The Town’s proposed Sewer Use Law amendments violate New York Town Law and therefore, must be rejected.

(B) The Town Board’s attempt to Make Users in Dist. No. 1, Ext. 1 through 4 Pay for Operation and Maintenance of Dist. No.1, Ext. No. 5’s Grinder Pumps and Sewer Service Lines Constitutes an Illegal Gift of Public Money

The proposed Sewer Use Law Amendments provide that “where certain easement agreements exist” the Town shall only be responsible for maintenance and repair of grinder pumps and service lines until such time that the District’s EFC loan used to install these improvements is paid in full”. *See* Proposed Sewer Use Law Amendments, Section 115-78. The Town Board is amending this language to remove reference to Dist. Ext. No. 5 that was included in Local Law No. 2 of 2022, however the only improvements that were constructed with EFC loan monies were improvements that are for the benefit of Dist. Ext. No. 5. This provision clearly addresses grinder pumps that were purchased by the Town using loan money from NYSEFC which will serve individual users within district Ext. No. 5.

The proposed amendment makes the Town responsible for maintaining these improvements until the EFC loan is paid off. If the proposed consolidation is approved and the sewer amendments adopted, my clients will be forced to pay toward the operation and maintenance of these individual grinder pumps and the sewer service lines that are being installed to serve Dist. No. 5 properties. This is obviously inequitable and amounts to the confiscation of funds from select property owners to pay for improvements the Town has made to other people’s property. This concept is not only offensive, but also illegal and should not be entertained by the Town Board.

IV. Conclusion

Based on the foregoing, the Town Board is urged to table any further consideration of the proposed sewer and water rate schedule and Sewer Use Law amendments, and other related actions until such time as the Town Board can gather the accurate information it needs to prepare and adopt a budget for each district, adopt a rational sewer rate for 2024, and then carefully consider its related and larger plan for sewer district consolidation,

Very truly yours,

A handwritten signature in black ink, appearing to read "Allyson M. Phillips". The signature is written in a cursive style with a large, prominent initial "A".

Allyson M. Phillips, Esq.

AMP/yl