HOUSING APPEALS COMMITTEE

HOLLIS HILLS, LLC		
	Appellant	
v.		No. 07-13
LUNENBURG ZONING BOARD OF APPEALS,		
	Appellee	

POST-DECISION RULING AND ORDER REGARDING APPLICABLE SEWER FEES

This ruling addresses outstanding issues with respect to the existence, validity and applicability of certain Lunenburg town bylaws, regulations, policies and documents regarding sewer betterment, privilege and connection fees to the comprehensive permit project approved for Hollis Hills, LLC.

The Zoning Board of Appeals seeks an order upholding the Town's conditioning the issuance of a building permit on the payment of a sewer privilege fee of $11,551 per unit for the 136-unit project, totaling $1,571,000. It also seeks an order that the applicable sewer connection charge is $1,760 per building plus $550 for each bedroom in excess of three bedrooms, for a total of $238,150. For each of these fees, the Board relies upon documents that it contends were adopted by the Sewer Commission as regulations with the full force and effect of law. Hollis Hills disagrees, and contends that the only validly adopted sewer fees applicable to it are the sewer connection charges established pursuant to Section 147-5 of the Sewer Use Regulations dated May 2005, which provides for sewer permit and inspection fees of $125 per unit for multifamily units or a total of $17,000. Each party requests that the Committee issue an order establishing the applicable sewer fees.

The disparity in the total amount of the fees advocated by each party indicates the fervor with which the parties have argued their positions. It is well-settled in the Committee's cases that municipalities may only impose on a project approved under Chapter 40B those non-waived local requirements and regulations that were in effect at the time of its application to the Board. *Hollis Hills, LLC v. Lunenburg,* No. 07-13, slip op. at 40-41 (Mass. Housing Appeals Committee Dec. 4, 2009) and authorities cited. Also see 760 CMR 56.02. In our decision overturning the Board's denial of a comprehensive permit, we determined that, "barring any change in state law requirements no sewer privilege fee or sewer betterment fee may be applied to Hollis Hills if it is based on a local rule adopted subsequent to February 13, 2006, the date Hollis Hills' comprehensive permit application was submitted to the Board." *Hollis Hills, supra,* slip op. at 41. The parties disagree not only about what sewer fee rules were in effect at the time of the comprehensive permit application, but also whether the documents in question should apply to the developer under the circumstances of this case.

I. PROCEDURAL HISTORY AND BACKGROUND

The Committee's December 4, 2009 Decision overturning the Board's decision and ordering a comprehensive permit approved a development of 136 condominium units in attached townhouses on approximately 34 acres on Hollis and West Streets adjacent to Electric Avenue in Lunenburg. In the Decision, the Committee determined that the Board had not demonstrated the sewer fees applicable to the project site, but that since the only argument preserved by the developer in the Pre-Hearing Order and argument in its brief was that it should not be required to pay for fees greater than those lawfully charged for market rate housing as of the date of its application to the Board for a comprehensive permit, the Decision limited its evaluation of fees to addressing and granting the relief requested in the Pre-Hearing Order.

During the pendency of the Board's appeal of the Committee's decision, Hollis Hills submitted an application for a building permit to the Lunenburg building inspector,[1] who

1. Pursuant to 760 CMR 56.05(12)(a), a developer may proceed at its own risk with construction of a project subject to a pending appeal.

denied the request, in part on the ground that the developer had not paid the applicable sewer privilege fee. Exh. N25.[2]

Hollis Hills then filed a motion for an enforcement order with the Committee. In a ruling of September 27, 2010 denying Hollis Hills' motion, the Committee denied the motion without prejudice with respect to the issue of a sewer privilege fee and ordered an evidentiary hearing on the applicability of a sewer fee in this case. The ruling rejected Hollis Hills' argument that it was too late for the Town to charge a sewer privilege fee for the development, since the Decision had expressly left open the possibility of the assessment of such a fee. *Hollis Hills, LLC v. Lunenburg,* No. 07-13, slip op. at 5-6 (Mass. Housing Appeals Committee Sept. 27, 2010 Ruling on Motion for Enforcement Order).

Following a prehearing conference, Hollis Hills submitted a motion in limine to exclude sewer evidence, which the presiding officer denied. After several requests for continuances in an attempt to resolve this matter, and the presiding officer's grant of a short-lived request to bifurcate the proceeding, the parties agreed to a post-decision Pre-Hearing Order setting out the issues for determination. The parties submitted prefiled testimony and the presiding officer deferred the Board's motion for directed decision and granted and denied in part the Board's motion to strike certain pre-filed testimony. A one-day evidentiary hearing was held, and the Board and Hollis Hills filed post hearing memoranda and reply memoranda.[3] We now deny the motion for directed decision.

II. ISSUES FOR CONSIDERATION

In its comprehensive permit application, Hollis Hills had requested an exemption "from all local filing, permit and construction related fees, other than the filing fee imposed and directly related to the Comprehensive Permit Application." Exhs. 4; N34-1. Subsequently by letter dated May 9, 2007 from Daniel J. McCarty, the developer's project

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2. The building inspector's letter stated: "It is a condition of any sewer connection permit that the applicable sewer privilege fee be paid. The Commission informed me that you have not tendered payment of that fee. The HAC Decision specifically referenced this requirement on pages 40-41 of its Decision, waiving any fee provision that was adopted subsequent to the date of the Hollis Hills application. The Town's Sewer Use Regulations have contained a sewer privilege fee provision since 2001; therefore it applies to this Project." Exh. N25, p. 2.

3. Intervener Mark S. Testa declined to participate in this post-decision issue.

manager, Hollis Hills requested a "Waiver for Betterment Charges as currently exist or as may be enacted by the Town." Exhs. 118; N34-2. In the Pre-Hearing Order for the original hearing, which limited the scope of issues for appeal, Hollis Hills set out the sewer fee issue as follows:

> If the Committee reverses the ZBA denial, Hollis Hills seeks a determination that the sewer connection fee imposed on the Project can be no greater than the fee, if any, lawfully charged to market-rate housing at the time Hollis Hills made its comprehensive permit application. As part of its *prima facie* case, Hollis Hills will introduce evidence that the ZBA threatened to impose on the Project a significant sewer connection or "betterment" fee, even though no Town by-law or regulation authorizes the imposition of a sewer connection fee, except for formal betterments assessed in compliance with state law.

Initial Pre-Hearing Order, § IV.C.3.

The post-decision Pre-Hearing Order set out the issues as the following:

1. Whether the Town had legally adopted a local bylaw or rule regarding the assessment of a sewer privilege fee that was in effect as of the date of Hollis Hills' application for a comprehensive permit.
2. Whether the local rule, by its terms, requires the payment of a sewer privilege fee by Hollis Hills, and if so, the amount of such a fee.
3. Whether the fee would render the project uneconomic.[4]
4. Whether the fee constitutes a valid local concern that outweighs the need for affordable housing.
5. Whether the Town has subjected Hollis Hills to unequal treatment in assessing the fee to Hollis Hills.

Post-Decision Pre-Hearing Order, § IV. Since we decide the first question in the negative, we do not need to reach the subsequent issues. However, an additional issue regarding the applicable sewer connection fee was addressed by the parties in the post-decision Pre-Hearing Order and their evidence, and briefed by them. See Post-Decision Pre-Hearing Order, § IV.A.3., § IV.B.7. Therefore we decide this issue here as well.

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4. Hollis Hills has waived the presentation of evidence on this issue.

III. FACTUAL BACKGROUND

A. Sewer Construction and Town Betterment Assessment

In 1999, the Town developed a comprehensive wastewater management plan, approving appropriations for implementing Phase I of the plan at the May 8, 1999 Annual Town Meeting. Exhs. 175, ¶¶ 8-12; 63-66. At the May 12, 2001 Annual Town Meeting, the Town added a new Section 21 to its General Bylaw, Article IX, Miscellaneous Provisions, which stated:

> ARTICLE 12. VOTED UNANIMOUSLY to amend the General By-law of the Town, Article IX, Miscellaneous Provisions, by adding a new Section 21 as follows: "*Sewer Betterment Assessments – The Board of Selectmen, acting as Sewer Commissioners, shall assess sewer betterment assessments under MGL Chapter 83, §14 by a rate based upon the uniform unit method, as provided by MGL Chapter 83,§15, and shall assess one-hundred percent of the cost of sewer projects upon those who benefit from each project, unless another percentage is voted by Town Meeting.*" and to see if the Town will further vote to amend its vote under Article 4 of the May 8, 1999 Annual Town Meeting to provide that assessments authorized by that vote under the fixed uniform rate be instead assessed under the uniform unit method provided by the By-law. [Sic] [Emphasis added.]

Exh. N1. This bylaw was the only sewer assessment bylaw in effect on February 13, 2006, the date on which Hollis Hills filed its application for a comprehensive permit with the Board. Exh. 172, ¶ 18.

On November 26, 2002, the Lunenburg Board of Selectmen, acting as the Sewer Commission, certified to the town Board of Assessors betterment assessments under G.L. c. 83 and the foregoing Article 12 of the Town Bylaws. Pursuant to this certification, Lunenburg assessed preliminary betterments to properties abutting the sewer line on Electric Avenue. Construction of Phase I sewers was completed in June 2006. Ms. Bertram, vice-chair of the Sewer Commission from May 2006 to at least 2009, testified in the original hearing that on June 24, 2008, the Sewer Commission approved a final betterment assessment to all properties to be served by the completed construction of the Phase I sewers. The final total residential betterment assessment was $11,551 per unit. Exhs. 175, ¶¶ 15-16, 20-21; 142-145.

B. The Project Site Connection to the Sewer System

Hollis Hills' project site includes four parcels totaling about 34 acres with frontage on West Street, Hollis Road and Electric Avenue, all public ways, and Carr Avenue, a private roadway. The parcel that fronts on Electric Avenue (the Electric Avenue Parcel) abuts a neighboring parcel at 321 Electric Avenue. Exhs. 3-6; 100; 172, ¶¶ 6-8; 173, ¶ 29. In our Decision, we found that "when Lunenburg assessed sewer betterment fees for Electric Avenue lots obtaining connections, it did not include the Electric Avenue Parcel." *Hollis Hills Decision, supra,* slip op. at 40. Exh. 175, ¶ 23; Tr. I, 49-53.

At the time of the original assessment, Hollis Hills, which acquired the site in 2005, did not own the project site. Sky Cycle, Inc., the owner of the Electric Avenue Parcel at the time of the preliminary betterment assessment, was not charged a betterment assessment. Exhs. 94-C; 125; 129;143; Post-Decision Transcript (PD Tr.) 56-62. In her testimony in the original hearing, Ms. Bertram stated that the preliminary betterment assessment did not include the project site. Initially she stated that Hollis Hill's project site was not among the properties assessed a betterment fee for the sewer construction project because the project site does not abut a public way served by the sewers, stating that:

> It has come to my attention that the developer of the proposed Hollis Hills project acquired a parcel of land abutting the project site in 2005 that has approximately 50 feet of frontage on Electric Avenue, which is sewered. That lot was not separately assessed a betterment, however, because the lot was not shown as having frontage on Electric Avenue on the Town's assessors' maps at the time of the betterment assessments. [Emphasis in original.]

Exh. 175, ¶ 23. However, Ms. Bertram acknowledged on cross-examination that the Sewer Commissioners were aware that Hollis Hills' parcel had frontage on Electric Avenue, but they nevertheless did not assess a betterment fee against Hollis Hills at the time of their final assessment in 2008. Tr. I, 53; See Tr. I, 49-53; Exh. 94.

In its preliminary sewer betterment assessment, by Order of Statement recorded November 17, 2004, the Board of Selectmen/Sewer Commission assessed Fred J. LaBerge, registered owner of the abutting parcel at 321 Electric Avenue, an initial amount of $10,000. Exhs. N7; 133; 142; 143. On June 24, 2008, the Sewer Commission approved the final betterment assessment of all properties served by the completed construction of the Phase I

sewers in the amount of $11,551 per unit. Exh. N33, ¶ 19; Exh. 144. The Sewer Commission assessed 321 Electric Avenue the balance of the betterment, notifying the then owner of the lot, Central Mass. Motorcycles, Ltd., which had acquired the property from Mr. LaBerge by deed dated June 28, 2007. Exhs. 133A; 145. As Ms. Bertram testified, Hollis Hills, the owner of the project site, including the Electric Avenue Parcel, at the time of final assessment, was not assessed a betterment charge. Neither Hollis Hills, nor its predecessors in title to the project site were listed as owners of assessed properties on the betterment lists recorded with the town. Exh. 143, 144.[5] There is no evidence that the betterments were recorded in the chain of title for the project site. PD Tr. 221.

C. Communications During Board Hearing Regarding Sewer Fees

During the course of the Board's hearings on Hollis Hills' comprehensive permit application, the Sewer Commission requested, in letters dated December 13, 2006 and March 6, 2007, that the Board condition the approval of any permit to Hollis Hills on payment of betterment assessments equal to 100% of the betterment to be charged to all single family property owners for each of the units approved in the development "consistent with the provisions of the Lunenburg Assessment Bylaw," stating that if the project is approved prior to the assessment of the final Phase I betterment, it would be assessed "in accordance with Section 1 of the Sewer Betterment Policy...." Exh. 41. See Exh. 42. In its March 6, 2007 letter, the Sewer Commission also requested that the Board not waive the portion of the sewer connection fees that Lunenburg must pay over to Leominster. Exh. 42.

In a March 27, 2007 letter to the chair of the Board, Mr. McCarty noted that Hollis Hills had instructed its attorney to obtain certified copies of the Town's bylaws and regulations from the Town Clerk and individual commissions and Boards. Exh. 117. The Sewer Commission chair at that time, William J. Gustus, wrote to the Board regarding Hollis Hills' request, in another letter dated March 6, 2007, stating:

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5. The Board takes the position that 321 Electric Avenue includes a portion of the project site and it therefore was assessed a betterment. See Exh. N33, ¶ 23. Even if an assessor's map indicates a lot size that assumed inclusion of a portion of the project site, this does not demonstrate that the project site was assessed. See PD Tr. 220-221.

> I am writing at the request of the Sewer Commission for some clarification of a letter we received from attorneys representing the developer of the Hollis Hills 40B project. They have asked us to certify that a list of by-laws listed in the letter comprises all of the by-laws that may govern the Hollis Hills project. We as a Board do not believe that it is our responsibility to make that determination for the applicant. If you believe differently please advise.

Exh. 43.

By memorandum dated May 9, 2007 from Mr. McCarty to the Board, Hollis Hills requested "Waiver for Betterment Charges as currently exist or as may be enacted by the Town." Exh. 118; see Exh. N34, ¶¶ 3-6. Mr. McCarty credibly testified that in 2007 he was unaware of the betterment assessment order and unaware of the amount of the assessments. PD Tr. 221-222.

IV. SEWER PRIVILEGE FEE

A. History of the "Sewer Assessment Bylaw" Relied on by the Board

The Board seeks to impose a sewer privilege fee upon Hollis Hills' project based on an undated document entitled "Sewer Assessment By-law." This "Sewer Assessment By-law" was not enacted by the Town as a bylaw until the May 5, 2007 annual town meeting. Among other provisions, the 2007 bylaw addresses the assessment of privilege fees in the circumstance of a property previously assessed a betterment which increases its use of the sewer system (Section 2), as well as in the context of a property not previously assessed which obtains an extension to connect to the sewer system (Section 3(c)). However, this bylaw, enacted after Hollis Hills filed its comprehensive permit application, does not apply.

The history of the *undated* document entitled "Sewer Assessment By-law" is less clear. The only version of the undated document entitled "Sewer Assessment By-Law," which was introduced into evidence in the original hearing before the Committee contained text indicating revisions on three dates: "5/6/06, 5/5/07 and 12/5/07," thus demonstrating that version to have been created after Hollis Hills filed its comprehensive permit application, and therefore to be inapplicable. Exh. 51. The post-hearing record now shows that these three dates – all subsequent to the submission of Hollis Hills' comprehensive

permit application – coincide with the dates of annual town meetings in those respective years.[6] PD Tr. 43-44.

At the post-decision sewer fee hearing, the Board introduced both another undated version of the "bylaw" which did not contain the revision annotations, as well as the version adopted as a bylaw by the Town. Exhs. N3, N2. Robert Ebersole, Chair of the Sewer Commission, testified in this hearing that the undated "bylaw," which he called a regulation, was adopted by the board of selectmen acting as sewer commissioners in 2001, and later incorporated into the Town's General Bylaws in 2007. Exh. N33, ¶¶ 10-11. When asked how he knew the undated bylaw was the correct document, Mr. Ebersole, the only Town employee who offered testimony to identify it, provided no direct knowledge, but stated that he believed it was the bylaw adopted by the Sewer Commission based on how the exhibits were submitted.[7] PD Tr. 67. The Board also introduced into evidence a memorandum dated September 4, 2001, from the executive secretary for the selectmen to the town clerk stating that "In accordance with Article 12 of the May 12, 2001 Annual Town Meeting, this office is forwarding the Sewer Betterment Assessment By-Law for the Town," stating that "[t]he Board of Selectmen/Sewer Commissioners approved said by-law at their meeting of 8/28/01." Exh. N4. The memorandum has no attachments.

The record contains neither minutes of an August 28, 2001 meeting of the Sewer Commissioners which could explain action taken by them regarding the document, nor any other evidence of their purpose or intent regarding it. Nor does the record contain any evidence that further action was taken to formalize the "Sewer Assessment Bylaw" until the Annual Town meeting of May 5, 2007, when the Sewer Assessment Bylaw was added as a

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6. At the May 6, 2006 special town meeting, the Town voted to establish a separate sewer commission. Exhs. 175, ¶ 3; 141. The May 2007 town meeting added the sewer assessment bylaw, and the December 5, 2007 Lunenburg special town meeting, adopted a change unrelated to this proceeding. Exhs. N33-A; N27.

7. None of the witnesses proffered by the Board were members of the Lunenburg Sewer Commission in 2001 when the Board asserts the document took effect. Paula Bertram, who testified in the original hearing before the Committee, served as Vice-Chair of the Lunenburg Sewer Commission, and Vice-Chair of the Board of Selectmen from May 2006 until at least February 2009. Exh. 175, ¶ 1. Robert Ebersole, current Chairman of the Sewer Commission, has been a member of the Commission since November 3, 2009. Exh. N33, ¶ 1. William Gustus, former chief administrative finance officer in Lunenburg, served on the Lunenburg Sewer Commission from the summer of 2006 through the end of June 2009. PD Tr. 123-124.

bylaw by the Town. Exh. N2. The text of the Sewer Assessment Bylaw adopted by Town Meeting in 2007 is identical to the text of the undated document entitled "Sewer Assessment Bylaw," except for typographical differences. Compare Exhs. N2 and N3. See Exh. 51.

During the course of the proceedings in this case, the document has been variously characterized by town employees, and by the Board and its counsel, as a bylaw, a policy, and, during this post-decision proceeding, as a regulation and an "extension" of the bylaw. In her testimony in the original hearing Ms. Bertram characterized it as a bylaw. Tr. I, 42-44, 53-54; Exh. 175, ¶ 25. Although no copy of the document predating December 2007 was entered into the record at that time, in correspondence with the Board during the hearing on Hollis Hills' application, the Sewer Commission quoted from it and referred to it as a "policy." Exhs. 41, 42.

During the post hearing proceedings, the difficulty in characterizing the document has continued. In its Opposition to Hollis Hills' Motion for Enforcement dated July 19, 2010, the Board took the position that the document was a duly adopted bylaw, adopted at town meeting in 2001. Board Opposition, p. 5. The Board changed that characterization in its supplemental opposition on July 27, 2010, which asserted that the title of the document "is probably a misnomer" and the Sewer Commission had adopted a regulation. Board Supplemental Opposition, p. 2 n.2. See PD Tr. 20. In his prefiled testimony and at the post-decision hearing, Mr. Ebersole testified that it was a regulation adopted by the Sewer Commissioners in 2001. Exh. N33, ¶¶ 10-11; PD Tr. 46. In his testimony, Mr. Gustus characterized it as "the regulation, the sewer betterment policy" and "an extension of the bylaw." PD Tr. 172. In light of the evidence contradicting their characterizations, we do not credit their testimony. Although the Board now argues that the "bylaw" is a regulation promulgated by the Sewer Commissioners, it has offered no evidence of any action the Town took to promulgate the document as a regulation pursuant to law.

B. Validity of the "Sewer Assessment By-Law"

Although entitled "bylaw," the "Sewer Assessment Bylaw" was not enacted by town meeting until May 2007 and was not a bylaw before then.[8] The dispute between the parties centers on the status of the document between 2001, when the secretary reported it as having been "approved" by the Sewer Commissioners, and May 5, 2007, when it was enacted as a bylaw at Town meeting. The Board argues it constitutes a regulation, while Hollis Hills contends it is at most a mere policy, and of no legal effect. See Exhs. N33, ¶¶ 10-11; N4; N3.

The Board contends that, notwithstanding its title as a bylaw, the document was in fact adopted as a regulation. The difficulty with the Board's assertion is several fold. First, the Board has not demonstrated that it was ever promulgated as a regulation. The document does not appear in the Town's Sewer Use Regulations or in any other regulations. The record does not indicate that this document was published in a newspaper or made available for inspection by the public, pursuant to G.L. c. 83, § 10, which provides:

> A city, town or sewer district may, from time to time, prescribe rules and regulations regarding the use of common sewers to prevent the entrance or discharge therein of any substance which may tend to interfere with the flow of sewage or the proper operation of the sewerage system and the treatment and disposal works, for the connection of estates and buildings with sewers, for the construction, alteration, and use of all connections entering into such sewers, and for the inspection of all materials used therein;... *Such rules and regulations shall be published once in a newspaper published in the city or town, if there be any, and if not, then in a newspaper published in the county, and shall include a notice that said rules and regulations shall be available for inspection by the public, and shall not take effect until such publication has been made.* [Emphasis added.]

The requirements of publication and availability for inspection by the public are not inconsequential. The Supreme Judicial Court has explained why compliance with statutory requirements for promulgation is important – so that those regulated by the town "may know in advance what is or may be required of them and what standards and procedures will be

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8. As the Board acknowledges, only the legislative body of municipal government has the authority to adopt bylaws. Municipal boards and commissions may adopt regulations to carry out their statutory powers. Board reply brief, p. 5.

applied to them." *Castle Estates, Inc. v. Park and Planning Bd. of Medfield,* 344 Mass. 329, 334 (1962). In *Castle Estates*, the applicable statute, G.L. c. 41, § 81M, required the town to adopt zoning rules and regulations under § 81Q. The court therefore ruled that to be effective, the town's imposition of water supply and drainage conditions must be found in a statute or duly adopted regulations. *Id.* at 332-333. The importance of public availability and advance knowledge is embodied in G.L. c. 83, § 10's requirements that the town publish and make the regulation available for inspection.

In *Fieldstone Meadows Dev. Corp. v. Conservation Com'n of Andover,* 62 Mass. App. Ct. 265 (2004), the court overturned denial of an application to perform work within 100 feet of a protected resource area because the denial was "impermissibly based ... upon a policy ... not otherwise found in the town by-law or any regulations promulgated thereunder," *id.* at 266, even though the town bylaw provided that the conservation commission shall promulgate regulations "after due notice and public hearing, 'requiring the maintenance of an undisturbed vegetated buffer of not more than 25 feet from the edge' of any areas protected by the town by-law." *Id.* at 266 n.3. However, although the commission had drafted such regulations, the record did not suggest that such a regulation was adopted and in effect at the time the commission acted on *Fieldstone's* application. *Id.* at 266. The court concluded that "a no-build zone 'policy' not lawfully adopted as a regulation, and containing no requirement of uniform application, could not form the basis of the commission's denial in this case." *Id.* at 268.

As in *Fieldstone*, the precise genesis of the "bylaw" is not apparent from the record. No minutes of the meeting of the Sewer Commission at which the document was approved were submitted to clarify the purpose of the Commission in approving it. However, we can infer from the language of the document, which ultimately was enacted as a bylaw, that it was more likely than not originally intended to be a bylaw, but for an unknown reason, was not adopted until 2007. First, it was titled "bylaw." The general introductory section sets out the powers of the Sewer Commission, as though those powers are prescribed by a superior authority, such as town meeting. See Section 1(a) General. The document itself refers to the Sewer Commissioner's powers to promulgate regulations. See § 3(a): "Any such connection as may be approved by the Sewer Commission shall be in accordance with all rules and

regulations as may be from time to time promulgated by the Sewer Commission." Exh. N3. The memorandum of the Selectmen's executive secretary states that the Sewer Commissioners "approved" the "bylaw," not that they "adopted" it. Finally, the document was in fact ultimately adopted as a bylaw in 2007.

As the record shows, Hollis Hills sought to learn the regulations and bylaws in effect and the Sewer Commissioners chose not to confirm the correct information. The only bylaw on record was the "Sewer Betterment Assessments" bylaw enacted in 2001. The only sewer regulations on record were the Sewer Use Regulations. The Sewer Commission's letter to the Board which quoted portions of the "policy" does not meet the requirements of G.L. c. 83, § 10 and fails to establish the legitimacy of the provision in the "policy" cited by the Sewer Commission. Exhs. 41, 42. The Board has not demonstrated that it promulgated the "bylaw" as a regulation.

Without proof that the "bylaw" was promulgated by the Sewer Commissioners as a regulation, duly published as a regulation and made available for review by residents of the town, the "bylaw" is unenforceable as a regulation. Notably, the Town, the party in possession of evidence relevant to such proof, failed to provide it. The promulgation of the regulation, rather than its substantive content, does not benefit from a presumption in its favor. *Town of Brookfield v. Kruzewski,* 2010 WL 282909 at 2 (Mass. Land Ct. 2010) (challenges to validity of alleged regulations on grounds they were never properly enacted pursuant to statutorily-mandated procedure are not subject to presumption of validity accorded regulations enacted pursuant to enabling statutes), citing *Springfield Preservation Trust, Inc. v. Springfield Library & Museums Ass'n, Inc.*, 447 Mass. 408, 418 (2006); *Beard v. Salisbury*, 378 Mass. 435, 439-40 (1979). Therefore the document fails to meet the statutory requirement. Since the document does not qualify as either a bylaw or a regulation, then at most it might have been a policy issued by a municipal agency, if the evidence had supported that. PD Tr. 172; Exhs. 41, 42. On the record, however, we do not find it to have been adopted as a policy, even though the Sewer Commission treated it as a policy. Even if it were an adopted policy, its adoption as a policy would still be insufficient for the reasons stated. See *Castle Estates, supra,* 344 Mass. at 333 (regulations "should be comprehensive … so that owners may know in advance what is or may be required of them and what

standards and procedures will be applied to them."); *Fieldstone Meadows, supra,* 62 Mass. App. Ct. at 266, 267, 270 (annulling action "improperly based on a policy existing outside of the regulatory framework"). The Town has failed to meet its burden of proof. Post-Decision Pre-Hearing Order, § IV.

Finally, evidence in the record suggests unevenness in the Town's application of the "bylaw." The record shows that Emerald Place, a market rate project located near the project site, which the Town either knew or had failed to determine would be accessing sewer use through Lunenburg and not directly from neighboring Leominster, was charged sewer privilege fees for only 45 of its 240 units. PD Tr. 36-37, 126-129, 185, 191, 194, 198-199; Exh. N38. Mr. Gustus testified that the Sewer Commissioners considered treating a Chapter 40R multifamily rental development as commercial and assigning units based on estimated water consumption, rather than according to the residential land provision, thus allowing the Sewer Commission discretion in the amount of the assessment. PD Tr. 143-149; See Exhs. N33, ¶¶ 5-6; N3; 80.

The Board argues that under Chapter 83 it has the authority to impose a sewer privilege fee. However, the Town has taken a position which suggests that the Town did not believe it had valid authority to charge sewer privilege fees. At the May 2, 2009 annual town meeting, the Town adopted a bylaw authorizing the selectmen to petition the Legislature to authorize Lunenburg to charge sewer privilege fees to landowners who had not been charged a betterment fee. Exh. 170; Tr. I, 46-49. On the evidence before us, we find and rule that the Town did not take the appropriate action to exercise any such statutory authority before the enactment of the bylaw on May 5, 2007.

For the foregoing reasons the Committee finds and rules that the "Sewer Assessment By-law" was not validly adopted before the date of Hollis Hills' application for a comprehensive permit was filed with the Board and does not apply to the Hollis Hills project.

V. SEWER CONNECTION FEE

A. Regulations Regarding Sewer Connection Fees

The Board seeks to impose a sewer connection fee of $1,760 per building plus $550 for each bedroom in excess of three bedrooms, for a total of $238,150. Exh. N35, ¶ 5.

During the original hearing, Mr. McCarty testified that Hollis Hills was willing to pay "the sewer connection fee, if any, that is required pursuant to a duly adopted by-law and has been lawfully imposed on developers of market-rate housing." Exh. 172, ¶ 62. The May 7, 2005 version of the Lunenburg Sewer Use Regulations was in effect as of the date of Hollis Hills' application for a comprehensive permit on February 13, 2006. It provides for a sewer connection permit fee as well as an inspection fee in Section 147-5, which states:

> A. Connection permits: There shall be three (3) classes of building sewer permits: single-family residential, multifamily and commercial, and industrial. In each case, the owner or his agent shall make application on a special form furnished by the city. The permit application shall be supplemented by any plans, specifications or other information considered pertinent in the judgment of the Commissioners. There shall be a sewer permit fee of ten dollars ($10) for single-family class, twenty-five dollars ($25) for multifamily or commercial class and fifty dollars ($50) for industrial class. In addition, for each class, an inspection fee of one hundred dollars ($100) shall be paid, said fees to be remitted to the city with each application.... [Sic]

Exhs. 52; N29, Sewer Use Regulations, § 147-5.A, updated May 7, 2005.

Mr. Ebersole testified that the Sewer Use Regulations were initially adopted in 1996 and modeled on Fitchburg's regulations. He testified that the Board of Selectmen acting as Sewer Commissioners, adopted sewer connection fees on July 1, 2003. A memorandum issued by the Board of Selectmen dated July 21, 2003 lists sewer connection fees (including sewer connection charge, permit fee and inspection fee) based on the number of bedrooms, providing for $660 for a one-bedroom unit, with an increase of $550 for each additional bedroom up to five. Exhs. N33, ¶¶ 28-29, 32; N33-C.

On February 1, 2005, the Board of Selectmen, acting as Sewer Commissioners, voted to amend "the Sewer Connection Charge Policy of the Lunenburg Sewer District" to require assessment of a minimum connection charge of $1760 to any building connecting to the Lunenburg sewer system, plus, for residential dwellings, an additional $550 for each additional bedroom beyond three bedrooms. Exhs. N33, ¶ 30; N5.

Although the Sewer Commission voted to adopt these sewer connection charges in February 2005, they were not included in the actual Sewer Use Regulations updated May 7, 2005. Rather, the Sewer Commission did not note the need to amend the Sewer Use

Regulations until its December 30, 2008 meeting, when it discussed and voted on revisions to § 147-5, to reflect "the addition of the connection fee policy."[9] Exh. N30. See Exhs. N31, N29, N11; PD Tr. 93-94.

Mr. Ebersole testified that the Sewer Use Regulations did not set specific connection fees until December 2008, but that the fees were always authorized under § 147-34 of the Sewer Use Regulations, which allows the Sewer Commission to adopt charges and fees for a variety of purposes including fees associated with the town's pretreatment program, monitoring, accidental discharge procedures and construction, permit applications, filing appeals, removal of pollutants, and other fees deemed necessary to carry out the requirements "contained herein." The provision states that "these fees relate solely to the matters covered by this chapter and are separate from all other fees chargeable by the town." Exh. 52. He stated that the purpose of the connection fees was to recoup the Town's own connection costs under its intermunicipal agreements with Leominster and Fitchburg, as those municipalities are recipients of sewage discharged into Lunenburg's sewer system. Exh. N33, ¶ 32. However, since his testimony is contradicted by the text of the Sewer Use Regulations, we accord this testimony no weight.

B. Hollis Hills's Knowledge of the Sewer Connection Fee

The Board suggests that Hollis Hills has conceded the sewer connection fee, since Mr. McCarty submitted a response in the hearing before the Board that the developer was aware of the Board's proposed connection fee. In a September 6, 2006 memorandum to the Board, Mr. McCarty responded to peer review commentary:

> Item 97: The City of Leominster imposes substantial fees for connection to their wastewater collections and treatment systems and ongoing charges for discharges during occupancy of the property serviced. The applicant should document their proposal for payments to ensure that Lunenburg is held harmless with respect to financial liability.
>
> Response: The applicant must pay all fees to the Town of Lunenburg. All Fees are required to be paid prior to issuance of a building permit. ...
>
> The applicant understands that the only specified fee charged by the Town of Lunenburg is the connection fee. Connection Fee indicated is $1,760 for up

9. The Sewer Commission has applied the $1,760 connection charge policy in practice. See Exh. N11.

> to three bedrooms and $550 for each additional bedroom. The applicant was advised that there is no specification for how to apply betterment fees nor the method of calculating betterment fees. The Applicant request that the ZBA obtain the current fee schedule from the Sewer Commissioners for connection, betterment and any other charges proposed.
>
> The applicant advises that fees imposed may have a significant effect on project affordability.

Exh. 39. In the post-decision hearing, Mr. McCarty testified that he learned of this fee from a source outside Lunenburg town government and as a result asked the Board and Sewer Commission to confirm it and provide a source for the fee. He stated that at the time Hollis Hills filed its application, the sewer connection fee listed in the town's Sewer Use Regulations was $125 per unit. Therefore, Hollis Hills had requested that the Sewer Commission confirm a list of regulations and bylaws in effect. As noted above, the Sewer Commission did not do so. Exhs. 39, 41-43, 117; N34, ¶¶ 9-10; PD Tr. 204, 223-224.

The sewer connection fee policy on which the Board relies is in conflict with the regulatory provision in § 147-5. The Board cannot rely on a policy based on § 147-34 generally allowing fees to be set when a specific provision setting out the fees was already within the regulations at § 147-5. Having failed to comply with the statutory requirements to have updated, comprehensive municipal regulations so that those regulated by the town "may know in advance what is or may be required of them and what standards and procedures will be applied to them," see *Castle Estates, supra,* 344 Mass. at 332-333, the Sewer Commission cannot now claim that the policy overrides the regulation. Rather § 147-5.A. of the Sewer Use Regulations "updated 5/7/05" sets forth the applicable sewer connection and inspection fees of $125 per unit.

VI. CONCLUSION AND ORDER

Since we find that the "Sewer Assessment Bylaw" was not a valid bylaw until May 5, 2007, and was not a valid regulation at the time of Hollis Hills' application for a comprehensive permit to the Board, it does not provide the authority for assessment of a sewer privilege fee on Hollis Hills. Similarly we find that the sewer connection policy on which the Board relies was not the valid regulation when Hollis Hills applied for a comprehensive permit and it does not provide the authority for the imposition of the sewer

connection charge on Hollis Hills. Accordingly the sewer connection charge applicable to Hollis Hills is the charge set forth in the 2005 Sewer Use Regulation, § 147-5.A., which provides for a total of $125 per unit for each of the units, or $17,000.

As a result of these findings of fact and rulings, the Committee need not reach the remaining issues.

This ruling and order may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the ruling.

Housing Appeals Committee

Dated: 3/25/13

Werner Lohe, Chairman

Carol A. Gloff

Joseph P. Henefield

Theodore M. Hess-Mahan

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer