

LEGAL OPINION

ISSUE

**WHETHER OR NOT MISQUAMICUT FIRE DISTRICT IS IN THE
WESTERLY SEWER DISTRICT**

Submitted,

JOHN P. TOSCANO, JR., SOLICITOR
Misquamicut Fire District
9 Canal Street
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FACTS

On November 10, 1986, a regular meeting of the Westerly Town Council was held and under the subject of **UNFINISHED BUSINESS – Reserve Decision – Petition of Udo and Jane Schwarz for Right of Entry into Public Sewer System, Atlantic Avenue, Misquamicut**, much discussion and a vote took place solely on this subject. Despite the advice of Town Solicitor Levanti who indicated that the Council had not thought about the question of taxation nor had they thought about the question of expanding the sewer district, the Solicitor stated *“You have to be very careful, you cannot do this without first expanding the sewer district. You may place in jeopardy the ability to tax it. I have already told you that. It’s in plain English in the ordinance. You have to have the ability to tax and that comes from putting someone in the sewer district. **Misquamicut is not in the sewer district.**”* the Council took a poll vote on a Motion made by Councilor Comolli and seconded by Councilor Trovato as follows:

Councilor Comolli moved *“that the Council approve the extension of sewers into the Misquamicut area subject to the approval of proper authorities, Town Engineer, all state authorities and everyone to make sure that this is done correctly.”*

The vote was three (3) to one (1) in favor of the Motion.

Thereafter, the matter went before the Superior Court for a determination as to whether or not the above vote was valid in that out of seven (7) councilors, one councilor was absent and two (2) councilors were disqualified leaving four (4) councilors to vote on the Motion. The matter went to the Washington County Superior Court for a determination. The Court deemed the vote to be valid.

A Resolution was then adopted by the Town Council indicating that the vote was, in fact, valid, as determined by the Court, and it **“RESOLVED that the Westerly Town Council approves of the plan of Udo Schwarz et. al. for the installation of a four-inch and six-inch sewer line along a route approved by the Town of Westerly and as approved by the Department of Environmental Management upon such conditions as imposed by the Town Engineer.”**

The Town of Westerly Code, Part II entitled **“General Legislation”** Article II, entitled **“Expansion, Extension and Maintenance of System”** §206-3 entitled **“Extensions within locus authorized by Department of Public Works”** states that the Department of Public Works would authorize sewer main extensions as delineated in the shaded portions of a certain map of the sewer district dated April 11, 1988 which was referred to as “the locus” and in which the developer or owner would bear all costs and expenses of such sewer extension including all construction costs, indemnifying the Town for the same. **This section clearly states that any extension proposal which would result in any cost to the Town would require approval of the Town Council after public hearing.**

Westerly Code, Part II, §206-4 entitled "Extensions outside locus authorized by Town Council" states the "Extension of the sewer system outside of the locus described in §206-3 shall be authorized solely by the Town Council **after public hearing**. The Town Council shall provide such terms and conditions under which any person not within the locus may enter and connect with such sewer system." **Once again, this section clearly states that any extension outside of the locus as shown on the map designating the sewer district dated April 11, 1988 must be accomplished by the Town Council only after a public hearing.**

It is important to note that the Schwarz application was for a private sewer line, and that it later became the application of one, John Strafach, which was, also, for a private line.

On April 30, 1993, the Director of Public Works addressed an Interoffice Correspondence to the then Town Manager Pellegrino stating that prior to the DPW issuing the permit for the sewer connection to Mr. Strafach, it would be necessary for the Council to define, by metes and bounds, the extent of the sewer district expansion which a prior Council had approved. The DPW Director, in his memo, made a recommendation that the "sewer district expansion be limited at this time to the applicant's establishment and 1½ feet on either side of the two (2) force mains that would transport the sewage..."

On May 3, 1993, a Workshop of the Westerly Town Council took place wherein the subject of Misquamicut Sewer Lines – Strafach was discussed. At this meeting, Councilor Douglas stated that the sewer line was granted for one individual plat but expansion of the sewer district was never voted on at a public hearing." [See meeting of November 10, 1986] She questioned whether there would be a public hearing to expand the sewer district. [See Article II, §206-3, 4] She expressed concern that a private line was being installed in a public road because it then becomes the Town's responsibility.

At this meeting, President Comolli suggested that a public hearing be held to expand the sewer district to include any property on either side of the street and the whole length of this expansion would be included in the sewer district. Councilor Douglas read the vote of the Council from the November 1986 meeting minutes and stated that she did not feel that the Misquamicut Fire District was in the sewer district, but would like a public hearing to place it in the district.

President Comolli requested that this matter be placed on the May 10, 1993 agenda to ratify and confirm the 5 to 2 vote of the Council that the Strafach sewers in the Misquamicut Fire District be included in the sewer district. [Here, it is important to note that Mr. Comolli's reference to the vote was not correct in that it was actually a 3 to 1 vote later deemed to be valid by the Superior Court. Further, his motion refers only to the Strafach sewers, which was a proposed private line.]

On May 10, 1993, a regular meeting of the Westerly Town Council took place and all Councilors were present. Under NEW BUSINESS – Misquamicut Sewer Lines – Strafach a Motion was made by Councilor Cole and seconded by Councilor DiMaio, to ratify and confirm the 5 to 2 consensus of the Council that the Misquamicut Fire District is in the Sewer District. A poll vote was taken resulting in a 4 to 3 vote in favor. **[It is important to note that nowhere in the minutes of the Town Council can there be found a 5 to 2 consensus at any meeting prior to this May 10, 1993 meeting stating that the Misquamicut Fire District is in the sewer district. All minutes prior to the minutes of this meeting refer solely to the private sewer line of Udo and Jane Schwarz, and later to the private sewer line of John Strafach.]**

On December 19, 2000, a local referendum was held wherein voters were asked *“Shall the Town of Westerly borrow eight million dollars (\$8,000,000.00) for the purpose of financing the construction AND extension of sewers and sewage system into the Misquamicut area in the Town of Westerly?”*

This referenda question was defeated with 819 approving and 1,425 rejecting.

Clearly, this question not only asks the voters to approve borrowing by the Town of the sum of \$8,000,000.00, but ALSO to approve the extension of sewers and the sewage system into the Misquamicut area.

Also, a lawsuit brought by Westerly Residents for Thoughtful Development vs. Brancato et al which had been decided by Justice Rodgers in the Washington County Superior Court in February of 1989, was later overturned by the Rhode Island Supreme Court in favor of the defendants. The Supreme Court’s decision does not overturn Westerly’s Code, Article II, §206-3, 4 for the Expansion, Extension and Maintenance of System, and Extensions outside of locus, which requires that any extension outside of the locus [as described in 206.3] must be authorized by the Town Council **after public hearing**.

CONCLUSION

In light of the circumstances set forth in the within Facts, I have concluded that the Misquamicut Fire District is not in the Westerly Sewer District.

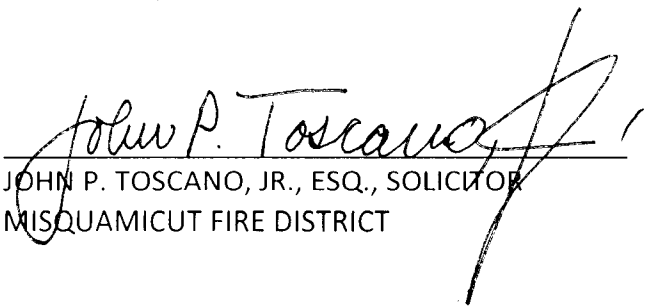
I have based my opinion on the following facts:

1. That all meetings of the Westerly Town Council as set forth herein were held solely for the purpose of discussing the Petition of Udo and Jane Schwarz for right of entry into the Town's sewer system, and later the Petition of John Strafach, both of which were specifically for a proposal for a private sewer line;
2. That any vote of the Town Council taken prior to the May 10, 1993 meeting on this subject was solely for the Schwarz and later Strafach plan;
3. That the vote taken at the May 10, 1993 meeting of the Town Council was not only inaccurate, but also, incorrect, and further, the matter was improperly before the Council in that the new business to be discussed was to be for the Strafach private sewer line;
4. That at no time did the Westerly Town Council vote to include the entire Misquamicut Fire District in the Town's public sewer system;
5. That Westerly Code, Article II, §206-3, 4, stands and requires that a public hearing must be held for any extension of the sewer system in the Town of Westerly.

I conclude that there is only one avenue that can be taken in order to extend and expand the Westerly Sewer District to include any area other than the locus described in Article II, §206-3, and that is by public hearing. As described in Article II, §206-4, such public hearing must be legally advertised and held, and thereafter, upon a favorable vote of the Town Council an Ordinance adopted. As of this date, this procedure has not been followed in order to extend the Westerly Sewer District to include any locus other than the locus as described in Article II, §206-3.

Based on these facts, I, therefore, conclude, that the Misquamicut Fire District is not in the Westerly Sewer District.

Submitted by,



JOHN P. TOSCANO, JR., ESQ., SOLICITOR
MISQUAMICUT FIRE DISTRICT