COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court in and for Suffolk County

The TOWN OF LITTLETON, Plaintiff, v. The TOWN OF CONCORD, Defendant.	No.: SJ-2018-0572

THE TOWN OF CONCORD'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Littleton's invocation of the Supreme Judicial Court's jurisdiction to appoint three commissioners to assess damages is not ripe for adjudication and should be dismissed. Littleton has not alleged facts in its Complaint demonstrating that it has fulfilled the requirements of Section 10 of the Acts of 1884 upon which it seeks to invoke this Court's jurisdiction. Thus, Littleton's claim is premature and the SJC lacks jurisdiction to adjudicate the claim. Similarly, Littleton's declaratory judgment claim in Count II is a thin attempt to sidestep the ripeness problem in Court I by trying to create a controversy that does not exist. There is no controversy regarding the water damages provision in Section 10, unless and until Littleton *actually* takes water from Nagog Pond.

Section 10 of the 1884 Act states:

> Nothing contained in this act shall prevent the town of Acton nor the town of Littleton from taking the waters of said Nagog Pond whenever said towns or either of them may require the same for similar purposes, and in case of such taking by either of said towns or both of them, if for any reason the supply of water in said pond shall not be more than sufficient for the needs of the inhabitants of said towns of Acton and Littleton, then the needs of the

> inhabitants of said towns shall be first supplied; and if either of said towns of Acton and Littleton shall hereafter be authorized to take and shall take the waters of said Nagog Pond or any part thereof which the town of Concord may have taken under the act, said town so taking shall pay to said Concord a just and proportionate part of whatever sums the said town of Concord shall have paid or become liable to pay for water damages to any persons or corporation for the taking of water rights from said pond or the outlet thereof, to be ascertained, if the parties shall fail to agree, by three commissioners to be appointed upon the application of either party by the supreme judicial court; the report of said commissioners made after hearing the parties, and returned to and accepted by said court shall be final between the said parties.

The jurisdiction of the SJC under Section 10 to appoint the three commissioners Littleton seeks, does not becomes effective, if at all, until after Littleton has been "authorized to take and shall take the waters of said Nagog Pond." Littleton has not alleged that either of these events have occurred. Littleton does not identify any specific "authoriz[ation] to take" the waters of Nagog Pond. Nor does Littleton allege any actual "taking" of the waters of Nagog Pond. Moreover, before any water damages can be assessed, Littleton must have taken "any part [of the waters of Nagog Pond] which the town of Concord may have taken under the Act." Littleton has not alleged that is has taken any part of the waters of Nagog Pond that the Town of Concord has taken under the 1884 Act. In fact, Littleton **cannot** take any water from Nagog Pond, because it lacks an approval to withdraw water from Nagog Pond under the Water Management Act ("WMA") from the Massachusetts Department of Environmental Protection ("MassDEP").

Not only does Littleton lack a WMA Permit, it has not even applied for a WMA Permit. Furthermore, Littleton cannot obtain a WMA Permit while Concord holds a Registration under Section 5 of the WMA for the entire volume of Nagog Pond. Thus, it is impossible for Littleton to take any water from Nagog Pond without

a violation of law and its Complaint seeking an appointment of commissioners to assess water damages is blatantly premature. It would be a waste of judicial resources for the SJC to adjudicate either Count I, regarding the appointment of commissioners under Section 10, or the declaratory judgment claim in Count II, where there is no actual controversy regarding the damages provision of the 1884 Act, since it is by no means clear that Littleton will ever acquire the authority to take the water of Nagog Pond.[1]

Accordingly, the Single Justice should dismiss this action as not ripe for adjudication for an assessment of damages, because Littleton has not satisfied the prerequisite criteria in Section 10 of the 1884 Act to be authorized to take water from Nagog Pond, let alone having performed an actual taking resulting in damages to Concord which would necessitate an action for the SJC to appoint a commission to assess those damages under the 1884 Act. Since there has been no actual taking of the waters of Nagog Pond, there is no actual controversy regarding water damages justifying a declaratory judgment claim on that issue.

I. FACTUAL BACKGROUND

For the purposes of this Motion to Dismiss, Concord takes the allegations in the Littleton Complaint to be true. The most pertinent allegations for this Motion to Dismiss are as follows:

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[1] The issue of the continued existence of Littleton's purported rights under the 1884 Act following the Commonwealth's adoption of the WMA is the subject of a separate declaratory judgment action before Judge Keith Long in the Land Court, Town of Concord v. Littleton Water Department, 18 MISC 000596 [KCL]. Concord filed the declaratory judgment case in Land Court on November 8, 2018, which takes priority over Littleton's Complaint. There is a Case Management Conference in that case on January 9, 2019. On December 20, 2018, during a conference to discuss the preparation of a Joint Statement for the Case Management Conference, counsel for Littleton advised the undersigned counsel it will file a motion to dismiss in the Land Court and intends to transfer Concord's declaratory judgment action to the SJC. Concord will oppose.

1. In 1884, Concord successfully secured from the General Court a legislative right to take and hold Nagog Pond's waters, associated water rights, and other land or property for Concord's use in meeting its water supply needs. Stat. 1884, c. 201 (the "1884 Act"). Concord eventually took the waters of Nagog Pond in its entirety in 1909 and has, for over a century, been the beneficiary of that water supply. Complaint, ¶ 2.

2. By vote taken pursuant to Article 14 of the 1909 Concord Annual Town Meeting, the Concord Water and Sewer Commission was authorized to "take and hold the waters of Nagog Pond...and also to take and hold by purchase or otherwise all necessary land, water rights, rights of water and easement for raising, holding, diverting, purifying, and preserving such waters. Complaint, ¶ 30.

3. On July 28, 1909, Concord recorded an Instrument of Taking in the Middlesex County Registry of Deeds, [B]ook 3457, Page 221-237. Complaint, ¶ 31, and Exhibits 3 and 4 attached thereto.[2]

4. [Through] [t]he Instrument of Taking [Concord] purports to take: (i) all of the waters of Nagog Pond; (ii) the waters that flow into and from the Pond; (iii) the land under the Pond up to the overflow level of the

[2] In Flagg v. Town of Concord, 222 Mass. 569, 573 (1916), a case reviewing Concord's takings for Nagog Pond, the SJC concluded that the 1884 Act "authorizes the defendant to take 'all the waters of Nagog Pond' and [that] the instrument of taking was coextensive with the power." In addition to the initial takings in 1909, Concord periodically obtained other parcels on Nagog Pond to support its water supply infrastructure, to limit development along the pond, and to ensure water quality. Currently, Concord owns approximately 40 acres of land in Littleton along the northern shore and 60 acres of land in Acton along the southeast shore of Nagog Pond.

dam at its outlet; and (iv) the littoral rights otherwise accruing to the owner of the adjacent properties thereby taken. Complaint, ¶ 32.

5. On December 18, 1985, the General Court enacted "An Act Relative to the Establishment of a Massachusetts Water Management Act" to create a Statewide mechanism for allocating and managing water withdrawals pursuant to existing and future water rights. See Stat. 1985, c. 592. Complaint, ¶ 37.

6. Under the WMA, M.G.L. c. 21G, all water withdrawals in excess of 100,000 gallons per day are reported to the Commonwealth. Withdrawals in excess of that "threshold amount" which existed prior to the Act, if registered no later than January 1, 1988, are now grandfathered from State infringement so long as the withdrawing entity continues to maintain its registration. Complaint, ¶ 38.

7. In August 1987, Concord filed a Registration Statement pursuant to section 5 of the WMA, establishing a withdrawal of a total of 2.1 million gallons per day (MGD) from 10 withdrawal points, one of which was Nagog Pond. Complaint, ¶ 40.

8. Concord's Registration Statement was renewed on December 31, 1997 and December 31, 2007. Pursuant to the Permit Extension Act, Chapter 240 of the Acts of 2010, § 173 (extended by Chapter 238 of the Acts of 2012, §§ 74-75), Concord's Registration Statement is currently expected to expire on December 31, 2021, but may be renewed prior to that date. Complaint, ¶ 41.

9. Because of its projected future need, Littleton **intends to exercise** its right under the 1884 Act to withdraw water from Nagog Pond. Complaint, ¶ 58 (emphasis added).

10. **Upon completion** of the procedures set forth in the 1884 Act, Littleton **will be entitled** to take from Nagog Pond the full amount of water that is necessary for the needs of its residents and inhabitants. Complaint, ¶ 60 (emphasis added).

11. Littleton presently **intends to exercise** its duly authorized right to take and hold part or all of Nagog Pond's waters and associated water rights to supply its inhabitants projected future water needs. Complaint, ¶ 71 (emphasis added).

II. STANDARD OF REVIEW FOR MOTION TO DISMISS

Rule 12(b)(6) permits prompt resolution of a case where the factual allegations clearly demonstrate the plaintiff's claims are legally insufficient. See Harvard Crimson, Inc. v. President and Fellows of Harvard Coll., 445 Mass. 745, 748 (2006). Granting Concord's Motion to Dismiss is warranted, because it is "beyond doubt that [Littleton] can prove no set of facts in support if [its] claim which would entitle [it] to relief." Nader v. Citron, 372 Mass. 96, 98 (1977), quoting Conley v. Gibson, 355 U.S. 41, 45046 (1957).

Though Concord is challenging the viability of the 1884 Act, in light of the later-in-time WMA in its declaratory judgment action in Land Court, for the purpose of this Motion to Dismiss, Concord acknowledges that the Court must take as true the

allegations in the Complaint and all reasonable inferences as may be drawn from the allegations. Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 429 (1991).

But this Court does not need to take as true Littleton's legal assertions with respect to its purported rights under the 1884 Act. For example, Littleton's allegations in paragraph 6 of the Complaint, present its interpretation of the 1884 Act and the 1911 Act. The presentation presents a legal conclusion, not a factual allegation. As discussed in greater detail below, the text of these two acts are not as definitive as presented in the Complaint. The 1884 Act states "if...Littleton shall hereafter be authorized," and the 1911 Act states "no source of water supply...shall be taken without first obtained in the advice and approval of the state board of health." Therefore, it is not accurate to state that "Littleton is authorized" to take the waters of Nagog Pond as presented in paragraph 6 of Littleton's Complaint.

III. ARGUMENT

A. Littleton's Demand for a Commission to Ascertain the Water Damages Payable to Concord in Count I Is Premature and Should be Dismissed

Count I of Littleton's Petition focuses on the assessment of water damages in Section 10 of the 1884 Act. Littleton's demand for an assessment of water damages is premature. The Single Justice should dismiss Littleton's Complaint, because Littleton has not satisfied the conditions contained in Section 10 of the 1884 Act that would warrant initiating a Petition for the appointment of commissioners to ascertain the "just and proportionate" water damages due to Concord.

The first inquiry set out in the damages provision in Section 10 the 1884 Act, is to assess the extent to which Littleton's use has impaired Concord's ability to

provide water to its customers. Once an impairment has been quantified, the next step is a determination of the just and proportionate measure of the portion of the original cost of the taking that the impairment represents. Since Littleton has never taken any water from Nagog Pond, Concord's ability to provide water to its customers has not been impaired. Thus, there is no need to make an assessment of the water damages at this time. Unless and until Littleton is actually authorized and actually takes water from Nagog Pond that impairs Concord's ability to provide water to its customers, there is no need to empanel three commissioners to assess damages. Littleton admits in Paragraph 71 of its Complaint that it "presently intends to exercise" rights it believes it has to Nagog Pond, but this mere intent does not trigger an impairment of Concord's use of Nagog Pond, warranting an assessment of damages. Accordingly, this Petition is premature and Littleton's Complaint should be dismissed.

B. Section 10 of the 1884 Act Is Not Self-Authorizing and Littleton Has Not Received Authorization To Take Water From Nagog Pond.

Section 10 of the 1884 Act is not self-authorizing. The statute clearly contemplates that Littleton would have to receive additional approvals before it could take water from Nagog Pond. The Section states: "if either of said towns of Acton and Littleton shall hereafter be authorized to take..." (emphasis added). Based on this passage, it is clear that the 1884 Act alone does not give Littleton the power and authority to take water from Nagog Pond. Littleton's Petition alleges that Chapter 617 of the Acts of 1911 (Exhibit 6 to the Littleton Complaint) authorizes Littleton to take water from Nagog Pond, because the 1911 Act states: "[Littleton] may take, or

acquire by purchase or otherwise, and hold the waters of any pond or stream or of any ground sources of supply by means of driven artesian or other wells within the limits of the town." (emphasis added). However, Littleton has not affected such a taking. Littleton has not executed a taking that is equivalent to the comprehensive steps Concord took in 1909, when it recorded an instrument of taking giving it control over Nagog Pond. See Complaint, ¶¶ 31 – 33.

In addition to the fact that Littleton has not executed a taking, the text of Chapter 617 of the Acts of 1911 expressly notes that the 1911 Act itself is not sufficient authorization to take the water of Nagog Pond. The text of the Chapter 617 of the Acts of 1911 states that "no source of water supply and no lands necessary for preserving the quality of the water shall be taken without first obtaining the advice and approval of the state board of health." Littleton has not received the approval of the "state board of health," which is now the MassDEP.

Unless and until Littleton receives such authorization to take water from Nagog Pond from MassDEP, Littleton cannot take any water from Nagog Pond and, accordingly, any demand or Petition seeking a commission to determine water damages without ever securing the authorization required by the statutes Littleton is relying on, is premature.

C. Though Section 10 of the 1884 Act States that "Nothing Contained in This Act Shall Prevent" Littleton from Taking Water from Nagog Pond, the Subsequent Enactment of the WMA Affected Each Town's Use of Nagog Pond.

Though the text of Section 10 states that "nothing contained in the Act" shall prevent Littleton from taking the water of Nagog Pond, the actions of Concord and

the changes to the legislative landscape regarding water rights in Massachusetts have changed since 1884.

In 1985, Massachusetts adopted the WMA. Pursuant to the WMA, MassDEP adopted the regulations it deemed necessary to establish "a mechanism for managing ground and surface water in the Commonwealth as a single hydrologic system..." M.G.L. c. 21G, § 3. MassDEP published these regulations at 310 CMR 36.00. These regulations reflect the comprehensive two-tiered scheme of registrations and permits established by the WMA for the management of surface and ground water withdrawals of water in excess of 100,000 gallons per day (gpd) from river basins throughout the Commonwealth.

Established historic withdrawals were eligible to receive a "registration" to grandfather their withdrawals under the WMA. To accomplish this, the WMA enabled users who consistently withdrew 100,000 gpd or more of water to "file a registration statement" on or before January 1, 1988, setting forth their "existing withdrawal," based on measured withdrawals from January 1, 1981 through December 31, 1985 (the "WMA Registration Eligibility Period").

In Water Dep't of Fairhaven v. Dep't of Envtl. Prot., 455 Mass. 740, 747 (2010) ("Fairhaven"), the Supreme Judicial Court discussed to the 1987 WMA Guidance as part of its interpretation of the difference between registrations and permits. The SJC noted, "[w]ithdrawal by registration is treated very differently from withdrawal by permit. As noted earlier, the Act 'grandfathered' a registrant's entitlement to existing withdrawals, provided the registrant timely filed a registration statement and renewals." In a footnote citing the 1987 WMA Guidance, the SJC

decision in Fairhaven expounded on this issue and the significance of registration as it was understood to the drafters of the WMA:

> In 1987 and 1988, the department, then known as the Department of Environmental Quality Engineering, stated that the purpose of the registration process was to record water usage and "grandfather" the registrant's entitlement to existing withdrawals. See Department of Environmental Quality Engineering, Water Management Act Registration Guidelines 2 (July 1987) (registration "serves to document water use and to grandfather the rights to this amount of water to the registrant"); Department of Environmental Quality Engineering, The Water Management Act: Questions and Answers 7 (Sept. 1988) ("purpose of registration is to gather historical water withdrawal information and to grandfather certain previously existing withdrawals").
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> Fairhaven, fn. 7.

In the Fairhaven decision, the SJC also provided commentary on how a registration holder's withdrawal is protected:

> Once the registrant files its registration statement, the registrant is entitled to continue its existing withdrawal until the expiration of the registration statement, which may not exceed a term of ten years. G.L. c. 21G, § 5. On the expiration of a registration statement, 'the registrant shall be entitled, upon the filing of a renewal registration statement, to continue existing withdrawals specified in the registration statement for a period of ten years.' Id. The Act thereby guarantees that any registrant that registered before January 1, 1988, and timely renewed its registration statement **may continue forever** to withdraw water at the rate of its existing withdrawal.
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> Fairhaven, 455 Mass. at 742 (emphasis added).

The SJC went further to state that the "only exception to this guarantee," that a registrant is able to continue withdrawing water at the rate of its registered withdrawal, is that, if "a state of water emergency" is declared under G.L. c. 21G, § 15. Fairhaven, 455 Mass. at 742. In the context of a declared emergency, MassDEP "may issue an order directing a registrant 'to reduce, by a specified volume, the withdrawal or use of any water; or to cease the withdrawal or use of any

water.' G.L. c. 21G, § 17(3)." Fairhaven, 455 Mass. at 742. Absent these extreme conditions, a registrant's withdrawal is preserved and protected.

The WMA followed established report by the Special Legislative Commission of Water Supply (the "Water Supply Commission") to address concerns that the availability of the water supply in the Commonwealth could no longer be assumed. The Water Supply Commission studied what actions, if any, the Commonwealth should take to ensure water needs were met, to establish a definitive water supply policy, and recommend the means to meet the identified needs. As part of its work, the Water Supply Commission issued a study, Senate No. 1826, Report of the Special Commission Established to Make Investigation and Study Relative to Determining the Adequacy of the Water Supply of the Commonwealth, (1983) (the "Water Supply Commission Report), a copy of which is attached to Littleton's Complaint as **Exhibit 8A.** The Water Supply Commission Report highlighted the interconnection of ground and surface waters as a single hydrologic system, and the consequent inability of local authorities that have geographically limited powers to address issues or remedy problems inherent in the regional span of water sources. The Water Supply Commission Report recommended regulation of water withdrawals at the state level through the adoption of comprehensive new legislation, the WMA.

For new or increased withdrawals after the close of the WMA Registration Eligibility Period, applicants had to apply for a WMA permit from MassDEP. In contrast to registrations under G.L. c. 21G, § 5, Water Management Act permits issued by MassDEP under G.L. c. 21G, § 7, can be conditioned based a variety of factors, including the impact of the proposed withdrawal on other hydrologically

interconnected water sources and reasonable conservation measures, among other criteria and standards.

The WMA was enacted with a broad mandate and deliberately designed to establish a new water management regime.

In a Memorandum of Law, a copy of which is attached to the Complaint as Exhibit 8D, submitted by MassDEP in the context of an adjudicatory hearing regarding the extent to which the WMA effectively repealed prior special acts regarding water withdrawals, In the Matter of Freetown, Docket Nos. 91-103 and 91-112, Ruling on Department's Motion for Summary Decision, 7 DEPR 33 (March 30, 2000), MassDEP stressed the significance of the extensive legislative history for the WMA, including the 1978 Water Supply Commission Report [Exhibit 8B to the Complaint] and the broad intent of the WMA:

> The legislature clearly adopted the rationale of the [Water Supply Commission] Report in enacting the Water Management Act, which it proposed.[]...It is equally clear that the [Water Supply Commission] Report intended the [WMA] to occupy the field regarding withdrawals of water in the commonwealth. It states:
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> The [WMA] would establish a mechanism for registering existing withdrawals...The [WMA]'s requirement of water withdrawal permits for subsequent new users...would not apply to existing withdrawals of water...The resultant data gathering would enable protection of needs of existing uses within a framework of comprehensive management of ground and surface water withdrawal in Massachusetts.
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> Moreover, Section 3 of the [WMA] charges the water resources commission with adopting principles, policies, and guidelines necessary for the effective planning and management of water use and conservation in the commonwealth...Such principles, policies, and guidelines shall be designed...to assure comprehensive and systematic planning and management of water withdrawals and use in the commonwealth.

> There is no doubt that the legislature intended the Act to establish a state-wide, uniform system for authorizing and managing water withdrawals. (underline emphasis in the MassDEP Memorandum).

This language is consistent with principles of statutory interpretation, which hold that where "legislation had been enacted which seems to have been intended to cover the whole subject to which it relates, it repeals impliedly all existing statutes touching the subject and supersedes the common law." Inhabitants of the Town of Salisbury v. Salisbury Water Supply Co., 279 Mass. 204, 206-207 (1932).

Thus, this later-in-time statute adopted with express knowledge that older special acts regarding water rights existed combined with Concord's Registration under the WMA, prevents Littleton from taking the waters of Nagog Pond, regardless of what the 1884 Act said. The WMA cannot be read to preserve the 1884 Act which would undermine the unified administration of the waters of the Commonwealth as a "single hydrologic system." The mere reservation in the 1884 Act that "nothing contained in the Act" does not insulate Littleton from the 1985 WMA, particularly when the WMA was adopted with the express purpose of establishing a new means of acknowledging and distributing water rights in the Commonwealth.

Between the 1884 Act to the passage of the WMA in 1985, Littleton received a some authority to take water within Littleton in a 1911 Act, but it: (a) did not receive a specific authorization to take water from Nagog Pond from the "state board of health;" (b) did not record any taking; and (c) it did not actually take any water. During the WMA Registration Eligibility Period from 1981 to 1985, Littleton was not authorized to use and did not use Nagog Pond to establish a registration to Nagog Pond under the WMA. During the period from 1985 to the present, Littleton has not

even applied for a Water Management Act Permit to withdraw water from Nagog Pond.

In contrast, Concord took many actions to secure and perfect its right to withdraw water from Nagog Pond under the 1884 Act and under the WMA, including the following:

(a) executing takings of land and water rights over 100 acres around the pond starting in 1909 [Complaint, ¶¶ 3-4];

(b) establishing an intake pipe and dam as part of its water works to take water from Nagog Pond in 1909;

(c) using the water of Nagog Pond every year since 1909, including the WMA Eligibility Period from 1981 to 1985;

(d) applying for and receiving a Registration under the WMA to grandfather its existing withdrawal rights [Complaint, ¶ 40-41]; and,

(e) maintaining the validity of its WMA Registration through timely renewals [Complaint, ¶ 41].

In this manner, Concord perfected rights to withdraw water from Nagog Pond under the 1884 Act and secured the continued enjoyment of the rights it perfected under the regulatory regime ushered in with the WMA. Therefore, through its actions and compliance with the 1884 Act and the WMA, Concord perfected its rights, while Littleton never obtained an authorization to take water from Nagog Pond.

Furthermore, Concord holds the right to withdraw the entire firm yield of Nagog Pond. Therefore, there is no volume of water from Nagog Pond that MassDEP could grant to Littleton in a WMA Permit. Without an authorization to

withdraw water from Nagog Pond issued by MassDEP, Littleton cannot satisfy the prerequisite in Section 10 that "if...Littleton shall hereafter be authorized to take" the water of Nagog Pond.

While not necessary to resolve for the purposes of this Motion to Dismiss, it is also possible that Littleton is precluded from attempting to take Nagog Pond as a water supply, because M.G.L. chapter 40, section 38, states that a "city or town having a water supply or water distributing system may develop and use any source of water supply within its limits, not already appropriated for purposes of public water supply." (emphasis added). While Littleton may argue that G.L. c. 40, § 38, which was adopted in 1938, does not apply to Chapter 617 of the Acts of 1911, the fact is Littleton still has not performed a taking to get water rights to Nagog Pond.

G.L. c. 40, § 38 was amended in 1990 – after the adoption of the WMA, which indicates that the statute's prohibition on using sources that are already appropriated for water supply is consistent with the structure and intent of the WMA. The viability of G.L. c. 40, § 38 is fatal to Littleton's desire to develop Nagog Pond. Nagog Pond has already been appropriated to Concord and its use has been grandfathered by a WMA registration. Therefore, Littleton is not able to be authorized to take water from Nagog Pond, and this Petition for an assessment of damages is premature and should be dismissed.

D. The Language of Section 10 Only Gives Littleton Some Priority over Concord with Respect to Directly Conflicting Withdrawals that Have Not Occurred.

Even assuming for the sake of argument that Section 10 of the 1884 Act is still valid after the Commonwealth adopted the WMA, the legislation only gave

Littleton *some* priority over Concord's use of Nagog Pond in very *limited* circumstances. Section 10 restricts the incidents where Littleton might have priority to the following: " [i]f [for] any reason the supply of water in said pond shall not be more than sufficient for the *needs of the inhabitants* of said towns of Acton and Littleton, then the *needs of the inhabitants* of said towns shall be first supplied."

According to Littleton's own Water System Capacity Analysis report [Exhibit 5 to the Complaint], a primary driver for Littleton's interest in obtaining more water is the Patriot Beverage bottling plant. Based on the Water System Capacity Analysis, Patriot Beverage will be the major factor contributing to an increase in the average daily use of water in Littleton. Even assuming that a manufacturing interest could be construed as an "inhabitant," given that Patriot Beverage's business is just to bottle water from Littleton's public water supply and export it for sale throughout New England as Pure Leaf Tea or Aquafina bottled water, such usage cannot be considered to be meeting the '*needs of the inhabitants*," as the 1884 Act intended as it tried to balance access to a Great Pond among competing municipal public water suppliers.

Setting aside whether Littleton's plan for the water comport with the provisions of the 1884 Act, it is still fatal for both counts in Littleton's Complaint that there are no actual competing withdrawals. Thus, there is no actual conflict regarding the allocation of the active withdrawals from the pond. Unless and until there is a conflict that results in the Towns not having sufficient supply, there is no need for a damages assessment. Without actual conflicting withdrawals, the damages provision in Section 10 is not triggered and both of Littleton's counts are premature.

CONCLUSION

Accordingly, the Court should dismiss Littleton's Complaint and issue an Order dismissing this action as not ripe for adjudication for an assessment of damages through Count I, or for a declaratory judgment regarding water damages in Count II, because Littleton has not satisfied the prerequisite criteria in Section 10 of the 1884 Act to exercise any rights to Nagog Pond, let alone initiate an action for the appointment of three commissioners to assess damages under the 1884 Act. Without actual use of Nagog Pond by Littleton there is no actual controversy regarding an assessment of water damages and no need for the SJC to appoint commissioners to determine those water damages.

Respectfully submitted,
Town of Concord
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CERTIFICATE OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail, postage prepaid, (~~hand-delivering a copy of same~~) to all counsel of record on Dec. 21, 2018