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ENVIRONMENTAL AND LAND USE LAW

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January 8, 2019

By FedEx

Clerk
Land Court
3 Pemberton Square, 5th Floor
Boston, MA 02108

RE: **Town of Concord v. Littleton Water Department**
Land Court No. 18 MISC 000596 (KCL)

Dear Sir/Madam:

I enclose for filing and docketing the “Partially Assented-To Joint Motion of the Town of Acton and the Water Supply District of Acton to Intervene.” Please note that this case is scheduled for a Case Management Conference with Judge Long tomorrow, January 9, at 9:30 AM.

As noted in the enclosed motion, the plaintiff Town of Concord and the defendant Littleton Water Department (“Littleton”) have both assented to the intervention of the Town of Acton. Littleton has also assented to the intervention of the Water Supply District of Acton (the “AWD”), but Concord will be filing an opposition to the AWD’s intervention.

Thank you for your attention to this matter.

Sincerely,



Jeffrey L. Roelofs

Enclosure

cc: Corey Pontes, Sessions Clerk for Judge Long (by email)
Peter Durning and John Shea (by email and mail) – Counsel for the Town of Concord
Thomas Harrington, Raymond Miyares and Bryan Bertram (by email and mail) –
Counsel for the Littleton Water Department
Mary Bassett, Esq. (by email and mail) – Counsel for the Water Supply District of Acton

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 18 MISC 000596 (KCL)

TOWN OF CONCORD,
Plaintiff,
v.
LITTLETON WATER DEPARTMENT,
Defendant.
v.
TOWN OF ACTON and the
WATER SUPPLY DISTRICT OF ACTON,
[Proposed] Intervenors.

**PARTIALLY ASSENTED-TO JOINT MOTION OF THE
TOWN OF ACTON AND THE WATER SUPPLY DISTRICT
OF ACTON TO INTERVENE**

The Town of Acton and the Water Supply District of Acton (“Acton Water District” or “AWD”) respectfully move pursuant to Massachusetts Rule of Civil Procedure 24 to intervene in this action in order to protect their rights to use Nagog Pond as a future water supply pursuant to Chapter 201 of the Acts of 1884 (the “1884 Act”) (Complaint, Ex. A).

Concord and the defendant Littleton Water Department (“Littleton”) have both assented to the intervention of the Town of Acton. Littleton has also assented to the AWD’s intervention, but Concord will be filing an opposition to the AWD’s intervention.

INTRODUCTION

Nagog Pond is a Great Pond located in Acton and Littleton. Through the 1884 Act, the legislature granted Concord a qualified right to use Nagog Pond as a water supply, which

Concord has done since the early 1900s. The 1884 Act also granted or reserved to Acton and Littleton the right to use Nagog Pond as a water supply if needed at some future date.¹

Through this action Concord seeks to nullify the 1884 Act in its entirety and, indeed, to nullify all special acts regarding water withdrawals adopted prior to enactment of the Water Management Act, G.L. c. 21G, in 1985.² Alternatively, Concord seeks a declaration that its right to withdraw water from Nagog Pond is “superior to any rights Littleton purports to hold pursuant to Section 10 of the 1884 Act.” Complaint, p. 19. Concord does not seek a declaration that expressly affects the rights of Acton or its inhabitants under the 1884 Act – focusing, instead, only on its current dispute with Littleton. However, because the 1884 Act treats Acton and Littleton similarly, any judicial declaration that nullifies or constrains the rights of Littleton under the 1884 Act will likely be interpreted or applied as also nullifying or constraining the rights of Acton and its inhabitants under doctrines of estoppel, preclusion, precedent or similar legal principles.

Intervention as of right is warranted because the interests of Acton and the AWD in preserving the rights afforded to Acton and its inhabitants under the 1884 Act are directly at stake in this action and diverge from and will not be adequately represented by Littleton. Mass.R.Civ.P. 24(a)(2). Alternatively, Acton and the AWD move for permissive intervention on similar grounds. Mass.R.Civ.P. 24(b).

¹ The 1884 Act provides, in part, that “if from any reason the supply of water in said pond shall not be more than sufficient for the needs of the inhabitants of the towns of Acton and Littleton, then the needs of the inhabitants of said towns shall be first supplied.” 1884 Act, § 10.

² Concord has requested a declaration “stating that the [Water Management Act] effectively repealed [all] special acts regarding water withdrawals adopted prior to the WMA.” Complaint, p. 18. That claim implicates the rights of many municipalities, water districts, entities and persons – all indispensable parties that, pursuant to Mass.R.Civ.P. 19(a), would have to be joined in this action before this Court could even entertain such a broad request for relief.

ARGUMENT

I. ACTON AND THE AWD ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(A)(2)

Under Mass. R. Civ. P. 24(a)(2), intervention as of right is appropriate when (1) the motion is timely, (2) the movant claims an interest relating to the property or transaction that is the subject of the litigation in which the movant wishes to intervene, (3) the movant shows that, unless able to intervene, the disposition of the action may, as a practical matter, impair its ability to protect its interest, and (4) the movant demonstrates that its interest in the litigation is not adequately represented by existing parties. Bolden v. O'Connor Cafe of Worcester, Inc., 50 Mass. App. Ct. 56, 61 (2000); Mass. R. Civ. P. 24(a)(2). Acton and the AWD satisfy these criteria.

A. This motion is timely

This motion is timely because it is being served near the outset of the action, prior to Littleton having responded to the Complaint, prior to any party undertaking any discovery and prior to the Court's Case Management Conference scheduled for January 9, 2019. The existing parties will not be prejudiced by Acton and the AWD joining the litigation at this point.

B. Acton and the AWD have direct and substantial interests that may be impaired by this litigation

The 1884 Act, which Concord seeks to effectively void through this action, grants and reserves important rights to the Town of Acton and to Acton's inhabitants. As discussed above, although Concord does not seek a declaration that explicitly affects the rights of Acton or its inhabitants under the 1884 Act, any judicial declaration that nullifies or constrains the rights of Littleton under the 1884 Act will likely be interpreted or applied as also nullifying or constraining the rights of Acton and Acton's inhabitants.

The 1884 Act was enacted prior to the creation of the AWD in 1912. As such, the 1884 Act does not mention the AWD or grant any rights directly to it. Nonetheless, the AWD is the entity established by the inhabitants of Acton (who were expressly granted rights under the 1884 Act) for the purpose of securing and supplying water throughout the town of Acton.³ As such, the AWD, as the entity acting on behalf of Acton's residents with respect to water supply matters, has a direct and substantial interest in preserving the rights that the 1884 Act granted or reserved to Acton and Acton's inhabitants.⁴

C. The outcome of this action may impair or impede the ability of Acton and the AWD to protect their interests

Because the 1884 Act treats Acton and Littleton similarly, as discussed above, any judicial declaration that nullifies or constrains the rights of Littleton under the 1884 Act will likely be interpreted or applied as also nullifying or constraining the rights of Acton and its inhabitants under doctrines of estoppel, preclusion, precedent or similar legal principles. Said differently, if Concord gets the results it is seeking, it would not only foreclose Littleton from use of Nagog Pond, but Acton and the AWD as well.

³ The AWD was formed pursuant to Chapter 326 of the Acts of 1912 (Exhibit A) as an independent governmental body to supply water in South and West Acton. Over the course of the next several decades the AWD's boundaries were enlarged to encompass the entire town of Acton. See Chapter 667 of the Acts of 1962 (Exhibit B) (re-naming the district the "Water Supply District of Acton" and extending its boundaries to encompass all of Acton).

⁴ In determining whether an intervenor's interest is sufficient, courts take "a flexible, rather than rigid approach," and "the requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention." Cosby v. Dep't of Social Servs., 32 Mass. App. Ct. 392, 395-396 (1992). See also Ruthardt v. United States, 164 F. Supp. 2d 232, 245 (D. Mass. 2001) citing Public Service Co. of New Hampshire v. Patch, 136 F.3d 197, 204 (1st Cir.1998) (the criteria should not be read "discretely, but together, and always in keeping with a commonsense view of the overall litigation").

D. Littleton cannot adequately represent the interests of Acton or the AWD

Although Acton, the AWD and Littleton are aligned in wanting to preserve the validity and enforceability of the 1884 Act, Littleton's current water supply needs, interests and activities diverge significantly from those of Acton and the AWD – particularly with respect to Nagog Pond.

For example, Acton and the AWD have no interest in withdrawing water from Nagog Pond at this time and, accordingly, have not sought to exercise their rights under the 1884 Act to do so. Nor have they taken steps to constrain or appropriate Concord's withdrawal rights. In fact, the Acton Board of Selectmen recently issued a special permit providing the local zoning authority for Concord's proposed construction of a new water treatment facility along Nagog Pond, supporting Concord's continued withdrawal and treatment of water from Nagog Pond, and have otherwise worked cooperatively with Concord concerning its provision of water to Acton residents and businesses along its water main in Acton.

Littleton's interests and recent activities with respect to Nagog Pond have differed significantly from those of Acton and the AWD. Among other things, Littleton has taken affirmative steps to exercise its rights under the 1884 Act to withdraw water from Nagog Pond, including steps aimed at appropriating Concord's regulatory rights to withdraw water from Nagog Pond for its own use.⁵ Littleton's actions in that regard do not align with the interests of Acton and the AWD and, depending on how they proceed, may be in direct conflict with them.

⁵ See the letters from the Littleton Water Department to Concord included in Exhibits E and F to Concord's Complaint in this action. Separately, on December 7, 2018, Littleton filed a complaint with the Supreme Judicial Court ("SJC") petitioning the SJC to appoint three commissioners to ascertain the water damages Littleton will be obligated to pay Concord for its intended taking and use of the waters from Nagog Pond under the 1884 Act. Town of Littleton, Massachusetts, acting by and through its Board of Water Commissioners v. Town of Concord, Massachusetts, No. SJ-2018-0572. A copy of that complaint, without exhibits, is included as Exhibit C hereto.

Littleton and Concord have also apparently been in discussions regarding an agreement to allocate water withdrawals from Nagog Pond. See Complaint, ¶¶ 82-101. Although any allocation agreed to by Concord and Littleton may also impact the future rights or ability of Acton and/or the AWD to withdraw water from Nagog Pond, Concord and Littleton did not include Acton or the AWD in those discussions. Based on the allegations in Concord's Complaint, it also appears that those discussions did not address or even acknowledge the current or future rights or interests of Acton or the AWD in Nagog Pond.

In summary, although the interests of Acton and the AWD overlap with those of Littleton with respect to preserving the validity of the 1884 Act, they also diverge significantly. As such, Littleton cannot adequately represent the interests of Acton and the AWD.

II. ALTERNATIVELY, THE COURT SHOULD PERMIT ACTON AND THE AWD TO INTERVENE UNDER RULE 24(B)

Acton and the AWD also meet the standard for permissive intervention because their motion is timely and their “claim or defense and the main action have a question of law or fact in common” – namely, the ongoing validity and enforceability of the 1884 Act. Mass. R. Civ. P. 24(b). The Court has discretion in granting permissive intervention and must consider “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Mass. R. Civ. P. 24(b). See Corcoran v. Wigglesworth Machinery Co., 389 Mass. 1002, 1003 (1983) (“Whether a party should be allowed to intervene is a matter that is largely left to the discretion of the judge below.”).

Intervention will afford Acton and the AWD the opportunity to protect their direct and substantial interests in the outcome of this litigation. Also, because Acton's and the AWD's interests are closely aligned with respect to the issues presented in this litigation, they expect to

act jointly in this litigation to the extent possible. Their intervention will not unduly delay or prejudice the adjudication of the rights of existing parties.

Respectfully submitted,

TOWN OF ACTON,

WATER SUPPLY DISTRICT OF ACTON,

By its attorney,

By its attorney,



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Dated: January 8, 2019

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served upon all parties by having copies sent by email and mail on this 8th day of January, 2019 to counsel of record, as follows:

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Jeffrey L. Roelofs

EXHIBIT A

AN ACT RELATIVE TO THE EVIDENCE OF DEFENDANTS IN TRIALS OF CRIMINAL CASES IN THE SUPERIOR COURT. *Chap.325*

Be it enacted, etc., as follows:

At the trial of a criminal case in the superior court, upon indictment or appeal, the fact that the defendant did not testify at the preliminary hearing or trial in the lower court, or that at such hearing or trial he waived examination or did not offer any evidence in his own defence, shall not be used as evidence against him, nor be referred to or commented upon by the district attorney or other prosecuting officer.

Certain acts not to be used as evidence in trials of criminal cases.

Approved March 25, 1912.

AN ACT TO ESTABLISH THE WEST AND SOUTH WATER SUPPLY DISTRICT OF ACTON AND TO PROVIDE FOR SUPPLYING SAID DISTRICT WITH WATER. *Chap.326*

Be it enacted, etc., as follows:

SECTION 1. The inhabitants of the westerly and southerly part of the town of Acton, liable to taxation in that town and residing within the territory enclosed by the following boundary lines, to wit: — Beginning at a stone monument, said monument marking the corner of the towns of Littleton, Boxborough and Acton; thence south twenty-six degrees fifty-eight minutes west, on the boundary line between Boxborough and Acton, about fourteen thousand eight hundred and fifty-five feet to a stone monument marking the corner of the towns of Boxborough, Stow and Acton; thence south sixty-two degrees one minute east on the boundary line between Stow and Acton, ten thousand four hundred and fifty-six feet to a stone monument marking the corner of the towns of Stow, Maynard and Acton; thence south sixty-one degrees fifty-seven minutes east on the boundary line between Maynard and Acton about three thousand and forty-eight feet to a stone monument on said boundary line and on the westerly side of the highway leading from South Acton to Maynard, known as Maynard street; thence north fifty-six degrees fifteen minutes east about five thousand nine hundred and eighty-four feet to a stone monument on the highway leading from the Edwin Barker place, so-called, to the Old Stow road, now known as the Sudbury road, said monument being near the point where said Sudbury road crosses the Fitchburg division of the

The West and South Water Supply District of Acton established.

Boston and Maine Railroad, known as Parker's crossing; thence north thirty degrees forty-five minutes west about eighteen thousand eight hundred and fifty feet to the bound first mentioned, — shall constitute a water supply district, and are hereby made a body corporate by the name of the West and South Water Supply District of Acton, for the purpose of supplying themselves with water for the extinguishment of fires and for domestic and other purposes, with power to establish fountains and hydrants, and to relocate and discontinue the same, to regulate the use of such water and to fix and collect rates to be paid therefor, and to take, or acquire by lease, purchase or otherwise, and to hold property, lands, rights of way and other easements for the purposes mentioned in this act, and to prosecute and defend all actions relating to the property and affairs of the district.

May acquire
and hold cer-
tain waters,
etc.

SECTION 2. Said water supply district, for the purposes aforesaid, 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 town of Acton or in the town of Boxborough, and the water rights connected with any such water sources. Said district may also take, or acquire by purchase or otherwise, and hold, all lands, rights of way and other easements necessary for collecting, storing, holding, purifying and preserving the purity of the water and for conveying the same to any part of said district: *provided, however*, that no source of water supply and no lands necessary for preserving the quality of the water, shall be taken or used without first obtaining the advice and approval of the state board of health, and that the location of all dams, reservoirs and wells to be used as sources of water supply under this act shall be subject to the approval of said board. Said district may construct on the lands acquired and held under the provisions of this act, proper dams, reservoirs, standpipes, tanks, buildings, fixtures and other structures, and may make excavations, procure and operate machinery and provide such other means and appliances, and do such other things as may be necessary for the establishment and maintenance of complete and effective water works; and for that purpose may construct wells and reservoirs and establish pumping works, and may construct, lay and maintain aqueducts, conduits, pipes and other works under or over any land, water courses, railroads, railways and public or other ways, and along such ways in Acton and Boxborough, in such

Proviso.

manner as not unnecessarily to obstruct the same; and for the purpose of constructing, laying, maintaining, operating and repairing such conduits, pipes and other works, and for all proper purposes of this act, said district may dig up or raise and embank any such lands, highways or other ways in such manner as to cause the least hindrance to public travel on such ways in Acton and Boxborough; and all things done upon any such way shall be subject to the direction of the selectmen of the towns of Acton and Boxborough, respectively.

SECTION 3. Said water supply district shall, within ninety days after the taking of any lands, water rights, water sources, rights of way, or other easements under the provisions of this act, file and cause to be recorded in the registry of deeds for the county or district in which the same are situated a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for. The title to all land taken, purchased or acquired in any way under the provisions of this act shall vest in said West and South Water Supply District of Acton, and the land so acquired may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interest of said district.

Taking of
lands, etc., to
be recorded.

SECTION 4. Said district shall pay all damages to property sustained by any person or corporation by the taking of any land, water, water source, water right, right of way, or other easement, or by anything done by said district under authority of this act. Any person or corporation sustaining damages as aforesaid, and failing to agree with the district as to the amount thereof, may have the same determined in the manner provided by law in the case of land taken for the laying out of highways, on application at any time within two years after the taking of such land or other property or the doing of other injury under authority of this act; but no such application shall be made after the expiration of said two years; and no application for assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by the district under authority of this act. Said district may by vote, from time to time, determine what amount or quantity of water it proposes to take and appropriate under this act; in which case any damages

Damages.

caused by such taking shall be based upon such amount or quantity until the same shall be increased by vote or otherwise, and in that event said district shall be liable further only for the additional damage caused by such additional taking.

West and
South Water
Supply Dis-
trict of Acton
Water Loan.

SECTION 5. Said district, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, may issue from time to time bonds, notes or scrip to an amount not exceeding one hundred thousand dollars. Such bonds, notes or scrip shall bear on their face the words, West and South Water Supply District of Acton Water Loan; shall be payable at the expiration of periods not exceeding thirty years from their respective dates of issue; shall bear interest, payable semi-annually, at a rate not exceeding four and one half per cent per annum; and shall be signed by the treasurer of the district and countersigned by the water commissioners hereinafter provided for. Said district may sell such securities at public or private sale, upon such terms and conditions as it may deem proper: *provided*, that they shall not be sold for less than their par value. The town of Acton may, at its annual town meeting or at a legal meeting called for the purpose, guarantee the payment of such bonds, notes or scrip.

Proviso.

Payment of
loan.

SECTION 6. Said district shall, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments, beginning not more than one year after the first issue of the said securities, as will extinguish the same within the time prescribed by this act; and when a vote to that effect has been passed a sum which, with the income derived from water rates, will be sufficient to pay the annual expense of operating its water works and the interest as it accrues on the securities issued as aforesaid by said district, and to make such payments on the principal as may be required under the provisions of this act, shall without further vote be raised annually by taxation in the manner hereinafter provided.

Certified copy
of vote to
assess a tax to
be sent to the
assessors, etc.

SECTION 7. Whenever a tax is duly voted by said district for the purposes of this act, the clerk shall send a certified copy of the vote to the assessors of the town of Acton, who shall proceed within thirty days thereafter to assess the same in the same manner in which town taxes are required by law to be assessed. The assessment shall be committed to the town collector, who shall collect said tax in the manner provided by law for the collection of town taxes,

and shall deposit the proceeds thereof with the district treasurer for the use and benefit of said district. Said district may collect interest on overdue taxes in the manner in which interest is authorized to be collected on town taxes: *provided*, that the district at the time of voting to raise the tax shall so determine and shall also fix a time for payment thereof. Proviso.

SECTION 8. The first meeting of said district shall be called on petition of ten or more legal voters therein, by a warrant from the selectmen of the town of Acton, or from a justice of the peace, directed to one of the petitioners, requiring him to give notice of the meeting by posting copies of the warrant in two or more public places in the district seven days at least before the time of the meeting. The said justice of the peace, or one of the selectmen, shall preside at the meeting until a clerk is chosen and sworn, and the clerk shall preside until a moderator is chosen. After the choice of a moderator for the meeting the question of the acceptance of this act shall be submitted to the voters, and if it is accepted by a majority of the voters present and voting thereon it shall take effect, and the meeting may then proceed to act on the other articles contained in the warrant. First meeting.

SECTION 9. The West and South Water Supply District of Acton shall, after the acceptance of this act as aforesaid, elect by ballot three persons to hold office, one until the expiration of three years, one until the expiration of two years and one until the expiration of one year from the next succeeding annual district meeting, to constitute a board of water commissioners; and at every annual meeting thereafter one such commissioner shall be elected by ballot for the term of three years. All the authority granted to said district by this act, and not otherwise specifically provided for, shall be vested in said board of water commissioners, who shall be subject however to such instructions, rules and regulations as the district may by vote impose. Said commissioners shall appoint a treasurer of said district, who may be one of their number, who shall give bonds to the district in such an amount and with such sureties as may be approved by the commissioners. A majority of the commissioners shall constitute a quorum for the transaction of business. Any vacancy occurring in said board from any cause may be filled for the remainder of the unexpired term by said water supply district at any legal meeting called Water commissioners, election, term, etc.

for the purpose. No money shall be drawn from the district treasury on account of the water works except upon a written order of said commissioners or a majority of them.

Water rates,
etc.

SECTION 10. Said commissioners shall fix just and equitable prices and rates for the use of water, and shall prescribe the time and manner of payment. The income of the water works shall be applied to defraying all operating expenses, interest charges and payments on the principal as they accrue upon any bonds, notes or scrip issued under authority of this act. If there should be a net surplus remaining after providing for the aforesaid charges, it may be used for such new construction as the water commissioners may determine upon, and in case a surplus should remain after payment for such new construction the water rates shall be reduced proportionately. No money shall be expended in new construction by the water commissioners except from the net surplus aforesaid, unless the district appropriates and provides money therefor. Said commissioners shall annually, and as often as the district may require, render a report upon the condition of the works under their charge, and an account of their doings, including an account of receipts and expenditures.

By-laws, etc.

SECTION 11. Said district may adopt by-laws prescribing by whom and how meetings may be called, notified and conducted; and, upon the application of ten or more legal voters in the district, meetings may also be called by warrant as provided in section eight. Said district may also establish rules and regulations for the management of its water works, not inconsistent with this act or with the laws of the commonwealth, and may choose such other officers not provided for in this act as it may deem necessary or proper.

Penalty for
corrupting,
etc., water.

SECTION 12. Whoever wilfully or wantonly corrupts, pollutes or diverts any water obtained or supplied under this act, or wilfully or wantonly injures any reservoir, stand-pipe, aqueduct, pipe or other property owned or used by said district for the purposes of this act, shall forfeit and pay to the district three times the amount of damages assessed therefor, to be recovered in an action of tort, and upon conviction of any of the above acts shall be punished by a fine not exceeding one hundred dollars or by imprisonment in jail for a term not exceeding six months.

The central
part of the
town of Acton
added to the
district, etc.

SECTION 13. The inhabitants of the central part of the town of Acton liable to taxation in that town and residing

within the territory enclosed by the following boundary lines, to wit: — Beginning at a stone monument marking the corner of said towns of Littleton, Boxborough and Acton; thence south seventy-five degrees east about twelve thousand eight hundred and eighteen feet to a stone monument on the northerly side of the Lowell road, so-called, between the residences of Henry H. Hawley, Jr., and Luther Conant; thence south eleven degrees fifty minutes west about thirteen thousand one hundred and ninety-five feet to a stone monument near the point where the Fitchburg division of the Boston and Maine Railroad crosses the Sudbury Road, so-called, being the northeasterly corner of the West and South Water Supply District of Acton as described in this act; thence north thirty degrees forty-five minutes west along the northerly line of said West and South Water Supply District of Acton about eighteen thousand eight hundred and fifty feet to the place of beginning, — shall be added to and become a part of the body corporate of the West and South Water Supply District of Acton. The territory hereby annexed to said district and the inhabitants residing therein shall have all the rights, powers, and privileges, and be subject to all the liabilities and duties, pertaining to said district according to the provisions of this act, except as hereinafter provided. Upon the acceptance of this act by the voters of that part of the district described in this section, as provided for in section fifteen of this act, the water system shall, within a period of two years thereafter, be extended into and the water be distributed therein, and thereupon that part of the district shall be bound to return an income which, for a period of ten years, will yield annually an amount equal to six per cent of the cost and expense incurred or sustained in making such extension, and in the event that such income proves insufficient therefor, then a sum sufficient to make up the deficit shall be added to the amount of the tax to be annually assessed upon that part of the district. The treasurer of said district shall keep a separate account showing in detail the cost and expense incurred in making the said extension, and in the event of any dispute, difference, or question arising as to the amount of such cost and expense said commissioners shall have full power and authority to determine and fix the amount thereof.

Act to be
accepted by
voters.

SECTION 14. Sections one to twelve, inclusive, of this act shall take effect upon their acceptance by a majority vote of the voters of said district described in section one,

Time of taking
effect of sec-
tions one to
twelve.

present and voting thereon at a district meeting called in accordance with the provisions of section eight, within two years after the passage of this act; but the said sections shall become void unless the said district shall begin to distribute water to consumers within two years after the date of the acceptance of said sections as aforesaid.

Time of taking
effect of sec-
tion thirteen.

SECTION 15. Section thirteen of this act shall take effect upon its acceptance by a majority of the voters of that part of the district described therein, present and voting thereon at a district meeting called in accordance with the provisions of section eight within two years after the acceptance of said sections one to twelve as provided in section fourteen of this act.

Approved March 27, 1912.

Chap.327 AN ACT TO AUTHORIZE THE TAKING OF FLOUNDERS BY MEANS OF DREDGES AND TRAWLS IN THE WATERS OF THE TOWN OF EDGARTOWN.

Be it enacted, etc., as follows:

Taking of
flounders in
the waters of
Edgartown.

SECTION 1. It shall be lawful to take flounders in the waters of the town of Edgartown by means of dredges, beam trawls or otter trawls.

Repeal.

SECTION 2. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 3. This act shall take effect upon its passage.

(The foregoing was laid before the Governor on the twentieth day of March, 1912, and after five days it had "the force of a law", as prescribed by the Constitution, as it was not returned by him with his objections thereto within that time.)

Chap.328 AN ACT TO AUTHORIZE THE TOWN OF ASHBURNHAM TO SUPPLY ITSELF AND ITS INHABITANTS WITH WATER.

Be it enacted, etc., as follows:

Water supply
for the town
of Ashburn-
ham.

SECTION 1. The town of Ashburnham may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes; may establish fountains and hydrants and relocate or discontinue the same; and may regulate the use of such water and fix and collect rates to be paid therefor.

May acquire
and hold cer-
tain waters.

SECTION 2. Said town, for the purposes aforesaid, 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, and the water rights connected with

EXHIBIT B

city or town for the amount of the tax which otherwise would have been collected on account of this balance.

SECTION 5. This act shall be applicable to taxes levied for the year nineteen hundred and sixty-two and subsequent years.

Approved July 16, 1962.

Chap. 667. AN ACT CHANGING THE NAME OF THE WEST AND SOUTH WATER SUPPLY DISTRICT OF ACTON TO THE WATER SUPPLY DISTRICT OF ACTON AND EXTENDING THE BOUNDARIES OF SAID DISTRICT.

Be it enacted, etc., as follows:

SECTION 1. Chapter 326 of the acts of 1912 is hereby amended by striking out section 1 and inserting in place thereof the following section: — *Section 1.* The inhabitants of the town of Acton, liable to taxation in that town and residing therein, shall constitute a water supply district, and are hereby made a body corporate by the name of the Water Supply District of Acton, for the purpose of supplying themselves with water for the extinguishment of fires and for domestic and other purposes, with power to establish fountains and hydrants, and to relocate and discontinue the same, to regulate the use of such water and to fix and collect rates to be paid therefor, and to take, or acquire by lease, purchase or otherwise, and to hold property, lands, rights of way and other easements for the purposes mentioned in this act, and to prosecute and defend all actions relating to the property and affairs of the district.

SECTION 2. Section 3 of said chapter 326 is hereby amended by striking out, in line 11, the words "West and South".

SECTION 3. Section 5 of said chapter 326 is hereby amended by striking out, in line 6, the words "West and South".

SECTION 4. Section 9 of said chapter 326 is hereby amended by striking out, in line 1, the words "West and South", and by striking out, in line 2, the words "as aforesaid".

SECTION 5. Section thirteen of said chapter three hundred and twenty-six is hereby repealed.

SECTION 6. Chapter two hundred and fifty-eight of the acts of nineteen hundred and forty-six is hereby repealed.

SECTION 7. All the powers, duties and obligations vested in the West and South Water Supply District of Acton shall, on the effective date of this act, vest in the Water Supply District of Acton and when used in any statute, rule, regulation or instrument acknowledging indebtedness or other obligation the phrase West and South Water Supply District of Acton shall mean the Water Supply District of Acton.

SECTION 8. Upon the acceptance of this act, all persons now in the service of the West and South Water Supply District of Acton shall continue to serve in the same capacity without loss of any rights, including, but not limited to, seniority, civil service, retirement, and group insurance rights.

SECTION 9. This act shall take effect upon its acceptance within two years from the date of its passage by a majority vote of the voters of the West and South Water Supply District of Acton present and voting thereon at a district meeting called for such purpose.

Approved July 16, 1962.

EXHIBIT C

**Commonwealth of Massachusetts
Supreme Judicial Court in and for Suffolk County**

The TOWN OF LITTLETON, MASSACHUSETTS, acting by
and through its BOARD OF WATER COMMISSIONERS,
Plaintiff,

v.

The TOWN OF CONCORD, MASSACHUSETTS,
Defendant.

No. : SJ-2018-

0572
**COPY
RECEIVED**

DEC 07 2018

MAURA S. DOYLE CLERK
OF THE SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

**COMPLAINT FOR ASSESSMENT OF STATUTORY WATER DAMAGES
UNDER STAT. 1884, C. 201 AND RELATED DECLARATORY RELIEF**

1. Nagog Pond is a freshwater, natural Great Pond lying along the boundary between the Towns of Littleton and Acton. Littleton has historically not needed to use Nagog Pond for its water supply needs. Although Littleton is authorized to use Nagog Pond for such a purpose and has the right to do so pursuant to Stat. 1884, c.201 and Stat. 1911, c.617, it has, until recently been able to supply its inhabitants with water from other sources.

2. During the period that it has been unneeded by Littleton (or Acton), Nagog Pond has historically served as a water supply to the Town of Concord. 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. That right, however, was limited and inferior to a reserved right left with Littleton: At any point in the future, Littleton

could take and hold Nagog Pond's waters—including waters held by Concord—and its inhabitants would be "first supplied" over Concord's. Stat.1884, c.201, §10.

3. In times of increasing water scarcity and a growing population, Littleton now needs to identify and develop new water supplies and intends to take and hold at least a part of Nagog Pond's waters toward that purpose. Concord, meanwhile, has developed alternative water supply sources over the last century.¹ It now also has emergency water capacity available to it from neighboring Acton and Bedford (the latter connected to the Massachusetts Water Resources Authority) in times of true need.²

4. Knowing that it will need to exercise its rights under the 1884 Act to secure water from Nagog Pond, Littleton has attempted to negotiate a fair and equitable process for doing so with Concord, including reimbursement to Concord of an appropriate sum of "water damages." Concord, after participating in a handful of negotiation session, has declined to participate further.

5. Accordingly, Littleton, acting by and through its Board of Water Commissioners, files this petition as the General Court commanded in 1884. See Stat. 1884, c.201, §10 (requiring application to the Supreme Judicial Court for ascertaining water damages related to Littleton's or Acton's taking of waters from Nagog Pond already taken by Concord). By this action, Littleton seeks to resolve its dispute with Concord over its imminent taking of Nagog Pond's waters. Count I of this petition requests the appointment of three commissioners, under Stat. 1884, c.201, §10, to ascertain a just and proportionate sum of "water damages" Littleton will be obligated to pay Concord for its intended lawful taking and holding of waters from Nagog Pond. Littleton further asks, in Count II, that this Court declare, pursuant to *M.G.L. c.231A*,

¹ <http://www.concordnet.org/363/Water-Supply>

² *Id.*; also <http://www.mwra.com/02org/html/locallist.htm>

the scope and extent of the term “water damages” as used in the 1884 Act and to instruct the three-commissioner panel consistent with that declaration.

PARTIES

6. The Town of Littleton, Massachusetts is a municipal corporation duly organized under the laws of the Commonwealth. Littleton Town Hall – its principal place of business – is at 37 Shattuck Street, in Littleton.

7. The Littleton Board of Water Commissioners is a five-member elected board whose authority derives from Stat. 1911, c.617 (the “1911 Act”). The Board’s principal place of business is 39 Ayer Road, in Littleton.

8. The Town of Concord, Massachusetts is a municipal corporation duly organized under the laws of the Commonwealth. Concord Town Hall – its principal place of business – is at 22 Monument Square, in Concord.

JURISDICTION AND VENUE

9. This Court has subject matter over this action in accordance with *M.G.L.* c.214, §§1, 2, and 8, and Stat. 1884, c.201.

10. This Court has personal jurisdiction over Concord under *M.G.L.* c.223A, §2.

11. Venue is proper in this Court under Stat. 1884, c.201.

FACTS

A. Overview of Nagog Pond.

12. Nagog Pond is a kettle hole lake situated in both Littleton and Acton.³ The actual boundary line between the two Towns runs approximately through the center of the Pond.

13. Nagog Pond is and has long been recognized as a natural Great Pond.

14. As with any other supply of water, Nagog Pond can only provide sustainable water supply to certain limits. Those limits can be expressed through its “firm yield” and “safe yield.”

15. In 2011, the U.S. Geological Service (“USGS”) determined that the “firm yield” of Nagog Pond—defined in the report as the maximum yield that can be delivered from a system without a failure, even during a severe drought—is 0.86 million gallons per day (MGD).

16. According to the most recent (2017) Annual Statistical Report filed by Concord with the Massachusetts Department of Environmental Protection, Bureau of Water Resources, Drinking Water Program, the “safe yield” of Nagog Pond is 1.23 MGD. *M.G.L. c. 21G*, §2 defines “safe yield” as “the maximum dependable withdrawal that can be made continuously from a water source including ground or surface water during a period of years in which the probable driest period or period of greatest water deficiency is likely to occur; provided however, that such dependability is relative and is a function of storage and drought probability.”

³ A kettle hole lake is a shallow, sediment filled body of water.

B. Concord's Request to the General Court to Use Nagog Pond as a Water Supply Source unless and until its Waters Were Needed by Littleton or Acton.

17. In the late 1800s, neither Littleton nor Acton used Nagog Pond as a source of water for either Town's respective inhabitants.

18. During this time, Concord had taken and was using the waters of Sandy Pond in Lincoln as a source of water for use by its inhabitants, among other sources. See St.1872, c.188 (authorizing Concord to "take and hold the waters of Sandy Pond" for purposes enumerated in statute).

19. After a severe, multi-year drought,⁴ Concord petitioned the General Court to allow it access to the waters of Nagog Pond, outside of its town borders, as an additional source of water supply.

20. The General Court obliged. On April 30, 1884, it approved "An Act To authorize the Town of Concord to increase its Water Supply." A copy of the 1884 Act is appended to this Complaint as Exhibit 1.

21. Through the 1884 Act, the General Court conferred a qualified authorization and right to Concord to take and use the waters of Nagog Pond, subject and secondary to any need by Littleton or Acton to take and use the same waters in the future. The 1884 Act set forth a framework of rights and obligations to implement that Legislative intent.

22. Section 1 authorized Concord—subject to certain other authorization requirements in later sections—to "supply itself and its inhabitants and other persons, towns and corporations on the line of its water works with pure water" for specific, statutorily-enumerated purposes. St. 1884, c.201, §1.

⁴ U.S. Geological Survey Water-Supply Paper 2375 National Water Summary 1988-89-Floods and Droughts: Massachusetts (available at <https://md.water.usgs.gov/publications/wsp-2375/ma/>).

23. Sections 2 and 3 authorized Concord to “take and hold the waters of Nagog Pond” and provided corresponding authority to “take and hold by purchase or otherwise all necessary lands for raising, holding, diverting, and purifying such waters” and on those lands to “erect...proper dams, reservoirs, buildings, fixtures and other structures, and make excavations and embankments, and procure and operate machinery” for water supply purposes. Stat. 1884, c.201, §§2-3. At its option, Concord could either take all of Nagog Pond’s waters (*id.* §2) or only “a part of said waters” (*id.* §3). In the case of taking a water or water right, Concord was required to pay those proportioned damages only when “the water [was] actually withdrawn or diverted...” *Id.*

24. Section 10 reserved primary rights to Nagog Pond’s waters to the two Towns within which it is located: Littleton and Acton. See Stat. 1884, c.201, §10. That section states explicitly that none of the Act’s provisions “shall prevent” the Towns of Littleton and Acton “from taking the waters of Nagog Pond whenever said towns or either of them may require the same for similar purposes...” *Id.* The Act then goes on to subjugate Concord’s water supply rights to those of Littleton and Acton, commanding that “if from any reason the supply of water in said pond shall not be more than sufficient for the needs of the inhabitants of the towns of Acton and Littleton, then the needs of the inhabitants of said towns shall be first supplied.” *Id.*

25. Section 10 of the 1884 Act also anticipates that either or both of Littleton’s or Acton’s exercise of their superior rights to Nagog Pond’s waters might mean taking and holding waters previously taken and held by Concord. In such a circumstance, Littleton or Acton would be obligated to pay “water damages” to Concord for whatever “water rights” the Town took from Concord. Stat. 1884, c.201, §10. The General Court explicitly limited those “water damages” to only damages in a just and proportionate amount of whatever Concord had previously paid to “any persons or corporations for the taking of water rights from [Nagog Pond] or the outlet

thereof....” *Id.* The General Court declined to require the payment of any additional “water damages” or “damages” in any other form to Concord should Littleton or Acton, or both, choose to exercise their superior water supply rights.

26. Finally, Section 10 contemplates the possibility of a dispute over the “ascertain[ment]” of “water damages” owed to Concord. Stat. 1884, c.201, §10. Thus, the General Court said that “water damages” are to be “ascertained, if the parties fail to agree, by three commissioners to be appointed upon the application of either party by the supreme judicial court....” *Id.*

27. At its Annual Town Meeting the year following enactment of the 1884 Act, Concord voted to accept the Act’s provisions as the Act required. See Stat. 1884, c.201, §12.

C. Concord’s Taking and Holding of All of Nagog Pond’s Waters for Its Own Use in the Early 1900s.

28. It would not be until another quarter century passed, before Concord found the need to exercise its qualified right to take and hold Nagog Pond’s waters under the 1884 Act.

29. After a “[s]eries of dry years alternating with wet ones,” the Concord Water and Sewer Commissioners recommended in Concord’s Town Report that the Town “procure an additional supply [of water] from another source.” Seventh Annual Report of the Water and Sewer Commissioners, Concord Town Report, pp. 126-28 (for the year ending Jan. 31, 1909), appended to this complaint as Exhibit 2.

30. 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.”

31. On July 28, 1909, Concord recorded an Instrument of Taking in the Middlesex County Registry of Deeds, book 3457, Page 221-237. A copy of the original cursive instrument and a transcription of the original are appended to this Complaint as Exhibits 3 and 4.

32. The Instrument of Taking 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 dam at its outlet; and (iv) the littoral rights otherwise accruing to the owner of the adjacent properties thereby taken.

33. The July 28, 1909 Instrument of Taking and various other taking instruments recorded since that date, purport to take other property interests pursuant to the authority conferred by the 1884 Act.

34. On information and belief, none of the payments made in compensation for such takings constitute “water damages” within the meaning of Section 10 of the 1884 Act.

D. The General Court’s Enactment of the *Water Management Act to Create a Statewide Framework for Registering, Licensing, and Coordinating Water Withdrawals*

35. In the early 1980s, the General Court increasingly became aware that “the continued adequacy of the Commonwealth’s water supplies [could] no longer be taken for granted.”⁵ Thus, the General Court established a Special Commission to examine issues related to water scarcity and to report on those issues, including making recommendations. *Id.*

⁵ Report of the Special Comm’n Established (Under Chapter 13 of the Resolves of 1977 and Most Recently Revived and Continued by Chapter 9 of the Resolves of 1982) to Make an Investigation and Study Relative to Determining the Adequacy of the Water Supply of the Commonwealth (“Senate Report No. 1826”), Senate No. 1826 (Jan. 27, 1983).

36. In making its resulting report to the General Court in 1982, the Special Commission observed, among other items, that “In order to protect existing [water] users, a management framework which will enable water allocation in the future must be developed.”⁶ The Special Commission retained special legal counsel who provided a recommended framework and proposed implementing legislation.⁷ Special legal counsel’s accompanying report described the then-proposed *Water Management Act* as necessary to “establish a mechanism for authorizing new withdrawals of both ground and surface water in excess of a threshold volume....”⁸ That mechanism, according to special legal counsel, was the “minimum level of allocation regulation consistent with its management objectives.”⁹

37. The General Court acted in accord with these recommendations. 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.

38. Under the *Water Management Act* (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” that 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. Stat. 1985, c.592, §5. All non-registered withdrawals beyond that threshold amount

⁶ Senate Report No. 1826, p. 4.

⁷ *Id.*

⁸ *Id.* at 50.

⁹ *Id.*

now require a State-issued permit, in addition, of course, to some property or other legal right to withdraw the water in question. *M.G.L. c.21G*, §7.

39. Through this registration/permit overlay, the Commonwealth now manages the allocation of water withdrawals among those with water withdrawal rights and interests to ensure that, as a collective whole, those withdrawals do not endanger the future existence or replenishment of the Commonwealth's water supply. Nowhere in its text does the WMA assign, change, or otherwise alter property rights related to water withdrawals. Rather, as the "minimum level of allocation regulation consistent with its management objectives" (Senate Report No. 1826, p. 50), the WMA creates a State-level registration and permit framework that applies to and regulates then-existing and all future property rights to withdraw water.

40. In August 1987, Concord filed a Registration Statement pursuant to section 5 of the WMA, establishing its withdrawal of a total of 2.1 million gallons per day (MGD) from 10 withdrawal points, one of which was Nagog Pond. The Registration Statement does not specify what portion of the 2.1 MGD was being withdrawn from Nagog Pond.

41. 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.

42. On information and belief, Concord's average daily withdrawals from Nagog Pond since 2010 have never exceeded 0.13 MGD in any single year. Withdrawals have occurred in 100 or fewer days in each year since 2010, and the maximum withdrawal on any single day during that period was 0.84 MGD.

E. Littleton's Comprehensive Water Supply Planning for Its Increasing, Future Town Needs

43. Like many Massachusetts communities, Littleton has seen significant population growth in recent decades. That growth has come, unsurprisingly, with an increased demand for water, for use by the Town's residents and businesses.

44. The Littleton Water Department—responsible for supplying and distributing water within the Town's boundaries—currently operates a public water supply distribution system. That system serves 2,989 residential customers and 498 commercial customers.

45. Littleton currently withdraws water from six groundwater wells:

- Whitcomb TWF #3, DEP Source ID 2158000-01G
- Whitcomb GPW #1, DEP Source ID 2158000-02G
- Spectacle Pond Well, DEP Source ID 2158000-04G
- Replacement Well 2.1, DEP Source ID 2158000-05G
- Replacement Well 2.2, DEP Source ID 2158000-06G
- Replacement Well 2.3, DEP Source ID 215000-07G

Each of these wells is the subject of a permit issued by the Department of Environmental Protection (DEP), which sets the maximum volume of water that can be pumped therefrom on a single day.

46. The combined maximum volume of water that can be pumped from Littleton's six groundwater wells is 2.21 MGD.

47. Littleton does not currently utilize any water from Nagog Pond in its public water supply system.

48. Approximately 60% of Littleton's authorized withdrawals are the subject of a WMA Registration Statement filed with the Department of Environmental Protection (DEP) on or before January 1, 1988 and subsequently renewed on July 1, 1997 and August 8, 2007. The average daily volume of water withdrawals registered

by Littleton is 0.834 MGD. Littleton's Registration Statement is currently expected to expire on December 31, 2021 but may be renewed prior to that date.

49. Withdrawals in excess of Littleton's registered water volumes are currently also made from Littleton's water supply wells for which Littleton holds a WMA permit issued in March 1997 by DEP. The average daily volume of water withdrawals for which Littleton holds a DEP permit is 0.63 MGD.

50. Combining the Town's registered and permit water withdrawal volumes, Littleton is authorized to withdraw an average daily volume of 1.464 MGD from its public water supply wells.

51. Since 2010, Littleton's average daily withdrawals for its public water supply in any single year have been as high as 1.23 MGD. Littleton's maximum withdrawal on any single day during that period was 2.12 MGD.

52. As a practical matter, Littleton's six groundwater wells must be pumped at or near their maximum authorized capacity during periods of peak demand. If any of the wells is undergoing maintenance or repair during a peak-demand period, Littleton currently would not have adequate pumping capacity to meet that demand.

53. Anticipating increased, future demands on its water supply, Littleton retained Tighe & Bond—expert engineering consultants—to conduct a Water System Capacity Analysis.

54. That resulting analysis, delivered on July 31, 2017 and appended to this complaint as Exhibit 5, describes Littleton as "facing the extremely challenging situation of meeting rapidly increasing customer demands while balancing the feasibility, schedule, and costs of water system upgrades and keeping rates reasonable." In addition to recommendations such as optimizing Littleton's existing water supply system, Tighe & Bond concluded that "to meet future water demands, additional withdrawals at existing well facilities or permitting of withdrawals at new facilities will be necessary."

55. Tighe & Bond projects that, in order to meet the expected demand of its residential and business customers, the Littleton Water Department would need to accommodate an increase in its daily peak withdrawal volume by 0.33 MGD by the year 2040. Tighe & Bond projects that the maximum daily demand in Littleton in 2040 will be 2.54 million gallons.

56. Consistent with this need for future water supply sources, Littleton is now actively engaged in planning for its future and is pursuing several additional sources of future water supply.

57. One such source is Nagog Pond.

58. Because of its projected future need, Littleton intends to exercise its right under the 1884 Act to withdraw water from Nagog Pond.

59. Littleton is authorized to take waters from Nagog Pond under both the 1884 Act and Stat. 1911, c.617 (the "1911 Act") that authorized Littleton to supply itself with water, including through the taking and holding of waters and water rights "within the limits of the town." A copy of the 1911 act is appended to this complaint as Exhibit 6.

60. 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 businesses.

61. Based on Littleton's current and projected peak demand for water, and upon completion of the procedures set forth in the 1884 Act, and subsequent WMA permitting, Littleton's anticipated maximum daily withdrawals from Nagog Pond by 2040 would prevent Concord from making withdrawals from the pond consistent with its historical peak withdrawal volumes without exceeding the Pond's firm yield.

F. Littleton's Attempt to Negotiate Cooperatively with Concord to Determine "Water Damages" Owed to Concord for Littleton's Taking of Waters from Nagog Pond

62. On February 20, 2018, Littleton—acting through its Water Department—gave Concord notice of its intent to exercise the full extent of its rights to withdraw water from Nagog Pond. A copy of that notice is appended to this complaint as Exhibit 7.

63. In that notice, Littleton offered to negotiate appropriate water damages to be paid to Concord as the result of its exercise of its withdrawal rights. Littleton stated that, in the event that an agreement on the amount owed could not be reached by August 1, 2018, it would commence the process specified in section 10 of the 1884 Act by filing an application in this Court.

64. Concord ignored that notice. On April 17, 2018, the Littleton Water Department wrote to Concord concerning the latter's failure to respond and stating Littleton's intent to file a petition for water damages in this Court on May 1, if Concord had no interest in responding to Littleton.

65. Concord thereafter responded and negotiations between the parties were conducted at meetings held on June 6, July 24 and November 7, 2018. At the final meeting, Concord's representatives informed Littleton that they were willing to discuss only a single issue: Littleton's pending application before DEP for a potential new well, which Littleton believes to be hydrologically unconnected with Nagog Pond.

66. The very next day, November 8, 2018, without any advance notice or warning to Littleton, and without any further offer of negotiation, Concord filed a complaint before the Land Court requesting a declaration that the 1884 had been impliedly repealed in its entirety by the enactment of the *Water Management Act*. (No. 18 MISC 000596.) A copy of that Complaint is appended to this Complaint as Exhibit 8.

**COUNT I: ASSESSMENT OF WATER DAMAGES
UNDER STAT. 1884, C. 201, §10**

67. The allegations set forth in paragraph 1 through 66 are incorporated by reference as if set forth in their entirety in this paragraph.

68. Littleton is authorized to take and hold the waters of Nagog Pond and associated water rights under Stat. 1884, c.201 and Stat. 1911, c.617 for its own use as a water supply.

69. Littleton's right and authorization to take and hold the waters of Nagog Pond and associated water rights is independent of and superior to Concord's right and authorization to take and hold the waters of Nagog Pond.

70. If Littleton's right and authorization come into conflict with Concord's rights and authorization to take and hold the waters of Nagog Pond, then Littleton's needs are to be supplied before Concord's.

71. 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.

72. Littleton has attempted in good faith to negotiate the water damages that would be owed to Concord for such a taking. Concord has rejected Littleton's overtures and further negotiations would be fruitless.

73. Under the 1884 Act, where the parties fail to agree on water damages, this Court is to appoint a panel of three commissioners to ascertain the amount of water damages payable to Concord.

74. Under the 1884 Act, Littleton is obligated to pay only for "water damages" and not any broader form of damages Concord may have paid to any person or entity related to its use of Nagog Pond.

75. “Water damages” are limited to only damages paid by Concord to “any persons or corporations for the taking of water rights from [Nagog Pond] or the outlet thereof,” Stat. 1884, c.201, §10.

76. On information and belief, Concord has never paid any sums to any person or corporation for the taking of “water rights” from Nagog Pond itself or from its outlet. See Stat. 1884, c. 201, § 10.

77. On information and belief, Littleton does not owe Concord any sum for water damages for the taking, in whole or in part, of the waters of Nagog Pond. A three Commissioner panel appointed by this Court should therefore decline to issue any award of “water damages” to Concord.

COUNT II: DECLARATORY RELIEF – SCOPE OF “WATER DAMAGES” SUBJECT TO COMPUTATION BY COMMISSIONERS

78. The allegations set forth in paragraph 1 through 77 are incorporated by reference as if set forth in this paragraph.

79. Pursuant to *M.G.L. c.231A*, §§1 and 2, this Court is authorized to determine the rights, duties, status or other legal relations of the parties under the laws of the Commonwealth.

80. Littleton has the previously-identified right and authorization under the 1884 Act and the 1911 Act to take the waters of Nagog Pond, as described in this Complaint.

81. Littleton intends to exercise that right.

82. As previously described, Littleton has attempted to negotiate with Concord concerning the amount of “water damages” that is obligated to pay upon exercise of that right, to no avail.

83. An actual controversy exists between Concord and Littleton because the two Towns disagree concerning the meaning and scope of the term “water damages” as included in the 1884 Act.

84. Any three-commissioner panel responsible for ascertaining water damages will require, in the performance of its duties, instruction on the meaning and scope of the term “water damages.”

85. A declaration by this Court defining the legal meaning and scope of “water damages,” as that term is used in the 1884 Act, is necessary to the final assessment of damages payable by Littleton to Concord for the former’s exercise of its right to take the waters of Nagog Pond.

PRAYER FOR RELIEF

WHEREFORE, the Town of Littleton respectfully asks this Court to enter judgment:

- A. In favor of the Town of Littleton on all Counts of this Complaint;
- B. Appointing a panel of three commissioners to ascertain the just and proportionate amount of water damages that should be reimbursed by Littleton as a condition of its exercise of its rights under the 1884 Act.
- C. Declaring that the term “water damages,” as used in Chapter 201 of the Acts of 1884 is limited to only those sums Concord has paid for the taking, purchase, or conveyance of “water rights from [Nagog Pond] or its outlet” and instructing the panel of commissioners concerning the same.
- D. Awarding the Town of Littleton other and further relief as the Court deems to be just, equitable, and proper.

Respectfully submitted,

THE TOWN OF LITTLETON MASSACHUSETTS,
acting by and through its BOARD OF WATER
COMMISSIONERS,

By its attorneys,



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Dated: December 7, 2018