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

THE TOWN OF LITTLETON'S OPPOSITION TO CONCORD'S MOTION TO DISMISS

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Plaintiff, the Town of Littleton, submits this Brief in opposition to the Defendant, Town of Concord's, Motion to Dismiss this action as "unripe" or without an actual controversy, under Mass. R. Civ. P. 12(b)(6), 365 Mass. 754 (1974).

INTRODUCTION

Littleton and Concord disagree—significantly—about their respective rights to Nagog Pond's waters. That disagreement has now yielded two lawsuits; this action and another in the Land Court. Those lawsuits followed months of negotiations between the towns, after Littleton put Concord on notice that it would exercise its right, under Section 10 of Stat. 1884, c.201 (the "1884 Act"), to start the process to take, hold, and use Nagog Pond's waters for municipal water supply, should those negotiations fail. Starting that process, and concluding it in a reasonable time, is critical to Littleton to support its short- and long-term municipal water planning, to meet the Town's growing water needs. The rights of each town to use Nagog Pond—and, particularly, Littleton—requires thoughtful but prompt resolution of several, interrelated issues in a single action and in a single court. Most important: they require resolution now.

Concord asks this Court, against that backdrop, to dismiss this action, under Mass. R. Civ. P. 12(b)(6), for lack of "ripeness" and as not presenting an actual controversy under *M.G.L.* c.231A. That Motion must fail. Where the parties disagree over their rights to Nagog Pond, and with Concord having already filed a parallel—but narrower—lawsuit in the Land Court, this action is hardly premature. To the contrary, it ensures that the entirety of the Nagog Pond dispute can be resolved as one action, efficiently, which Concord's Land Court lawsuit will not do. Allowing Concord's Motion would, contrary to the relevant legal standards, deny that reasonable, common-sense approach to

resolving the Nagog Pond dispute, serving only to dismember related legal issues that all arise from the same core controversy into separate, *seriatim* lawsuits.

Concord's attempt to do so must be rejected. For these reasons, as explained more fully below, this Court should deny Concord's Motion.

BACKGROUND

The pertinent background—including facts relevant to the Motion—are set forth in Littleton's Complaint. For brevity, those facts are not repeated here. Where relevant, they are incorporated in the Argument, below. Because Concord advances this Motion under Mass. R. Civ. P. 12(b)(6), this Court must accept all those facts and reasonable inferences drawn from Littleton's Complaint as true when deciding this Motion. See *Harvard Crimson, Inc. v. President and Fellows of Harvard Coll.*, 445 Mass. 745, 749 (2006) ("The allegations set forth in the complaint, as well as such reasonable inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true.").

To those facts, this Court may also take judicial notice that Concord has filed a separate action in the Land Court related to the same core controversy alleged in the Complaint in this action (the "Land Court action"). Specifically, Concord has requested a declaration from the Land Court, under *M.G.L.* c.231A, §§1-2, that the *Water Management Act, M.G.L.* c.21G, impliedly repealed the 1884 Act, meaning that Littleton no longer has any rights to exercise under Section 10 of the latter. (See Compl., Ex. 8.) Littleton has moved to dismiss that action for lack of subject matter jurisdiction. Given the interconnection between that action and this one, Littleton previously filed a courtesy copy of its motion to dismiss the Land Court action in this Court, to keep this Court apprised of that development. (Dkt. #6.)

Finally, shortly after filing its Complaint in this action, Littleton filed, in this Court, a Motion to Transfer and Consolidate Land Court Proceeding under

M.G.L. c.211, §4A (the "Motion to Transfer"). In that motion, Littleton asks this Court to transfer the Land Court action to this Court's docket, with this action, so that all legal claims related to the parties' disputed rights over Nagog Pond can be litigated efficiently, as part of one lawsuit, in a single court. (See Dkt. #24.) This Court has authority to take those actions under *M.G.L.* c.211, §4A. Concord filed its opposition to the Motion to Transfer on January 2, 2019. (See Dkt. #5.) The Motion to Transfer is thus fully briefed and ripe for decision.

ARGUMENT

Concord argues that the Complaint is "unripe" (as to Count I) and does not present an actual controversy under *M.G.L.* c.231A (as to Count II) as its bases for dismissal. (See Mot. at 1.) Neither is true.

The ripeness of Littleton's Count I—for an assessment of damages under Section 10 of the 1884 Act—must be analyzed under that statute's text.[1] Section 10 of that Act specifies a process for Littleton to take, hold, and use Nagog Pond's waters, which Littleton has properly commenced. The statutory text allows for an ascertainment of corresponding water damages (under Section 10) at any reasonable stage in that process; Count I, seeking such an ascertainment, is therefore ripe.

Littleton's Count II—for a declaration concerning the meaning of the term "water damages"'—must be analyzed under the required elements for a declaratory judgment claim; specifically, whether an "actual controversy" exists between the parties. Such a controversy exists—either in conjunction with, or even independent of, Count I—because the parties plainly disagree over the meaning of that term. That is the very definition of an "actual controversy" that

[1] Massachusetts courts, of course, are not restricted by Article III "case or controversy" requirements for "ripeness," see U.S. Const. art. III, §2, cl.1.

is properly advanced and ripe for review and resolution under *M.G.L.* c.231A. Particularly where resolving that controversy is an important component to resolving the towns' overarching dispute over Nagog Pond.

I. Count I of Littleton's Complaint to Ascertain Water Damages is Ripe Because Such a Proceeding May Occur at any Reasonable Stage of the Section 10 Takings Process.

A. The 1884 Act's Text and Purpose Allows for a Water Damages Proceeding at any Reasonable Time During a Section 10 Takings Process.

Analyzing the ripeness of a proceeding to ascertain water damages pursuant to Section 10 of the 1884 Act is a question of statutory interpretation. The critical question is when the General Court intended to authorize such an action to proceed. See, *e.g.*, *MacLaurin v. City of Holyoke*, 475 Mass. 231, 238 (2016). "[A]nalysis begins with the plain language of the statute, which is the 'principal source of insight into legislative intent.'" *Tze-Kit Mui v. Massachusetts Port Auth.*, 478 Mass. 710, 712 (2018), quoting *Water Dep't of Fairhaven v. Department of Envtl. Protection*, 455 Mass. 740, 744 (2010). Analyzing a text's meaning is never an isolated endeavor; "[t]his Court must consider that text "in connection with the statute as a whole and in consideration of the surrounding text, structure, and purpose of the [1884 Act]." *ENGIE Gas & LNG, LLC v. Department of Pub. Utilities*, 475 Mass. 191, 199 (2016), quoting *Custody of Victoria*, 473 Mass. 64, 73 (2015).

The text of the 1884 Act, in Section 10, sets forth a process for Littleton to exercise its rights to take, hold, and use Nagog Pond's waters. See Stat. 1884, c.201, §10. In several related clauses, Section 10 says:

> 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 if either of said towns of Acton or 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 this 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 corporations 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....

Id. That process has multiple steps, including a negotiation between Littleton and Concord concerning a "just and proportionate" amount of "water damages" owed to Concord by Littleton for a taking; a proceeding in this Court vis-à-vis a three-commissioner panel to ascertain water damages in the face of disagreement; and all of the steps associated with a municipal taking of water rights. See *id.*[2]

The question here is whether Section 10 says—as Concord wants—that a water damages ascertainment action, brought by Littleton in Count I, is *only* permissible once everything else in that process is done. Section 10's text supplies the answer: No. The General Court's differing word choices in the relevant clauses is the reason why. On the one hand, the Act is clear that the actual payment of water damages by Littleton to Concord must occur only *after* Littleton has concluded the takings process because the relevant clause creates the requirement for a town "so taking," and later refers to payment for waters a Town "may have taken." See *id.* That past tense verbiage is a command as to the payment's timing. See *id.* That is the final step in the process.

But, Section 10 lacks similar, past-tense verbiage with respect to when Littleton may commence an action to *ascertain* the amount of water damages it would eventually have to pay. The process for ascertaining the amount of water

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[2] The total process also now includes the overlay of statutes enacted since 1884 concerning municipal water supply. E.g., *M.G.L.* c.40, §§39A-41.

damages—first through negotiation and, failing that, through an SJC three-commissioner panel appointment—is in a different, comma-denominated clause that lacks any timing-specific text. See *id.* ("[T]o 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 . . .."). Where that clause lacks the precise timing language of the clause preceding it, the Court must read the different language to have meaning. See *Ciani v. McGrath*, No. SJC-12531, 2019 WL 122956, at *4 (Jan. 8, 2019) (holding that Legislative use of different words "strongly suggests that it intended to convey a different meaning"). That differing language, in turn, yields a ready interpretative outcome: While payment of water damages must occur at the end of a takings process, the General Court did not intend an action to ascertain water damages to be so temporally limited and, instead, left that process open to starting and concluding at any reasonable point during the takings process.[3] See *id.*

Interpreting Section 10 this way also flows from the purpose of the 1884 Act. It is uncontroversial to say that municipal water supply planning is important. That was true in the late 1880s[4] and is true now. In turn, identifying and utilizing water supplies requires advance planning in addition to all of the necessary steps to perfecting a taking of the necessary water rights. The 1884 Act's purpose was preserving Littleton's rights to use Nagog Pond for water supply. It follows from that purpose that the General Court meant to allow for ascertaining water damages at any reasonable or appropriate step in the Section

[3] Of course, that clause does make clear that a negotiation period must precede a judicial ascertainment of water damages but that is the only timing-related text in that clause.

[4] Indeed, Concord originally petitioned the General Court to use Nagog Pond after experiencing shortages in other water supplies, such as Sandy Pond in Lincoln. (See Compl. ¶18, citing St. 1872, c.188.)

10 process that would further that purpose. A flexible, rather than wooden, process, best ensures a straightforward exercise and smooth transition of water rights from one town to the other. There was no need or reason, and the General Court did not attempt, to micromanage how that process would play out. See Stat. 1884, c.201, §10.

B. Littleton's Complaint Establishes that This is a Reasonable and Appropriate Time to Commence a Section 10 Proceeding.

Now is the proper time, under Section 10's flexible text, for this proceeding to begin. Waiting any longer, as Concord demands, would only hobble Littleton's water supply planning and erect a barrier to Littleton's fair exercise of its Section 10 rights, something the General Court did not intend.

Littleton's Complaint pleads, in detail, concerning the Town's current water supply planning. (Compl. ¶¶43-61, Ex. 5.). That includes a "Water System Capacity Analysis" from Littleton's expert consultant, attached as Exhibit 5 to that Complaint. In brief, Littleton is "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." (Id. ¶54.) Thus, the consultant has concluded that "to meet future water demands, additional withdrawals at existing well facilities or permitting of withdrawals at new facilities will be necessary." (Id.) This has required careful analysis of alternative sources of water, including assessing the costs and timing associated with each. (See *id.*; Ex. 5.)

Those facts establish the appropriateness—indeed, necessity—of a Section 10 proceeding now, rather than later. Where Littleton is evaluating several, different water supply possibilities and the cost of each is an important factor to that consideration, Littleton must know now—before concluding a taking of Nagog Pond's waters or even proceeding down the potentially long road such a

process presents—how much that taking will cost. That information is necessary to reasonable, prudent, and sensible decision-making by the Town. And it is fully consistent with the flexible text of the 1884 Act, to further that Act's overarching purpose to allow Littleton to reclaim Nagog Pond's waters for its own use, should it need to do so.

Holding otherwise would mean interpreting the 1884 Act in a way that frustrates its purpose by erecting an enormous barrier to Littleton's exercise of its rights. As already explained, no text in the operative clause of the 1884 Act suggests the General Court intended such a result. To inject a timing requirement into Section 10 that does not exist would both rewrite that Section's text and yield the unreasonable result that Littleton would be required to take a significant government act—a taking—with no mechanism to responsibly and prudently assess the costs and consequences of doing so. That undermines Littleton's process, as explained in the allegations of its Complaint. Such an unreasonable result must be rejected. See, *e.g.*, *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336 (1982) ("We will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable").

In sum, both the text and purpose of the 1884 Act support the ripeness of Count I of Littleton's Complaint. Moreover, dismissal would lead to an unreasonable result, contrary to that Legislative purpose. Accordingly, this Court should deny Concord's Motion with respect to Count II of the Complaint.

II. Count II of Littleton's Complaint is Ripe Because Littleton Has Pled an Actual Controversy Over the Meaning of "Water Damages" in the 1884 Act, as Required by *M.G.L.* c.231A, §§1-2.

Count II of Littleton's Complaint is also ready for review now. In Count II, Littleton properly invokes the Court's jurisdiction under *M.G.L.* c.231A, §§1-2 to resolve an actual controversy between the parties concerning the meaning of the statutory term "water damages" in the 1884 Act. Resolving that dispute is

crucial to the parties' ultimate resolution of their disputed rights over Nagog Pond. And, important to the Motion, that is true regardless of whether Count I goes forward: While a declaration under Count II would instruct a three-commissioner panel appointed under Count I, even without a Count I, a declaration would serve to resolve an actual, existing controversy between the parties in their dispute over Nagog Pond.

To begin, an "actual controversy" is a required element for a declaratory judgment claim. See *Libertarian Ass'n of Mass. v. Secretary of the Commonwealth*, 462 Mass. 538, 546-47 (2012). The legal standards for an actual controversy are well settled. It means one party's assertion of a legal right in which that party has a definite interest; and denial of that interest by another party that also has a definite interest, with imminent litigation. See *id.* Such a dispute must be more than an abstract hypothetical, but one grounded in an actual dispute between two parties. *Penal Insts. Comm'r for Suffolk County v. Commissioner of Correction*, 382 Mass. 527, 531 (1981).

This action fits that bill. Not only is there an actual controversy, but it one that has even seen Concord file its own lawsuit. That follows the many months of negotiations between the parties concerning Nagog Pond water rights, already explained. (Compl. ¶¶62-66, Exs. 7-8.) Of course, the controversy over Nagog Pond implicates a number of legal issues, including interpreting the meaning of "water damages" as used in the 1884 Act as well as the issue Concord advances in the Land Court, whether the Water Management Act impliedly repealed the 1884 Act. But many cases under *M.G.L.* c.231A implicate *multiple* legal issues that concern the same core controversy. And sometimes certain of those legal issues are dependent or follow upon others. But that doesn't alter that those cases remain fundamentally one case, not many. This case is no different. There is a live, concrete controversy over these Towns' respective

rights to Nagog Pond's waters that, among other judicial action, requires a declaration of the meaning of "water damages," as Littleton requests in Count II.

Furthermore, that dispute requires adjudication now. As already explained, Littleton is now engaged in long-term municipal planning for its future water supply needs. The same reasons that necessitate a Section 10 water damages proceeding going forward now, support Count II's request for a declaratory judgment. Resolving these parties' legal differences is necessary now, where both Towns are presently engaged in water supply activities necessary to meet their respective future municipal needs.

In sum, both Counts of Littleton's Complaint are ripe and ready for resolution. But, even if the Court is inclined to dismiss Count I, there still remains an extant, existing controversy concerning the proper legal interpretation of "water damages" in the 1884 Act, a question of law that can and should be resolved even before a water damages action is commenced. Accordingly, this Court should deny Concord's Motion with respect to Count II of the Complaint.

III. Concord's Arguments to the Contrary Lack Merit and Would Unfairly Undermine Littleton's Exercise of its Section 10 Water Rights to Nagog Pond.

Concord advances several arguments to assert that Littleton's Complaint is unripe. Those arguments lack merit.

First, Concord argues that Count I is premature based on "conditions of" the 1884 Act." (The Town of Concord's Memo. of Law in Supp. of Its Mot. to Dismiss ("Memo.") at 7-9.) Concord essentially argues that Littleton must take certain steps—including concluding a municipal taking of Nagog Pond water rights—prior to initiating a Section 10 water damages proceeding. (Id.) Concord is wrong, for the reasons already explained. First, the 1884 Act's text does not impose a timing-based condition on the water damages proceeding and, second,

reading the 1884 Act to include such an unstated condition would be contrary to the Act's purpose, yielding an unreasonable result. (Section I.A., above.)

Second, Concord also questions Littleton's authority to take Nagog Pond water rights without prior consultations with MassDEP. (Memo. at 8-9.) The argument is of no moment. Concord points to Stat. 1911, chapter 617, which required—back in 1911—that Littleton first obtain the advice and approval of MassDEP[5] before taking waters for municipal water supply. Littleton identified that statute in its Complaint as part of the relevant chronology—that was the first time the General Court authorized Littleton to supply itself with water, including from Nagog Pond. (See Compl. ¶ 59.) The law and Littleton's municipal authority has since evolved. Littleton's Water Commissioners now also exercise Littleton's water supply authority under, *M.G.L.* c.40, §39B and related statutes. That statute gives water commissioners (such as Littleton's) authority to take and hold waters for municipal water supply and there is a process that provides for doing so that involves MassDEP. See *id.*; *M.G.L.* c.40, §§39A-41. All those statutes give Littleton the authority Concord contests. To be sure, the process for exercising that authority may involve MassDEP, but that does not mean that Littleton lacks authority to proceed with the process. As Littleton has already argued, the very purpose of the Section 10 water damages action and related declaration is to support Littleton's exercise of its authority to proceed through that process and perfect its rights to Nagog Pond's waters.

Third, and finally, the balance—and perhaps majority—of Concord's arguments do not really concern ripeness or actual controversy, but instead run to the substantive merits of the parties' dispute. (See Memo. at 9-17.) For

[5] The statute actually says the State Board of Health. MassDEP is the successor agency to that entity.

example, Concord spends many pages of briefing on its position that the *Water Management Act* impliedly repealed the 1884 Act. Suffice it to say, Littleton disagrees.[6] The reasons, however, are not germane to this Motion and can be left to another day. Concord's Motion is for lack of ripeness or lack of an actual controversy, not that Concord's substantive legal position should prevail. Where Concord has already filed its own lawsuit seeking a declaration from the Land Court on the very issue of implied repeal, that issue is indisputably both ripe and presents an actual controversy. That the parties disagree on that issue's substance does not vitiate the existence of that controversy and does not support Concord's Motion.[7] Arguing the substance of that issue, in the guise of G.L. c. 231A's "actual controversy" requirement, only confuses matters where Concord already seeks a declaration on that same subject in the Land Court—not only is the issue live but it is one that should be decided only after the two cases are consolidated, to avoid duplicate litigations.

And, at bottom, all of this underscores the central flaw of Concord's Motion. Concord does not ask to dismiss a premature action but, rather, to dismember the component parts of a core, ripe controversy (over Nagog Pond)

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[6] Among other reasons, there is a heavy presumption against implied repeal. Instead, statutes should be read harmoniously where ever possible. See *Commonwealth v. Hudson*, 404 Mass. 282, 285-86 (1989). Here, the 1884 Act and Water Management Act are harmonious—the Water Manage Act is a State regulatory system for managing cumulative water withdrawals from connected water resources. See *M.G.L.* c.21G. It does not speak to or affect individual's or entity's underlying rights to use a water resource in the first place. See *id.* There is no reason the Water Management Act cannot regulate against an underlying assignment of water rights pursuant to Section 10 of the 1884 Act.

[7] If that were true, then no declaratory judgment action would need proceed to the merits—the mere assertion by one party that it was right and the other wrong would mean that all such lawsuits would be decided on the actual controversy requirement. That is not the law.

into separate, *seriatim* lawsuits. No principle of "ripeness" or law demands doing this. Lawsuits regularly require resolving multiple, interrelated legal and factual issues, some of which depend upon or turn others. By first filing a lawsuit in the Land Court—where Littleton could not file this action[8]—and now moving to dismiss this case, Concord seeks to litigate the core controversy over Nagog Pond piecemeal. Where Littleton is the party that seeks to exercise rights and needs to do so in a timely fashion to meet future needs, this path may benefit Concord, but it is not the proper one. Certainly, such piecemeal resolution prejudicing Littleton's exercise of its rights could not have been the General Court's intent when enacting the 1884 Act.

IV. The Court Should Pair Denial of this Motion with an Order Allowing Littleton's Motion to Transfer.

If Concord's Motion highlights anything, it is not a need to dismiss this lawsuit but a need, instead, to consolidate the two pending lawsuits over Nagog Pond into a single, consolidated action. The parties' dispute over Nagog Pond involves a number of related but distinct issues. Because Littleton is now engaged in future planning that implicates Nagog Pond, there is a present and important need to resolve those issues efficiently, without unnecessary delay but also without unduly wasting judicial resources in multiple, overlapping lawsuits.

In short, this case and the parallel Land Court action require sound case management to resolve this controversy. But so long as the cases are in different courts, that case management is impossible. Thus, after denying Concord's Motion, this Court should act on Littleton's pending Motion to Transfer. Specifically, this Court should allow that Motion. The Court should further order the scheduling of a case management conference, at which time the parties

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[8] The 1884 Act gives only this Court original jurisdiction over Section 10 damages actions and matters related to such actions. See Stat. 1884, c.201, §10.

can present to the Court a schedule for litigating a single, consolidated action to resolve fully the parties' existing controversy over the taking, holding, and use of Nagog Pond's waters.

CONCLUSION

For the reasons above, the Court should DENY Concord's Motion to Dismiss.

Respectfully submitted,

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Dated: January 18, 2019

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 ~~hand~~ on 1-18-19