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December 16, 2009

Patricia A. Cantor
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BY HAND

Clerk
Appeals Court
For the Commonwealth of Massachusetts
John Adams Courthouse
1 Pemberton Square
Suite 1200
Boston, MA 02108-1767

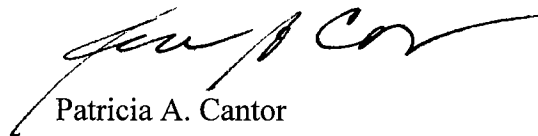
Re: Twenty Wayland, LLC v. Town of Wayland Historic District Commission
Middlesex Superior C.A. No. 09MICV02987
Appeals Court No. 09-J-535

Dear Sir/Madam:

Enclosed for filing please find the following:

1. Motion of the Massachusetts Municipal Association and The Town of Wayland for Leave to File Brief of *Amicus Curiae*;
2. Brief in Support of Petition for Interlocutory Relief; and
3. Certificate of Service.

Very truly yours,



Patricia A. Cantor

PAC/kjg

Enc.

cc: Massachusetts Municipal Association
Wayland Board of Selectmen
Brian C. Levey, Esq.
Barbara Hayes Buell, Esq.

389293/WAYL/0042

CERTIFICATE OF SERVICE

I, Patricia A. Cantor, hereby certify that on the below date, I served a copy of the foregoing Motion of the Massachusetts Municipal Association and The Town of Wayland for Leave to File Brief of *Amicus Curiae* and the Brief in Support of Petition for Interlocutory Relief by federal express to the following counsel of record:

Brian C. Levey, Esq.
Beveridge & Diamond, P.C.
15 Walnut Street, Suite 400
Wellesley, MA 02481

Barbara Hayes Buell, Esq.
Smith & Duggan, LLP
Lincoln North
55 Old Bedford Road
Lincoln, MA 01733

Dated: December 16, 2009



Patricia A. Cantor

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

APPEALS COURT
NO. 09-J-535
MIDDLESEX SUPERIOR COURT
C.A. No. 09MICV02987

TWENTY WAYLAND, LLC,

Plaintiff/Appellant

v.

TOWN OF WAYLAND HISTORIC
DISTRICT COMMISSION,

Defendant/Appellee

MOTION OF THE MASSACHUSETTS
MUNICIPAL ASSOCIATION AND
THE TOWN OF WAYLAND FOR
LEAVE TO FILE BRIEF OF
AMICUS CURIAE

The Massachusetts Municipal Association ("MMA") and the Town of Wayland ("Wayland" or "Town") hereby move this honorable Court for leave to file an *amicus curiae* brief in this appeal. In support of this Motion, the MMA and Wayland rely upon the following:

A. Interest of the Massachusetts Municipal Association.

The MMA is a nonprofit, nonpartisan association that provides advocacy, training, research and other services to Massachusetts city and town officials. The MMA also serves as an advocate for its member communities before the Massachusetts General Court, the executive branch, regulatory bodies and the courts. The MMA assists local governments to develop and pursue policies to more

effectively carry out their responsibilities to their citizens, while complying with applicable laws.

The issue in this appeal concerns the authority of municipal officials to appoint counsel for municipal departments and whether counsel may appear on behalf of a municipality notwithstanding that the counsel has not been appointed or authorized by the municipality to represent the municipality. The consequences of the November 17, 2009 Superior Court ruling ("Ruling" , a copy of which is attached to the Brief of *Amicus Curiae*), which is the subject of this appeal, are that counsel for a municipal department may be allowed to appear contrary to the local provisions regulating representation of the municipality and long settled state law. This issue is of great interest and importance to all municipal governments in the Commonwealth.

The question before this Court affects the powers of all Massachusetts municipalities in that if the Ruling is allowed to stand, a municipality's authority to control who is permitted to represent the municipality and who is allowed to control litigation will be seriously jeopardized, regardless of the fact that the counsel services may be provided *pro bono* and the city or town may not be directly paying for counsel services. The Ruling

being appealed and the arguments in support of it would permit municipal departments, boards, and commissions, and employees to engage counsel independently regardless of the municipality's position in the litigation and regardless of the authority of the municipality to control who appears as counsel for the city or town. This issue is of great significance to the work of the MMA and to all municipalities in the Commonwealth.

B. Interest of the Town of Wayland.

Wayland is a municipality of the Commonwealth of Massachusetts. Wayland is not a party to the underlying litigation, which is an appeal by the plaintiff Twenty Wayland, LLC ("Twenty Wayland") from a decision by the Town's Historic District Commission ("HDC") regarding a major development project in the Town. See "Memorandum of Law in Support of Petition of Plaintiff Twenty Wayland, LLC for Interlocutory Relief." Wayland has, for policy reasons, and based upon settled law, decided not to defend the appeal or appoint counsel to represent the HDC in the litigation. However, as a result of the Ruling, Wayland is being compelled to allow unauthorized counsel to appear on behalf of a department of the Town.


The Town's interest is not to participate as a party to the appeal. Nonetheless, since the Ruling purports to

remove from the Town Administrator, who is the executive official vested with the authority and discretion regarding the appointment of counsel, the authority to determine if counsel may appear for the Town, the Town requests the Court to allow it to appear as an *amicus curiae*.

A copy of the Brief of Amicus Curiae is filed herewith.

MASSACHUSETTS MUNICIPAL
ASSOCIATION AND THE TOWN
OF WAYLAND,

By their attorney,



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Date: December 16, 2009
388165.v2/WAYL/0042

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 09-J-535

TWENTY WAYLAND, LLC,

Plaintiff,

v.

TOWN OF WAYLAND HISTORIC DISTRICT COMMISSION,

Defendant.

BRIEF OF MASSACHUSETTS MUNICIPAL ASSOCIATION AND
TOWN OF WAYLAND IN SUPPORT OF
PETITION FOR INTERLOCUTORY RELIEF

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STATEMENT OF THE INTERESTS OF AMICUS CURIAE

A. Massachusetts Municipal Association

The Massachusetts Municipal Association ("MMA") is a nonprofit, nonpartisan association that provides advocacy, training, research and other services to Massachusetts city and town officials. The MMA also serves as an advocate for its member communities before the Massachusetts General Court, the executive branch, regulatory bodies and the courts. The MMA assists local governments to develop and pursue policies to more effectively carry out their responsibilities to their citizens, while complying with applicable laws.

The issue in this appeal concerns the authority of municipal officials to appoint counsel for municipal departments and whether counsel may appear on behalf of a municipality notwithstanding that the counsel has not been appointed or authorized by the municipality to represent the municipality. The consequences of the November 17, 2009 Superior Court ruling ("the Ruling", a copy of which is attached hereto as Addendum A), which is the subject of this appeal, are that counsel for a municipal department may be allowed to appear contrary to the local provisions regulating representation of the municipality and long settled

state law. This issue is of great interest and importance to all municipal governments in the Commonwealth.

The question before this Court affects the powers of all Massachusetts municipalities in that if the Ruling is allowed to stand, a municipality's authority to control who is permitted to represent the municipality and who is allowed to control litigation will be seriously jeopardized, regardless of the fact that the counsel services may be provided *pro bono* and the city or town may not be directly paying for counsel services. The Ruling being appealed and the arguments in support of it would permit municipal departments, boards, and commissions, and employees to engage counsel independently regardless of the municipality's position in the litigation and regardless of the authority of the municipality to control who appears as counsel for the city or town. This issue is of great significance to the work of the MMA and to all municipalities in the Commonwealth.

B. Town of Wayland

The Town of Wayland ("Wayland" or the "Town") is a municipality of the Commonwealth of Massachusetts. Wayland is not a party to the underlying litigation,

which is an appeal by the plaintiff Twenty Wayland, LLC ("Twenty Wayland") from a decision by the Wayland Historic District Commission ("HDC") regarding a major development project in the Town. See "Memorandum of Law in Support of Petition of Plaintiff Twenty Wayland, LLC for Interlocutory Relief." Wayland has, for policy reasons, and based upon settled law, determined that the Town should not defend the appeal or appoint counsel to represent the HDC in the litigation. However, as a result of the Ruling, Wayland is being compelled to allow unauthorized counsel to appear on behalf of a department of the Town.

The Town's interest is not to participate as a party to the appeal. Nonetheless, since the Ruling purports to remove from the Town Administrator, who is the executive official vested with the authority and discretion regarding the appointment of counsel, to control whether counsel may appear for the Town, the Town requests the Court to allow it to appear as an *amicus curiae*.

STATEMENT OF THE ISSUES

The MMA and Wayland adopt the Issues of Law as set forth by Twenty Wayland, LLC ("Twenty Wayland"), in its "Petition of Plaintiff Twenty Wayland, LLC for

Interlocutory Relief Pursuant to G.L. c.213, §118, par.1" ("Petition").

STATEMENT OF THE FACTS

The MMA and Wayland adopt the Factual Background as set forth by Twenty Wayland in its "Memorandum of Law in Support of Petition of Plaintiff Twenty Wayland, LLC for Interlocutory Relief" ("Memorandum").

ARGUMENT

- I. THE SUPERIOR COURT RULING VIOLATES EXPRESS LOCAL LAW AND LONG ESTABLISHED STATE LAW BY IMPERMISSIBLY INTERFERING WITH THE REGULAR COURSE OF CONDUCTING MUNICIPAL BUSINESS.
 - A. The Superior Court Ruling Violates Express Local Law.

In the cities and towns of the Commonwealth, a particular officer or board is vested with the authority to appoint counsel to represent the municipality in litigation. In Wayland that power is vested in the Town Administrator pursuant to Chapter 320 of the Acts of 2004 ("Special Act") and the Town of Wayland Code, §60.2.3 ("By-law") (copies of which are attached hereto as Addenda B and C, respectively). In relevant part, the Special Act, §2, provides:

"Notwithstanding any general or special law to the contrary, subject to ratification by a majority vote of the full membership of the board of selectmen, the town

administrator may appoint solely on basis of merit and fitness: . . . (viii) such other town officers, department heads and employees under the jurisdiction of the board of selectmen, except for members of appointed boards or committees, as authorized by order of the board of selectmen or by-law of the town." The town officers subject to appointment by the Town Administrator include legal counsel. Affidavit of Frederic E. Turkington, Jr., ¶4 (filed as Addendum to Twenty Wayland's Petition).

The By-law, §60.2.3, tracks the Special Act and provides: "The Town Administrator shall have the power and authority to: . . . (c) Appoint, on the basis of merit and fitness alone, subject to ratification by a majority vote of the full membership of the Board of Selectmen then serving, and, without cause, remove without the ratification of the Board of Selectmen, Town Counsel and special counsel, except for counsel to the School Committee."

No other order of the Wayland selectmen and no by-law or subsequent legal enactment authorizes any person or entity other than the Town Administrator to appoint counsel to represent the Town in any proceeding. Thus, no local law would permit counsel to be appointed other

than by the Town Administrator or to appear on behalf of a Wayland Town board (except for the special exception for the School Committee), such as, in this instance, the HDC.

Accordingly, the consequences of the Ruling are to directly contravene the Special Act and the By-law. As such, the Ruling seriously undermines and impermissibly interferes with the authority of the duly authorized local official to conduct the affairs of the municipality. The Ruling thus impermissibly preempts local control and involves the court in a matter over which it has no authority. Such interference impedes the orderly administration of local government, which the MMA strives to protect.

B. The Superior Court Ruling Violates Long Established State Law.

There is no question that Massachusetts case law is well-settled that a municipal department or board lacks the authority to hire its own counsel. In the leading case of Board of Public Works v. Board of Selectmen of Wellesley, 377 Mass. 621, 624 (1979), the Supreme Judicial Court reiterated the fundamental principle: "It is conventional learning that a municipal department is not permitted to bring suit for

the town without specific authorization from the town or from agents entitled to act for it unless, indeed, there is governing legislation conferring the power on the department. . . The rule serves to prevent confusion or conflict in the direction and management of municipal litigation." [Internal citations omitted].

Nothing in the facts, analysis or conclusion of the Wellesley case depends on whether counsel was retained to bring an affirmative action or to defend a lawsuit. Additionally, nothing in that case depends on whether or not counsel was being paid for legal services.¹ While the Supreme Judicial Court stated that controlling expenses was among the purposes of "municipal enactments centering legal activities in a counsel officially appointed", the Court also recognized that the "purpose" of such provisions is to "improve management." Id. at 625. Thus, regardless of whether counsel is being paid a fee, the interest of the designated municipal authorities in managing the business of their communities, including whether and

¹ For the purposes of this Brief in Support of the Petition, the MMA and Wayland assume, but do not admit, that counsel who purportedly is appearing for the HDC is not being paid for her services. See, Memorandum, p. 6, n.1.

under what circumstances to participate in litigation, is controlling.

Additionally, even assuming *arguendo*, that counsel is not being paid, there certainly are costs related to any litigation, such as administrative activities, document searches, copying, and the like, that a municipality would incur related to the conduct of litigation. In the event that counsel, not duly appointed by the relevant municipal authority, is allowed to represent the municipality, the municipality would be subject to various costs other than the direct payment of counsel fees. As such, the municipality, in fact, would be incurring expenses, notwithstanding its specific intention to not participate in the litigation.

Moreover, the entire argument of the HDC in the Superior Court is based on an erroneous claim - the claim that the HDC has the "inherent" right to hire counsel. No such "inherent" right exists for such a municipal board. See, Wellesley, supra. Indeed, not only is there no "inherent" right, the express rule is to the contrary: the HDC cannot appoint its own counsel unless the Town Administrator so authorizes.

Finally, the error of the Superior Court Ruling is demonstrated by the very recent ruling of another trial court judge in a strikingly similar matter. In Town of Rehoboth, et al. v. Roger Breault, et al., Land Court Misc. No. 09-405262-CWT, "Order Allowing the Plaintiffs' Motion to Strike Appearance of Counsel; Striking the Defendants' Motion for a Protective Order and Sanctions; and Dismissing the Answer" (A copy of which is attached hereto as Addendum D), a Land Court judge, based upon the Wellesley case, correctly ruled that counsel could not appear to defend the Town of Rehoboth zoning board of appeals where the appropriate officials in that community (the board of selectmen) refused to appoint counsel for the board. That is the same position taken by the Wayland Town Administrator regarding the HDC. In the Rehoboth case, the Land Court firmly rejected the argument that because counsel asserted that he was appearing *pro bono*, the appearance and answer should not be stricken. The Land Court correctly ruled, at p. 2: "this fact is immaterial; the Board of Appeals is without the executive authority to direct the legal interests of the Town of Rehoboth, whether Town funds are expended or not."

The Petition presents this Court with the opportunity to correct a clear error of law. This Court should take that opportunity to bring the instant litigation within the holding of established case law, law which also was very recently recognized and applied by another trial court.

II. SINCE THE HDC DOES NOT HAVE ANY INDEPENDENT AUTHORITY TO RETAIN COUNSEL, THE SUPERIOR COURT ERRED IN DENYING TWENTY WAYLAND'S MOTION.

There is also no question that the HDC lacks independent authority to retain counsel. Related to the rule explained in the Wellesley case, is the corollary principle that a department or board of a city or town has no authority to engage counsel absent approval from the municipal entity charged with employing counsel. As the Supreme Judicial Court held in O'Reilly v. Scituate, 328 Mass. 154, 154-55 (1951): "In the absence of legislative authority, it is settled that a department of a city or town has no authority to employ counsel. [Citations omitted.]" Moreover, "[be]nefit to the municipality is immaterial." Id. In that case, a claim for counsel fees for an attorney employed by the planning board, but not authorized by the board of selectmen (the entity with the power to hire counsel),

was rejected. Similarly, here, the HDC may not engage its own counsel and the Superior Court Ruling to the contrary was plainly beyond the court's authority.

The HDC is not a body separate or distinct from Wayland. While the HDC exists pursuant to state law, G.L. c.40C, the HDC, like many other municipal boards, is not an independent body for the purpose of hiring counsel in circumstances where the Town Administrator has determined that counsel should not be provided. O'Reilly, supra. Compare, Middleborough v. Middleborough Gas & Electric Dep't., 422 Mass. 583, 585 (1996) (whether a suit may lie between a town and a municipal body within it "depends on whether [the municipal body] and the town are sufficiently distinct as financial and political entities to support a suit by" one against the other).

Like the planning board or zoning board or department of public works that were the subjects in the Wellesley, Scituate, and Rehoboth cases, the HDC is an administrative body of Wayland. Like those entities, absent specific authorization, such a body has no authority to engage counsel, except as permitted by the municipal authority designated to appoint counsel. Accordingly, the Ruling is erroneous and cannot stand.

III. ALLOWING THE SUPERIOR COURT RULING TO STAND
WOULD SERIOUSLY UNDERMINE IMPORTANT PUBLIC
POLICY PRINCIPLES.

It would be extremely detrimental to the management and functioning of municipal government in Massachusetts if every local board or official were allowed to retain counsel, whether paid or not, whenever the board or official disagrees with the position of the entity possessing the power to determine when and if the municipality will be represented in litigation.

Moreover, allowing such an administrative body to take a position in litigation that is adverse to that of the city or town's executive authority would be fundamentally at odds with the public interest. The Superior Court's denial of Twenty Wayland's Motion is thus absolutely contrary to settled legal principles and to the underlying policies that govern a municipality's right to control who may appear as counsel for the municipality and when counsel may be appointed.

The fact that the HDC's purported counsel may be acting *pro bono* is of no consequence. To allow a board to enlist the aid of a volunteer attorney and to involve the city or town in litigation merely because

an attorney can be found to bring or defend a lawsuit without charging a fee, would vitiate the purpose of centralizing control over the municipality's legal affairs, here in the Town Administrator, and conflict with the orderly management of the municipality's litigation. Case law establishes that the HDC lacks executive authority, specifically, the power to direct the Town's legal affairs. This deficiency is not remedied, whether public funds are directly expended or not. See Town of Rehoboth, et al. v. Roger Breault, et al., supra, striking appearance of counsel for zoning board of appeals and dismissing board's answer and counterclaim against the town. Sound public policy dictates that nothing in the present case warrants any departure from the established rules.

The fatal flaw in the Ruling is the failure to recognize that the appearance of counsel would result in the appearance of an attorney who is not approved by Wayland (or any other municipality for that matter) to appear for and act on behalf of a city or town. In such event, the basic control by the designated municipal officials to conduct public business would be severely undermined. Unlike an individual who has a right to counsel in circumstances where fundamental liberty or

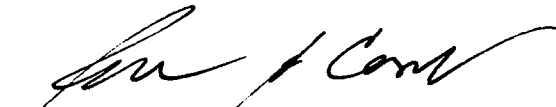
other interests are at stake, without specific statutory authority, a municipal board or official being sued regarding a decision enjoys no such protection. Absent specific power to the contrary, a board or official, as a division of the municipality, only is entitled to counsel when the designated authority determines that counsel should be provided. The public interest is protected in such instances because the public authorities vested with the power to appoint as counsel are vested with the discretion to determine when, if and whom to appoint as counsel to represent the municipality. In other words, only the duly authorized executive of the municipality should be allowed to speak for the municipality when it comes to allowing counsel to represent the city or town.

CONCLUSION

For the reasons argued herein, the Petition should be granted and the Ruling should be reversed and an order entered granting Twenty Wayland's "Motion to Disqualify Defendant's Counsel, to Strike Answer, and for Entry of Default."

MASSACHUSETTS MUNICIPAL
ASSOCIATION AND THE TOWN OF
WAYLAND

By their attorney,



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December 16, 2009

389248/WAYL/0042

ADD. A

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

Civil Docket MICV2009-02967

RE: Twenty Wayland, LLC v Wayland Historic District Commission

TO: Brian C Levey, Esquire
Beveridge & Diamond PC
15 Walnut St.
Suite 400
Wellesley Hills, MA 02481-4004

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 11/17/2009:

RE: Plaintiff Twenty Wayland, LLC's MOTION to Disqualify Defendant's Counsel, to strike Answer, and for Entry of Default; Affidavit of Marc J. Goldstein; Affidavit of Frederic E. Turkington, Jr.; Defendant, Wayland, Historic District Commission's opposition to plff's motion; Affidavit of Gretchen G. Schuler.

is as follows:

Motion (P#4) DENIED, In all respects, Under chapter 320 of the acts of 2004, An act relative to the Position of Town administrator in the Town of Wayland, The Town Administrator was given authority to appoint Town Counsel and special counsel, In the normal course, Town Counsel would be appointed to defend the HDC in a case such as the one before this court. The Town Counsel indicated he has a conflict of and is unable to do so pursuant to the rules of professional conduct. The Town Administrator has refused to appoint special counsel. The latter goes beyond its authority . The By Laws of the town are enacted for multiple purposes, one of which is to conserve town resources, but if the defendant has found an attorney to represent it pro bono, or if the individual members of the HDC are willing to pay for that attorney there is nothing in the By-Laws to preclude that. (Leila R. Kern, Justice) Notices mailed 11/18/2009

Dated at Woburn, Massachusetts this 18th day of November,
2009.

Michael A. Sullivan,
Clerk of the Courts

BY:

Arthur DeGuglielmo
Assistant Clerk

Disabled individuals who need handicap accommodations should contact the Administrative Office of the Superior Court at (617) 788-6130 -- cvdresult_2.wpd 1460135 motden newmdebb

ADD 83

ADD. B

Chapter 320 of the Acts of 2004

AN ACT RELATIVE TO THE POSITION OF TOWN ADMINISTRATOR IN THE TOWN OF WAYLAND.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. There shall be a town administrator in the town of Wayland.

Notwithstanding any general or special law to the contrary, the town administrator shall be the chief operating and administrative officer of the town and shall be accountable to the board of selectmen. The town administrator shall be responsible and accountable for ensuring there is appropriate administration and coordination, in the implementation of and adherence to town policies affecting town departments and in the development and execution of programs affecting various town departments.

SECTION 2. Notwithstanding any general or special law to the contrary, subject to ratification by majority vote of the full membership of the board of selectmen, the town administrator may appoint solely on the basis of merit and fitness: (i) a police chief (ii) a fire chief, and (iii) a finance director, who shall have the authority and responsibilities of a town accountant; and, without ratification by the board of selectmen (iv) a building commissioner, (v) 1 or 2 directors of the council on aging, (vi) a conservation administrator, (vii) a town treasurer and collector; and (viii) such other town officers, department heads and employees under the jurisdiction of the board of selectmen, except for members of appointed boards or committees, as authorized by order of the board of selectmen or by-law of the town. The town administrator shall have the power and authority to evaluate, discipline and, for cause, remove the appointees from all of those positions. The town administrator shall consult with relevant primary boards and committees working with the department heads before implementing personnel related actions.

SECTION 3. Notwithstanding any general or special law to the contrary, with respect to a department head working for an elected board other than the board of selectmen, the town administrator shall report to the elected board on the employee's job performance, at a minimum as part of the annual evaluation process, and advise to the elected board on personnel hiring and removal. Evaluation reports shall address under the code of the town of Wayland, chapter 60, section 2.2 (a) to (h), inclusive, thereof, and other similar interactions. Final authority over hiring, evaluating, disciplining and removal will remain with the elected boards, with input provided by the town administrator.

SECTION 4. Section 2 of chapter 307 of the acts of 1972 is hereby amended by striking out, in line 1, the word "selectmen" and inserting in place thereof the following words:- town administrator.

SECTION 5. Section 3 of said chapter 307 is hereby amended by striking out, in line 1, the word "selectmen" and inserting in place thereof the following words:- town administrator.

SECTION 6. This act shall take effect upon its passage.

Approved August 19, 2004.

Return to:

List of Laws passed in 2004 Session

General Court home page, or

Commonwealth of Massachusetts home page.

ADD. C



Search	Town of Wayland, MA	Index
Standard View		New Laws
§ 60-1. Appointment and qualifications.	CHAPTER 60. TOWN ADMINISTRATOR	§ 60-3. Removal of the Town Administrator.

This electronic version is provided for informational purposes only. For the official version please contact the municipality.

§ 60-2. Authority and responsibilities.

60.2.1 The Town Administrator shall be responsible for executing all of the activities noted in the Town Administrator's job description in compliance with federal and state laws and the Town's bylaws and Town policies. The Town Administrator shall be responsible for the management of all affairs of the Town and Town departments under the supervision and control of the Board of Selectmen and shall act by and for the Selectmen in any matter relating to the administration and operations of the affairs of the Town which they may assign to the position.

The Town Administrator shall be responsible for overseeing, coordinating, and making recommendations that may impact multiple Town boards and committees, broadly or in detail, regarding Town financial, personnel and legal activities. The Town Administrator will not set Town policy, but will ensure there is appropriate coordination in the implementation of Town policy working across all Town departments in conjunction with all elected and appointed boards and committees.

Certain department heads and elected boards and committees have state statutory authority or responsibility over specific job-related activities resulting in the implementation of technical decisions, as defined in Town bylaws or Town policies. The technical knowledge necessary to execute the specific job-related activities is held by the applicable department heads and elected boards and committees. The Town Administrator shall understand and have a working knowledge of the statutory authority and responsibility held by certain department heads and elected boards and committees so s/he/she can effectively support these officers in the execution of their duties. Nothing in this bylaw is intended to reassign state statutory authority or responsibility over specific job activities, as defined in Town bylaws or Town policies to the Town Administrator.

60.2.2 The Town Administrator shall, unless otherwise directed by the Board of Selectmen, manage and supervise all affairs of Town departments and committees under the jurisdiction of the Board of Selectmen.

With respect to all other affairs of the Town government, the Town Administrator shall:

- (a) With respect to Town policies and programs that impact multiple areas of Town government, working with all elected and appointed boards and committees and Town department heads, be accountable for ensuring there is appropriate administration and coordination both (i) in the implementation and on-going adherence to Town policies; and (ii) in the development and execution of programs;
- (b) Be accountable for ensuring that all Town boards and committees and employees under the jurisdiction of these Boards:

- 1) Comply with the Town's financial, personnel and legal policies and procedures;
 - 2) Comply with votes of Town meeting and Town bylaws and federal and state laws;
 - 3) With respect to the development, implementation and execution of policies and programs affecting various Town departments:
 - i. Coordinate the setting of priorities with the rest of the Town government;
 - ii. Communicate activities, including projects, plans and studies, so that necessary input is received from all areas of Town government that should be involved in those initiatives;
 - iii. Coordinate efforts so that cross-functional services to residents and others are effectively and consistently delivered, and
 - 4) Prepare, file and maintain the appropriate records and reports on behalf of the Town; but, in no event shall the Town Administrator be responsible for making policy decisions or implementing technical decisions provided for by state statute, Town bylaws or Town policies;
- (c) Work with the Finance Director and Finance Committee to:
- 1) Develop long-term financial strategies for the Town;
 - 2) Establish set budgetary guidelines to be used in the development of annual budgets;
 - 3) Review budgets of all Town departments and make recommendations to the affected boards and committees and to the Finance Committee about priorities important to budget development; and
 - 4) Evaluate actual expenditures and receipts against budgets and coordinate with affected department heads, boards and committees the development of plans to manage to the budget or obtain Finance Committee approval for Reserve Fund transfers, in advance of spending, when possible;
- (d) Maintain an inventory of all Town-owned real and personal property;
- (e) Serve as the Town's chief procurement officer under the provisions of Massachusetts General Laws Chapter 30B;
- (f) Working with the Town's Human Resource Director, be responsible for the daily administration of the Town-wide personnel system, including the maintenance of personnel records and the enforcement of personnel policies, rules and regulations and managing personnel costs to ensure maximum efficiency and fairness across Town departments;
- (g) Oversee crisis intervention in emergency situations, working with other key Town department heads, and address any systemic problems impacting multiple areas of the Town as they arise, being accountable for ensuring priority items are properly attended to and for bringing concerns about problem resolution to related boards and committees, and ultimately, to the Board of Selectmen for assistance in resolution, if necessary;

- (h) Annually evaluate the job performance of all Town officers and department heads under the jurisdiction of the Board of Selectmen after seeking input and recommendations from any appointed committees served by any such officers and department heads;
- (i) For department heads under the jurisdiction of elected boards, the Town Administrator will provide input to the elected board on the department head's job performance, at a minimum, as part of the annual performance evaluation process and will provide input to the elected board on personnel hiring and removal. Evaluation feedback will address the Town Administrator's interaction with the department head relating to areas addressed under Subsections (a) through (g) above, and other similar interactions. Authority for hiring, evaluating, disciplining and removal of such department heads will remain with the elected board, with input provided by the Town Administrator;
- (j) At least annually, provide input to the office of the Town Clerk about his/her performance.

60.2.3 The Town Administrator shall have the power and authority to:

- (a) Appoint, on the basis of merit and fitness alone, without the ratification by the Board of Selectmen, and evaluate, discipline or, for cause, remove, without the ratification of the Board of Selectmen:
 - 1) An Information Technology Director;
 - 2) A Town Surveyor or a Town Engineer;
 - 3) All other administrative and clerical employees in the Offices of the Board of Selectmen and the Town Administrator; and
 - 4) Such other Town officers, department heads and employees under the jurisdiction of the Board of Selectmen, except for members of appointed boards or committees, as authorized by order of the Board of Selectmen, bylaw or state law; and
- (b) Appoint, on the basis of merit and fitness alone, subject to ratification by a majority vote of the full membership of the Board of Selectmen then serving, and, evaluate, discipline and, for cause, remove, without the ratification of the Board of Selectmen, a Human Resource Director;
- (c) Appoint, on the basis of merit and fitness alone, subject to ratification by a majority vote of the full membership of the Board of Selectmen then serving, and, without cause, remove, without the ratification of the Board of Selectmen, Town Counsel and special counsel, except for counsel to the School Committee;
- (d) Upon enactment of a special act approved by the General Court of the Commonwealth of Massachusetts, appoint, on the basis of merit and fitness alone, with ratification by a majority vote of the full membership of the Board of Selectmen then serving, and evaluate, discipline and, for cause, remove, without the ratification of the Board of Selectmen:
 - 1) A Police Chief;
 - 2) A Fire Chief;
 - 3) A Finance Director, who shall have the authority and responsibilities of a Town accountant; and

(e) Upon enactment of a special act approved by the General Court of the Commonwealth of Massachusetts, appoint, on the basis of merit and fitness alone, without ratification by the Board of Selectmen, and evaluate, discipline and, for cause, remove, without the ratification of the Board of Selectmen:

- 1) A Building Commissioner;
- 2) One or two Directors of the Council on Aging;
- 3) A Conservation Administrator; and
- 4) A Town Treasurer and Collector.

60.2.4 The Town Administrator will consult with relevant primary boards and committees working with the department heads enumerated in Subsections (a) through (e) above, prior to implementing personnel related actions.

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ADD. D

(SEAL)

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT**

DEPARTMENT OF THE TRIAL COURT

BRISTOL, ss

CASE NO. 09 MISC 405262 (CWT)

TOWN OF REHOBOTH, by and through its
BOARD OF SELECTMEN, BUILDING
COMMISSIONER, and ZONING
ENFORCEMENT OFFICER,

Plaintiffs

v.

ROGER BREault, FRANK MOITZO,
JOY CAMBRIA, JERRY CADORETTE,
CHARLES DeBOIS, CHRIS DePALO, and
SUSAN ANDERSON, as they are members of
the TOWN OF REHOBOTH ZONING
BOARD OF APPEALS;
HAROLD MESSENGER; and
ANN MESSENGER,

Defendants

**ORDER ALLOWING THE PLAINTIFFS' MOTION TO STRIKE APPEARANCE OF
COUNSEL;
STRIKING THE DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND
SANCTIONS; AND
DISMISSING THE ANSWER**

The case comes before the court on motion of the Plaintiffs, the Town of Rehoboth, by and through its Board of Selectmen, Building Commissioner, and Zoning Enforcement Officer, to strike the appearance of counsel and dismiss counterclaims. The action underlying this motion is an appeal, pursuant to G.L. c. 40A, § 17, of a decision of the Defendant, the Town of Rehoboth Zoning Board of Appeals, to overturn and modify a cease and desist order issued by the Building Commissioner, concerning a parcel of real property, known as and numbered 152 Pine Street in Rehoboth, owned of record by Defendants, Harold Messenger and Ann Messenger. By this motion, Plaintiffs seek to strike the appearance of Attorney Hans A. Stoeckler as the attorney for the Board of Appeals on the ground that the Board of Appeals is not authorized to retain legal counsel. Plaintiffs seek also to dismiss the Counterclaims, pursuant to Mass. R. Civ. P. 12(b)(6) and (1). Defendant Board of Appeals argues that it is a necessary party to this litigation and therefore has a due process right to legal representation and that the Counterclaims are compulsory in nature and within the court's jurisdiction.

It is well-settled law in the Commonwealth that a department of a city or town has no inherent authority to retain legal counsel but must obtain specific authorization from the town or otherwise have such authorization conferred upon it by applicable legislation. Bd. of Public Works of Wellesley v. Bd. of Selectmen of Wellesley, 377 Mass. 621, 624 (1979) (and cases cited); O'Reilly, Jr. v. Town of Scituate, 328 Mass. 154, 154 (1951) (and cases cited). In the present case, it is undisputed that the Board of Appeals is a department of the Town of Rehoboth and was not authorized by the Board of Selectmen or applicable legislation to retain legal counsel. Accordingly, Attorney Stoeckler was not properly retained and does not represent the Town of Rehoboth through its Zoning Board of Appeals, and therefore, the court does not recognize the Answer. Attorney Stoeckler argues that he has agreed to represent the Board of Appeals pro bono. However, this fact is immaterial; the Board of Appeals is without the executive authority to direct the legal interest of the Town of Rehoboth, whether Town funds are expended or not. Accordingly, it is hereby:

ORDERED that the Plaintiffs' Motion to Strike Appearance of Counsel is **ALLOWED**; the appearance of Attorney Hans A. Stoeckler as the attorney for the Defendant, the Zoning Board of Appeals of the Town of Rehoboth is **STRICKEN**; and it is further

ORDERED that the Plaintiffs' Motion to Dismiss the Counterclaims is **ALLOWED**; moreover, the entirety of the Answer filed by Attorney Stoeckler on behalf of the Board of Appeals is necessarily also **STRICKEN**.

Defendants move also for a protective order, pursuant to Mass. R. Civ. P. 26(c), and sanctions from a letter from the Town Administrator to the Chairman of the Board of Appeals, dated September 30, 2009. The letter, written on behalf of the Board of Selectmen, requests documentation from the Board of Appeals, regarding the Board of Appeals's relationship with Attorney Stoeckler. As discussed previously, Attorney Stoeckler does not properly represent the Board of Appeals, and so this motion is not before the court. However, even if the motion were before the court, it is clear that the September 30, 2009 letter concerns a private town administrative matter and does not involve an issue in the present case. Therefore, the letter does not constitute an improper discovery request, which would require a protective order. Accordingly, it is hereby: **ORDERED** that the Defendants' Motion for Protective Order and Sanctions is **STRICKEN**.

So Ordered.

By the court (Trombly, J.).

Attest

Deborah J. Patterson
Recorder

Dated: November 2, 2009

A TRUE COPY
ATTEST:

Deborah J. Patterson
RECORDER