

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT  
PLCV2014-00199

CITY OF BROCKTON, and,  
WILLIAM G. CARPENTER, III, in his official capacity  
as MAYOR of the CITY OF BROCKTON

Plaintiff,

v.

BROCKTON CITY COUNCIL,  
And ROBERT SULLIVAN, in his official capacity  
As CITY COUNCIL PRESIDENT,

Defendants.

**OPPOSITION OF THE DEFENDANTS, BROCKTON CITY COUNCIL AND ROBERT SULLIVAN, TO PLAINTIFF'S MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION**

**I. FACTUAL BACKGROUND**

The Brockton Water Department is a duly constituted entity of the City of Brockton (hereafter "City") and has been established by the City for the purpose of supplying water to the inhabitants of Brockton, Whitman and a portion of Hanson. The Brockton Water Department is a public water supplier. The Department of Environmental Protection (hereafter "DEP") has primary responsibility to enforce the requirements of the Federal Safe Drinking Water Act, 42 U.S.C. § 300(f) et seq. (hereafter "Act"), and regulations promulgated thereunder by the United States Environmental Protection Agency (hereafter "EPA").

Pursuant to the authority conferred by M.G.L. c. 21A, § 16, DEP has the authority to issue civil administrative penalties and has adopted regulations governing the assessment of such

penalties at 310 CMR 5.00. Pursuant to the authority granted to DEP by M.G.L. c. 21G and c. 111, §§ 159, 160 and 160A, DEP has promulgated the Drinking Water Resolutions for the Commonwealth of Massachusetts at 310 CMR 22.00, which include provisions to assure the public health and safety of the customers served by a public water system.

M.G.L. c. 111 § 160 provides that the DEP may "... make rules and regulations and issue such orders as in its opinion may be necessary to prevent the pollution and to secure the sanitary protection of all such waters used as sources of water supply and to ensure the delivery of a fit and pure water supply to all consumers."

Since 1986 the City and DEP have been seeking a solution to the problems associated with providing an adequate source of potable water to the residents and businesses within the City.

The City established the unprecedented cooperation of Federal, State, Municipal, Environmental and Business interests working toward a resolution of a Regional Water Shortage. The department prepared and published, in December of 1993, a STRATEGY FOR MEETING THE WATER SUPPLY NEEDS OF BROCKTON AND OTHER TAUNTON RIVER BASIN AND COMMUNITIES THROUGH THE YEAR 2020. The strategy sought to allow for the lifting of a water connection moratorium / water bank that had hampered development in Brockton and the surrounding region. The Department had, in December of 1993, renewed Brockton's Emergency Declaration. See Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

One of the strategies required by the Department and set forth in its published Strategy was for Brockton to secure through Ordinance a re-delegation of authority for water management, demand reduction, and regulation to a board of water commissioners. The

delegation was required by the Department in order to avoid competition between water and other infrastructure needs. The Department noted that the success of its strategy depended upon autonomous Water Department Management and Fund Allocation and therefore required that the City move to re-delegate authority over Water Management to a Board of Water Commissioners.

The Department noted that political obstacles in Brockton could halt the City's efforts to uphold an inter-municipal agreement and noted the City Council's superseding authority to make water decisions. The Department sought to vest water decisions in a Board of Water Commissioners. See Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

Toward that end, the City worked with the Department toward formulation of an Ordinance establishing a Water Commission. See Exhibit 1- Affidavit of Former Mayor Winthrop Farwell. The Water Commission was established as the result of an Administrative Consent Order issued by the Department of Environmental Protection ("Department") of the Commonwealth of Massachusetts and was the collaborative effort of the City of Brockton and the Department of Environmental Protection to seek a solution to the problems associated with providing an adequate source of potable water to the residence. See Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

The Ordinance establishing a Water Commission in the City of Brockton was introduced in the City Council on December 27, 1994 by Councilor Paul Studenski. See Exhibit 2, Affidavit of City Clerk. Such proposed Ordinance provided for a Water Commission consisting of five (5) members as follows:

One (1) Ward Councilor and one (1) Councilor-At-Large, elected, elected annually by the City Council at their first meeting in January; and 3 residents of the City of Brockton appointed by the Mayor and confirmed by the City Council, for a term of three (3) years.

The proposed ordinance was referred to the City Council Committee on Ordinances and

Rules and multiple meetings were held by the Ordinance Committee to consider and review the Ordinance, including the following dates:

January 30, 1995;

February 21, 1995;

March 14, 1995;

May 11, 1995;

May 16, 1995;

June 8, 1995; and

August 2, 1995.

See Exhibit 2, Affidavit of City Clerk.

Officials of the Commonwealth Executive Office of Environmental Affairs and the Department of Environmental Protection were invited to and did appear at Ordinance Committee Meetings to review the proposed ordinance. Those officials that were invited and participated included Sharon D. McGregor, Executive Office of Environmental Affairs, George Crombie, Regional Director with the Department of Environmental Protection and Larry S. Dayian, Chief, Water Supply Section of Department of Environmental Protection. The DEP was involved in review and revision to the proposed ordinance. See Exhibit 2, Affidavit of City Clerk and Exhibit C attached thereto – June 12, 1995 letter to Mayor and City Council Members from George Crombie, Regional Director of DEP forwarding ordinance with DEP comments incorporated.

Various drafts were exchanged and reviewed by the City and the Department. The Department's then regional director, George Crombie, and Legal Staff were involved in the review of the Ordinance. See Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

On June 26, 1995, the City Council accepted a Motion to accept a Substitute Ordinance which, among other things, modified the makeup of the Water Commission to consist of three (3) residents of the City to be appointed by the Mayor, subject to confirmation by the City Council. On July 18, 1995, a meeting was held at the DEP offices in Lakeville involving Sharon D. McGregor, Executive Office of Environmental Affairs, George Crombie, Regional Director with the Department of Environmental Protection and Larry S. Dayian, Chief, Water Supply Section of Department of Environmental Protection and then Councilor, Thomas Plouffe and then Councilor Geraldine Creedon and the City Council's Legislative Council. On July 28, 1995, a meeting involving some members of the City Council and Officials of the DEP took place at which time the Water Commission Order was reviewed further. The issue of appointments by the President of the City Council was discussed. See Exhibit 2, Affidavit of City Clerk.

The then City Council was concerned as to its relinquishment and delegation of authority relative to water matters to a Water Commission and wanted to have a say in the makeup of the Water Commission through the appointment of two (2) of the members of the Water Commission by the President of the City Council. See Exhibit 3, Affidavit of Former Councilor Geraldine Creedon.

There never was any discussion or consideration by the City Council that the authority of the City Council President to make appointments to the Water Commission would terminate. There never was any discussion or consideration by the City Council that the City Council President would only make initial appointments to the Water Commission and thereafter the Mayor would have all the appointments. See Exhibit 3, Affidavit of Former Councilor Geraldine Creedon.

On August 2, 1995, a revised draft of the proposed ordinance was forwarded to DEP

Legal Counsel for review. The revised draft included provisions for the appointment of two (2) residents of the City by the President of the City Council. At the meeting of the Ordinance Committee the night of August 2, 1995, Councilor Plouffe introduced a Second Substitute Ordinance to the Ordinance Committee which, among other things, modified the proposed Water Commission to consist of three (3) residents of the City to be appointed by the Mayor and two (2) residents of the City appointed by the President of the City Council, consistent with the draft forwarded to DEP Legal Counsel. See Exhibit 2, Affidavit of City Clerk.

Thereafter, DEP provided the City of Brockton with a draft Administrative Consent Order that included provisions providing for the rescission of the Declaration of Water Supply Emergency upon the City establishing a Board of Water Commissioners. See Exhibit 2, Affidavit of City Clerk and Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

On September 25, 1995, the City Council enacted an Ordinance establishing a Water Commission for the City of Brockton by a unanimous vote of eleven (11) members. The Ordinance established a Water Commission consisting of three (3) residents of the City to be appointed by the Mayor and two (2) residents of the City appointed by the President of the City Council. On September 28, 1995, the Mayor, Winthrop H. Farwell, Jr. approved the Ordinance which included and two (2) residents of the City appointed by the President of the City Council. See Exhibit 2, Affidavit of City Clerk.

On November 2, 1995, the Department and the City entered into an Administration Consent Order which provided, in part:

Since 1986, The City and the Department have been seeking a solution to the problems associated with providing an adequate source of potable water to the residents and businesses within the City. The agreement provided herein represents the best efforts of the City to ensure that an ample supply of potable water is available to the City.

The Department has primary responsibility to enforce the requirements of the Federal Safe Drinking Water Act, 42 U.S.C. § 300 (f) et seq. (the "Act"), and regulations promulgated thereunder by the United State Environmental Protection Agency ("USEPA").

Pursuant to the authority conferred by M.G.L.C. 21A, § 16, the Department has the authority to issue civil administrative penalties and has adopted regulations governing the assessment of such penalties at 310 CMR 5.00.

Pursuant to the authority granted to the Department by M.G.L. c. 21G, and C. 111, §§ 156, 160 and 160A, the Department has promulgated the Drinking Water Regulations for the Commonwealth of Massachusetts at 310 C.M.R. 22.00, which includes provisions to assure the public health and safety of the customers served by a public water system.

A Declaration of Water Supply Emergency has been in effect since December 2, 1986, and has been extended every six months since that date. The most recent extension was verbally authorized on December 21, 1994 and formally authorized in a letter dated March 27, 1995 with a Water Emergency Extension and Order with an expiration date of June 23, 1995.

See Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

Mayor Farwell entered into the Administrative Consent Order as Chief Executive Officer of the City with the Department because it was in the public interest and it would be more productive not to expend considerable resources in time and litigation over disputed issues and more beneficial to use collective resources and time to undertake forthwith and without delay the actions provided in the Administrative Consent Order. See Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

In paragraph 17 of the Administrative Consent Order, the Department agreed to rescind the existing Declaration of Water Supply Emergency then in effect in the City upon receipt by the Department of Documentation from the City certifying that certain tasks have been successfully accomplished. One of the tasks identified was for the City to establish a Board of Water Commissioners. See Exhibit 1, Affidavit of Former Mayor Winthrop Farwell.

The Administrative Consent Order caused the DEP to lift a Declaration of Water

Emergency for the City so long as the City took certain actions, including the establishment of a Water Commission.

Consistent with the Ordinance adopted by the City Council and approved by the Mayor on September 28, 1995, since that time the City Council President has appointed two (2) members of the Water Commission. Since enactment of the Ordinance, the City Council President has made the following appointments to the Water Commission:

| <u>Member</u>         | <u>Appointment Date</u> |
|-----------------------|-------------------------|
| Eloise M. Paro        | March 1998              |
| Jacques A. Borges     | March 1998              |
| Michael A. Picanzi    | March 2001              |
| Joseph Moses          | March 2001              |
| Charles M. Alteri     | March 2001              |
| Joseph Vasapollo, Jr. | March 2004              |
| Stephen P. Wenzel     | March 2004              |
| William Work, III     | March 2004              |
| Stephen P. Wenzel     | March 2007              |
| Craig O. Pina         | March 2009              |
| William Work, III     | March 2007              |
| William Work, III     | March 2010              |
| Patrick Quinn         | March 2012              |
| Peggy McGrath         | March 2013              |
| Kathryn Archard       | February 2014           |

See Exhibit 2, Affidavit of City Clerk.

The Water Commission presently has only three members:

Ossie Jordan  
Patrick Quinn  
Kathryn Archard

Two (2) of the existing three (3) members of the Water Commission are appointments that have been made by City Council Presidents. See Exhibit 2, Affidavit of City Clerk.

On or about November 2, 1995, the City entered into an Administrative Consent Order (hereafter "Order") with DEP to ensure that an ample supply of potable water is available to the



City. Pursuant to the authority granted to DEP by M.G.L. c.21, § 16, and 310 CMR 5.00, DEP issued and the City consented to the issuance of the Order. The City admitted to the jurisdiction of DEP to issue the Order and agreed to comply fully with the terms fo the Order. The Order was voluntarily entered into by the City and DEP because they mutually agreed that it is in the public interest, and in their own interests to proceed promptly with the actions called for by DEP.

Prior to the issuance of the Order on November 2, 1995, a Declaration of Water Supply Emergency had been in place since December 2, 1986. The priority task of the Order was to establish a Board of Water Commissioners. On or about February 21, 1997, DEP and the City entered in to an amendment to the Order and the amendment represents the continuation of the best efforts by the City to ensure that an ample supply of potable water is available to those served by the City public water system. The Order is currently still open and operational. The City wrote to DEP as recently as 2009 requesting that the Order be closed. However, it remains open.

In January 2014, the City Council President was notified by an employee of the City of Brockton Department of Public Works as to the obligation under Chapter 23 of the Revised Ordinances of the City of Brockton. The City Council President was requested to act quickly as the Water Commission would be holding rate hearings in February and submitting its budget in March. See Exhibit 4, Affidavit of Robert Sullivan, and copy of letter of January 24, 2014 attached thereto as Exhibit A. The City Council President appointing members of the Water Commission was consistent with the process for appointing members of the Water Commission that has been followed for nearly 18 years. See Exhibit 2, Affidavit of City Clerk and Exhibit 4, Affidavit of Robert Sullivan. Pursuant to the request of the employee of the City of Brockton Department of Public Works, and consistent to the practices followed for nearly 18 years, the

City Council President appointed Kathryn Archard, a resident of Brockton who had been an opponent of the City Council President in a recent election for Councilor-At-Large and a graduate of Stonehill College and the recipient of a Masters from Suffolk University, to the Water Commission. See Exhibit 4, Affidavit of Robert Sullivan.

On or about February 7, 2014, Ms. Archard was sworn in at the City Clerk's Office as a member of the Water Commission. See Exhibit 4, Affidavit of Robert Sullivan.

## **II. STANDARD OF REVIEW**

In order to succeed on a motion for preliminary injunction, Plaintiffs bear the burden of proving (1) that it has a reasonable likelihood of success on the merits; (2) that irreparable harm will result from the denial of the injunction; and (3) that Plaintiff's harm irreparable harm outweighs any harm the opposing party would suffer if the injunction were granted. *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001); *Callahan & Sons, Inc. v. City of Malden*, 430 Mass. 124, 131 (1999); *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980). An injunction may issue properly if the Court concludes that the risk of irreparable harm to a Plaintiff, in light of its chances of success on its claim, outweighs the defendant's probable harm and likelihood of prevailing on the merits of the case. *Commonwealth v. Mass. CRINE*, 392 Mass. 79, 87-88 (1984).

Where, as here, the dispute involves a public entity, the court is charged with balancing the risk of harm to each party; the Court "is required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Id.* Thus, the Court should also consider the risk of harm to the public interest. *LeClair v. Town of Norwell*, 430 Mass. 328, 337 (1999); *Biotti v. Board of Selectmen of Manchester*, 25 Mass. App. Ct. 637, 640 (1988); see also *GTE Product Corp. v. Stewart*, 414

Mass. 721, 723 (1993)(“[i]n an appropriate case, the risk of harm to the public interest also may be considered”).

### III. ARGUMENT

#### A. PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS.

An injunction, preliminary or permanent, which enjoins and restrains the Defendant from making any appointments of members to the Water Commission should not be granted in this action because the Plaintiff has no likelihood of success on the merits on any of the issues raised in his Complaint. The Plaintiff’s argument that the Ordinance is inconsistent with the Plan B Charter is legally misplaced and untenable. The Plan B Charter is simply a by-product of the Home Rule Amendment to the Constitution of the Commonwealth. The Home Rule Procedures Act is a general law itself, with which the exercise of any power or function by a local ordinance or by-law must be “not inconsistent.” *Bloom v. Worcester*, 363 Mass. 136, 146 (1973).

#### Mayor’s Argument that M.G.L. ch. 43, sec. 60 supercedes all.

##### 1. The Ordinance Was Enacted Pursuant to an Administrative Consent Order Issued By the Department of Environmental Protection.

The Mayor essentially argues that the City’s Charter as set out in M.G.L. c. 43, § 60 grants to the Mayor exclusive and unrestrained appointing authority with respect to the Water Commission, even though it was created pursuant to a DEP Administrative Consent Order. A literal reading of M.G.L. c. 43, § 60 may appear to support the Mayor’s position; however, a closer look at the facts that gave rise to the Water Commission and at the authority under State Law of the DEP shows that the Mayor’s position cannot be sustained.

The Affidavits of Former Mayor Winthrop Farwell and the City Clerk provide the history and the context by which the Water Commission Ordinance Was enacted. There existed a Declaration of Water Emergency in the City and DEP was requiring a Water Commission.

M.G.L. c. 111 § 160 provides that the DEP may "... make rules and regulations and issue such orders as in its opinion may be necessary to prevent the pollution and to secure the sanitary protection of all such waters used as sources of water supply and to ensure the delivery of a fit and pure water supply to all consumers." To determine whether a local ordinance is inconsistent with a statute, this court has looked to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject. *Bloom v. Worcester*, 363 Mass. 136, 155-156 (1973). Moreover, in some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose. *Wendell v. Attorney Gen.*, 394 Mass. 518, 527-528 (1985). See also *New England Tel. & Tel. Co. v. Lowell*, 369 Mass. 831 (1976) (intent to preempt inferred from comprehensive legislative scheme).

The crux of this dispute is accordingly the Legislature's intent in enacting the provisions of M.G.L. c. 21A, § 16., c. 21G and c. 111, §§ 159, 160 and 160A. Plaintiffs Verified Complaint and Memorandum of Law In Support Of Its Motion for A Preliminary and Permanent Injunction does not even mention or allude to the November 2, 1995, Administrative Consent Order the City entered into with DEP to ensure that an ample supply of potable water is available to the City. Interestingly, the Order is the **only** reason the Water Commission was established in the first place. Thus, the Ordinance should be enforced by the Court because it is consistent with the laws enacted by the general court in conformity with powers reserved to the general court. The legislature's creation of the DEP and the authority granted to it eclipses the powers granted to the Mayor under M.G.L. ch. 43, sec. 60.

2. The City Admitted to the Jurisdiction of DEP to Issue the Order and The Ordinance Was Signed Into Law By the City's Then Mayor.

Since 1986, the City and DEP have been seeking a solution to the the problems associated with providing a safe and adequate source of potable water to the residents and businesses served by the City public water system. The City admitted to the jurisdiction of DEP to issue the Order and agreed to comply fully with the terms of the Order. In addition, the Order was voluntarily entered into by the City and DEP because they mutually agreed that it is in the public interest, and in their own interests to proceed promptly with the actions called for by DEP. Finally, the City's Mayor (at the time the Order was entered) signed into law Ordinance 23-30, which is the subject of this Complaint, thus bolstering its validity.

3. To the extent that the Court finds that Section 60 requires the Mayor to make such appointments, such authority was delegated to the City Council President through the Approval of the Ordinance in 1995 by the then City's Mayor.

As is set forth in the attached Affidavits of Former Mayor Winthrop Farwell and the City Clerk, the Ordinance creating the Water Commission with appointment authority for two (2) members was signed by the Mayor on September 28, 1995. In doing so, the Mayor delegated his authority under M.G.L. ch. 43, sec. 60 to make appointments for two (2) members of the Water Commission to the City Council President. Any rescission or change in such delegation should be made in the same manner, i.e. by way of an Ordinance changing the appointment method, such Ordinance to be approved by the Mayor.

*Mayor's Argument that City Council President only makes initial appointments.*

4. The Authority to Appoint Two Members of the Water Commission By The City Council President is Consistent With the Concerns of the City Council At Time Of Enactment of the Ordinance.

The then City Council was concerned as to its relinquishment and delegation of authority relative to water matters to a Water Commission and wanted to have a say in the makeup of the

Water Commission through the appointment of two (2) of the members of the Water Commission by the President of the City Council. See Exhibit 3, Affidavit of Former Councilor Geraldine Creedon. The City Council President having the authority to make two (2) appointments to the Water Commission addressed the concern of the then City Council and was accepted by then Mayor Farwell.

5. The Mayor's Literal Interpretation of the Water Commission Ordinance Provides An Absurd and Unreasonable Result and Cannot be Accepted.

As a general matter, "where the language of the statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Gillette Co. v. Commissioner of Revenue*, 425 Mass. 670, 674 (1997). However, it is also the case that courts "will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable. We assume the Legislature intended to act reasonably." *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336 (1982). Consequently, "when a literal reading of a statute would be inconsistent with legislative intent, we look beyond the words of the statute," including "other statutes on the same subject." *Id.* at 336, 337. In addition, courts "construe statutes that relate to the same subject matter as a harmonious whole and avoid absurd results." *Connors v. Annino*, 460 Mass. 790, 796 (2011), quoting *Canton v. Commissioner of the Mass. Highway Dep't*, 455 Mass. 783, 791-792 (2010).

The language of the Water Commission is clear that the City Council President appoints two (2) members of the Water Commission and the Mayor appoints three (3) members. There never was any discussion or consideration by the City Council that the authority of the City Council President to make appointments to the Water Commission would terminate. There never was any discussion or consideration by the City Council that the City Council President would only make initial appointments to the Water Commission and thereafter the Mayor would

have all the appointments. See Exhibit 3, Affidavit of Former Councilor Geraldine Creedon. The Mayor's interpretation that the appointment authority of the City Council President applies only to initial appointments creates an absurd result, especially when the history of the creation of the Water Commission, as set forth in the Affidavits of Former Mayor Winthrop Farwell, Former City Councilor Geraldine Creedon, and the City Clerk, is considered.

For these reasons, Plaintiff's argument that the Ordinance cannot be legally enforced is unfounded and had no likelihood of success on the merits

B. THE MAYOR'S ARGUMENT THAT HE IS NOT REQUIRED TO MAKE THE REQUISITE SHOWING OF IRREPARABLE HARM IS MISPLACED AND INACCURATE.

Although the Mayor argues that he does not need to make a showing of irreparable harm because the claim involves a violation of a statute, this argument advanced by the Mayor is short sighted and curtailed to advance his position. It appears that the Mayor has applied the wrong standard in his analysis of what the court must consider when it undertakes the decision of whether or not to grant a permanent or preliminary injunction. A showing of irreparable harm is required, however, the irreparable harm is that which would affect the public interest, not the Mayor's personal interest.

When a private party seeks a preliminary injunction, the moving party is required to show that an irreparable injury would occur without immediate injunctive relief. *Packaging Indus. Group, Inc. v. Cheney*, supra at 617. When, however, a suit is brought either by the government or a citizen acting as a private attorney general to enforce a statute or a declared policy of the Legislature irreparable harm is not required. *Edwards v. Boston*, 408 Mass. 643, 646-647 (1990). A judge, in these circumstances, must first determine whether there is a likelihood of success on the merits of a plaintiff's claims and then determine whether "the requested order promotes the

public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984). In *Commonwealth v. Mass. CRINC*, the court held that "[w]hen the government acts to enforce a statute or make effective a declared policy of [the Legislature], the standard of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief," *Id.* at 89, quoting *United States v. D'Annolfo*, 474 F. Supp. 220, 222 (D. Mass. 1979). Moreover, where a statutory violation is alleged, "the judge who decides whether an injunction should issue needs to consider specifically whether there is a likelihood of statutory violations and how such statutory violations affect the public interest." *Id.*

Assuming arguendo that a statutory violation did occur, the public would not be served by the granting of the Mayor's request and therefore it should not be granted. The Mayor relies on *LeClair v. Town of Norwell*, 430 Mass. 328 (1999), to support his position that a showing of irreparable harm is not required for the court to grant his requested injunction. Interestingly, *LeClair v. Town of Norwell*, actually stands for the proposition that even where a town does not adhere to the letter of a statute or by-law, the public interest was still not served by entering a preliminary injunction. The fact that the Mayor's requested order does not promote the public interest, or, alternatively, that the equitable relief will adversely affect the public is addressed in "section C" of this Memorandum of Law.

Moreover, the Mayor's argument that irreparable harm is not required is rendered disingenuous and meaningless by the fact that the Mayor was before this Court just four (4) weeks ago arguing that there would be irreparable harm if an injunction were to be granted in a case where it was alleged that the Mayor would be violating a statute by appointing an individual over the age of sixty-five (65) to the position of Chief of Police. *See Brockton Police*



Supervisors Union Local 1162 LIUA v. City of Brockton and William G. Carpenter, Docket No. PLCV2014-00097.

It will certainly not adversely affect the public if the status quo continues during the pendency of this case, i.e. the Water Commission continues to operate the way that it has for the past eighteen (18) years.

C. GRANT OF AN INJUNCTION DOES NOT PROMOTE PUBLIC INTEREST AND WILL ADVERSELY AFFECT THE PUBLIC

When the court is requested to issue an order for a preliminary injunction, he or she must evaluate the moving party's claim of injury and its chances of success on the merits. In cases affecting the public interest, the standards for injunctive relief applicable to private parties do not apply. See *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984). In evaluating the appropriateness of a preliminary injunction here, the Court must consider how the requested relief affects the public interest. *LeClair v. Town of Norwell*, 430 Mass. at 337. Where a preliminary injunction involves a public entity, the public interest should also be considered. *Bank of New England, N.A. v. Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 246 (1991); *Biotti v. Board Of Selectmen of Manchester*, 25 Mass. App. Ct. 637, 640 (1988). The method of such evaluation was succinctly stated in *Commonwealth v. Mass CRINC*, 392 Mass. 79, 89 (1984) as follows: "before issuing the preliminary injunction, a judge is required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public."

The granting of an injunction preventing the City Council President's appointment to the Water Commission would in no way promote the public interest, but rather the requested equitable relief would adversely affect the public.

- a. The granting of the injunction would preclude the Water Commission from functioning.

The Water Commission presently only has three (3) members: Ossie Jordan, Patrick Quinn, and Kathryn Archard. Two (2) of the existing three (3) members of the Water Commission are appointments that have been made by City Council Presidents. See Exhibit 2, Affidavit of City Clerk. The Mayor has not made any appointments to the Water Commission and only one of the Mayor's appointments stand filled. If the injunction in this matter is allowed and Ms. Archard is deemed not to be a member of the Water Commission, the Water Commission would not consist of the legally necessary number of members to achieve a quorum and the Water Commission would be unable to carry out the duties required of it by the Administrative Consent Order. Even if the Mayor were to seek to make his two (2) additional appointments, not only would this process would take a period of time leaving the City without an operating Water Commission, but such actions of the Mayor would not remedy the legal questions that would be created concerning the past acts of the Water Commission.

- b. The granting of the injunction would expose the City to claims for past actions of the Water Commission and call into question the validity of the water rates charged by the City.

The Water Commission has been operating the same way since its creation, by Order of DEP, since 1995, a period of almost 18 years. A successful challenge to the Ordinance would delegitimize all of the actions of the Water Commission and potentially open up the City to real liability. It is possible that any developers and/or residents who were aggrieved by any matters overseen by the Water Commission will be able to sue the city for damages. Further, if the court rules against the ordinance then essentially every appointment made by the City Council Presidents under the ordinance was improper. This strategy is highly risky and extremely detrimental to the residents for whom this Water Commission was established to protect. This

decision could call into question every decision, recommendation and rate that past Water Commissions have created or assisted with.

- c. The granting of the injunction would put the City at risk of being in violation of the Administrative Consent Order.

If an injunction was granted, a Board that was established as a result of a DEP Administrative Consent Order, an Order that is still in effect, would be unable to carry out its duties. The City would be at risk of failing to fulfill its obligations under the ACO. Paragraph 23 of the ACO provides:

“This Administrative Consent Order shall be binding on the City, and the City shall not violate the terms of this Administrative Consent Order, and shall not allow or suffer its employees, agents, or contractors to violate this Administrative Consent Order.”

- d. The public interest is not advanced through allowing an injunction in a lawsuit filed for political reasons.

Incredibly, the Mayor never raised any issue with the City Council President or the City Council relative to changing the manner in which members of the Water Commission are appointed prior to utilizing public resources to sue the City Council. See Exhibit 4, Affidavit of Robert Sullivan. The appointment of Kathryn Archand precipitated the filing of the court action against the City Council and the City Council President. Ms. Archand is a member of the grassroots organization Stop the Power and was often critical of the Mayor, particularly in regard to his support for a power plant that is proposed for the City. Attached as Exhibit 5 is a copy of an article appearing in the February 26, 2014 edition of the Enterprise with the headline

**“MAYOR SUES COUNCIL TO REMOVE POLITICAL FOE FROM BOARD”.**

The Mayor is described as a “political enemy” of Ms. Archand.

In a February 25, 2014 interview on a local radio station, the Mayor acknowledges Ms. Archand as “one of my biggest critics”. See Exhibit 6, Excerpt of Recorded Radio Interview,

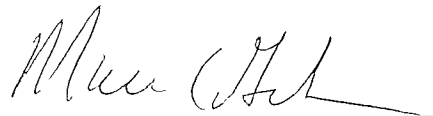
page 5 line 21 to page 6 line 3. The Mayor also acknowledges that Ms. Archand's appointment "could perhaps have been a factor in moving it up a couple of notches on the to-do list". See Exhibit 6, page 6 line 4 to page 6 line 10.

The public interest is adversely impacted by granting injunctive relief in lawsuits by public officials for political purposes. Public resources are scant enough and should not be wasted through actions taken purportedly in the name of good government but really for political purposes.

#### **IV. CONCLUSION**

For the foregoing reasons, the Plaintiff's request for injunctive relief should be denied.

The Defendant, Brockton City Council,  
and its President, Robert Sullivan,  
by its attorney,



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