

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 1:19-cv-10018-DJC

DAVID AND JILL MARKHAM, SEWER FAIRNESS)
ALLIANCE OF CHELMSFORD, and SEWER FAIRNESS)
ALLIANCE OF CHELMSFORD, INC.,)
Plaintiffs,)

vs.)

TOWN OF CHELMSFORD, BOARD OF SELECTMEN OF)
TOWN OF CHELMSFORD, GLENN DIGGS, in his official)
capacity as Chair of the Board of Selectmen, KENNETH)
LEFEBVRE, in his official capacity as Vice-Chair of the Board)
of Selectmen, EMILY ANTUL, in her official capacity as Clerk)
of the Board of Selectmen, PATRICIA WOJTAS and GEORGE)
R. DIXON, JR., in their official capacity as Members of the Board)
of Selectmen, and PAUL COHEN, in his official capacity as)
Town Manager of the Town of Chelmsford, and their successors)
in office,)
Defendants.)

ANSWER AND JURY DEMAND OF DEFENDANTS

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim against the defendants upon which relief can be granted and, therefore, must be dismissed.

SECOND DEFENSE

The defendants, Town of Chelmsford, the Board of Selectmen of the Town of Chelmsford, and Glenn Diggs, Kenneth LeFebvre, Emily Antul, Patricia Wojtas, George R. Dixon, Jr., and Paul Cohen, in their official capacities, hereby respond to plaintiffs' paragraph by paragraph, as follows:

I. Introduction

1. The defendants deny that Glenn Diggs is still a member of the Town of Chelmsford Board of Selectmen. The defendants neither admit nor deny the remainder of the statements contained in Paragraph 1 as they are mere conclusions to which no response is required.

II. Warrant Article

2. The defendants admit the allegations contained in the first sentence of Paragraph 2. The defendants neither admit nor deny the statement contained in the second sentence of Paragraph 2 as the regulation is a written document that speaks for itself.

III. Parties

3. The defendants admit the allegations contained in the first sentence of Paragraph 3. The defendants neither admit nor deny the allegations contained in the second sentence of Paragraph 3 because they have no actual knowledge of same and, therefore, call upon plaintiffs to prove same.

4. The defendants neither admit nor deny the allegations contained in Paragraph 4 because they have no actual knowledge of same and, therefore, call upon plaintiffs to prove same. To the extent a response is nonetheless required, the defendants deny any inequity in sewer maintenance is imposed on homeowners with grinder pumps.

5. The defendants neither admit nor deny the allegations contained in Paragraph 5 because they have no actual knowledge of same and because Paragraph 5 contains conclusions of law to which no response is required. The defendants, therefore, call upon plaintiffs to prove same. To the extent a response is nonetheless required, the defendants deny an “inequitable situation ... currently exists” and further deny that homeowners connected to the sewer system are treated inequitably.

6. The defendants deny that plaintiffs bring this action on behalf of others. The defendants admit that the preferred method of discharge of sewage from an individual building or group of buildings to the Town's sewer system is gravity flow. The Town further admits that grinder pumps shall be approved only after alternatives for gravity service connections have been thoroughly considered and, in the opinion of the Town of Chelmsford Department of Public Works, such alternatives cannot reasonably discharge to the Town's sewer system by gravity flow. The Town neither admits nor denies the remainder of the allegations contained in Paragraph 6 as the regulation is a written document that speaks for itself.

7. – 11. The defendants deny the allegations contained in Paragraphs 7 - 11.

12. The defendants admit the allegations contained in Paragraph 12.

13. The defendants deny that Glenn Diggs is still a member of the Town of Chelmsford Board of Selectmen. The defendants admit the remainder of the allegations contained in Paragraph 13.

IV. Jurisdiction and Venue

14. The defendants do not contest personal jurisdiction.

15. The defendants do not contest subject matter jurisdiction.

16. The defendants do not contest venue.

V. Causes of Action

FIRST CAUSE OF ACTION
(Violation of Due Process of Law – Art. CVI – Declaration of Rights
Massachusetts Constitution)

17. The defendants repeat and incorporate by reference their responses to Paragraphs 1 – 15 above.

18. The defendants admit that, because plaintiffs' home lies in a low area, it is equipped with a grinder pump station. The defendants neither admit nor deny the date upon which the grinder

pump was installed, because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

19. The defendants admit that many Town residents suffered two storm-related power outages in the Fall of 2011. The defendants admit the allegations contained in the second sentence of Paragraph 19. The defendants neither admit nor deny the allegations contained in the third sentence of Paragraph 19 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

20. – 22. The defendants neither admit nor deny the allegations contained in Paragraphs 20 – 22 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to

23. The defendants admit the allegations contained in the first and third sentences of Paragraph 23. The defendants neither admit nor deny the allegations contained in the second sentence of Paragraph 23 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

24. – 27. The defendants neither admit nor deny the allegations contained in Paragraphs 24 – 27 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

28. The defendants admit the allegations contained in Paragraph 28.

29. The defendants have no actual knowledge of whether the pump sounded an audible and, therefore, neither admit nor deny the allegations contained in Paragraph 29 and call upon plaintiffs to prove same.

30. – 46. The defendants neither admit nor deny the allegations contained in Paragraphs 30 – 46 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

47. The defendants deny the Markhams never received the January 2017 sewer bill, but admit the remainder of the allegations contained in Paragraph 47.

48. The defendants admit the Sewer Superintendent sent the Markhams a letter dated December 1, 2016, but neither admit nor deny the contents of the letter as it is a written document that speaks for itself. The defendants admit that the Sewer Superintendent included enclosures with the letter, but neither admit nor deny the contents of the enclosures as they are written documents that speak for themselves.

49. The defendants admit David Markham sent an email to the DPW Director on or about July 13, 2017, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

50. The defendants admit Superintendent Michael Vosnakis sent an email to the Markhams on or about August 1, 2017, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

51. The defendants admit the Markhams sent an email to Town Manager Paul Cohen and DPW Director Gary Persichetti on or about August 28, 2017, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

52. The defendants admit Sharon Boyer sent an email to the Markhams on or about August 31, 2017, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

53. The defendants admit the Markhams sent an email to Sharon Boyer on or about September 5, 2017, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

54. The defendants admit Sharon Boyer sent an email to David Markham on or about September 25, 2017, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

55. The defendants admit there was a power outage at the Markhams' residence in late October/early November 2017. The defendants deny the allegations contained in the third sentence of Paragraph 55. The defendants neither admit nor deny the remainder of the allegations contained in Paragraph 55 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

56. The defendants admit that the SFA published on-line a document captioned "Grinder Pump Failure – Sep 11, 2016." The defendants neither admit nor deny the contents of the document as it is a written document that speaks for itself. The defendants admit the document is available on the SFA website. The defendants neither admit nor deny the qualifications of David Foley because they have no actual knowledge of same and, therefore, call upon plaintiffs to prove same.

57. The defendants admit the Markhams appealed the Director's decision and attended a grinder pump hearing on or about February 13, 2018. The defendants admit the hearing was attended by Mr. Markham, Mr. Foley and several Town officials. The defendants admit Mr. Foley discussed the SFA document captioned "Grinder Pump Failure – Sep 11, 2016." The defendants neither admit nor deny the contents of the document as it is a written document that speaks for itself. The defendants deny the allegations contained in the fourth sentence of Paragraph 57. The defendants admit Mr. Foley requested the repair record, which was not available the meeting. The defendants deny the remainder of the allegations contained in Paragraph 57.

58. The defendants admit Assistant Director Steven Jahnle set a letter to Mr. Markham dated February 28, 2018. The defendants neither admit nor deny the contents of the letter as it is a written document that speaks for itself.

59. The defendants admit there was a power outage at the Markhams' residence in early March 2018. The defendants deny the allegations contained in the third sentence of Paragraph 59. The defendants neither admit nor deny the remainder of the allegations contained in Paragraph 59 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

60. The defendants admit Mr. Foley spoke at the open session of the Board of Selectmen meeting held on March 12, 2018. The defendants neither admit nor deny the contents of the document attached as Exhibit "X" as it is a written document that speaks for itself. The defendants deny the Markhams were denied due process and, therefore, deny the remainder of the allegations contained in Paragraph 60.

61. The defendants admit the allegations contained in Paragraph 61.

62. The defendants admit Mr. Foley sent a letter that was published in the Lowell Sun, but neither admit nor deny the contents of the letter as it is a written document that speaks for itself. The defendants neither admit nor deny the remainder of the allegations contained in Paragraph 62 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

63. The defendants admit Mr. Foley sent an email to the Assistant Town Manager Michael McCall on or about April 2, 2018, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself. The defendants neither admit nor deny the remainder

of the allegations contained in Paragraph 63 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

64. The defendants admit Mr. Foley sent a records request to Mr. Jahnle, but neither admit nor deny the contents of the request as it is an electronic document that speaks for itself.

65. The defendants admit Mr. Foley sent an email to Board of Selectmen on or about May 8, 2018, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself. The defendants deny Mr. Foley received no response. The defendants neither admit nor deny the remainder of the allegations contained in Paragraph 65 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

66. The defendants admit Mr. Foley sent an email to Mr. Cohen on or about May 8, 2018, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself. The defendants admit Mr. Cohen responded to Mr. Foley by email sent on or about May 11, 2018, but neither admit nor deny the contents of his response as it is an electronic document that speaks for itself. The defendants neither admit nor deny the remainder of the allegations contained in Paragraph 66 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

67. The defendants admit Mr. Foley sent a letter to Mr. Cohen on or about May 8, 2018, but neither admit nor deny the contents of the letter as it is a written document that speaks for itself. The defendants deny the remainder of the allegations contained in Paragraph 67.

68. The defendants neither admit nor deny the contents of the grinder pump repair record as it is a written document that speaks for itself. The defendants neither admit nor deny the remainder of the allegations contained in Paragraph 68 because they have no actual knowledge of same and, therefore, call upon the plaintiffs to prove same.

69. The defendants admit Mr. Foley sent an email to Mr. Persichetti on or about June 28, 2018, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

70. The defendants admit Mr. Persichetti sent an email to Mr. Foley on or about June 28, 2018, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself. The defendants admit Mr. Foley sent an email response to Mr. Persichetti on or about July 13, 2018, but neither admit nor deny the contents of the email as it is an electronic document that speaks for itself.

71. The defendants deny the allegations contained in Paragraph 71.

72. The defendants admit that Liz Hryniewich and Pat McGahan sent a letter to Mr. Vosnakis on or about October 6, 2018, but neither admit nor deny the contents of the letter as it is a written document that speaks for itself. The defendants deny the Markhams were denied due process, but admit the remainder of the allegations contained in the second sentence of Paragraph 72.

73. The defendants neither admit nor deny the statement contained in the first sentence of Paragraph 73 as it is a mere conclusion of law to which no response is required. The defendants deny the remainder of the allegations contained in Paragraph 73.

74. The defendants deny the allegations contained in Paragraph 74.

SECOND CAUSE OF ACTION
(Violation of Due Process of Law – Fourteenth Amendment to the
United States Constitution)

75. The defendants repeat and incorporate by reference their responses to Paragraphs 1 – 74 above.

76. The defendants deny the allegations contained in Paragraph 76. The defendants further deny that the plaintiffs are entitled to any of the relief requested.

THIRD DEFENSE

There is no private right of action under the Massachusetts Constitution and, therefore, the First Cause of Action should be dismissed.

FOURTH DEFENSE

Plaintiffs fail to allege that the defendants interfered or attempted to interfere with their rights by means of threats, intimidation or coercion and, therefore, the First Cause of Action should be dismissed.

FIFTH DEFENSE

An “adverse administrative action, at least when not part of a scheme of harassment, does not rise to the level of threats, intimidation or coercion.” Murphy v. Town of Duxbury, 40 Mass. App. Ct. 513, 518 (1996). Therefore, the First Cause of Action should be dismissed.

SIXTH DEFENSE

The defendant, Town of Chelmsford, is not a “person” subject to the proscriptions of M.G.L. c. 12, §§ 11H & 11I and, therefore, the First Cause of Action should be dismissed.

SEVENTH DEFENSE

The Chelmsford Board of Selectmen is not a separate legal entity subject to suit. Suit brought against the Town Manager and the individual members the Board of Selectmen in their official capacities is the equivalent of suit brought against the Town of Chelmsford. There is, in fact and in law, only one defendant in this matter – the Town of Chelmsford.

EIGHTH DEFENSE

Plaintiffs were provided with all the process to which they were due and, therefore, cannot recover.

NINTH DEFENSE

Plaintiffs had adequate post-deprivation remedies and, therefore, cannot recover.

TENTH DEFENSE

Plaintiffs failed to exhaust their administrative remedies and, therefore, cannot recover.

ELEVENTH DEFENSE

Plaintiffs allege no unconstitutional custom, policy or practice whatsoever, nor do they allege sufficient facts to show they were harmed by the Town of Chelmsford's enforcement of or adherence to an unconstitutional custom, policy or practice. Therefore, plaintiffs cannot recover.

TWELFTH DEFENSE

The Sewer Fairness Alliance of Chelmsford and the Sewer Fairness Alliance of Chelmsford, Inc., lack standing to bring this suit.

THIRTEENTH DEFENSE

Plaintiffs cannot certify a class in accordance with the requirements of Fed. R. Civ. P. 23 and/or federal law.

JURY DEMAND

The defendants demand a trial by jury on all claims.

Respectfully submitted,

The Defendants,

TOWN OF CHELMSFORD, BOARD OF
SELECTMEN OF THE TOWN OF CHELMSFORD,
GLENN DIGGS, in his official capacity as Chair of the
Board of Selectmen, KENNETH LEFEBVRE, in his
official capacity as Vice-Chair of the Board of
Selectmen, EMILY ANTUL, in her official capacity as
Clerk of the Board of Selectmen, PATRICIA WOJTAS
and GEORGE R. DIXON, JR., in their official capacity
as Members of the Board of Selectmen, and PAUL
COHEN, in his official capacity as Town Manager of the
Town of Chelmsford, and their successors in office,

By their Attorneys,

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/s/ John J. Davis

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Dated: September 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, filed through the Electronic Case Filing System, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and that a paper copy shall be served upon those indicated as non-registered participants on September 9, 2019.

/s/ John J. Davis

John J. Davis, Esq.