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.	)

JOINT STATEMENT

Pursuant to the Court's Notice of Scheduling Conference and Rule 16.1(d) of the Local Rules of the United States District Court for the District of Massachusetts, counsel for the above-named parties have conferred and state as follows:

I. Joint Discovery Plan and Motion Schedule.

The parties propose the following pre-trial schedule:

(a) Automatic Disclosures and production to be completed on or before October 21, 2019;

(b) Written document requests and interrogatories to be served by December 2, 2019, and responses/answers thereto to be served within the time periods provided by the Federal Rules of Civil Procedure;

(c) Plaintiffs shall name other parties, if any, no later than December 16, 2019;

(d) All fact discovery, including lay depositions and requests for admissions, to be completed by April 17, 2020;

(e) A conference to discuss dispositive motions, if any, shall be scheduled at the convenience of the Court after the close of fact discovery;

(f) All dispositive motions, if any, to be filed by May 22, 2020, and responses/oppositions thereto to be filed by June 22, 2020;

(g) Plaintiffs' expert witnesses (if any) to be designated, and disclosure of plaintiffs' expert reports to be served, within thirty (30) days after the Court issues a decision on any motion for summary judgment. In the event no motions for summary judgment are filed, plaintiffs' expert designations and disclosures shall be served by June 12, 2020. Defendants' expert designations and disclosures shall be served within thirty (30) days after plaintiffs' expert designations and disclosures. Expert depositions to be completed within thirty (30) days after service of defendants' expert designations and disclosures.

(h) A final pre-trial conference will be held per order of the Court.

II. Depositions.

Plaintiffs intend to conduct approximately 4 to 6 depositions during the discovery period. Defendants intend to conduct approximately 4 to 6 depositions during the discovery period.

III. Certifications.

Certifications regarding each party's consultation with counsel regarding budgets and alternative dispute resolution shall be filed separately.

IV. Concise Summary of Positions.

Plaintiffs:

Plaintiffs were wrongfully charged with violating the Town of Chelmsford's ordinance regarding the proper use of their grinder pump and assessed charges for this violation. Plaintiffs

maintain that, not only was this charge inappropriate because, as a matter of fact that was later found from the inspection of the grinder pump in question, the use of their generator could not have caused the grinder pump to fail, but that the Town did not provide any form of notice to home owners charged with misuse of their grinder pump as to how such charges can be contested. In this case, it was only because the president of Plaintiff Sewer Fairness Alliance, Inc. who has two degrees in electrical engineering from MIT, and is also a neighbor of the Markhams, knew that the generator could not have been used at 120V and therefore could not have caused the damage to the grinder pump that the Town claimed was what happened. Other Chelmsford residents similarly charged with misuse of their grinder pump, either because of alleged misuse of a generator or other alleged reason, might not have been as fortunate as the Markhams because David Foley is not their neighbor.

One would have thought that, if the Town had due process procedures for contesting charges for violating the grinder pump ordinance, it would have stated them in its brief and attached a copy as an exhibit to its Motion to Dismiss. The Town did not provide this basic due process information because it didn't and doesn't exist – not in the ordinance and not anywhere else. Town residents should not have to spend money to hire a lawyer to know what basic due process procedures are before – or after – the deprivation of their right to notice and hearing before an objective viewer of the facts. The assessment of a penalty for misuse is NOT a tax for the reasons stated in Plaintiffs' Opposition too Defendants' Motion to Dismiss and therefore "due process" did not exist, and could not have existed, in the form of pursuing a tax abatement. If a Town is going to have the power to assess fines for violations of its laws, it needs to inform those who are adversely affected about how they can contest assessments that they believe are

wrongful. This concept is embedded in constitutional law from at least Goldberg v. Kelly, 397 U.S. 297 (1970).

In this case, not only the inspector of the grinder pump not look at the generator, when on the premises, a later inspection of the grinder pump found that its failure was not due to the generator but to normal wear and tear because it is a mechanical object. That determination was not made before the penalty was assessed. Basic due process guarantees are the only restraint against the exercise of arbitrary and absolute power – which is what happened here. Though Mr. Foley pursued every possible avenue, none of those with whom he spoke knew who had the power to provide a due process hearing to the Markhams. At the end, he was told by the Assistant Town Manager that appeal of the decision was in Superior Court, and this is what plaintiffs did. That is not due process that should be available to each and every Chelmsford resident accused of violating the Town Ordinance regarding the use of grinder pumps.

Defendant:

The only true defendant in this action is the Town of Chelmsford. Even if the First Cause of Action in plaintiffs' Verified Complaint states a viable claim for declaratory or injunctive relief under the Massachusetts Declaration of Rights, plaintiffs are not entitled to such relief. The Town provides property owners with a process whereby they can contest any charges assessed for the repair or replacement of a grinder pump or grinder pump system. That process includes a grinder pump hearing held before the Director of the Department of Public Works, as well as an appeal therefrom to the Town Manager. Further, regardless of whether a property owner requests a grinder pump hearing, he or she may also contest a sewer assessment by filing an application for abatement with the Chelmsford Board of Assessors. M.G.L. c. 59, § 59. Finally, if the Board of Assessors should deny an application for abatement, either in whole or in

part, an aggrieved property owner may appeal such denial to the Appellate Tax Board upon the same terms and conditions as a person aggrieved by a refusal of the Assessors to abate a tax. M.G.L. c. 83, § 16E. These procedures meet the requirements of due process as guaranteed in Articles I, X and XII of the Massachusetts Declaration of Rights.

Moreover, the plaintiffs pursued and received all process to which they were due. On February 13, 2018, David and Jill Markham appealed the charge assessed on their sewer bill to Gary Persichetti, Director of the Chelmsford Department of Public Works. Mr. Persichetti held a grinder pump hearing, of which the plaintiffs had actual notice, and at which the plaintiffs had "an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Amsden v. Moran, 904 F.2d 748, 753 (1st Cir. 1990) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); Clukey v. Town of Camden, 717 F.3d 52, 59 (1st Cir. 2013). Following that hearing, the plaintiffs appeared before the Chelmsford Board of Selectmen, then appealed the DPW Director's decision to the Chelmsford Town Manager. The Town Manager declined to reverse the decision of the DPW Director. The fact that plaintiffs received only *partial* relief does not mean they were denied due process. "Whether the deprivation . . . was itself erroneous is beside the procedural due process point." Amdsen, 904 F.2d at 753 (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)). See Gonzalez-Droz v. Gonzalez-Colon, 660 F.3d 1, 13 (1st Cir. 2011) ("Whether the deprivation was, in fact, justified is not an element of the procedural due process inquiry").

Even if plaintiffs were deprived of due process in the first instance (which defendant denies), they cannot prevail under 42 U.S.C. § 1983 absent a showing that they were also denied adequate post-deprivation remedies. Cronin v. Town of Amesbury, 81 F.3d 257, 260 (1st Cir. 1996). Here, plaintiffs had adequate post-deprivation remedies. In addition to the grinder pump

hearing, Board of Selectmen appearance and appeal to the Town Manager, plaintiffs (as set forth above) had a right to file an application for an abatement with the Chelmsford Board of Assessors, M.G.L. c. 59, § 59, and to appeal the Board of Assessors' decision to the Appellate Tax Board. M.G.L. c. 83, § 16E. Whether plaintiffs took advantage of such post-deprivation remedies is immaterial to their constitutional claim. The availability of adequate post-deprivation remedies defeats their Second Cause of Action. Slavas v. Town of Monroe, 2017 WL 959575, *8 (D. Mass. March 10, 2017).

The defendant further relies on the denials and defenses raised in its Answer to plaintiffs' Verified Complaint.

V. Magistrate.

The parties do not consent to a trial by Magistrate.

Respectfully submitted,

The Plaintiffs,
DAVID AND JILL MARKHAM, *et al.*,

By their Attorneys,
ROM LAW PC

/s/ Alan Jay Rom
Alan Jay Rom, BBO #425960
P.O. Box 585
Chelmsford, MA 01824-0825
(978) 455-9589
alan@romlawoffice.com

Respectfully submitted,

The Defendants,
TOWN OF CHELMSFORD, *et al.*,

By their Attorneys,
PIERCE DAVIS & PERRITANO LLP

/s/ John J. Davis
John J. Davis, BBO #115890
10 Post Office Square, Suite 1100N
Boston, MA 02109
(617) 350-0950
jdavis@piercedavis.com

Date: September 25, 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 25, 2019.

/s/ John J. Davis
John J. Davis, Esq.