

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 2011MICV-04095-F

TWENTY WAYLAND, LLC,

Plaintiff,

v.

TOWN OF WAYLAND and WAYLAND
WASTEWATER MANAGEMENT DISTRICT
COMMISSION,

Defendants.

**THE PARTIES' RULE 9A(b)(5)(ii) and (iv)
STATEMENT OF MATERIAL FACTS WITH RESPONSES**

The Parties jointly submit this Statement of Material Facts in connection with Twenty Wayland, LLC's Motion for Summary Judgment. In accordance with Superior Court Rule 9A(b)(5)(ii) and (iv), the document is set up with plaintiff's statement of facts, with defendants' responses, first; followed by defendants' statement of additional facts, with plaintiff's responses.

Plaintiff's Statement

1. Plaintiff Twenty Wayland, LLC is a Massachusetts limited liability corporation. Twenty Wayland owns an approximately 56.9-acre parcel of land at 400-440 Boston Post Road in Wayland, Massachusetts (the "Property"). Twenty Wayland is the successor-in-interest to Wayland Business Center, LLC with respect to the Property. Twenty Wayland is seeking to redevelop the property as a mixed-use development, known as the Town Center Project. The Town Center

Project enjoys the support of a large majority of the residents of Wayland. **Complaint ¶¶ 1, 60, 61; Answer ¶¶ 1, 60, 61.**¹

Defendants' Response:** Admitted, except that the Defendants deny that Twenty Wayland, LLC ("20 Wayland") currently owns all of the Property. **Exhibit ("Ex.") 3.

2. Defendant Town of Wayland (the "Town") is a municipal corporation in Middlesex County, Massachusetts, with a principal place of business at Wayland Town Hall, 41 Cochituate Road, Wayland, MA 01778. **Complaint ¶ 2; Answer ¶ 2.**

***Defendants' Response:** Admitted.*

3. Defendant Wayland Wastewater Management District Commission (the "Commission" or the "WWMDC") is the duly-designated municipal body of the Town of Wayland responsible for the establishment and maintenance of the town's wastewater management system. The Commission's usual place of business is at Wayland Town Hall, 41 Cochituate Road, Wayland, MA 01778. **Complaint ¶ 3; Answer ¶ 3.**

***Defendants' Response:** Admitted.*

4. Effective August 30, 1999, Wayland Business Center, LLC, the Town, and the Commission entered into a Memorandum of Agreement. A true and accurate copy of the Memorandum of Agreement is attached as Exhibit A to the Complaint. **Complaint ¶ 4; Answer ¶ 4.**

***Defendants' Response:** Admitted.*

5. The Memorandum of Agreement recited that "WBC [referring to the Wayland Business Center, LLC] owns the property located at 400-440 Boston Post Road in the Town of Wayland ... upon which is located a wastewater treatment plant used to serve the buildings located on the Site..." **Complaint ¶ 5; Answer ¶ 5.**

¹ The Complaint with exhibits and the Answer have been reproduced at Tabs 1 and 2 respectively in the accompanying Joint Appendix.

***Defendants' Response:** Admitted as a partial restatement of August 30, 1999 Memorandum of Agreement (the "1999 MOA").*

6. The wastewater treatment plant was the subject of a September 4, 1998 permit (NPDES Permit No. MA0039853) issued by the United States Environmental Protection Agency and the Massachusetts Department of Environmental Protection, which authorized the plant to discharge no more than 65,000 gallons per day of treated wastewater into the Sudbury River.

Complaint ¶ 6; Answer ¶ 6.

***Defendants' Response:** Admitted. Answering further, the Defendants state that NPDES Permit No. MA0039853 (the "1998 WWTP Permit") speaks for itself.*

7. At the time of the Memorandum of Agreement, the wastewater treatment plant had excess capacity. The Town and the Commission desired to take the plant by eminent domain. Ownership of the plant would allow the Town and Commission to take advantage of the excess capacity to provide wastewater treatment hook-ups to other users in the Town. **Complaint ¶ 7; Answer ¶ 7.**

***Defendants' Response:** Admitted.*

8. Through the Memorandum of Agreement, WBC agreed not to oppose the Town's eminent domain taking of the wastewater treatment plant and appurtenant easements. **Complaint ¶ 8; Answer ¶ 8.**

***Defendants' Response:** Admitted.*

9. The Memorandum of Agreement provided in part: "[The Commission] shall provide 45,000 [gallons per day] of sewage treatment capacity to WBC at a pro-rated cost of operation and amortized acquisition costs, but excluding all costs in any way related to installations made for service to others and services provided to others." **Complaint ¶ 9; Answer ¶ 9. See also Complaint ¶ 76; Answer ¶ 76** ("Defendants contractually guaranteed to plaintiff, through the 1999 Memorandum of Agreement, 45,000 gallons per day of maximum daily design flow."); and

Complaint ¶ 83; Answer ¶ 83 (“Defendants contractually agreed, through the 1999 Memorandum of Agreement, not to charge Twenty Wayland for costs associated with other users of the wastewater treatment plant.”)

Defendants’ Response: Admitted as a partial restatement of the 1999 MOA.

10. Thus, under the Memorandum of Agreement, WBC was guaranteed at least 45,000 gallons per day of sewage treatment capacity at the plant, with 20,000 gallons per day available for other users.² **Complaint ¶ 10; Answer ¶ 10.**

Defendants’ Response: Admitted as a partial restatement of the 1999 MOA.

11. Further, under the Memorandum of Agreement, the Commission could charge WBC its pro-rated cost of operation and amortized acquisition costs, but could not charge WBC for costs related to other users. **Complaint ¶ 11; Answer ¶ 11.**

Defendants’ Response: Admitted.

12. The execution of the Memorandum of Agreement by the Board of Selectmen on behalf of the Town and by the Commission was an authorized act. On June 4, 1998, the Town at a Special Town Meeting voted to adopt Article 5 of the 1998 Special Town Meeting Warrant authorizing the Town’s Board of Selectmen to acquire the wastewater treatment plant and appurtenant easements for access and other purposes. **Complaint ¶ 12; Answer ¶ 12.**

Defendants’ Response: Admitted.

13. Effective September 24, 1999, the Memorandum of Agreement was modified by a Supplemental Agreement, which did not alter the obligation of the Commission to provide 45,000 gallons per day to WBC and to not charge WBC for services provided to other users. **Complaint ¶ 13; Answer ¶ 13.**

² *Twenty Wayland’s annotation on the undisputed facts:* Based on this language, the 45,000 gallons was not a future commitment by the Town and Commission to some day deliver 45,000 gallons of flow in the future, but a reservation of 45,000 gallons in the existing plant being transferred from WBC to the Town and Commission.

Defendants' Response: Admitted.

14. Since 1999, the Town and the Commission have reaffirmed their obligations under the Memorandum of Agreement on a number of occasions. **Complaint ¶ 14; Answer ¶ 14.**

Defendants' Response: Admitted.

15. For example, effective March 28, 2006, the Town and Twenty Wayland entered into a Memorandum of Agreement that stated in part: “[Twenty Wayland] and Wayland hereby acknowledge and confirm that each has certain rights and obligations under a August 30, 1999 Memorandum of Agreement by and between Wayland and [Commission] and Wayland Business Center, LLC (Developer’s predecessor-in-interest), as modified by a Supplemental Agreement dated September 24, 1999 (collectively the “MOA”), including, without limitation, regarding gallons per day of maximum daily design flow (as defined in 310 CMR 15.000) of 20,000 for Wayland and [Commission] and 45,000 for Developer [Twenty Wayland].” A true and accurate copy of the 2006 Memorandum of Agreement (without exhibits) is attached to the Complaint as Exhibit B. **Complaint ¶ 15; Answer ¶ 15.**

Defendants' Response: Admitted as a partial restatement of the March 28, 2006 Memorandum of Agreement (the “2006 MOA”).

16. By letter dated February 26, 2007, the Town Administrator wrote to counsel for Twenty Wayland stating in part: “I can assure you that the WWMDC has not taken any actions that would effectively abrogate its and the Town’s contractual obligations to provide Twenty Wayland, LLC 45,000 gallons per day (“GPD”) of wastewater disposal capacity of the maximum permitted 65,000 GPD capacity at the Town-owned sewage treatment plant adjacent to 400-440 Boston Post Road.” The letter continues: “This letter confirms and reaffirms the Town’s and the WWMDC’s contractual obligation to provide Twenty Wayland, LLC, as successor to Wayland Business Center, LLC (“WBC”), 45,000 GPD of wastewater flow capacity at the Plant in accordance with the

Memorandum of Agreement among WBC, the Town, and the WWMDC dated August 30, 1999.”

A true and accurate copy of the February 26, 2007 letter is attached to the Complaint as Exhibit C.

Complaint ¶ 16; Answer ¶ 16.

Defendants’ Response: Admitted as a partial restatement of said February 26, 2007 letter.

17. On July 2, 2007, the Town Administrator wrote again to counsel for Twenty Wayland: “The Board of Selectmen, Town Counsel and I have reviewed this matter with the Wayland Wastewater Management District Commission (the “WWMDC”). After doing so on June 28, 2007, the WWMDC voted (2-0-0; Davies and Schofield in favor; Roberts absent) to confirm and reaffirm the Town’s and the WWMDC’s contractual obligation to provide Twenty Wayland, LLC, as successor to Wayland Business Center, LLC (“WBC”), 45,000 GPD of wastewater capacity at the Town’s sewage treatment plant in accordance with the Memorandum of Agreement among WBC, the Town and the WWMDC dated August 30, 1999.” A true and correct copy of the July 2, 2007 letter is attached to the Complaint as Exhibit D. **Complaint ¶ 17; Answer ¶ 17.**

Defendants’ Response: Admitted as a partial restatement of said July 2, 2007 letter.

18. Most recently, on May 6, 2011, the Board of Selectmen posted a letter (a true and accurate copy of which is attached to the Complaint as Exhibit E) that stated: “Under the terms of that 1999 agreement transferring the existing plant to the town, the Town Center property is entitled to 69 percent of the flow [45,000/65,000] that is treated at the plant and discharged into the Sudbury River. The remaining flow is available to nearby businesses, homes and municipal buildings.”³

Complaint ¶ 18; Answer ¶ 18.

Defendants’ Response: Admitted. Answering further, the Plaintiff’s annotation below is argumentative and not factual.

³ *Twenty Wayland’s annotation on the undisputed facts:* Twenty Wayland references Complaint exhibits B to E in this statement of facts to demonstrate that the Town and Commission have acknowledged that Twenty Wayland, as success-in-interest to the Wayland Business Center, may enforce the obligations under the Memorandum of Agreement.

19. In a March 17, 2004 letter from the Commission to the Board of Selectmen (a true and correct copy of which is attached to the Complaint as Exhibit F), the Commission identified a quandary: “The Wastewater Commission has been striving to find a way to offer Wayland Meadows [another property owner in the area] capacity at the Route 20 Sewer System. The treatment plant has an approved capacity of 65,000 gallons per day. Of this capacity, the Wayland Business Center has been allocated a capacity of 45,000 gallons per day. The remaining users have been allocated a total capacity of 23,205 gallons per day.”⁴ **Complaint ¶ 21; Answer ¶ 21 (admitting the authenticity of the letter).**

Defendants’ Response: Admitted as a partial restatement of said March 17, 2004 letter. The Defendants deny its characterization as a statement or a quandary.

20. The March 17, 2004 letter (Complaint Exh. F) continued with an observation about current actual usage (as opposed to allocation): “The System is substantially underutilized and the Commission would welcome additional flow through the System.”⁵ **Complaint ¶ 21; Answer ¶ 21 (admitting the authenticity of the letter).** In a separate memorandum about a year later (a true and correct copy of which is attached to the Complaint as Exhibit H), the Commission explained further: “The permit issued by the U.S.E.P.A. allows the treatment of wastewater and discharge to the Sudbury River ... with a maximum of 65,000 gallons per day. In the five years of the system’s existence, the system has never been required to treat anywhere near the allowable average or maximum amount of wastewater. At the present time, the facility is averaging about 10,000 gallons

⁴ *Twenty Wayland’s annotation on the undisputed facts:* Thus, five years after the 1999 MOA, the Commission noted in writing to the Board of Selectmen that it had already allocated more than the authorized 65,000 gallons of capacity, and was trying to figure out how it could allocate even more to additional users.

⁵ *Twenty Wayland’s annotation on the undisputed facts:* At the time in 2004, there was a Polaroid office building at 400-440 Boston Post Road, with rapidly declining occupancy. Thus, actual usage for this one property at the time was well below allocated capacity. By around 2005, Polaroid and the few remaining other tenants had vacated the building entirely, bringing actual usage to or near zero.

per day primarily due to the business center [400-440 Boston Post Road] being empty.” **Complaint ¶ 28; Answer ¶ 28 (admitting the authenticity of the memorandum).**

Defendants’ Response: Admitted as a partial restatement of said March 17, 2004 letter.

21. The March 17, 2004 letter (Complaint Exh. F) continued by explaining how the Commission planned to address the situation: “The Commission has decided to use 60 % of Title 5 Guidelines as the typical water usage for users of the Sewer System (50 % plus a safety factor of 10 %). Using the 60 % rule and maximum water usage (or input to the Sewer System) of 20,000 gallons per day for users other than the Wayland Business Center [Twenty Wayland’s predecessor], the Commission can allocate sewer capacity of 33,333 gallons per day (20,000/.6) without exceeding the flow through the treatment plant.”⁶ **Complaint ¶ 21; Answer ¶ 21.**

***Defendants’ Response:** Admitted as a partial restatement of said March 17, 2004 letter. The Defendants deny the annotation the statements in the annotation to ¶21 in that it confuses design flow as an indicator of estimated flow into the treatment plant with actual flow discharged from the treatment plant as plant capacity.*

22. The Commission never sought a variance from the DEP regulations. DEP has not authorized any variance from its flow regulations to the Commission. **Complaint ¶ 26; Answer ¶ 26.**

***Defendants’ Response:** Admitted. Answering further, no such variance is needed.*

23. Twenty Wayland repeatedly protested the Commission’s procedure. For example, on December 8, 2006, counsel for Twenty Wayland wrote to the Town Administrator and Town Counsel: “We of course expect the Town and the WWMDC to perform fully their contractual

⁶ *Twenty Wayland’s annotation on the undisputed facts:* In other words, under the 1999 Memorandum of Agreement, the Commission had 20,000 gallons per day of flow to allocate out of the total capacity of 65,000 gallons under the plant’s EPA and DEP permits. However, demand for capacity exceeded what the Town and Commission had available. To meet the demand, the Town and Commission decided to treat the 20,000 gallons as if it were 33,333 gallons per day (20,000 divided by .6), which it justified because actual usage was lower than allocated capacity. Effectively, however, by allocating more than 13,000 gallons of capacity above permitted levels to other users, the Town and Commission were taking this capacity away from Twenty Wayland.

obligation to deliver to us our full 45,000 GPD capacity. I am sure I need not remind you of the importance to us of that 45,000 GPD and our continuing reliance on its availability. But in light of the fact that the plant's maximum daily flow capacity is 65,000 GPD, we feel we must ask you to explain both the methodology for the allocations to others that exceed the 20,000 GPD available and bring the total above 65,000 GPD, and the legal basis for that methodology. In this regard, we note that the July 18, 2005 chart makes reference to a '60% rule' that is not described and for which we have found no regulatory or engineering reference." A true and accurate copy of the letter is attached to the Complaint as Exhibit I. Attached to the Complaint as Exhibit J is a true and accurate copy of another letter from Twenty Wayland protesting the Commission's methodology.

Complaint ¶ 29; Answer ¶ 29.

Defendants' Response: Admitted as a partial restatement of said December 8, 2006 letter.

24. Due to the Town and Commission's overallocation of capacity to other users, there was not sufficient capacity as permitted by EPA and DEP for the 45,000 gallons reserved for Twenty Wayland. By letter dated November 9, 2010 to the Town (a true and accurate copy of which is attached to the Complaint as Exhibit K), DEP wrote, "Currently, the WWTP receives approximately 11,000 gpd of wastewater, with another 13,000 gpd of committed, but not yet connected, flow from other projects. The current permitted capacity of the WWTP is 52,000 gpd [that refers to average flow per day; 65,000 gallons was the permitted maximum flow per day], leaving 28,000 gpd of available capacity for 20 Wayland." The letter to the Town described a process through which DEP would consider allowing the connection, in phases, to benefit Twenty Wayland. The letter concluded: "Additionally, it should be noted that the Department still has concern with the past practice of the WWMDC in oversubscribing commitments to projects seeking to connect to the WWTP. MassDEP needs written assurance from both the Town and WWMDC

that connections to the WWTP will be more responsibly managed moving forward. Absent some better checks and balances being put in place, the Department may take action to serve as the approving authority for all future connections to the WWTP.” (Emphasis added). **Complaint ¶ 32; Answer ¶ 32 (admitting the authenticity of the letter).**

Defendants’ Response: Denied as to the first sentence. Admitted as a partial restatement of said November 9, 2010 letter.

25. In June 2011, DEP permitted 28,000 gallons per day of flow for the Property. DEP has not approved the balance of 17,000 gallons per day of flow. See Minutes of August 24, 2011 Commission meeting (attached to the Complaint as Exhibit O) (“Fred Knight [the Chair] reported that DEP is reluctant to give Twenty Wayland a connection permit for the full capacity of 45,000 gallons per day that was granted under the 1999 agreement. DEP has issued a connection permit to Twenty Wayland for capacity of 28,000 gallons per day under Phase 1.”) **Complaint ¶ 59; Answer ¶ 59 (admitting the authenticity of the minutes).**

Defendants’ Response: Admitted as it relates to design flow an indicator of estimated flow into the treatment plant.

26. Since at least 2008, Twenty Wayland has been charged by the Commission a wastewater treatment fee based on a capacity of 45,000 gallons per day. **Complaint ¶ 41; Answer ¶ 41.**

Defendants’ Response: Admitted.

27. Beginning in 2010, the Commission adopted a new methodology for charging wastewater treatment fees. It determined that it would seek to recover its fixed costs based on a user’s allocated capacity, and its variable costs based on a user’s actual usage. It then determined that 80 percent of its overall costs were due to fixed costs and 20 percent were due to variable costs. **Complaint ¶ 43; Answer ¶ 43.**

Defendants’ Response: Admitted.

28. Under the formula, the Commission would then divide each user's allocated capacity by total plant capacity and multiply that number by 80 percent and then add it to 20 percent times actual usage divided by total usage. **Complaint ¶ 45; Answer ¶ 45.**

Defendants' Response: Admitted.

29. The Commission used 45,000 gallons as the numerator on the capacity (fixed cost) side of the formula for the calculation of Twenty Wayland's fee. That came to 64.4 percent (based on the Commission using 69,827 gallons in the denominator). The Commission then multiplied that by 80 percent, to come up with a subtotal allocation to Twenty Wayland of 51.52 percent. On the usage (variable cost) side of the formula, Twenty Wayland's actual usage has been zero on a total usage of 10,740 gallons for a subtotal allocation of zero. Adding both parts of the formula together gave a total allocation to Twenty Wayland of 51.52 percent of the total costs for the wastewater treatment plant. **Complaint ¶ 47; Answer ¶ 47.**

Defendants' Response: Admitted.

30. Since the beginning of 2008, the Commission has charged Twenty Wayland based on this formula. **Complaint ¶ 48; Answer ¶ 48.**

Defendants' Response: Admitted as to the formula described in ¶28.

31. Twenty Wayland protested the formula and its allocated charges. Nevertheless, Twenty Wayland has paid all invoiced charges under protest. **Complaint ¶¶ 54, 57; Answer ¶¶ 54, 57.**

Defendants' Response: Admitted.

32. Now that DEP has permitted 28,000 gallons per day capacity to Twenty Wayland, Twenty Wayland has requested that going forward the Commission use 28,000 gallons per day in the numerator for Twenty Wayland on the capacity (fixed cost) side of the formula. The

Commission has stated that it intends to continue to use 45,000 gallons per day in the numerator for Twenty Wayland. **Complaint ¶¶ 55, 56; Answer ¶¶ 55, 56.**

Defendants' Response: Admitted.

Defendant's Statement of Additional Material Facts

33. The 1998 WWTP Permit and the current discharge permit (the "2009 WWTP Permit") both limit the capacity of the Town's Wastewater Treatment Plant (the "WWTP") in terms of actual gallons per day of flow of treated effluent discharged from the WWTP as measured on an average monthly basis. **Ex.'s 4 and 5.**

Plaintiff's Response: Twenty Wayland admits that the permits limit maximum flow per day.

34. Water usage by a building or a facility connected to a WWTP is approximately fifty percent (50%) of the building's or facility's wastewater design flow as set forth in 310 CMR 15.203 ("Title V Design Flow"). **Ex. 6.**

Plaintiff's Response: The reference to actual usage being approximately half of Title V Design Flow standards is not a figure that comes out of Title V, although Twenty Wayland will admit that day to day, actual usage is less than the maximum permitted capacity.

35. The capacity of the WWTP, stated in terms of Title V Maximum Daily Design Flow, is 132,500 gallons per day. **Id.**

Plaintiff's Response: Twenty Wayland cannot verify this figure and it is not one used by DEP, but for purposes of summary judgment only, Twenty Wayland will not dispute the figure.

36. The aggregate Title V Design Flow for all facilities connected to the WWTP and authorized to connect, but not yet connected, including 45,000 gallon per day of design flow for the Plaintiff, is 76,887 gallons per day or 57% said aggregate maximum daily design flow. **Id.**

Plaintiff's Response: Twenty Wayland does not know how defendants derived their figures and they are not ones that DEP is using. For purposes of summary judgment only, Twenty Wayland will not dispute the figures, but they are not material as to whether the Town and

Commission are in breach of the 1999 MOA. Twenty Wayland understands that the Town and Commission are trying to argue that since actual usage is less than maximum permitted capacity, there is capacity available at the treatment plant for Twenty Wayland. If DEP would accept this argument and allow Twenty Wayland to connect to 45,000 gallons per day of flow capacity, then great. But DEP has not accepted the Town and Commission's argument and as of today, the Town and Commission still are not able to deliver the contractually agreed 45,000 gallons per day of capacity.

37. Effluent actually discharged from the WWTP is much less than amount permitted in the 2009 WWTP Permit. **Ex. 7.** During calendar year 2011, the average daily flow of wastewater discharged from the WWTP was 17,427 gallons per day or 34% of the permitted averaged daily flow of 52,000 gallons per day. **Id.**

***Plaintiff's Response:** Twenty Wayland admits that Exhibit 7 states the figures set forth here but has no way to verify the figures. For purposes of summary judgment only, Twenty Wayland will not dispute the figures, but they are not material as to whether the Town and Commission remain in breach of the 1999 MOA.*

38. The Plaintiff has never filed with the WWMDC an application for an abatement of the sewer usage charges billed to Plaintiff for its use of Town's wastewater management system. **Id.**

***Plaintiff's Response:** Twenty Wayland admits that it has not filed an application for an abatement, but states that it is not seeking an abatement. Instead, its claim is that the sewer usage charges violate the parties' contract.*

39. The Sewer Connection Permit issued by DEP to the Plaintiff on June 7, 2011 contains a notice stating that a party aggrieved by the permit decision may appeal it by filing a notice of claim for adjudicatory hearing within 30 days of the date of issuance. **Ex. 7.** The Plaintiff did not appeal said sewer connection permit decision. **Ex. 7.**

***Plaintiff's Response:** Twenty Wayland admits that it did not appeal the permit from DEP authorizing connection to the first 28,000 gallons of flow per day (but not the full 45,000 gallons).*

Respectfully submitted,

TWENTY WAYLAND, LLC,

By its attorney,

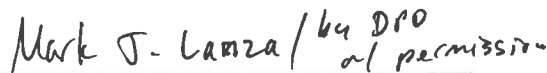


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April 11, 2012

TOWN and WWMDC

By their attorney,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was
served upon the attorney of record for each other party
by mail (by hand) on 4-11-12.

*and
email*

