COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

MIDDLESEX, ss. **SUPERIOR COURT DEPARTMENT**
DOCKET NO. 2011MICV-04095

TWENTY WAYLAND, LLC,

Plaintiff,

v.

TOWN OF WAYLAND and WAYLAND WASTEWATER MANAGEMENT DISTRICT COMMISSION,

Defendants.

DEFENDANTS' MOTION UNDER RULE 59 FOR A NEW TRIAL OR TO AMEND JUDGMENT OR, IN THE ALTERNATIVE, UNDER RULE 60 FOR RELIEF FROM JUDGMENT

The Town of Wayland (the "Town") and the Wayland Wastewater Management District Commission (the "WWMDC"), Defendants in the above-captioned action, for the reasons discussed below, hereby move pursuant to Mass. R. Civ. P. 59 (a) and (e) for a new trial or to amend the judgment entered in this action on June 24, 2013, or, in the alternative, pursuant to Mass. R. Civ. P. 60 (b) (6) for relief from said judgment.

INTRODUCTION

In this action, the Plaintiff real estate developer seeks to enforce a contract between its predecessor-in-title and

the Defendants (the "1999 MOA") in which the Town and the WWMDC agreed to provide wastewater treatment capacity at the Town-owned wastewater treatment plant (the "WWTP") at a pro-rated cost of the WWTP's operation and amortized acquisition costs. A sewer connection permit issued by the Massachusetts Department of Environmental Protection ("DEP") on June 7, 2011 temporarily limited the sewer capacity at the WWTP to 28,000 gallons per day ("GPD"), even though there was (and is) more than sufficient capacity for the Plaintiff and all other buildings permitted to connect to the WWTP. The Plaintiff sought damages, specific performance, and declaratory relief. The Defendants asserted, among others, affirmative defenses of statute of limitations and failure to exhaust administrative remedies. The Plaintiff's Motion for Summary Judgment seeking specific performance of the Defendants' contractual obligation to provide sewer capacity was denied. The Defendants' subsequent Motion to Dismiss on the grounds that the Plaintiff failed to exhaust its administrative remedies before asserting its sewer charge claims in this action was also denied.

A Final Pre-Trial Conference was held on June 7, 2012, and a Final Trial Conference was held on June 4, 2013. A jury was

selected on June 7, 2013, and evidence was presented to the jury over two days, June 10 and 11, 2013. 48 exhibits were admitted into evidence and the jury heard testimony from witnesses Twenty Wayland, LLC Principal Anthony DeLuca, Twenty Wayland, LLC Project Manager Frank Dougherty, DEP Northeast Regional Office Wastewater Management Section Chief Kevin Brander, Plaintiff's Construction Cost Estimator witness Kevin Foley, WWMDC Chairman Frederick K. Knight, and WWMDC Consulting Engineer Ian B. Catlow, as well as some of the Mass. R. Civ. P.

Rule 30(b)(6) deposition testimony of the Town, through its designee, Town Administrator Frederic E. Turkington, Jr. The jury returned a verdict in favor of the Plaintiff on all issues tried to the jury and awarded the Plaintiff damages in the amount of $989,774. The Plaintiff filed a proposed judgment on June 21, 2013. The Court (Curran, J.), on June 24, 2013, entered a judgment on the jury's verdict, together with pre-judgment interest in the amount of $234,298.45 and costs of $3,413.04, and ordered the Defendants to accept, treat, and discharge up to 45,000 GPD of wastewater from the Plaintiff's property and declared that only sewage treatment capacity actually available and useable by the Plaintiff, currently 28,000 GPD, may be taken

into account when calculating the Plaintiff's sewer usage charges.

At the Defendants' request, the Court extended the time for serving for serving post-trial motions relative to the amendment of said judgment and/or a new trial to August 2, 2013 and tolled the running of the post-judgment 30-day appeal period[1] until after the Court's ruling on the Defendants' post-trial motions. The Defendants now move for a new trial or an amended judgment or for relief from said judgment.

REASONS WHY THE DEFENDANTS' MOTION SHOULD BE ALLOWED

I. THE JURY'S VERDICT THAT THE DEFENDANTS BREACHED THEIR CONTRACTUAL OBLIGATION TO PROVIDE 45,000 GALLONS PER DAY OF MAXIMUM DAILY DESIGN FLOW (AS DEFINED IN 310 CMR 15.000) OF SEWAGE TREATMENT CAPACITY TO THE PLAINTIFF WAS AGAINST THE WEIGHT OF THE EVIDENCE.

"It is a well-established principle that '[t]he granting or denying of a new trial on the ground that the verdict is against the weight of the evidence rests in the discretion of the

[1]On July 23, 2013, the Defendants filed a notice of appeal in order to preserve their rights in the event that procedural issues arise relative to the Court's extension of the time for serving post-trial motions and the tolling of the appeal period. The Defendants have not made a decision to prosecute an appeal and recognize that they may need to withdraw their notice of appeal and file a subsequent notice of appeal in the event that the judgment entered on June 24, 2013 is modified in a way that is not satisfactory to them.

judge.'" Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 520, *cert. denied*, 493 U.S. 894 (1989), *quoting* Bergdoll v. Suprynowicz, 359 Mass. 173, 175 (1971). "Ruling on a motion for a new trial presents a limited question of fact, because the judge should not decide the case as if sitting without a jury; rather, the judge should only set aside the verdict if satisfied that the jury 'failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.'" Robertson *supra* at 404 Mass. at 520, *quoting* Hartmann v. Boston Herald-Traveler Corp., 323 Mass. 56,, 60 (1948). "A judge should exercise this discretion only when the verdict 'is so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice.' " Turnpike Motors, Inc v. Newbury Group, Inc., 413 Mass. at 127, *quoting* Scannell v. Boston Elev. Ry., 208 Mass. 513, 514 (1911).

In the instant case, there was insufficient evidence for the jury to conclude that the Defendants did not provide the agreed

sewer capacity to the Plaintiff. The jurors must have misapprehended the undisputed evidence.

It is undisputed that the Defendants never denied a sewer connection permit for or placed any restrictions on the Plaintiff's ability to use the 45,000 GPD of sewer capacity that the Defendants agreed to provide to the Plaintiff's predecessor-in-title. At trial, the WWMDC's Consulting Engineer Ian B. Catlow testified that the capacity of the WWTP, in terms of design flow, is 78,000 GPD (average daily flow) or 135,200 GPD (maximum daily design flow).

Indeed, during his trial testimony, DEP Northeast Regional Office Wastewater Management Section Chief Kevin Brander readily admitted that the WWTP is "overdesigned". The aggregate design flow of all users connected and committed to be connected to the WWTP, including 45,000 GPD of design flow for the Plaintiff, is 76,245 GPD. (Trial Exhibit ["Tr. Ex."] 36). Mr. Catlow's trial testimony that there is sufficient design flow at the WWTP for the Plaintiff and all other permitted connectees is undisputed.

The Defendants' agreement to provide sewer capacity to the Plaintiff's predecessor at the WWTP is stated in terms of **design flow**. Where the undisputed evidence showed that the Defendants have provided 45,000 GPD of design flow sewer capacity

to the Plaintiff at the WWTP, the jury's verdict to the contrary must have been the result of a misunderstanding of the evidence. Such a misapprehension led to an erroneous verdict on the most significant issue in this case that must be rectified at a new trial or by an amended judgment.

II. THE AWARD OF DAMAGES, INTEREST AND COSTS IS EXCESSIVE.

An excessive award of damages is grounds for a new trial. Commonwealth v. Johnson Insulation, 425 Mass. 650, 667 (1997). Where the damages are excessive, a new trial may be granted in order to determine the amount of damages, without opening the whole case. Hunter v. Farren, 127 Mass. 481 (1879). Under Mass. R. Civ. P. 59 (a), a new trial is not to be granted until the prevailing party is first given the opportunity to consent to remittitur. Johnson Insulation *supra* at 425 Mass. 668. A motion for a new trial may be granted where the damages awarded are greatly disproportionate to the injury proved or represent a miscarriage of justice. Id. In the instant case, a new trial is warranted to rectify such injustice.

A. The Jury's Award of Damages for Increased Construction Costs Due to Delay was based on Speculation and no Evidence of Net Increased Expenses.

It is undisputed that the Plaintiff paid no costs for

the construction of the residential portion of the Wayland

Town Center Project (the "Residential Project"). In fact, Plaintiff's principal, Anthony DeLuca testified at trial that Twenty Wayland, LLC had entered into a contract with Brendon Properties, LLC ("Brendon") to construct the Residential

Project[2]. Thus, the Plaintiff did spend and will spend nothing on the construction of this part of the project. The undisputed evidence at trial showed that the Plaintiff incurred no construction costs relative to the Residential Project. Standing alone, such a lack of evidence of damages is sufficient grounds for the Court to adjudge that the award of damages for construction costs increase due to delay in the amount of $440,000.00 is excessive.

Further, the award of $440,000.00 for such costs was based on pure speculation about likely increased construction costs since June, 2011 with no evidence of likely increased revenue or

[2]The undersigned counsel for the Defendants learned of the existence of such a contract on May 23, 2013, in connection with information provided by the Town Planner regarding an application filed with the Town's Planning Board by Brendon on May 22, 2013 for the development of the Residential Project. Where a significant portion of the Plaintiff's damages claim was based on costs associated with the delay of the construction of the Residential Project, the undersigned counsel for the Defendants orally requested a short continuance of the trial at the Final Trial Conference on June 4, 2013 to conduct some discovery of the facts and documents relative to this last-minute, but significant development. The request for a continuance was denied.

income from the sales of the residential dwelling units for the same period. Both Messrs. Foley and DeLuca testified at trial that they did not even consider the income to be derived from the residential portion of the project, only the expenses. Construction costs in breach of contract action which are based speculation cannot be the basis for a damages award. Thomas O'Connor & Co., Inc. v. City of Medford, 16 Mass. App. Ct. 10, 16-17 (1983). An award of damages for breach of contract, must take into account both income and expenses. The Community Builders, Inc. v. Indian Motocycle Associates, Inc., 44 Mass. App. Ct. 537, 557 (1998). In the absence of evidence of both income and expenses, any award of damages is speculative and must be reduced. Id.

B. The Jury's Award of Damages for Real Estate Taxes Paid Due to Delay of the Sale of the Residential Project was based on Speculation and an Error in Calculation.

At trial, Mr. DeLuca testified that the Plaintiff suffered damages by, among other things, paying real estate taxes on the land comprising the Residential Project, which would have been sold by June, 2011, if the DEP had not prevented additional sewer connections. On cross-examination, Mr. DeLuca admitted that he was not certain that the land would have been

sold at that time. At trial, no evidence of an offer or purchase and sale agreement for the land comprising the Residential Project was presented. In response to questions about the Plaintiff's contract with Brendon, Mr. DeLuca testified that Brendon's obligation purchase the land was subject to several contingencies, which could preclude the sale from ever occurring.

Thus, any damage award based on the assumption that the land comprising the residential project would have been sold in June, 2011, thereby relieving the Plaintiff of the responsibility for paying real estate taxes assessed on the land was based on pure speculation (see discussion above). As such, the portion of the damages award for real estate taxes in the amount of $55,100 cannot stand and must be reduced to nothing after a new trial or by an amended judgment.

In any event, the portion of the damages award for real estate taxes in the amount of $55,100 was based on an error in calculation. The correct method of calculating this portion of the damages would have been to determine to total amount of taxes assessed on the Town Center Project property for the June 7, 2011 (date of DEP restriction on sewer capacity) to June 11, 2013 (last day of trial) period, less the amount attributable to buildings, multiplied by the percentage that the land comprising

the Residential Project constitutes as a part of all of the Town Center Project land. According to the real estate tax bills and payment documents in evidence[3], the following information was presented to the jury:

Total Assessed Value Year Town Center Project Prop.:	Fiscal Year 2011 (7/1/2010-6/30/2011)	Fiscal Year 2012 (7/1/2011-6/30/2012)	Fiscal Year 2013 (7/1/2012-6/30/13)
	$23,422,800.	$23,422,800.	$8,432,200.
Assessed Value of Land	$ 9,969,200.	not visible in exhibits	not visible in exhibits
Assessed Value of Buildings	$13,453,600.	not visible in exhibits	not visible in exhibits
Total	$23,422,800.	$23,422,800.	not visible in exhibits
Total Taxes Assessed[4]	$ 460,029.	$ 451,946.	$ 153,114.
Total Land Area Assessed	55.59 acres	55.59 acres	44.07 acres
Land Area of Residential Project	not visible in exhibits	not visible in exhibits	not visible in

[3]Tr. Ex.'s 39 and 40.

[4]Cents are omitted.

exhibits

Without the missing required information, the portion of the damages award for real estate taxes in the amount of $55,100. could not have been correctly calculated. The following complete information relative to the calculation, based on public records in the Plaintiff's possession and available to the Plaintiff to present at trial, lead to the following different amount.

Total Assessed Value Town Center Project Prop. Encompassing the Residential Project	Fiscal Year 2011 (7/1/2010-6/30/2011)	Fiscal Year 2012 (7/1/2011-6/30/2012)	Fiscal Year 2013 (7/1/2012-6/30/13)
	$23,422,800.	$23,422,800.	$8,432,200.
Assessed Value of Land[5]	$ 9,969,200.	$ 7,873,000.	$4,206,200.
Assessed Value of Buildings	$13,453,600.	$15,549,000.	$4,226,000.
Total Assessed Value	$23,422,800.	$23,422,800.$	8,432,200.
Total Taxes Assessed[6]	$ 460,029.	$ 451,946.	$ 153,114.
Total Land Area Assessed	55.59 acres	55.59 acres	44.07 acres

[5]Information on real estate tax assessments missing from trial exhibits is included in Exhibit A, which are attested copies of the Town Assessors' property record cards for the property of which the Residential Project is a part.

[6]Cents are omitted.

Land Area of Residential Project[7]	5.0 acres	5.0 acres	5.0 acres
Residential Project as a Percentage of Total Land Area	.09	.09	.11
Assessed Value of Land in Residential Project	$ 897,228.	$ 708,570.	$ 462,682.

	F.Y. 2011	F.Y. 2012	F.Y. 2103
Real Estate Taxes for Entire Fiscal Year (cents omitted)	$ 17,361.	$ 13,470.	$ 8,796.
Days in Fiscal Year for Damages Period (365/346) as a % of Fiscal Year	0.06 (365/23)	1.00 (365/365)	.95
Real Estate Taxes Apportioned to Damages (rounded to nearest $)	$ 1,042.	$ 13,470.	$ 8,356.

Assuming, without admitting, that the Plaintiff was entitled to damages for delay for real estate taxes assessed and paid on the land comprising the Residential Project, the total would be $22,868. and not $55,100.

C. The Jury's Award of Damages for Mortgage Interest Paid on the Mortgage Attributable to the Residential Project was based on Speculation.

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[7]Exhibit B at 3 (unnumbered). Attested copy of application filed by Brendon with the Town's Planning Board for site plan approval of Residential Project.

The award of damages relative to Plaintiff's claim that it should not have paid mortgage interest on the mortgage attributable to the Residential Project was based on the same speculation as the portion of the award of damages for real estate taxes – that the land comprising the Residential Project would have been sold in June, 2011, if the DEP had not imposed the restriction of 17,000 gallons per day of the sewer capacity. The portion of the damages award for mortgage interest paid on the land comprising the Residential Project in the amount of $70,000 must be reduced to nothing for the same reason that the damages award for real estate taxes must be so reduced.

D. The Jury's Award of Damages for Overpaid Sewer Usage Charges was based on an Error in Calculation and Was Inconsistent with the Law.

The jury's award of damages for sewer user charges paid by the Plaintiff for its pro-rata share of the costs of the operation and amortized acquisition of the Town's sewer system represents a refund of all sewer usage charges paid by the Plaintiff for the July 1, 2005 through June 30, 2011 period. If this portion of the jury's verdict is allowed to stand, the Plaintiff will have paid nothing for its share of the costs of

the operation and amortization of acquisition of the Town's sewer system for 5 years. Additionally, it will receive pre-judgment interest in the amount of $208,742.15, for a total of $633,415.70, as well as an undetermined amount of post-judgment interest. (Plaintiff's Motion for Entry of Proposed Judgment, Exhibit C, Pre-Judgment Interest Calculation, at 1). Such an award is the result of an apparent error in calculation and is inconsistent with the law.

The gravamen of the Plaintiff's Complaint in this action is that it was charged for sewer capacity that was not available to it after the DEP restriction on its sewer connection permit and it suffered damages for delay of the Residential Project as a result of such unavailable sewer capacity. Prior to the DEP's permit on June 7, 2011, there is no evidence that any restriction was placed on the Plaintiff's use of its 45,000 GPD of sewer capacity. The undisputed evidence showed that any lack of use of its sewer capacity for this period was the Plaintiff's decision.

Assuming, without admitting, that the Plaintiff is entitled to a rebate of a portion of the sewer usage charges that were based, in part, on 45,000 GPD of capacity, the period of time when all 45,000 GPD of capacity was not available to the

Plaintiff for use began on June 7, 2011, when DEP placed a restriction on 17,000 GPD of the Plaintiff's capacity, and ended on June 11, 2013, the last day of trial. Apparently, the jury ignored the time period prior to June 7, 2011 in calculating the Plaintiff's damages for allegedly overpaid sewer charges. The jury's failure to limit damages to after June 7, 2011 was an error that must be corrected at a new trial or by an amended judgment.

In the event that the jury's award was based on the assumption that the WWMDC may not charge a system user based on sewer capacity if the user does not discharge wastewater into the sewer system, then the award is inconsistent with the law. A town may use available, but unused, design flow sewer capacity in determining a landowner's proportionate share of the cost of making and repairing common sewers. W.R. Grace & Co.-Conn. v. Town of Acton, 62 Mass. App. Ct. 462, 463-465, n. 1 (2004). Paragraph (a) of Section 7 of Chapter 461 of the Acts of 1996, as amended by Chapter 374 of Acts of 2006, provides in pertinent part that: "[t]he commission may charge fees, rates, rents, assessments, delinquency charges and other charges based on sewer capacity or water usage or both at the discretion of the

commission." 2006 Mass. Acts. c. 374. Since the Plaintiff's water usage at the Town Center Project property for the July 1, 2005 through June 30, 2011 period was zero, the Plaintiff's sewer charges for this period could only have been based on sewer capacity. No provision of the law requires that a system connectee actually discharge wastewater into the Town's sewer system in order for the WWMDC to charge the user for its share of the system based on sewer capacity. Where the jury's award appears to have been based on such a misapprehension of the law, the portion of its verdict awarding damages for overpaid sewer charges cannot stand and must rectified at a new trial or by an amendment to the judgment.

Additionally, the jury's error is emphasized by the Plaintiff's inherently inconsistent position. The Plaintiff is complaining that the Defendants should not have reduced the available capacity by allowing other users with failed septic systems and another real estate developer to connect to the WWTP, but is also complaining that it should not have to pay for capacity unless and until it used the capacity.

Further, based on design flow sewer capacity, the Plaintiff's capacity comprises more than 50% of the total WWTP

capacity. (Tr. Ex.'s 20 at Ex. B[8] and 36[9]). If a system user with the majority of the committed design capacity at the WWTP could completely avoid any sewer usage charges by not discharging any wastewater into the sewer system for an indefinite period of time and all other users could only be charged for capacity actually used, the WWMDC would not be able to collect more than 50% of the revenues needed to operate the sewer system. Such a restriction would have dire consequences, including financial insolvency. Additionally, doing so would be inconsistent with the provisions of c. 461 of the Acts of 1996. Under Paragraph (*b*) of Section 7 of said c. 461, the fees, rates, rents, assessments and other charges established by the WWMDC must be sufficient to pay all of the expenses of the Town's sewer system. 1996 Mass. Acts c. 461, § 7 (*b*). If the WWMDC could bill users based on sewer capacity only if the capacity is actually used, it would not be able to meet its legal obligation under state law. Alternatively, if the WWMDC could only recover the costs of

[8]This Exhibit shows that as of October 8, 2009, the Plaintiff's sewer capacity comprised 64% (69,827 GPD/45,000 GPD) of the total committed design capacity of the WWTP.

[9]This Exhibit shows that as of June 7, 2013, the Plaintiff's sewer capacity comprised 59% (76,245 GPD/45,000 GPD) of the total committed design capacity of the WWTP.

the system by charging users constituting less than 50% of the system, based on capacity, for 100% of the system's costs, such a method of charging sewer system users would be patently inequitable. By law, municipal sewer system usage charges must "equitable". M.G.L. c. 83, §16.[10]

E. The Pre-Judgment Interest is Excessive and was Based on Errors in Calculation.

Pre-judgment interest, if any is due to the Plaintiff, must be based on the correct amount of damages. For the reasons discussed above and below, the Plaintiff if not entitled to any damages, or, alternatively, significantly reduced damages. Where the amount of damages is excessive, the pre-judgment interest added to the damages is likewise excessive. Further, the correct rate of interest must be applied. In this case, it was not.

1. <u>The Amount of Pre-judgment Interest, if any is Due, Must be Recalculated Based on the Amended or New Judgment</u>.

If the entire damage award in the judgment is vacated, then the pre-judgment interest award must be likewise vacated.

[10]M.G.L. c. 83, §16 provides pertinent part that: "[t]he…sewer commissioners…of a town, may from time to time establish just and equitable annual charges for the use of common sewers…, which shall be paid by every person who enters his particular sewer therein. The money so received may be applied to the payment of the cost of maintenance and repairs of such sewers or of any debt contracted for sewer purposes."

If the amount of damages is reduced, there must be a corresponding reduction in pre-judgment interest. If so, the parties must be afforded adequate time to agree on the amount of reduced interest or submit the question to the Court for a determination.

2. The Rates of Interest Applied to Damages Relating to Overpaid Real Estate Taxes and Sewer User Fees Are Not Correct.

In essence, the Plaintiff's claims for overpaid real estate taxes relative to the Residential Project land and overpaid sewer usage charges are abatement claims. The interest rate payable by municipalities for rebates of abated real estate taxes is eight percent. M.G.L. c. 59, §69[11]. The same rate of interest is payable on abatements of sewer usage charges. M.G.L. c. 83, §16E[12]. Therefore, the twelve percent rate of interest applicable

[11] **M.G.L. c. 59,** §69 provides in pertinent part that: "[a] person whose tax has been abated shall, if the tax has been paid, be reimbursed by the town to the amount of the abatement allowed, including all interest and all charges paid therewith except legal costs paid as provided in section sixty-two, with interest on the amount so abated at eight per cent from the time of payment or the due date of the tax, whichever is later."

[12] M.G.L. c. 83, §16E provides in pertinent part that: "[a]**n owner of real estate aggrieved by a [sewer usage] charge imposed thereon under sections sixteen A to sixteen F, inclusive, in addition to such remedy as he may have under section ten of chapter one hundred and sixty-five, may apply for an abatement thereof by filing a petition with the board or officer having control of the sewer department within the time allowed by law for filing an application for abatement of the tax of which such charge is, or, if the property were not tax exempt, would have been, a part, and if such board or officer finds that such charge is more than is properly due, a reasonable**

to pre-judgment breach of contract damages pursuant to M.G.L. c. 231, §6C that was applied to the portions of the judgment based on the jury's award of damages for overpaid real estate taxes and sewer usage charges was incorrect. Once the Court determines what amounts, if any, of such damages should be awarded to the Plaintiff after a new trial or by an amended judgment, interest on such damages must be recalculated at the correct rate of eight percent.

F. The Portion of the Costs Award relative to Copying Trial Exhibits is Excessive.

The costs award added to the judgment includes $1,858.29 for copying trial exhibit binders. (Affidavit of Daniel P. Dain and Ex. B attached thereto, filed with Plaintiff's Motion for Entry of Proposed Judgment). By any standard, such an amount for copying and assembling trial exhibit binders is grossly excessive. An award of costs to the prevailing party in a civil case pursuant to M.G.L. c. 261, §1 must be reasonable and the judge has the discretion to set the amount to be awarded even if the plaintiff is obligated to pay the amount billed. Linthicum

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abatement shall be made; and except as otherwise provided herein, the provisions of chapter fifty-nine relative to the abatement of taxes by assessors shall apply, so far as applicable, to abatements hereunder." (Emphasis added).

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Archambault, 379 Mass. 381 (1979). Therefore, the Court should reduce the portion of the cost award for trial exhibit binders to a reasonable amount.

III. THE PLAINTIFF DID NOTHING TO MITIGATE ITS DAMAGES RELATIVE TO THE RESIDENTIAL PROJECT.

The jury was correctly instructed that the party claiming breach of contract is under an obligation to use all reasonable efforts to minimize and lessen its damages. The party must use the care that a person or entity of ordinary prudence would have exercised in seeing that the amount of damages are minimized. Global Investors Agent Corporation v. National Fire Insurance Company of Hartford, 76 Mass. App. Ct. 812, 825-826 (2010). Burnham v. Mark IV Homes, 387 Mass 575 (1982). Despite the clear instruction, it is apparent that the jury ignored the Plaintiff's obligation to mitigate damages.

At trial, the Plaintiff offered no evidence that it did anything to mitigate its claimed damages relative to the Residential Project. The Plaintiff offered no evidence of that it made any effort to make alternative wastewater disposal arrangements for the Residential Project (e.g., constructing a septic system or phasing the Town Center Project Development by reallocating sewer capacity for other project buildings which

are not occupied). It did not appeal or seek a modification of the restriction placed on its sewer capacity in the WWTP connection permit issued by DEP. It made no effort to lease or otherwise generate income from the land comprising the Residential Project. In sum, the Plaintiff did nothing to mitigate its damages.

"[W]here a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent." Warren v. Stoddart, 105 U.S. 224, 229 (1881). "The word 'trifling' in this passage has reference to the situation of the parties. It means a sum which is trifling in comparison with the consequential damages which the plaintiff is seeking to recover in the particular case." Bear Cat Mining Co. v. Grasselli Chem. Co., 247 F. 286, 288 (8th Cir. 1917). The undisputed evidence showed that the Plaintiff made no reasonable efforts to avoid its claimed damages resulting from the delay of the Residential Project due to lack of useable sewer capacity at the WWTP.

Therefore, the jury award for such damages must be reduced at a new trial or by an amended judgment.

IV. WHERE THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE PLAINTIFF'S SEWER CHARGE CLAIMS, THE JURY'S AWARD OF DAMAGES FOR SUCH CLAIMS CANNOT STAND.

Through Counts II, III and IV, the Plaintiff seeks reductions in its sewer usage charges. By characterizing its sewer charge claims as breach of contract, declaratory relief and violation of the sewer charge statute, the Plaintiff seeks lower sewer charges and refunds in the form of "damages" and a declaration as to how future charges shall be calculated at a reduced rate. Such characterizations cannot excuse the Plaintiff's failure to pursue its administrative remedies prior to seeking judicial intervention. The Plaintiff has not shown (and, in any event, cannot show) that there are any extraordinary circumstances that would justify such relief without first having exhausted its administrative remedies through the abatement process. The abatement remedy, if granted, would result in reduced sewer charges and refunds of alleged overcharges which have been paid. Since reduced charges and refunds are sought by the Plaintiff in Counts II, III and IV, the abatement remedy would be adequate to redress its claims.

A. The Plaintiff Failed to Exhaust its Administrative Remedies Prior to Asserting its Sewer Charge Claims in this Action.

It is well established that "[i]n the absence of a statutory directive to the contrary, the administrative remedies should be exhausted before resort to the courts." East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination, 364 Mass. 444, (1973), *quoting* Gordon v. Hardware Mut. Casualty Co., 361 Mass. 582, 587 (1972), and cases cited. "To permit judicial interference with the orderly administration by the [board] of matters entrusted to it by the Legislature before it has commenced to exercise its authority in any particular case or before it has had an opportunity to determine the facts and make a final decision, would in effect transfer to the courts the determination of questions which the Legislature has left in the first instance to the [board], and would result in the substitution of the judgment of the court for that of the [board]. Courts must be careful not to invade the province of an administrative board. The instances are rare where circumstances will require such interference." Saint Luke's Hosp. v. Labor Relations Comm'n, 320 Mass. 467, 470 (1946)." Gill v. Board of Registration of Psychologists, 399 Mass. 724, 726 (1987).

Since the Supreme Judicial Court's "("SJC") 1965 decision

in Shoppers' World, Inc. v. Assessors of Framingham, 348 Mass. 366, 377 (1965), which firmly established an administrative remedy under M. G. L. c. 59, Section 59, for claims of disproportionate real property tax assessment, the SJC has confined alternative remedies within very "narrow limits." Tregor v. Assessors of Boston, 377 Mass. 602, 606 (1979). "Unless the administrative remedy is 'seriously inadequate' under all the conditions of the case, it should not be displaced by an action for a declaration (*see* Leto v. Assessors of Wilmington, 348 Mass. 144, 149 [1964]), and care must be taken lest allowance of a judicial substitute disrupt unduly the orderly collection of tax." Sydney v. Commissioner of Corps. & Taxn., 371 Mass. 289, 294 (1976). Whether relief has been sought by a statutory remedy, as in Sears, Roebuck & Co. v. Somerville, 363 Mass. 756,758 & n.3 (1973) (M.G.L. c. 60, Section 98), or by a declaration, as in Nearis v. Gloucester, 357 Mass. 203, *cert. denied*, 400 U.S. 918 (1970), relief has been denied unless the abatement procedures are "seriously inadequate."

The SJC in Sears left open a possible challenge to a wholly void tax under G. L. c. 60, Section 98. In the instant case, there is no claim by the Plaintiff that the sewer usage charges

are wholly void. *See* Collector of Taxes of West Bridgewater v. Dunster, 231 Mass. 291, 292 (1918). Moreover, the Plaintiff does not suggest they are not subject to any sewer usage charge, that the charge is for an illegal purpose or that the WWMDC lacks jurisdiction. The substance of its claims is that the charges which were imposed were too high. In such circumstances the Plaintiff is not relieved from following the normal abatement route. *See* Harrington v. Glidden, 179 Mass. 486, 492-493 (1901), *aff'd*, 189 U.S. 255 (1903); City of Boston v. Second Realty Corp., 9 Mass. App. Ct. 282, 284-285 (1980) (unpaid water and sewer usage charges and real estate taxes); and R.W. Grace Co.-Conn. *supra* at 62 Mass. App. Ct. at 466 (sewer betterment assessments). Even where a tax is alleged to be wholly void, if the substance of the claim is that the assessment is excessive, and if the ordinary abatement procedures "are open to . . . (the taxpayer) to seek a revaluation," G. L. c. 59, Section 59, is the exclusive method of challenge absent extraordinary circumstances. *See* Nearis v. Gloucester, 357 Mass. at 205. The criteria for extraordinary relief are set forth in Leto v. Assessors of Wilmington, 348 Mass. 144, 148-149 (1964).

The Plaintiff has not shown that the abatement procedures are "seriously inadequate." The fact that the time period for obtaining administrative relief has run is no reason to permit declaratory relief. Second Church in Dorchester v. Boston, 343 Mass. 477, 479 (1962). Goldman v. Planning Bd. of Burlington, 347 Mass. 320, 326 (1964). Gallo v. Division of Water Pollution Control, 374 Mass. 278, 288 (1978). On the contrary, the Plaintiff's total disregard for the requirements of the sewer usage charge system, including the clear method of challenge provided in M.G.L. c. 83, Section 16E, precludes any equitable relief or damages for breach of contract, even without considering the significant fiscal disruption to the Town and other cities, towns and sewer districts, were such a tardy attack permitted. Under the circumstances of this action, the Plaintiff had not shown (and cannot show) that there is a violation "so great" as to find "equitable interference with normal assessment and collection processes" "seasonable" within the meaning of the Leto decision.

M.G.L. c. 83, §16E applies to sewer use charge abatements. §16E provides in pertinent part that: "[a]n owner of real estate aggrieved by a charge imposed thereon under sections sixteen A to sixteen F, inclusive…may apply for an abatement thereof by

filing a petition with the board or officer having control of the sewer department within the time allowed by law for filing an application for abatement of the tax of which such charge is, or, if the property were not tax exempt, would have been, a part, and if such board or officer finds that such charge is more than is properly due, a reasonable abatement shall be made; and except as otherwise provided herein, the provisions of chapter fifty-nine relative to the abatement of taxes by assessors shall apply, so far as applicable, to abatements hereunder. If such petition is denied in whole or in part, the petitioner may appeal to the appellate tax board upon the same terms and conditions as a person aggrieved by the refusal of the assessors of a city or town to abate a tax." M.G.L. c. 83, §16E. Under M.G.L. c. 83, §16, sewer commissioners are authorized to "establish just and equitable annual charges for the use of common sewers…which shall be paid by every person who enters his particular sewer therein." Pursuant to M.G.L. c. 83, §16B, liens for sewer usage charges take effect by operation of law on the day immediately following the due date of such charge. The WWMDC has the powers of sewer commissioners. 1996 Mass. Acts. c. 461, §§6 and 7. With respect to sewer usage charge abatements,

the WWMDC "shall have the benefit, without further acceptance of sections sixteen A and sixteen B of said chapter eighty-three, to the extent applicable and consistent with this act. Applications for abatements in accordance with section sixteen E of said chapter eighty-three shall be made within thirty days after the date of such demand." Id. at §7(d).

An appeal to the Appellate Tax Board ("ATB") of the WWMDC's decision relative to a sewer usage charge abatement applcaiton must be taken within within three months after the date of the WWMDC's decision or within three months after the time when the application for abatement is deemed to be denied. M.G.L. c. 59, §64. An application is deemed denied when the WWMDC fails to act upon the application, except with the written consent of the applicant, prior to the expiration of three months from the date of filing of such application. Id.

Appeals from final decisions of the ATB, with certain exceptions not applicable here, and appeals as to matters of law arising from an ATB decision may be taken to the Massachusetts Appeals Court by either party to the proceedings before the ATB, so long as that party has not waived such right of appeal. M.G.L. c. 58A, § 13A, ¶ 3. Such an appeal may be commenced by filing with the Clerk of the ATB a claim of such appeal in

accordance with the Massachusetts Rules of Appellate Procedure, which rules shall govern the appeal. Id. Judicial review of ATB decisions by the Superior Court is not available. Id.

The Plaintiff did not follow the statutorily required abatement and appeal procedures before seeking judicial intervention relative to its sewer charge claims. Even if the Plaintiff's verbal and written protests about the formula used by the WWMDC to determine its sewer charges could be treated as abatement applications, it is undisputed that the Plaintiff did not appeal the WWMDC's inaction to the ATB. Had it done so, this Court would have been releived of the burden of addressing the Plaintiff's sewer charge claims in this action.

At trial, the Plaintiff offered no evidence showing that it pursued its abatement remedy prior to asserting is sewer charge claims in this action. Nor did it offer any evidence showing that the abatement remedy is wholly inadequate. To the contrary, the damages that it sought and obtained by the jury award was, in effect, an abatement of all of its sewer useage charges for a 5-year period.

Where the Plaintiff failed to exhaust its administrative

remedies prior to asserting its sewer charge claims in this action, this Court lacks subject matter jurisdiction of those claims. Nelson v. Blue Shield of Massachusetts, 377 Mass. 746, 752-753 (1979). Therefore, the jury's award of damages based on the sewer charge claims must be vacated at a new trial or by an amended judgment.

V. WHERE THE PLAINTIFF'S BREACH OF CONTRACT CLAIMS RELATIVE TO SEWER CAPACITY AND SEWER USE CHARGES FOR THE FIRST AND SECOND QUARTERS OF FISCAL YEAR 2006 ARE TIME-BARRED BY THE STATUTE OF LIMITATIONS FOR BREACH OF CONTRACT, THE JURY'S AWARD OF DAMAGES FOR THESE CLAIMS CANNOT STAND.

Breach of contract claims are subject to the six-year statute of limitations set forth in M.G.L. c. 260, §2[13]. Chapman v. University of Massachusetts Medical Center, 417 Mass. 104, 105-106 (1994). Counts I, II and III of this action are breach of contract claims.

Sewer Capacity

At trial, and in its answers to the Defendants' Interrogatories, the Plaintiff did not commit to a date when the Defendants' alleged breach of their contractual obligation

[13]M.G.L. c. 260, §2 provides that: "[a]ctions of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgments or decrees of courts of record of the United States or of this or of any other state of the United States, shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues."

to

provide sewer capacity first occurred[14]. However, through counsel, the Plaintiff readily admitted in argumentative pleadings that the Plaintiff knew of the WWMDC's alleged first overallocation of sewer capacity over six years before this action was commenced[15], which alleged overcommitment is a basis for its breach of contract claims. Relying on unreported Superior Court decisions which were not subject to appellate Review, the Plaintiff argues that the Defendants' failure to provide the agreed sewer capacity constitutes a continuing breach giving rise to a new breach of contract action each day. The Plaintiff's argument is without merit. A cause of action

for breach of contract accrues at the time of the breach. Boston Tow Boat Co. v. Medford Natl. Bank, 232 Mass. 38 , 41 (1919).

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[14]On cross-examination by Defendant's counsel at trial, Mr. DeLuca testified that he did not know when the WWMDC first overallocated capacity at the WWTP. In his answers to Defendants' Interrogatories, Mr. DeLuca also gave evasive answers to questions about how and when the breach began. (Exhibit C at 2-3, Interrogatory No.'s 4 and 7).

[15]In the Memorandum in Support of Twenty Wayland, LLC's Motion for Summary Judgment prepared by the Plaintiff's counsel at 6, n. 7, it states in relevant part that: "[n]ote that while the commission first overallocated capacity at the plant more than six years ago, there is no statute of limitations issue here." Again, in the Memorandum in Support of Twenty Wayland, LLC's Motion *In Limine* to Preclude Argument as to Statute of Limitations prepared by Plaintiff's Counsel at 2, it states in pertinent part that: "[s]ome time before November 16, 2005, the Commission oversubscribed the plant – allocated capacity to users in the aggregate more than the plant was permitted for." Admissions by counsel in pleadings filed with the court are binding on the parties. See Mitchell v. Walton Lunch Co., 305 Mass. 76, 80 (1940); and DeLuca v. Cleary, 47 Mass. App. Ct. 50, 52 (1999).

Campanella & Cardi Constr. Co. v. Commonwealth, 351 Mass. 184, 185 (1966). DiGregorio v. Commonwealth, 10 Mass. App. Ct. 861, 862 (1980). This rule applies even though a specific amount of damages is unascertainable at the time of the breach or even if damages may not be sustained until a later time. DiGregorio v. Commonwealth, 10 Mass. App. Ct. at 862. Cf. Restatement (Second) of Contracts Section 236 comment a (1981) ("Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages"). If, as the Plaintiff alleges, the WWMDC allocated part of the Plaintiff's sewer capacity to another WWTP user over six years before this action was commenced and hasn't provided the agreed capacity to the Plaintiff since then, the breach of contract action (if any) accrued at that time. Any breach of contract claim filed by the Plaintiff more than six years after then is time-barred by M.G.L. c. 260, §2. Therefore, the portion of the jury's award for damages for breach of contract for failure to provide the agreed amount of sewer capacity must be reduced at a new trial or by an amended judgment.

First and Second Quarter F.Y. 2006 Sewer Charges

In its post-trial motion for entry of judgment, the

Plaintiff, for the first time, provided specificity as to the periods for the sewer charge billings for which it sought refunds

of payments. (Plaintiff's Motion for Entry of Proposed Judgment, Exhibit C, Pre-Judgment Interest Calculation, at 1). In its Pre-Judgment Interest Calculation dated June 21, 2013, the

Plaintiff seeks interest in the amounts of $10,029.28 and $9,774.91, respectively, on apparently refunded sewer charge payments made on November 30, 2005 in amount of $11,052.80 for charges for the first quarter of Fiscal Year 2006 (7/1 – 9/30/2005) and on February 8, 2006 in amount of $11,052.80 for charges for the second quarter of Fiscal Year 2006 (10/1-12/31/2005).

The Plaintiff alleges that the WWMDC breached its contractual obligation to charge the Plaintiff for no more than its pro-rata share of the costs of operation and amortized acquisition of the sewer system by charging the Plaintiff for sewer capacity that was not available to it. (Complaint at 10 – 13, Paragraphs 41-59). Thus, the breach, if any, arose when the WWMDC allegedly overcharged the Plaintiff. All of the first quarter of F.Y. 2006 (7/1-9/30/2005) and the first 47 days of the second quarter of F.Y. 2006 (10/1-11/16/2005) occurred more

than six years before this action was commenced. Therefore, the damages awarded by the jury for overpayments of sewer charges for these periods, together with the pre-judgment interest, were based on time-barred claims or portions of a claim. Consequently, the time-barred damages (1st quarter F.Y. 2006 - $11,052.80 + .51 [92 days/47 days] of 2nd quarter F.Y. 2006 - $5,636.93 = $16,689.73), with interest (1st quarter F.Y. 2006 - $10,029.08 + .51 [92 days/47 days] of 2nd quarter F.Y. 2006 - $4,958.20 = $14,987.28), must be eliminated from the damages award after a new trial or by an amended judgment.

VI. THE PLAINTIFF DID NOT ESTABLISH THE VALIDITY OF THE 1999 MOA.

To recover for a breach of contract against a municipality it must first be established by the party claiming breach that a valid contract existed between the parties. Massachusetts General Hospital v. Revere, 385 Mass. 772, 774 (1982), *rev'd on other grounds*, 463 U.S. 239 (1983). Parties who contract with the officers or agents of a municipal government must, at their peril, "see to it that those officers or agents are acting within the scope of their authority." Sancta Maria Hosp. v. Cambridge,

369 Mass. 586, 595 (1976). "Were it otherwise public officials could bind their governmental agencies to unlawful conduct by ready acquiescence in an agreement for judgment and, thus, circumvent the restrictions on their powers." Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 34 (1983).

At trial, the Plaintiff offered no evidence showing that the 1999 MOA was a legally authorized and binding contract which was assignable to the Plaintiff. It is of no consequence that the Defendants did not challenge the validity of the MOA at trial. The Plaintiff, nonetheless, had the burden proving that the 1999 MOA was valid. Having failed to do, any damages awarded for breach of the agreement must be vacated after a new trial or by an amended judgment.

VII. THE SPECIFIC PERFORMANCE REMEDY MUST BE AMEMDED TO TO ADD PROVISIONS FOR A REASONABLE PERIOD OF TIME FOR COMPLIANCE AND A CONTINGENCY FOR ACTIONS OR OMISSIONS BY DEP AND/OR THE EPA OR OTHER THIRD PARTIES.

The undisputed evidence showed that the Defendants' present and future ability to provide 45,000 GPD of available and

immediately useable design flow sewer capacity at the WWTP is contingent upon modifications and extension to and future grants of permits and approvals by DEP and/or the U.S. Environmental Protection Agency (the "EPA"). Applying for and obtaining such approvals takes time and money. Actions taken by DEP and/or the EPA on applications filed by the Defendants, as well as appeals of such approvals and the outcomes of appeals by third parties are beyond the control of the Defendants. When impossibility preventing and excusing performance of a party's contractual obligation is beyond the control of the party, performance is excused. Winchester Gables, Inc. v. Host Marriot Corp., 70 Mass. App. Ct. 585, 596 n. 10 (2007). For these reasons, the portion of

the judgment ordering specific performance of the Defendants' contractual obligation to make 45,000 GPD of design flow sewer capacity immediately available to and useable by the Plaintiff must be amended to provide for (1) a reasonable time for performance of six months; and (2) a contingency for actions and omissions by DEP and/or the EPA and other third parties which are beyond the control of the Defendants.

Relief From Judgment

Finally, as an alternative to a new trial or an amended judgment, pursuant to Mass. R. Civ. P. 60 (b) (6), the Defendants respectfully request that this Court grant relief from the judgment entered on June 24, 2013 on the grounds that the reasons discussed above for granting a new trial or amending said judgment constitute reasons other than those set forth in Mass. R. Civ. P. 60 (b) (1) – (5) justifying relief from the operation of said judgment. Chavoor v. Lewis, 383 Mass. 801 (1981).

CONCLUSION

For all of the reasons stated above, the foregoing motion should be allowed and, after the Plaintiff has been given an opportunity to consent to remittitur and declines such consent, a new trial should be granted or the judgment entered on June 24, 2013 should be amended, as requested above, or, in the alternative, relief from said judgment should be granted, as requested above.

Request to File Memorandum in Excess of 20 Pages Combined with Motion as a Single Document

Pursuant to Superior Court Rule 9A (a) (1) and (5), the Defendants respectfully request that this Court waive strict compliance with said rule and allow the Defendants (1) to

file the foregoing document as a single, combined motion and supporting memorandum; and (2) file a memorandum in excess of 20 pages in length pursuant to this request, instead of by separate letter to Presiding Justice of Session F, on the grounds that the issues that are the subject of this action and motion are complex and require more briefing than 20 pages.

Request for Hearing

Pursuant to Superior Court Rule 9A (c) (2), the Defendants respectfully request that this Court hold a hearing on the foregoing motion.

Respectfully submitted,
the Defendants, by their attorney,

Mark J. Lanza BBO #549994
Town Counsel, Town of Wayland
41 Cochituate Road
Wayland, MA 01778
(508) 358-3624/(978) 369-9100
e-mail: mjlanza@comcast.net

DATED: August 2, 2013

CERTIFICATE OF SERVICE

I, Mark J. Lanza, hereby certify that on August 2, 2013, I served a copy the foregoing document upon the Plaintiff, via courier, to its counsel of record.

_____
Mark J. Lanza

APPENDIX OF EXHIBITS TO MOTION

Exhibit	Description
A	Assessors' Property Record Cards (2) for Wayland Town Center Project Property
B	Brendon Properties, LLC's Application to the Wayland Planning Board for Site Plan Approval of the Residential Project dated May 22, 2013
C	Plaintiff's Answers to Defendants' Interrogatories