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COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT

MIDDLESEX, ss.

DOCKET NO.: 11-CV-4095-F

TWENTY WAYLAND, LLC
Plaintiff

v.

TOWN OF WAYLAND et al¹
Defendants

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S SEWER CHARGE CLAIMS²

Twenty Wayland, LLC has sued the Town of Wayland and the Wayland Wastewater Management District Commission for breach of a contract. This matter is presently before the Court on the defendants' motion to dismiss plaintiff's sewer charge claims. In that motion, the defendants argue that this Court does not have jurisdiction over the sewer charge-related claims because the plaintiff has not exhausted its administrative remedies. After reviewing both parties' papers, for the following reasons, the defendants' motion must be **DENIED**.

BACKGROUND

A motion to dismiss under Mass. R. Civ. P. 12(b)(1) requires the plaintiff to prove the jurisdictional facts necessary to show that the Court has jurisdiction over the dispute. *Williams v. Episcopal Diocese of Massachusetts*, 436 Mass. 574, 577 n.2 (2002). Unlike other motions under Rule 12 or Rule 56, the facts necessary for jurisdiction are not construed in the non-moving party's favor. See *Wooten v. Crayton*, 66 Mass. App. Ct. 187, 190 n.6 (2006). In deciding a motion to dismiss under Mass. R. Civ. P. 12(b)(1), a court may consider affidavits and other evidence outside the face of the complaint. *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322 n.6 (1998).

¹ Wayland Wastewater Management District Commission.

² While the Court originally asked for a supplementary briefing on this issue in its decision on the plaintiff's motion for summary judgment, it now treats the defendants' submission as a motion to dismiss for lack of subject matter jurisdiction, and notes the plaintiff's opposition thereto.

For purposes of this motion, the Court finds the following facts:

In 1999, Wayland Business Center, LLC (Twenty Wayland's predecessor in interest), the Town of Wayland and the Wayland Wastewater Management District Commission signed a Memorandum of Agreement. This Agreement transferred ownership of a wastewater treatment plant owned by Wayland Business Center, LLC to the Town and the Commission. In exchange, Wayland Business Center, LLC received \$250,000.00, a guaranteed allocation of sewage treatment capacity, and a commitment that the capacity would be provided 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."

The Agreement was intended to prevent the Wastewater Commission from charging Wayland Business Center, LLC for costs related to installations made for service to other users or services provided to other users. Since signing the Agreement, Twenty Wayland, LLC, and its predecessor, have been using little to none of the capacity allocated to it because the planned development at the site has only recently gone forward. Despite the low-usage, the company has made significant payments to the Wastewater Commission. These payments have been made under protest, however, Twenty Wayland, LLC is current on its sewer charge obligations through 2011. Because Twenty Wayland, LLC has kept the payments current, the charges have not been converted to a property tax that is added to their property tax bill.

While Twenty Wayland, LLC contends that the current calculations used to determine sewer charges offend the explicit terms of the 1999 Agreement, the defendants put forth no evidence that they are in compliance with the Agreement. Specifically, deposition testimony from Frederick Knight, the head of the Wastewater Commission, shows that the Commission did not even consider the terms of the 1999 Agreement when they created the current sewer charge formula.

DISCUSSION

The defendants argue that this Court should dismiss the plaintiff's sewer charge-related claims because Twenty Wayland, LLC has not exhausted its administrative remedies before bringing this suit. Typically, a suit may not be brought until the plaintiff has followed the administrative procedures laid out in the statute. *See, e.g., Nelson v. Blue Shield of Mass., Inc.*, 377 Mass. 746, 752-753 (1979). General Laws c. 59, § 59 applies to all sewer charge abatement requests and sets out an administrative scheme for challenging sewer charge calculations.³ G. L. c. 83, § 16E ("[T]he provisions of chapter fifty-nine relative to the abatement of taxes by assessors shall apply ... to abatements hereunder."). The statute specifies that a challenge begins with a request for an abatement to the local board of assessors. G. L. c. 59, § 59. Only after a decision has been reached at the administrative level may the case reach the Superior Court. *See* G. L. c. 80, § 7.

While this procedure represents the typical path that must be followed, the parties in this case altered their relationship by agreeing to the terms outlined in the 1999 Agreement. The inclusion of

³ While sewer charges are treated as "use charges" and not taxes, they are still subject to the administrative requirements outlined in G. L. c. 59, § 59. *See* G. L. c. 83, § 16E and *Boston v. Second Realty Corp.*, 9 Mass. App. Ct. 282, 283-284 (1980).

specific language about how Wayland Business Center's sewer charges would be calculated shifted the dynamic between the parties. In the 1999 Agreement, the Town and the Commission gave Wayland Business Center, and now Twenty Wayland, rights under the contract that the average entity connecting to a wastewater plant would not enjoy. These terms were bargained for and represent a benefit that Twenty Wayland feels it is entitled to by contract.

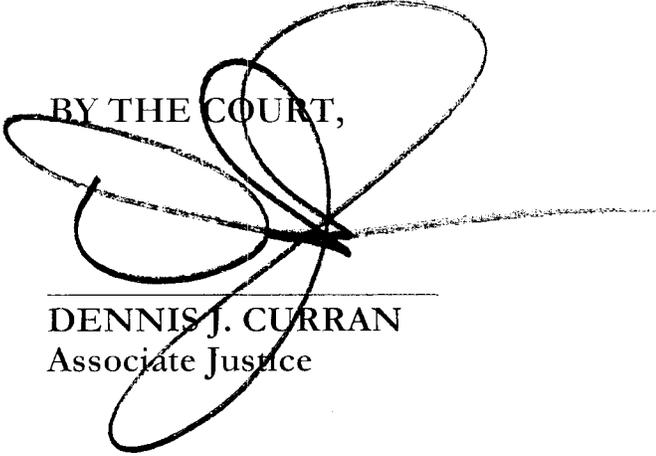
This Court is persuaded that the rationale outlined in *Kirchner v. City of Pittsfield*, 312 Mass. 342 (1942) is still good, and just, law. Had the 1999 Agreement simply been the sale of the wastewater treatment plant in exchange for \$250,000.00, then the normal administrative abatement process would apply. However, once the parties elected to identify specific terms as to the calculation of sewer charges, the relationship left the default realm. In *Kirchner*, the plaintiff was allowed to proceed with a breach of contract action against the city, despite similar administrative requirements to those outlined above. *Id.* at 346. The Court found the plaintiff's case "should be treated as an action to recover a sum exacted in violation of an express contract." *Id.* at 344. In the same vein, this Court holds that the plaintiff should be allowed to pursue their breach of contract allegations based upon the express terms of the contract.

Basic interests of fairness also influence the Court's ruling. Unfortunately, the notion that the Wastewater Commission allegedly did not consider the terms of the 1999 Agreement runs contrary to basic tenets of contract law. If the Town and the Commission did not wish to be bound to different terms with Twenty Wayland, LLC, then they should not have agreed to the terms of that Agreement. The defendants' argument that Twenty Wayland, LLC should now be forced to apply for an abatement to the very town that is allegedly breaching the contract is off-the-mark. By contract, the parties took their relationship out of the default sewer charge arrangement, and this Court will allow Twenty Wayland, LLC to pursue its claims under the contract.

ORDER

For these reasons, defendants' motion to dismiss plaintiff's sewer charge claims is **DENIED**.

BY THE COURT,



DENNIS J. CURRAN
Associate Justice

January 10, 2013.