

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

**SUPERIOR COURT
PLCV2011-00768**

**TOWN OF BRIDGEWATER,
Acting by and through its TOWN MANAGER,
TROY B. G. CLARKSON,
Plaintiff**

vs.

**MICHAEL BEROLINI,
as member, the Bridgewater Town Council,
and others¹,
Defendants**

and

**TOWN ATTORNEY OF TOWN OF BRIDGEWATER,
MARK C. GILDEA, in his official capacity as TOWN ATTORNEY,
Rule 19 party**

**Memorandum of Decision and Order on
Plaintiff's Complaint for Declaratory Judgment**

The Plaintiff, Town of Bridgewater, acting by and through its Town Manager, Troy B.G. Clarkson, commenced this action seeking a judgment declaring: that the Defendant, Bridgewater Town Council's Order #2011-015, "Minimum Criteria for Hiring of Legal Services/Town Attorney for the Town of Bridgewater" is invalid; that Article VI, Section 1 of the Bridgewater General Bylaws is invalid; and that the Bridgewater Town Council may not issue any order that directs or requests the appointment or removal of any person, or that attempts in any manner to participate in the appointment or removal of any person in the administrative service of the Town of Bridgewater for which the Town

¹ Scott Pitta, William Callahan, Timothy Fitzgibbons, Michael Demos, Kristy Colon, Peter Colombotos, William Wood, and Peter Riordan, as they are members of the Bridgewater Town Council.

Manager is responsible. The matter is before the court on the Plaintiff's and the Defendant Town Council's Motions for Judgment on the Pleadings.

Background

On or about April 24, 2010, the Town of Bridgewater adopted a Home Rule Charter which altered the form of government by which the Town is governed. Prior to the Charter, the Town Meeting served as the legislative branch, and the Board of Selectmen and the Town Administrator together acted as the executive branch of government. The 2010 Charter designated the Town Council to serve as the legislative body and the Town Manager to serve as the chief executive officer of the Town as the executive branch. See Home Rule Charter, Section 1-3. The Plaintiff, Troy B.G. Clarkson, is the current, duly appointed Town Manager of Bridgewater.

Under Section 1-3 of the Charter, the administration of all town fiscal, business, and municipal affairs is vested in the executive branch headed by the Town Manager. Section 4-3(a) states that the Town Manager, "except as otherwise provided by this charter... shall appoint, based upon merit and fitness alone, all department heads. All appointments of department heads, as defined within the administrative code, shall be subject to the ratification of the town council. The town manager shall also appoint officers, subordinates and employees for whom no other method of selection is provided in this charter." Section 2-6(c)(3) of the Charter also states that "[t]he town council shall not direct or request the appointment or employment of any person, or the removal of any person, or in any manner attempt to participate in the appointment or removal of a person in the administrative service of the town for which the Town Manager is responsible."

Under Section 4-4, the Town Manager has the authority to suspend or remove department heads and appointive administrative officers provided for by or under the Charter "except as otherwise provided by-law, collective bargaining agreements, this charter or personnel rules adopted pursuant to this charter." Additionally, under Section 10-2 of the Charter, "[a] person holding a town office or employment under the Town, shall retain the office or employment and shall continue to perform the duties of the office until provisions shall have been made in accordance with this charter for the performance of the duties by another person or agency."

Section 5-3(a) of the Charter specifically provides that the Town Attorney "shall be a legal officer of the town appointed by the town manager subject to confirmation by the town council." Mark Gildea has served as Town Attorney, formerly known as Town Counsel, for Bridgewater since February 2, 1995, and has resided in Bridgewater since April 19, 1996. Since adoption of the Charter on or about April 24, 2010, Gildea has served as a holdover in his capacity as Town Attorney. As of June 30, 2011, no provisions have been made to have the duties of the Town Attorney performed by another person or agency nor has the Town Manager removed Gildea sought to appoint another person or agency to perform the duties of the Town Attorney.

On May 3, 2011, the Bridgewater Town Council adopted Order #2011-015, or "Minimum Criteria for Hiring of Legal Services/Town Attorney for the Town of Bridgewater." The Order purported to establish criteria for providing legal services to the Town and for hiring a Town Attorney or law firm. The criteria are (1) that the law firm or attorney may not be located in or live in the Town of Bridgewater, (2) that the firm or attorney responding to a request for proposals or any other means of soliciting

proposals/bids for services must make a certification of no conflicts of interest relating to any business or to any resident within the Town, and (3) that the firm or attorney must have a minimum of five years of experience in Municipal Law.

Section 10-1 of the Charter states that “[a]ll by-laws, resolutions, rules, regulations and votes of the town meeting which are in force at the time this charter is adopted, not inconsistent with the provisions of this charter, shall continue in full force until amended or repealed. If the provisions of this charter conflict with provisions of town by-laws, rules, regulations, orders or special acts or acceptances of laws, the charter provisions shall govern. All provisions of town by-laws, rules, regulations, orders and special acts not superseded by this charter shall remain in force.”

Prior to the adoption of the Charter, the Town had enacted Article VI, Section 1 of the Bridgewater General Bylaws on or about November 18, 1974. It provided that “[t]he Selectmen shall annually in the month of May, appoint a Town Counsel, who shall be an attorney and counselor at law and a resident of the County of Plymouth, and who shall hold office for the term of one year from the first day of June and until his successor is appointed and qualified. He shall receive such compensation as the selectmen may determine, subject to the appropriation of the Town thereof.”

Discussion

The Town Manager and the Town Attorney suggest that the Town Council, by means of Order #2011-015, improperly seeks to force Gildea's dismissal and to undermine or usurp the Town Manager's exclusive authority under Section 5-3(a) of the Charter to appoint the Town Attorney. The Town Council denies any such intention. It

points out that Section 5-3(a) of the Charter also provides that the Town Attorney is “subject to confirmation by the town council,” and Section 5-3(b) provides that the Town Attorney’s duties include serving “as chief legal adviser to the town council.” The Town Council represents that “the Order at issue in this case is merely for the purposes of establishing policies and goals for the confirmation of the Town Attorney,” at such time as one might need to be confirmed. It does not bind the Town Manager, but merely “provide[s] guidance to him concerning the qualifications deemed by the Town Council as necessary for eligibility for its confirmation of the Town Manager’s appointment to the position of Town Attorney” (emphasis in the original). The Council represents that the Order does not include language that suggests it would apply “retroactively,” and that this court “should declare that the Order does not apply to Mr. Gildea.”²

There are difficulties with the Town Council’s position. First, the Order on its face says nothing that suggests it is setting out internal guidelines for the Council itself in exercising its powers of confirmation.³ Indeed, the word “confirmation” is absent from the language of the Order, which instead refers to criteria for “hiring” the Town Attorney. Second, the Council did not purport to issue contingency confirmation criteria for such time as the position of Town Attorney might become vacant, but took care to insert an effective date of July 1, 2011, setting forth criteria not only for the “hiring of a Town Attorney/Law Firm,” but also for “providing legal services to the Town of Bridgewater.”

² For his part, Gildea has submitted materials, including excerpts from minutes of various Town Council meetings, which, if credited, would suggest that the Town Council’s view of the Order has evolved considerably between July 1 and its representations to this court. Because the court agrees with the Town Council that these materials are inappropriate for consideration on a motion for judgment on the pleadings, the Council’s oral motion to strike exhibits 2-3 of the Memorandum of Mark C. Gildea, in his Official Capacity As Town Attorney, Rule 19 Party, is allowed.

³ As the Council recognizes, its “Order” cannot bind itself. Each member of the Council has the right under the Charter to vote to confirm or not to confirm any nominee for the position of Town Attorney as he or she sees fit.

Third, the Order on its face admits of no exceptions for anyone presently occupying the position of Town Attorney who is a resident of Bridgewater. Because Gildea, as Town Counsel, held "a town office or employment under the Town" pursuant to Section 10-2 of the Charter, he is to occupy "the office or employment and shall continue to perform the duties of the office" until his duties are assigned to another consistent with the charter. The Town Manager has not acted to remove Gildea pursuant to Section 4-4 of the Charter, nor has he nominated anyone for the position of Town Attorney.⁴ Thus, he remains Town Attorney.⁵

The reasonable effect of the Order was to convey to the Town Manager both that the Council believed that the present Town Attorney lacked the "minimum criteria" applicable as of July 1, 2010, and to establish criteria that the Town Manager would do well to follow in selecting a replacement. The Order thus violated the Charter's clear directive that the power to appoint the Town Attorney is the Town Manager's. It also violated Section 2-6(c)(3) of the Charter, which provides that "[t]he Town Council shall not direct or request the appointment or employment of any person, or the removal of any person, *or in any manner attempt to participate in the appointment or removal of a person in the administrative service of the town for which the Town Manager is responsible*" (emphasis supplied).

4 The Town Council does not suggest that the position of "Town Attorney" under the Charter is a different position than that of "Town Counsel" prior to adoption of the Charter. Neither would any such suggestion be tenable.

5 Article VI, Section 1 of the Bridgewater General Bylaws had provided that Town Counsel "shall hold office for the term of one year from the first day of June and until his successor is appointed and qualified." The Town Council represents to this court that it agrees that this bylaw "no longer governs appointment of the Town Attorney." Section 5-3 of the Charter, unlike Article VI, Section 1 of the Bylaws, has no language suggesting that the Town Attorney occupies his position for any particular term. Accordingly, no obligation exists on the Town Manager's part either to nominate a new candidate for Town Attorney or to renominate Gildea, who continues in the position until removed by the Town Manager.

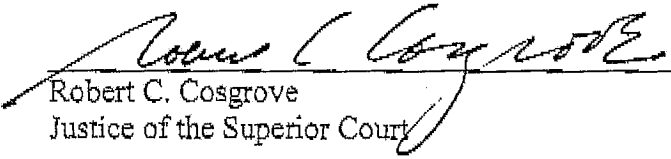
Judgment

Upon consideration of the Plaintiff's and Defendant's cross-motions for Judgment on the Pleadings and the arguments of the parties, judgment will enter for the Plaintiff on Count I and Count III of the Plaintiff's Complaint. Pursuant thereto, the court declares and adjudges that:

A. The Town Council's Order #2011-015 conflicts with the Town of Bridgewater Home Rule Charter, and therefore, is invalid and unenforceable.

B. The Town Council is without authority to adopt Orders that establish conditions of appointment and removal of the Town Attorney beyond those set forth in the Town of Bridgewater Home Rule Charter.

The Court finds that no actual controversy exists between the parties as to the continuing vitality of Article VI, Section 1 of the Bridgewater General Bylaws, all parties agreeing that it conflicts with the Town of Bridgewater Home Rule Charter, and therefore, is invalid and unenforceable. Accordingly, Count II of the Plaintiff's Complaint is dismissed.


Robert C. Cosgrove
Justice of the Superior Court

August 2, 2011