RETURN DATE: June 23, 2015

SENSIBLE WILTON,

Plaintiff,

v.

BOARD OF SELECTMEN OF THE TOWN OF WILTON, WILLIAM F. BRENNAN, in his capacity as First Selectman, JAMES A. SAXE, in his capacity as Second Selectman, MICHAEL P. KAELIN, in his capacity as Selectman, DEBORAH A. MCFADDEN, in her capacity as Selectman, and RICHARD J. DUBOW, in his capacity as Selectman,

Defendants.

SUPERIOR COURT

JUDICIAL DISTRICT OF STAMFORD-NORWALK

AT STAMFORD

Dated: May 29, 2015

PLAINTIFF'S MOTION FOR A TEMPORARY ORDER OF MANDAMUS

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Plaintiff, SENSIBLE WILTON ("Plaintiff" or "Sensible Wilton"), respectfully files this motion, brought by Order to Show Cause, seeking a temporary order of mandamus against Defendant, BOARD OF SELECTMEN OF THE TOWN OF WILTON ("Board of Selectmen") and each of the members of the Board of Selectmen, Defendants, WILLIAM J. BRENNAN ("Brennan"), JAMES A. SAXE ("Saxe"), MICHAEL P. KAELIN ("Kaelin"), DEBORAH A. MCFADDEN ("McFadden"), and RICHARD J. DUBOW ("Dubow"), in their individual capacities. Plaintiff's facts are set forth in its Verified Complaint, sworn to by Alex Ruskewich on May 28, 2015 ("Compl."), which is hereby incorporated herein.

PRELIMINARY STATEMENT

Plaintiff, Sensible Wilton, a political committee formed to oppose a $50,022,000 school renovation project in the Town of Wilton (the "Town") as fiscally irresponsible and unjustified, filed this action seeking a temporary and permanent order of mandamus to compel Defendants, the Board of Selectmen of the Town and each individual member of the Board of Selectmen, to call a Special Town Meeting as requested by a petition, filed by Sensible Wilton on April 1, 2015 (the "April 2015 Petition"), on behalf of hundreds of electors in the Town.

By the April 2015 Petition, which indisputably complies with all procedural requirements for a voter-initiated petition under the Wilton Town Charter (the "Charter"; copy annexed hereto as Exhibit "1"), Sensible Wilton formally demanded that the Board of Selectmen call a Special Town Meeting for the Town's electors to vote on a proposed ordinance seeking repeal of a prior bond authorization, voted on at a prior Special Town Meeting in September 2014 (the "September 2014 bond authorization"), which approved the issuance of $50,022,000 in bonds to renovate and expand the Miller-Driscoll School (the "School"), the Town's pre-K through 2nd grade school

building. On May 18, 2015, the Board of Selectmen voted to take no action on the April 2015 Petition, thus necessitating this lawsuit.

Such inaction was a violation of the Town's electors' clear legal right to a Special Town Meeting under the Charter. As set forth below, and in Plaintiff's Verified Complaint, the Charter expressly requires the Board of Selectmen to call a Special Town Meeting when requested by a duly filed petition containing at least 2% of the electors' signatures. Moreover, the September 2014 Special Town Meeting adopted an "ordinance" within the meaning of the Charter, and accordingly, the Town Meeting, which is the Town's primary legislative body, has the express authority to repeal such ordinance, including through the power of initiative.

Furthermore, the April 2015 Petition seeks a "proper purpose", not only because it fully protects all third parties who may have entered into contracts with the Town, but also because repeal of the prior bond authorization is fully justified here. Among other things, new evidence, which became available only *after* the September 2014 vote, substantially undermines the purported necessity of, and justification for, the proposed renovation project, and demonstrates that the equities strongly favor Plaintiff here. Critically, one of the major justifications offered by the Town's leaders for the project—not to mention one of the major reasons for its extraordinary cost—was that the project was necessary to provide sufficient space for a "growing" pre-K population. However, a demographic study by Professor Peter Prowda, Ph.D., dated January 2014 but made available to the public only in February *2015*, revealed that the population for the pre-K and K-2 classes is *declining*, and dramatically so—a conclusion confirmed by a subsequent study performed by the Town's own experts.

Moreover, the newly-discovered evidence also overwhelmingly demonstrates that the Town's leadership, including Defendants First Selectman Brennan and Selectman Dubow,

engaged in a massive marketing campaign at taxpayer expense to "sell" the renovation project to the Town, in violation of Connecticut's election laws *forbidding* the expenditure of taxpayer funds or use of government property or assets to advocate for or against any proposal or question presented at a referendum, including the bonding referendum that took place in September 2014.

Under the circumstances presented, Plaintiff has no adequate remedy at law short of issuance of a temporary order of mandamus. Accordingly, Plaintiff respectfully asks the Court to set the matter down for a prompt hearing and to issue a temporary order of mandamus to compel Defendants to schedule a Special Town Meeting at the earliest possible date.

JURISDICTION AND STANDING

This Court has jurisdiction under C.G.S. § 52-485(a) to issue a writ of mandamus, and may issue a temporary order of mandamus pursuant to C.G.S. § 52-493 and P.B. § 23-48. Sensible Wilton has associational standing to bring this action. *See*, *e.g.*, *Windham Taxpayers Ass'n v. Board of Selectmen of Town of Windham*, 234 Conn. 513, 526-27 (1995). Its members, including non-parties Alex Ruskewich, Sensible Wilton's President and Chair, and Curtis Noel, its Treasurer, are both electors in the Town of Wilton (Compl. ¶¶ 4-5) and thus would have had standing to sue in their own right, since they each were deprived of the opportunity to vote at a Special Town Meeting by Defendants, and therefore were aggrieved. *Id.* at 526, citing, *inter alia*, *Clark v. Gibbs*, 184 Conn. 410 (1981). Furthermore, Sensible Wilton, as an association formed in pertinent part to oppose the proposed renovation project of the School and as the proponent and sponsor of the voter-initiated petition at issue, seeks through this litigation to compel a vote on the petition, which proposes an ordinance to repeal the renovation project; hence, the interests that Sensible Wilton seeks to protect through this litigation are germane to its purpose. *Windham*, 234 Conn. at 527. Lastly, neither the claim asserted nor the relief requested requires the participation

of individual members in the lawsuit, since writs of mandamus of the nature presented here can be pursued without individual participation. *Id.* Accordingly, Plaintiff has standing to bring this action.

FACTUAL BACKGROUND

A. The Parties And Other Relevant Persons

Plaintiff is a duly formed political committee under the laws of the State of Connecticut. Compl. ¶ 3. Its stated purpose is to oppose a proposed renovation of the Miller-Driscoll School (the "School") in the Town of Wilton (the "Town"), at a cost of over $50,000,000, and its supporters include many hundreds of electors in the Town. *Id.* Its principals are non-parties, Alex Ruskewich ("Ruskewich"), the President and Chair of Sensible Wilton, and Curtis Noel ("Noel"), the Treasurer of Sensible Wilton. *Id.* ¶¶ 4-5. Both Ruskewich and Noel are electors permitted to vote in the Town. *Id.*

The Defendants herein are the Board of Selectmen of the Town of Wilton, along with each individual member of the Board of Selectmen, named in his or her official capacity. *Id.* ¶¶ 7-13.

Non-party Miller-Driscoll Building Committee ("MDBC") was formed by Defendants in February 2013 to implement a renovation of the School building according to specifications set forth by Defendants in a written Statement of Purpose and Objectives, and, pursuant to the Statement of Purpose and Objectives, to market the project for approval by the Town's voters. *Id.* ¶ 14. The MDBC's members include its Chair, Bruce Hampson (*id.* ¶ 15); its Vice Chair, Karen Birck, who was and is a member of the Town's Board of Finance as well (*id.* ¶ 16); and, Cheryl Jensen-Gerner ("Jensen-Gerner"), who also was and is the Principal of the School at all relevant times (*id.* ¶ 17). Defendant and First Selectman Brennan was and is an *ex officio* member of the

MDBC at all relevant times (*id.* ¶ 8), and Defendant Dubow was and is a member of the MDBC at all relevant times (*id.* ¶ 12).

B. The School

The Town's pre-kindergarten ("pre-K") and kindergarten through 2nd grade ("K-2") are housed in the School building, located at 217 Wolfpit Road, Wilton, Connecticut. *Id.* ¶ 18. It was originally two separate buildings and schools, the Miller School (constructed in 1964), and the Driscoll School (1967). *Id.* ¶ 19. The two were physically linked with the construction of the "Peach Core" in 1989, and in 2010, the two schools were merged under one administration. *Id.*

Due to deferred maintenance over a period of years, the School requires repairs to several building systems, including the roof, HVAC, building envelope, and electrical systems, as well as installation of fire alarm and sprinkler systems. *Id.* ¶ 20.

In 2012, the Town commissioned a forensic study (the "Forensic Study"; Compl. Ex. "1"), which determined that in spite of the issues arising out of deferred maintenance, the School was "sound and structurally [has] a significant lifespan." Compl. ¶ 21 & Ex. "1" thereto. The Forensic Study further determined, however, that a complete "gut retrofit" may not make logistical or economic sense, such that "[i]f only the steel frame is being re-used[,] it may no longer make sense, from a cost and schedule point of view, to retain the existing buildings." Compl. ¶ 22 & Ex. "1" thereto.

C. The Miller-Driscoll Building Committee

Notwithstanding the foregoing, the MDBC was formed several months later with the purpose of implementing a comprehensive renovation project at the School. In particular, the MDBC was tasked with following the Board of Selectmen's Statement of Purpose and Objectives, as recited in a Revised Statement of Requirements, dated February 7, 2013 (the "SOR"; Compl.

Ex. "2"), submitted by the Town's Board of Education ("BOE") and approved by the Board of Selectmen. Compl. ¶¶ 23-24.

Pursuant to the SOR, the K-2 program required 45 general education classrooms in the School to accommodate between 840 and 930 students, while "[a]nother of the BOS's objectives for the project is to dedicate approximately 10,000 square feet of contiguous space for another 75 preschool students, many of whom have special needs…." *Id.* ¶¶ 25-26 (citing SOR, Ex. "2" thereto, at p. 7). To accomplish the goal of dedicating 10,000 square feet of contiguous space for 75 preschool students, the MDBC developed a proposed renovation project that, among other things, calls for the demolition of the Peach Core and the "North Wing", a section of the School currently used for pre-K classes. Compl. ¶ 28.

D. The September 2014 Bond Authorization

On September 23, 2014, a Special Town Meeting called by the Board of Selectmen was held to consider whether to approve or reject an authorization appropriating $50,022,000 in bonds for the planning, design, construction, renovation, equipping, and furnishing of the Miller-Driscoll School and related costs. Compl. ¶ 29. The proposed authorization was the largest capital project in the Town's history. *Id.*

The Town's leaders, including Defendants, offered numerous justifications for the scope and cost of the renovation project. As noted above, one major reason given for the proposed project was that additional classrooms were needed to accommodate an expanding student population, particularly a growing pre-K population, with a projected need to accommodate 75 preschool children, as well as a projected need to accommodate between 840 and 930 K-2 students, as set forth in the SOR. Compl. ¶ 30 & Ex. "2" thereto. Another purported benefit of the proposed renovation would be that the project would provide a separate entrance and exit from the street to

the pre-K portion of the building. Compl. ¶ 31. Yet a third offered benefit of the proposed renovation was that the project would pay to replace the roof, which had long been subject to water intrusion and leaks. *Id.* ¶ 32.

The Town's electors voted on September 23, 2014, immediately following the Special Town Meeting that day, and again on September 27, 2014. *Id.* ¶ 33. The proposal passed by a margin of just twenty-seven (27) votes. *Id.* ¶ 34.

E. The SEEC Complaint

Shortly after the September 2014 Special Town Meeting, Sensible Wilton's President and Chair, Alex Ruskewich, filed a complaint with Connecticut's State Election Enforcement Commission ("SEEC"), alleging various violations of Connecticut's election laws. *Id.* ¶ 35. Among other things, the improper conduct by Town leaders, including Defendants, alleged to have taken place in the days and weeks leading up to the September 2014 vote include: (a) distribution of thousands of flyers to promote a "Yes" vote for the renovation; (b) distribution of thousands of "tri-fold" glossy brochures promoting a "Yes" vote for the renovation; (c) campaigning for the renovation at over a dozen school-sanctioned events on school property, including using a PowerPoint presentation advocating for a "Yes" vote; and, use of school websites to promote a "Yes" vote. *Id.* ¶¶ 36(a) – 35(d) & Exs. "3" through "6" thereto. Such conduct was alleged to be unlawful under Connecticut law. *Id.* ¶ 37; *see* C.G.S. § 9-369b(a) (prohibiting, with one exception not applicable here, the use of taxpayer funds in support of, or opposition to, any question presented to electors at a referendum). Ruskewich's complaint was unanimously accepted by the SEEC for investigation and submitted for executive review on May 18, 2015. *Id.* ¶ 38. A decision is expected to be issued in the coming weeks. *Id.*

F. New Facts Uncovered After The September 2014 Special Town Meeting

In the wake of the September 2014 Special Town Meeting, new facts came to light that had previously been unavailable, in several instances because such facts were not disclosed by Town officials, including Defendants, until complaints were filed under Connecticut's Freedom of Information Act. *Id.* ¶ 39. The new information dramatically undermined several of the key assumptions underlying the School renovation project's viability and purported necessity, while confirming Sensible Wilton's suspicions that the Town's officials, including Defendants, had repeatedly violated the laws prohibiting expenditures of taxpayer dollars, as well as use of government property or assets, by advocating for a "Yes" vote ahead of the September 2014 Special Town Meeting. *Id.*

The newly-discovered facts fall into four major categories.

1. In A Demographic Study Dated January 2014, But Made Available To The Public Only After The September 2014 Vote, The Pre-K and K-2 Populations Were Projected To Decline Dramatically For The Foreseeable Future. Defendants And The MDBC Nonetheless Continued To Represent To The Town's Electors That Substantial Expenditures Were Necessary To Accommodate A "Growing" Pre-K Population.

In February 2015, a demographic study conducted by Professor Peter Prowda, Ph.D., dated January 2014 (the "Prowda Report"; Compl. Ex. "7"), became available to the general public for the first time. Compl. ¶ 40. The previously undisclosed Prowda Report made clear that, contrary to the claims of Defendants that a substantial expansion of the existing school would be needed to accommodate a "growing" pre-K population as well as a K-2 population of between 830 and 940 students, the student population actually was *declining*, including a decline of 27.6% as to the K-2 population over the next five (5) years . *Id.* ¶¶ 41-43. A subsequent report, prepared by the Town's own experts, confirmed this trend. *Id.* ¶¶ 45-46; *see* Milone & MacBroom Report, Compl. Ex. "8"). Most strikingly, the purported need to accommodate 75 pre-K students, and concomitant

requirement of constructing five (5) additional pre-K classrooms and accompanying administrative and other space, turned out to be completely unjustified, since the 2014-2015 pre-K class consists of just 35 full-time equivalent students (Compl. ¶ 48), and is projected by the Prowda Report to decline by approximately 15% over the next 5 years (*id.* ¶ 49 & Ex. "7" thereto, at p. 18). Even though the Town's leadership, including Defendants, are believed to have been in possession of the Prowda Report since January 2014 at latest, Defendants and the MDBC continued to represent to the Town's electors throughout 2014 and in the run-up to the September 2014 Special Town Meeting that a substantial expenditure would be necessary to accommodate a "growing" pre-K class. *Id.* ¶¶ 44, 50-51; *see, e.g.*, Tri-Fold Brochure (Compl. Ex. "4"), at p. 2 (stating that "[t]he overall objective of this school renovation project is to extend the useful life of the school building for 25-30 more years and to add dedicated space to serve a growing special needs pre-kindergarten population") (emphasis in original).

The newly-revealed population projections demonstrate that there is no need to add dedicated space to serve a "growing" pre-K population, since, to the contrary, the pre-K and K-2 populations are projected to *decline* significantly for the foreseeable future. Specifically, there is no need to demolish substantial portions of the School, including the newest addition, the Peach Core, and to rebuild or newly construct a pre-K addition at great expense to taxpayers, since that course of action was justified solely by the requirement set forth in the SOR that the School purportedly needed to provide 10,000 square feet of contiguous space to accommodate 75 to 80 pre-K students. *Id.* ¶ 52. In light of the undisputed projections of the Prowda and Milone & MacBroom Reports, there is no rational justification for expending enormous sums to construct 10,000 square feet of contiguous space, since the existing space in the School, if properly

remediated and possibly reconfigured, is more than adequate to accommodate all the needs of the pre-K and the K-2 students in an appropriate manner. *Id.* ¶ 52.

2. The MDBC Learned That The Dedicated Entrance And Exit For The Pre-K Students Would Not Be Approved By The State And Thus Was No Longer Feasible.

Following the September 2014 vote, Defendants, along with the MDBC, conducted a traffic study in connection with the proposed third curb cut in Wolfpit Road, as contemplated by the School renovation project to provide a dedicated entrance and exit for the pre-K class. *Id.* ¶ 53. Upon obtaining the results of the traffic study, however, the MDBC learned that the third curb cut in Wolfpit Road would not be approved by the State's Department of Transportation. *Id.* ¶ 54. Thus, the dedicated pre-K entrance and exit is no longer a part of the proposed renovation, removing a major benefit touted by School officials and Town leaders in promoting the renovation project. *Id.* ¶ 55; *see, e.g.*, Tri-Fold Brochure (Compl. Ex. "4"), at p. 2 ((identifying "Proposed Site Improvements" as including "Separated Pre-K and K-2 drives" (¶ 2) and "Separate Pre-K Entrance" (¶ 6), and depicting in two illustrations a "Dedicated Controlled Pre-K Entrance" and "Pre-K Ramp Connection"); Pink Flyer (Compl. Ex. "3") (stating that "[t]he proposed project includes: …SEPARATE, SECURE PRE-K AND K-2 ENTRANCES").

3. The Roof Is Covered Under A Warranty, And Thus Does Not Need To Be Replaced At Taxpayers' Expense.

Also discovered for the first time after the September 2014 vote was that the roof of the School was and still is covered under a warranty by the roof's manufacturer. Compl. ¶ 56 & Ex. "9" thereto. Thus, the Town could and should have exercised (and still can exercise) its contractual rights under the warranty in lieu of spending taxpayer dollars to replace the roof outright—a fact never mentioned by the Town's leaders, including Defendants, in "selling" the renovation project to the electors. Compl. ¶ 57.

4. The Town's Leaders, Including Defendants, Engaged In A Massive Marketing Campaign, Expending Thousands Of Dollars And Repeatedly Using Government Property And Assets, Including School Property, To "Sell" The Renovation Project To The Voters, In Blatant Violation Of Connecticut's Election Laws.

Following the September 2014 Special Town Meeting, numerous electors sought documents from the Town's officials, including Defendants, regarding the apparent violations of the election laws prohibiting municipalities from expending taxpayer dollars and from using government property and assets to advocate for a position on a proposal or question put to voters. *Id.* ¶ 58. Among the documents obtained following the September 2014 Special Town Meeting, including several after filing formal Freedom of Information Act complaints[1] when such documents were withheld, were the following:

- An email from December 2013 to the MDBC's Ann Paul and Principal Jensen-Gerner, reminding them that under Connecticut law, "no one may use municipal funds to send an unsolicited communication to a group of residents (such as the parents of school children) regarding a referendum via electronic mail, text, telephone or other electronic or automated means for the purpose of reminding or encouraging such residents to vote in a referendum….As in the past, the use of public funds to advocate for a certain result in a referendum is strictly prohibited during the pendency of the referendum…" (*id.* ¶ 59(a) & Ex. "10" thereto)—demonstrating that the MDBC's Paul and Jensen-Gerner, at a bare minimum, knew as of December 2013 knew what the relevant laws were governing communications with residents, including the parents of school children, regarding a referendum;

- A "Miller-Driscoll Marketing Plan", attached to a July 15, 2014 email from the MDBC's Vice Chair, Karen Birck, to each of the MDBC members, the "BOE", and Miller-Driscoll's PTA President, Susan Price (Compl. Ex. "11"), indicating that the MDBC intend to promote the renovation project through, among other things: flyers (including enclosing copies of such flyers in each Miller-Driscoll child's first day packet); presentations at over a dozen "meet the teacher" days and "open house" events over August and September 2014 for parents of students at

[1] This Court may take judicial notice of the fact that the Wilton Public School, and the MDBC's Ann Paul, have been recently penalized by the Freedom of Information Commission for failing to produce documents promptly pursuant to requests. Indeed, in one such proceeding, the Wilton Public Schools "repeatedly represented that they had provided all responsive documents when, in fact, they had not." *Marissa Lowthert v. Superintendent of Schools, Wilton Public Schools,* Docket No. FIC 2014-148 (Feb. 25, 2015).

the public schools in the Town; and, displaying boards in the Town Hall Lobby, the timing of which was to be coordinated with Defendant and First Selectman Brennan—demonstrating, at a bare minimum, that Defendant Brennan as well as others were well aware of and involved in the "Marketing Plan" for the School renovation plan, including the intention to use tax dollars and government facilities to promote the project, in violation of Connecticut law (Compl. ¶ 59(b));

- An email, dated July 29, 2014, from Bruce Hampson to all members of the MDBC, stating in pertinent part that "Bill Brennan suggests that we no longer use the phrase 'Marketing Plan'…going forward we will refer to it as our 'Community Informational Plan'"—demonstrating that Defendants intended to obscure the true nature of the marketing and advocacy efforts being conducted, including in violation of Connecticut law, by renaming their "Marketing Plan" as a "Community Informational Plan" (Compl. ¶ 59(c) & Ex. "12" thereto);

- Emails discussing the "Tri-Fold Brochure" (Compl. Ex. "4"), demonstrating that Defendants and others knew that a pamphlet advocating for the project would be distributed to voters, including by placing 1,000 such pamphlets into the first-day packets of Miller-Driscoll students for delivery to their parents, and by distributing such pamphlets at information sessions coordinated by Defendant Brennan, and showing that the MDBC intended to use school property and websites to advocate for the renovation project, in violation of Connecticut law (Compl. ¶¶ 59(d), 59(g) – 59(i) & Exs. "13", "15" thereto);

- Invoices and check vouchers, demonstrating that with Defendant Brennan's personal authorization, Defendants spent thousands of dollars to prepare and print the Tri-Fold Brochure, in violation of Connecticut law (Compl. ¶ 59(*l*) & Exs. "17", "18" thereto);

- Emails from September 2014 among members of the MDBC, copied to Defendants Brennan and Dubow, among others, stating that the Town's leaders intended to "fight fire with fire" and "scare the voters" when confronted with opposition to the renovation project (Compl. ¶¶ 59(e) – 59(f) & Ex. "14" thereto); and,

- Emails, dated September 25, 2014, between the MDBC Chair's Bruce Hampson and PTA President Susan Price, in which Hampson, in authorizing Price to distribute pink flyers (Compl. Ex. "3") at a soccer game, stated, "If anyone asks…the flyers were paid for by private parties[,]" demonstrating that the MDBC's Chair knew that payment for such flyers should not have been made using taxpayer funds, and apparently suggesting to Price that, if asked, she should state to the contrary that the flyers were paid for by private funds, leading to a reasonable inference that payment of such flyers was in fact made using taxpayer funds, in violation of Connecticut law (Compl. ¶ 59(k) & Ex. "16" thereto).

Not only were the above facts unavailable and unknown to Plaintiff and the vast majority of the electors at the time of the September 2014 Special Town Meeting, but the conduct described also likely had a material effect on the outcome of the September 2014 vote, which was decided by a margin of just twenty-seven (27) votes. Compl. ¶ 60.

G. Sensible Wilton's Revote Petition

On January 8, 2015, Sensible Wilton submitted a petition to the Town Clerk requesting a "revote" of the September 2014 Special Town Meeting, including because of allegations of various election law violations committed by town leaders and school officials in the days and weeks before the Special Town Meeting, and also because of doubts about the financial, architectural, and practical logic of the proposed renovation project itself. *Id.* ¶ 61. However, on February 17, 2015, the Board of Selectmen concluded that because the power to request a revote is not one of the Town Meeting's enumerated powers under the Charter, the Board of Selectmen had no duty to call a Special Town Meeting for such a revote. *Id.* ¶ 62. Also at the February 17, 2015 meeting, Town Counsel Kenneth Bernhard commented on the allegations of election law violations contained in the SEEC complaint by stating, in pertinent part, that even if "technical" violations of election law had occurred, such violations were "de minimis" and thus unlikely to have had an impact on the outcome of the Special Town Meeting. *Id.* ¶ 63.

H. Sensible Wilton's April 2015 Petition To Repeal The Bond Authorization

Following the Board of Selectmen's rejection of Sensible Wilton's January 2015 petition on February 17, 2015, Sensible Wilton consulted counsel, and on April 1, 2015, Sensible Wilton filed the subject Petition (the "April 2015 Petition"; Compl. Ex. "19"), containing the signatures of more than 2% of the Town's electors, and stating as follows:

> SUBJECT: We, the undersigned electors and those of us qualified to vote in Town Meetings of the Town of Wilton, hereby Petition

> that a Special Town Meeting be held to consider and vote the following ordinance, without amendment, in full compliance with State Election Law:
>
> **The resolution appropriating and authorizing bonds in the amount of $50,022,000 for planning, design, construction, renovation, equipping and furnishing of the Miller-Driscoll School and related costs is hereby repealed; provided, however, that the Town will pay all legal obligations to third parties, lawfully incurred, including any arising from bonds or contracts already made and entered into by the Town prior to such repeal.**

(Bold in original.)

The Petition duly complied in form with the requirements of the Charter, and was accepted for filing by the Town Clerk and submitted on April 13, 2015, for consideration by the Board of Selectmen. Compl. ¶ 65. However, at a meeting on May 18, 2015, the Board of Selectmen voted to take no action on the April 2015 Petition. *Id.* ¶ 66.

I. The Status Of The Renovation Project

As of the date of the Complaint, no construction has begun on the project, and indeed, architectural plans, far from having been filed, are not even believed to have been finalized yet. *Id.* ¶¶ 67-68. Permits have not been obtained yet in connection with the renovation project, nor has the School obtained approval of the renovation project from the State of Connecticut—a step that will determine whether and to what extent the project will qualify for millions of dollars in reimbursements by the State. *Id.* ¶¶ 69-70.

ARGUMENT

"A party seeking a writ of mandamus must establish: (1) that the plaintiff has a clear legal right to the performance of a duty by the defendant; (2) that the defendant has no discretion with respect to the performance of that duty; and (3) that the plaintiff has no adequate remedy at law." *Stewart v. Town of Watertown*, 303 Conn. 699, 711-12 (2012), quoting *Hennessey v. Bridgeport*,

213 Conn. 656, 658-59 (1990) (internal citations and quotation marks omitted). "In deciding the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity." *Hennessey*, 213 Conn. at 659, citing *Sullivan v. Morgan*, 155 Conn. 630, 635 (1967). A party seeking a temporary order of mandamus must comply with the procedures in P.B. § 23-48, and thus must not only satisfy the requirements for issuance of a writ of mandamus but also must show "irreparable harm" in the absence of such prompt issuance. *See, e.g., Meyers v. Westport*, 41 Conn. Supp. 295, 297 (Sup. Ct., Jud. Dist. Stamford-Norwalk 1989).

As set forth in Part I below, Plaintiff has established a clear legal right to compel the Board of Selectmen to call a Special Town Meeting to vote on the proposed ordinance set forth in the April 2015 Petition—a non-discretionary, mandatory duty under the Town's Charter—and Plaintiff has no adequate remedy at law short of issuance of a writ of mandamus. Indeed, as set forth in Part II below, the equities plainly balance in favor of Plaintiff, and in the absence of a temporary order of mandamus, Plaintiff will suffer irreparable injury.

Accordingly, this Court should grant Plaintiff's application for issuance of a temporary order of mandamus.

I. PLAINTIFF HAS A CLEAR LEGAL RIGHT TO COMPEL A SPECIAL TOWN MEETING TO CONSIDER AND VOTE ON ITS PROPOSED ORDINANCE REPEALING THE PRIOR BOND AUTHORIZATION. DEFENDANTS HAD NO DISCRETION WITH RESPECT TO THEIR OBLIGATION TO CALL SUCH A SPECIAL TOWN MEETING, AND PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW.

A. The Parties' Rights Are Governed By The Wilton Town Charter.

As an initial matter, under the Home Rule Act, Plaintiff's rights here—and Defendants' concomitant obligations—are governed by the Wilton Town Charter (the "Charter"; copy annexed hereto as Exhibit "1").

In Connecticut, "[p]owers granted to any municipality under … any charter or special act, unless the charter or special act provides to the contrary, shall be exercised by ordinance when the exercise of such powers has the effect of … (2) [c]reating a permanent local law of general applicability." C.G.S. § 7-148(b)(2) (emphasis added). Those powers include the power to construct and reconstruct school houses, *id.* § 7-148(c)(6)(A)(i), and the power to "regulate the method of borrowing money for any purpose…." *Id.* § 7-148(c)(2)(I).

Furthermore, Connecticut's "Home Rule Act" permits any municipality to "adopt and amend a charter which shall be its organic law…." *Id.* § 7-188(a)(1). The Town of Wilton has exercised its authority under C.G.S. § 7-188(a)(1) to adopt a Charter, which was adopted on November 3, 2009. "In construing a [town] charter, the rules of statutory construction generally apply." *Stamford Ridgeway Associates v. Board of Education*, 214 Conn. 407, 423 (1990). Thus, "General Statutes § 1-2z directs [the court] first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered….The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." *Saunders v. Firtel*, 293 Conn. 515, 525 (2009). "[A] charter bears the same general relation to the ordinances of the city that the constitution of the state bears to the statutes." *Palermo v. Ulatowski*, 97 Conn. App. 521, 524 (2006), quoting 5 E. McQuillin, Municipal Corporations (3d Ed. Rev. 2004) §§ 15, 17.

B. The Power Of Initiative Is Generally Reserved To The Residents Of A Municipality To Repeal Prior Legislation, And Under Prevailing Connecticut Case Law, An Ordinance Adopted Pursuant To The Power Of Initiative May Repeal A Prior Resolution Adopted By The Municipality's Legislative Body. Indeed, An Ordinance "Trumps" A Mere Resolution.

Also relevant to the statutory analysis that follows is the role of the voter initiative, which the April 2015 Petition seeks to exercise, and specifically, the issue of whether a "resolution" adopted by a town's legislative body through a referendum may be repealed by a subsequent "ordinance" adopted pursuant to the power of initiative. The answer to that question is yes, and indeed, absent a statutory provision to the contrary, an ordinance trumps a mere resolution.

"The initiative and referendum are recognized as instruments of democratic government, widely used and of great value….An 'initiative', as applied to municipalities, is 'the power reserved to the people of a municipality residing therein to propose laws or ordinances….A 'referendum' is '[t]he power of the residents of a municipality to approve or reject at the polls any act of the municipal legislative body….The word 'referendum', however, has a popular definition broader in scope which also includes in the term initiative action, viz., the determination of questions as to certain existing or proposed legislation by reference to a vote of the people…." *Mazzey v. Stratford Town Council*, No. CV-03404203-S, 2003 WL 21772127, *3 (Sup. Ct., Jud. Dist. Fairfield, July 15, 2003) (copy annexed hereto as Exhibit "2") (internal citations and quotation marks omitted). "Generally, the people may, by initiative, enact laws on matters upon which the legislative body has not acted, and may amend or even repeal laws already enacted." *Id.*, citing 42 Am.Jur.2d, Initiative and Referendum § 9; *Morris v. Town of Newington*, 36 Conn. Supp. 74, 84 (Sup. Ct. 1979), *aff'd*, 180 Conn. 89 (1980).

"The enactment of ordinances by initiative and referendum has been recognized as a matter of local interest." *Windham Taxpayers Association v. Board of Selectmen of Town of Windham*,

234 Conn. 513, 536 (1995), citing *In re Pfahler*, 150 Cal. 71, 82 (1906); 56 Am.Jur.2d Municipal Corporations § 138 (1971), at p. 193. Thus, the Connecticut Supreme Court has held that a town may provide in its charter that a town meeting must be called upon the filing of a petition to repeal or reconsider a prior bond authorization for school construction. *Windham*, 234 Conn. at 537-38.[2]

"An ordinance prescribes some permanent rule of conduct or of government which is to continue in force until the ordinance is repealed. A resolution, generally speaking, is simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality….Where the charter of a municipality provides that action of the legislative body shall be by ordinance or resolution, it must act in the manner prescribed." *Newington*, 36 Conn. Supp. at 80. At the same time, "[w]here a resolution is in substance and effect an ordinance, the name given it is immaterial if it is passed with all the formalities of an ordinance. It thereby becomes a legislative act, and *whether it is called an 'ordinance' or a 'resolution' is not important.*" *Newington*, *supra* at 81 (emphasis added).

C. Under The Charter, The Town Meeting Is The Legislative Body Of The Town, Including With Respect To Bond Authorizations, And Is Empowered To Adopt, Amend, And Repeal Ordinances At Special Town Meetings. The Special Town Meeting At Which The Bond Authorization Was Approved Adopted An "Ordinance" Within The Meaning Of The Charter, And The Electors Have The Power Of Initiative To Repeal *Any* Ordinance Adopted At A Prior Special Town Meeting.

With the above background principles in mind, we now turn to the issue presented: namely, whether, pursuant to the Wilton Charter, an "ordinance" proposed by a voter initiative for

[2] In *Windham*, the Board of Selectmen was the legislative body of the Town, not the Town Meeting (unlike in Wilton), and the power of initiative under the Windham charter did not include the power to repeal prior ordinances, unlike the Wilton Charter (*see* § C-5(B)). Thus, it is inapposite that in that case, the charter in question did not permit repeal of the bond authorization in question.

consideration and vote at a Special Town Meeting may repeal a prior bond authorization adopted by referendum at a prior Special Town Meeting. The answer, upon consideration of all the relevant provisions of the Charter, is unequivocally yes, because the Town Meeting has the unlimited power of initiative to repeal previously adopted ordinances, and because the prior bond authorization was adopted pursuant to the Town Meeting's ordinance power under the Charter.

1. The September 2014 Special Town Meeting Authorizing Bonds For School Construction Adopted An "Ordinance" Within The Meaning Of The Charter.

"The Charter is the organic law of the Town of Wilton that provides the rules for administration of the Town's operations….Ordinances provide additional laws that govern the Town as well as the creation of local boards that are made of Town residents who serve as volunteers. The Charter and Ordinances together make up the Town Code." Charter Preamble, at p. 1. "Matters of administration of local affairs not provided for by this Charter or by lawful *ordinance* shall be governed by the General Statutes and any Special Acts of the State of Connecticut applicable to the Town." § C-1(B) (emphasis added).[3]

Section C-5(A) makes clear that "*all* powers of the Town shall be vested in and exercised by the *Town Meeting* [i.e., *not* the Board of Selectmen] except: (1) Powers otherwise allocated by this Charter; (2) Powers otherwise allocated by … [Connecticut State law] and not vested in the Town Meeting by this Charter; and (3) Powers delegated by *ordinance* so long as the same shall remain in effect." (Emphasis added.) Section C-5(B) states that "[t]he Town Meeting shall have the power pursuant to § C-9 to *adopt, amend* and *repeal ordinances*. An ordinance may amended or repealed only by the adoption of another *ordinance*." (Emphasis added.)

[3] In the interest of judicial economy, all subsequent section citations shall be to the Charter unless otherwise indicated.

Section C-9 of the Charter—i.e., the provision "pursuant to" which the Town Meeting has the power to adopt, amend, or repeal ordinances under § C-5(B)—is the Special Town Meeting provision.[4] Under § C-9, "[t]he Board of Selectmen *shall* call a Special Town Meeting whenever: (1) It is requested to do so by petition signed by at least 2% of the electors of the Town and filed with the Town Clerk pursuant to Subsection C below; (2) The Board of Selectmen deems it necessary or desirable; or (3) A meeting of the Town Meeting is required pursuant to Article VI or Article VII of this Charter." § C-9(A) (emphasis added).

It thus follows that the September 2014 bond authorization was adopted following a Special Town Meeting, called pursuant to § C-9(A)(3) as required under Article VII of the Charter, since the bonding procedures are set forth in Article VII, § C-33 of the Charter. That provision states that "[t]he Board of Selectmen, and only the Board of Selectmen, shall have the power to *propose* the issuance of bonds to the Town Meeting[,]" § C-33(A) (emphasis added), and that any such proposal, after review by the Board of Finance, shall be submitted to the Town Meeting to "vote for or against such proposal by machine voting. The resolution shall be adopted if approved by a majority of those voting and shall otherwise be rejected." § C-33(C).

Furthermore, "[t]he legislative body of the Town shall be the Town Meeting with respect to the following matters: …(2) The authorization of bonds, and all other forms of financing, the terms of which are in excess of one year." § C-6(A)(2). And, as noted above, "[t]he Town Meeting shall have the power *pursuant to § C-9* [which includes Special Town Meetings called pursuant to § C-9(A)(3) to consider bond proposals] to adopt, amend, and repeal *ordinances*." § C-5(B) (emphasis added). Hence, notwithstanding the use of the word "resolution" in § C-33(C), the

[4] The Charter defines a Special Town Meeting in § C-1(C) as a meeting of the Town Meeting, called either at the discretion of the Board of Selectmen or pursuant to § C-9.

Town Meeting exercised its *ordinance* power at the September 2014 Special Town Meeting under § C-5(B), § C-6(A)(2), and § C-9(A)(3) to approve the Board of Selectmen's $50,022,000 bond proposal. Indeed, it appears that the reference in § C-33 to the word "resolution" is to the Board of Selectmen's "expression of opinion or mind" concerning a proposed bond issuance, *Newington*, 36 Conn. Supp. at 80, while the Town Meeting's act of *adopting* such a "resolution" can only be considered an "ordinance", i.e., a "permanent rule of conduct or of government which is to continue in force until…repealed[,]" *id.*, in light of the above Charter provisions.[5]

2. Even Assuming That The September 2014 Bonding Authorization Constituted Adoption Of A "Resolution", The Connecticut Supreme Court Has Made Clear That When A Resolution Is Adopted With All The Formalities Of An Ordinance, Such A "Resolution" Is A* De Facto *Ordinance.

Indeed, even assuming that the September 2014 bonding authorization constituted the adoption of a "resolution"—the procedures for which are entirely unaddressed under the Charter, unlike the detailed and formal provisions for adopting an ordinance—the Connecticut Supreme Court has squarely held that a "resolution" otherwise adopted with all the formalities of an ordinance is a *de facto* ordinance, that the labels given to such a legislative act are unimportant, and, that the power of initiative may be used to adopt a subsequent ordinance to repeal a prior resolution, including one that amounts to a *de facto* ordinance. *Morris v. Town of Newington*, 36 Conn. Supp. 74, 80 (Sup. Ct. 1979), *aff'd*, 180 Conn. 89 (1980).

[5] Further support for the conclusion that the September 2014 Special Town Meeting adopted an "ordinance" is that Article VII nowhere contains the word "ordinance". Yet, under § C-5(B), the Town Meeting may adopt *ordinances* "pursuant to § C-9", including § C-9(A)(3), which states that a Special Town Meeting must be called whenever required under Article VII. By implication, when a Special Town Meeting, which was called as required under Article VII, § C-33, authorizes the issuance of bonds as occurred in September 2014, the Town Meeting is exercising its *ordinance* power under § C-5(B) and § C-9(A)(3).

In *Newington*, the plaintiffs, residents of Kimberley Road, a street in a residential zone near a large shopping center, successfully secured a resolution from their town council in 1976 to close Kimberley Road to vehicular traffic. 36 Conn. Supp. at 75.[6] In 1978, the voters presented a petition through the initiative provisions of their town charter seeking passage of an ordinance to reopen Kimberley Road. *Id.* at 75-76. Pursuant to the provisions of the charter, the town council was empowered to submit the petition to a referendum vote and chose to do so, and on May 31, 1978, the ordinance passed overwhelmingly. *Id.* at 76. The plaintiffs then sued to attack the ordinance, and while the litigation was pending, on June 19, 1978, the town council unanimously adopted a resolution rescinding the 1976 resolution, and redirected the closing of Kimberley Road. *Id.* at 77. In sum: The March 1976 town council resolution closed Kimberley Road; the May 1978 voter-initiative ordinance reopened it; and the June 1978 town council resolution closed it again.

The *Newington* court held that the initial, March 1976 "resolution" was "in substance and effect an ordinance", *id.* at 81, and rejected the notion that the resolution could not be repealed by a subsequent initiative ordinance, holding that "the people may, by initiative, enact laws on matters upon which the legislative body has not acted, and may amend *or even repeal* laws already enacted." *Id.* at 84 (emphasis added) (citing 42 Am.Jur.2d, Initiative and Referendum § 9). Furthermore, the *Newington* court concluded that the subsequent June 1978 resolution could not undo the May 1978 ordinance, not only because the Newington charter precluded the town council from amending an ordinance through a resolution, but also because "the reopening of Kimberley Road could properly be legislated only by an ordinance de jure or de facto, and not by a simple resolution adopted without the necessary formalities of an ordinance." *Id.* at 87.

[6] In Newington, unlike in Wilton, the legislative body was the town council. *Id.* at 75.

In short, even assuming that the September 2014 bond authorization was a "resolution" and not an "ordinance", *Newington* makes clear that the labels do not matter, and that an ordinance brought on by voter initiative may repeal a prior resolution.[7]

3. The Charter's Grant Of Legislative Power To The Town Meeting To Repeal Ordinances Through Voter Initiatives Is Express And Unlimited, And Such Power Extends To Repealing Prior Bond Authorization.

Of critical importance is the fact that the Charter expressly grants a broad power of repeal to the Wilton electors through the power of initiative under § C-5(B) and § C-9(B)(2). Hence, while the Town Meeting's power to *adopt* or *amend* ordinances with respect to bonding is admittedly circumscribed, the power of repeal is left fully intact.

Thus, § C-9(B)(1), which permits voter initiatives "[t]o consider any item or proposal permitted under § C-6(A)(3) through (7)", concededly excludes through implication a voter initiative to exercise the Town Meeting's legislative powers under § C-6(A)(1) ("[t]he adoption of an annual budget") or § C-6(A)(2) ("[t]he authorization of bonds and all other forms of financing, the terms of which are in excess of one year"). Nonetheless, the limitation in § C-9(B)(1) that bonding authorizations may not be *adopted* through the power of initiative is wholly consistent with the power under § C-9(B)(2) permitting *repeal* of prior ordinances, including those ordinances that authorized bond issuances, for two separate reasons.

First, as noted above, the Town Meeting may not *propose* a bond issuance, § C-33(A), nor *amend* such a proposal, § C-33(B), but neither § C-33 nor any other provision of the Charter

[7] The highest appellate courts in other jurisdictions concur that an ordinance trumps a resolution. *See, e.g.*, *Jewett v. Luau-Nyack Corp.*, 31 N.Y.2d 298 (1972) ("[A] village may always do by ordinance what may done by a less formal resolution…."); *City of Mitchell v. Dakota Cent. Telephone Co.*, 25 S.D. 409 (1910) ("[A]n ordinance of a municipality can only be repealed or changed by an ordinance and not by resolution."); *Chasis v. Tumulty*, 8 N.J. 147 (1951) ("[A]n action which does not rise to the dignity of an ordinance is a resolution.").

restricts the power of the Town Meeting to *repeal* a bond issuance. The well-established tenet of statutory construction known as *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another", Black's Law Dictionary (6th Ed. 1990), thus applies, such that "where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." *Gay and Lesbian Law Students Association at University of Connecticut School of Law v. Board of Trustees,* 236 Conn. 453, 476 (1996), quoting 73 Am.Jur.2d, Statutes § 316 (1974); *accord, State v. Bell*, 303 Conn. 246, 265 (2011), quoting *Honulik v. Town of Greenwich*, 293 Conn. 641, 694 n.5 (2009) (*Zarella, J.*, dissenting) (invoking *expressio unius est exclusio alterius* to "infer that the item not mentioned…was excluded by deliberate choice[.]"). Here, the Town Meeting's legislative powers to adopt, amend, or repeal ordinances are contained in a statutory "associated group or series", *Honulik, supra*, and thus, the legal presumption is that the Charter's authors deliberately chose through § C-33 to limit the power of the Town Meeting to *propose* or *amend* a bonding matter, but *not* to limit the power of the Town Meeting to *repeal* a prior bond authorization.

Second, §§ C-9(B)(1) and C-9(B)(2) are part of a disjunctive list of four different bases for which a voter initiative may be brought. "[The legislature's] use of the disjunctive 'or' between subparts of a statute indicates that the legislature intended its parts to be read separately, in the disjunctive." *Earl B. v. Commissioner of Children and Families*, 288 Conn. 163, 178 (2008), quoting *Gaynor v. Union Trust Co.*, 216 Conn. 458, 467 (1990) (internal quotation marks omitted). Thus, while § C-9(B)(1) authorizes a voter initiative to propose any item authorized under §§ C-6(A)(3) through (7), a voter initiative *also* may be brought under § C-9(B)(2) to adopt, amend, or repeal an ordinance, *or* under § C-9(B)(3) to overrule any legislative action of the Board of Selectmen, *or* under § C-9(B)(4) to propose any other legislative action. Again, if the Charter's

authors wished to limit voter initiatives *solely* to enacting legislation permitted under §§ C-6(A)(3) through (7), they would not have listed §§ C-9(B)(2) through (4) as alternative bases for which voter initiatives could be brought.

Reading §§ C-9(B)(1) and C-9(B)(2) in harmony thus means that a voter initiative to propose an ordinance adopting an annual budget is precluded—this is consistent, too, with the fact that annual budgets are adopted by the *Annual* Town Meeting pursuant to § C-8, not by the *Special* Town Meeting pursuant to § C-9—and that a voter initiative to *propose* or *amend* an issuance of bonds is likewise precluded, consistent with § C-33; but, by contrast, a voter initiative to *repeal* a prior bond authorization is permissible.

D. Since The April 2015 Petition Sought To Exercise A Proper Purpose, Namely, Repeal Of A Prior Bond Authorization While Fully Protecting The Rights Of Any Third Parties That May Have Vested In The Interim, The Board Of Selectmen Had No Discretion To Refuse To Schedule A Special Town Meeting To Consider And Vote On The Proposed Ordinance In The April 2015 Petition.

Notwithstanding the foregoing, Defendants can be expected to argue that even though the April 2015 Petition duly complied with the Charter's procedural requirements—and even though the plain language of § C-9(A) imposes a mandatory, non-discretionary duty on the Board of Selectmen to call a Special Town Meeting when presented with such a petition—the Board of Selectmen nonetheless did not need to schedule a Special Town Meeting because the April 2015 Petition was not for a "proper purpose". *See, e.g.*, *Palermo v. Ulatowski*, 97 Conn. App. 521, 524 (2006). However, under Connecticut law, the repeal of a prior bond authorization *is* a proper purpose of a voter initiative, so long as the Charter permits it. *Windham*, 234 Conn. at 537-38.

Moreover, the rights of all third parties are fully protected by the ordinance proposed by the April 2015 Petition. "The power to adopt a resolution carries with it the power to rescind unless irrevocable rights and obligations have been created by the original resolution." *Central*

Veterans' Association v. Stamford, 140 Conn. 451, 454 (1953), quoting *Madison v. Kimberly*, 118 Conn. 6, 11 (1934). Accordingly, the Connecticut Supreme Court has held that so long as the legal obligations of a municipality arising from contracts already made and entered into by the municipality are paid, a rescission or repeal of a prior bond authorization is enforceable and valid. *See Staples v. Bridgeport*, 75 Conn. 509, 512 (1903). Nothing in the Charter has altered this common law rule. Here, the April 2015 Petition expressly provides that, notwithstanding the repeal of the September 2014 bond authorization, "the Town will pay all legal obligations to third parties, lawfully incurred, including any arising from bonds or contracts already made and entered into by the Town prior to such repeal." Compl. Ex. "19". Under such circumstances, no third party will be harmed by the adoption of the ordinance proposed by the April 2015 Petition, and accordingly, the Charter's express grant of power to the Town Meeting to repeal the September 2014 bond authorization is for a "proper purpose".

E. The Board Of Selectmen Had A Non-Discretionary, Ministerial Duty Under § C-9 To Schedule A Special Town Meeting. Their Failure To Do So Leaves Plaintiff With No Adequate Remedy At Law.

In light of the foregoing, § C-9(A)(1) imposed a clear, ministerial, and non-discretionary duty on the Board of Selectmen to call a Special Town Meeting upon presentment of a valid petition. It is undisputed that the April 2015 Petition complied in full with all procedural requirements of the Charter and contained more than 2% of the electors' signatures. Furthermore, Defendants' failure to comply with their ministerial duty to call such a Special Town Meeting leaves Plaintiff with no adequate remedy at law.

* * *

In sum, the Charter vests *all* legislative powers of the Town in the Town Meeting (§ C-5(A)), which is empowered to adopt, amend, or repeal ordinances "pursuant to § C-9", i.e., at

Special Town Meetings (§ C-5(B)). The September 2014 bond authorization, which was adopted following a Special Town Meeting called pursuant to § C-9(A)(3), was an exercise of the Town Meeting's legislative power to adopt ordinances, specifically pursuant to § C-6(A)(2), which permits the Town Meeting to authorize the issuance of bonds. The Charter expressly authorizes the repeal of ordinances under § C-5(B) through voter initiatives (§ C-9(B)(2)), including the proposed ordinance set forth in the April 2015 Petition, and *nothing* in the Charter limits the Town Meeting's power of initiative to repeal a previously adopted ordinance. Finally, since the April 2015 Petition, which indisputably complies with all procedural requirements under the Charter, seeks a "proper purpose" in that it expressly protects the rights of all third parties while proposing a repeal of the prior bond authorization—a proposition that is amply justified by the changed circumstances and new facts that have emerged since the September 2014 vote—the Board of Selectmen had no right to refuse to schedule a Special Town Meeting. Their failure to call a Special Town Meeting under such circumstances has left Plaintiff with no adequate remedy at law, thus entitling Plaintiff to issuance of a writ of mandamus to compel such a meeting to be called.

II. IN THE ABSENCE OF THIS COURT'S ISSUANCE OF A TEMPORARY ORDER OF MANDAMUS, PLAINTIFF WILL SUFFER IRREPARABLE INJURY. FURTHERMORE, THE EQUITIES STRONGLY FAVOR PLAINTIFF.

For all the reasons stated above in Part I, Plaintiff has established a clear right of entitlement to issuance of a writ of mandamus. Furthermore, Plaintiff will suffer irreparable injury if a writ of mandamus does not issue promptly, and the equities plainly favor Plaintiff.

With respect to Plaintiff's showing of irreparable harm, it is clear that in the absence of this Court's intervention and issuance of a temporary order of mandamus on an expedited basis, Plaintiff will be deprived of the benefit of the judicial process, even if ultimately vindicated. According to Defendants' PowerPoint presentation regarding the renovation project (Compl. Ex.

"5"), construction documents will be submitted by July 2015, with construction scheduled to begin by the end of 2015. *Id.* at p. 16. Plaintiff has no remedy short of issuance of a temporary writ of mandamus, since it is expected that many millions of dollars in construction contracts will be executed in the coming months, by which point a vote to repeal the renovation project would be all but completely moot.

By contrast, Defendants have no such imminent risk of harm, since they can reserve all their rights in this litigation even if this Court compels them through a temporary order of mandamus to call a Special Town Meeting to vote on the proposed repeal. If the vote at that Special Town Meeting fails to gain majority support, then this lawsuit becomes moot, but if the vote succeeds in gaining majority support, Defendants still can argue that the repeal ordinance is void. In short, Plaintiff has amply demonstrated that it will suffer imminent and irreparable harm in the absence of this Court's immediate issuance of a temporary order of mandamus, while Defendants will suffer no significant prejudice should a temporary order of mandamus issue.

Moreover, the equities strongly favor Plaintiff under the facts presented. As set forth above in Part I, the April 2015 Petition imposes a clear legal duty on Defendants, who have refused to comply with their ministerial obligation to call a Special Town Meeting, leaving Plaintiff without an adequate remedy. Furthermore, the proposed repeal of the September 2014 bond authorization would cause no harm to any third parties, who are expressly protected.

In addition, for the reasons stated above and in the Verified Complaint, the new facts that have emerged since the September 2014 bond authorization dramatically undermine several of the key assumptions underlying the School renovation project's viability and purported necessity. Most notably, the claimed need for 10,000 square feet of contiguous space to accommodate a "growing" pre-K population was thoroughly gutted by the revelation in February 2015 of the

previously undisclosed Prowda Report, which demonstrated to the contrary that the pre-K and K-2 populations in the Town are *declining*. Even more strikingly, the evidence is now clear that the Town's leadership, including Defendants First Selectman Brennan and Selectman Dubow, engaged in a massive marketing campaign using taxpayer dollars to sell the renovation project to the Town's voters, in blatant violation of C.G.S. § 9-369b(a), which unequivocally prohibits the expenditure of taxpayer funds to influence the vote of any person in connection with a referendum proposal. Indeed, many of the newly discovered facts were revealed only after repeated demands were made and Freedom of Information Commission complaints filed. Contrary to the assertions of Town Counsel Kenneth Bernhard that such violations were "technical" and "de minimis" in nature, Compl. ¶ 63, Defendants' conduct constituted serious violations of Connecticut's election laws and likely had a material impact on the outcome of such a close vote. *See Sweetman v. State Election Enforcement Commission*, 249 Conn. 296, 302 (1999) (upholding the SEEC's conclusion that a regional school district's board of education and its members committed a "serious offense" under C.G.S. § 9-369b by authorizing the expenditure of municipal funds to prepare, reproduce, and distribute a pamphlet, which advocated for a "Yes" vote in support of a referendum authorizing bonds for school construction).

By contrast, the only potential damage that could occur in the event a temporary order of mandamus issues is the cost of holding a Special Town Meeting. All third parties are fully protected, *see* April 2015 Petition (Compl. Ex. "19"), and the Town's electors are best situated to decide whether to repeal their prior authorization for $50,022,000 in bonds in light of the changed circumstances and newly-discovered facts regarding the School renovation project.

Accordingly, the equities strongly weigh in Plaintiff's favor.

III. PLAINTIFF REQUESTS THAT THE COURT WAIVE THE BOND REQUIREMENT SET FORTH IN P.B. § 23-48.

Finally, Plaintiff requests that the Court exercise its discretion and waive the bond requirement set forth in P.B. § 23-48. In the analogous context of a bond requirement in connection with issuance of an injunction, "[t]he purpose of the bond is to indemnify the defendants from any damages which they might sustain if the plaintiff failed to prosecute the action to effect." *Spiniello Construction Co. v. Manchester*, 189 Conn. 539, 546 (1983), citing C.G.S. § 52-472. Here, Plaintiff has sought an expedited resolution of this matter on the merits, and does not even seek injunctive relief, and accordingly, Plaintiff submits that no bond is necessary in this case.

NO PRIOR REQUESTS

Plaintiff has not requested the relief sought herein, in this tribunal or any other.

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CONCLUSION

WHEREFORE, the reasons stated, Plaintiff respectfully asks this Court to grant the following relief:

(i) A prompt hearing on the matters raised by this application;

(ii) Issuance of a temporary writ of mandamus to compel the Board of Selectmen to call a Special Town Meeting, at which the electors may consider and vote on Plaintiff's April 2015 Petition; and

(iii) A waiver of the bond requirement under P.B. § 23-48.

Dated: May 29, 2015

PLAINTIFF
SENSIBLE WILTON

By:_____

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