SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

JAMES E. SWEENEY, F. WARREN BENTON, SAM ORANS, BRIAN PAYNE, RAY MALDONADO, DAN HEUBEL, PAUL J. ABRAHAMASEN , CHRISTOPHER MACDONALD and MICHAEL WEINER,

Plaintiffs,

- against -

DECISION & ORDER
Index No. 9480/07

ELIZABETH FELD, Mayor, MARLENE KOLBERT, Trustee, ANNE McANDREWS, Trustee, JIM MILLSTEIN, Trustee, RICHARD WARD, Trustee, constituting the Village of Larchmont Trustees and RICHARD HEINE, "Chief" of the Fire Department of the Village of Larchmont,

Defendants.

The following papers were read:

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An Order to Show Cause was brought on May 18, 2007 seeking a preliminary injunction to restrain and enjoin the defendants from implementing the Resolutions adopted by the Village Board of Larchmont on May 16, 2007, which provisionally appointed Richard Heine, a paid Fire Lieutenant, the Chief of the Fire Department of the Village of Larchmont and granted Chief Heine the authority over all Fire Department personnel, both paid and volunteer, and put him in charge of all apparatus and equipment of the Larchmont Fire Department. It was further resolved that the Fire Council of the Village of Larchmont shall remain in place but that delegates and or members of the Fire Department shall no longer nominate a person to be Chief of the Fire Department but shall continue to nominate Assistant Chiefs (aka "First Deputy Chief" and " Second Deputy Chief") as they have in the past. The Order to Show Cause also sought a temporary restraining order (TRO) seeking to stay the Village Board from proceeding with any action that would in any way implement or carry out the Resolutions of the Village Board.

CPLR § 6301 states, inter alia, that "a temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." Richard C. Liebowitz, JSC , as duty judge, heard from both the moving party and the opposing party on the application for a TRO and denied it. As the assigned Justice, it is now before this Court to decide the application for a preliminary injunction.

On May 16, 2007, the Village Board, acting pursuant to Village Law §10-1020, adopted two resolutions which , among other things, provisionally appointed Richard Heine as the paid Fire Chief of the Village Fire Department and provided Chief Heine with the authority over all Fire Department personnel, both paid and volunteer, and over all apparatus and equipment of the Village Fire Department. Chief Heine assumed the position of Chief on the morning of May 17, 2007.

The plaintiffs are volunteer members of the Village's combined paid and volunteer Fire Department and seek to enjoin the Village Board from employing defendant Richard Heine as the paid Fire Chief of the Department.

The plaintiffs contend that by appointing a paid Fire Chief to head the Department and by putting him in charge of all the apparatus and equipment, the Village Board has, in essence, partially abolished the Fire Department and, therefore, such action of the Board of Trustees shall be subject to a permissive referendum pursuant to Village Law §10-1020. Further, that it unlawfully strips the members of the Fire Department of their statutory grant of authority to elect the Chief of the Department.

The defendants contend that it did not partially abolish the Fire Department by appointing a paid Fire Chief. The four volunteer Companies remain in place. The Fire Council is still active, and the four Companies still elect two members from their respective membership to represent the Companies at the Fire Council. The only substantial change is that the Chief is now a full-time, paid employee of the Village, rather than a volunteer. He is the paid firefighter authorized by Village Law §10-1020 with authority over all Fire Department personnel, both paid and volunteer, and over all apparatus and equipment of the Fire Department.

Further, the Westchester County Department of Personnel, which serves as the Civil Service Department for municipalities in the County, has approved the position of paid Fire Chief for the Village.

Village Law §10-1020 clearly gives the Village Board the authority to appoint a paid fireman who will have charge over all of the apparatus and personnel, i.e. "and that the voluntary department shall act under the **orders** of such paid fireman or firemen" (emphasis supplied). Further, said section does not require a permissive referendum where a paid fireman is made Chief. It only requires a permissive referendum where the Fire Department is partially or wholly abolished by the Village Board , which was not the case here.

The other sections (Village Law §§ 10-1000 to 10-1018) cited by the plaintiffs indicate the procedures for the creation and implementation of the Fire Department , as well as the election of a volunteer Fire Chief and other officers, but they do not preclude the Village from pre-empting those other sections by the appointment of a paid firefighter as Chief.

The plaintiffs argue that the State Legislature did not intend to grant the Village Board the power to appoint a paid firefighter as Chief. However, a review of Bill Jacket 1972-0892 pertaining to the "new" Village Law enacted by the State Legislature in 1972 indicates, inter alia, that :

> "The legislative intent and policies are set forth in §57 of the bill and indicate that the intent was to provide legislation which will permit villages to develop and grow naturally thereby enabling them to meet the emerging needs of our time. This is accomplished in part by replacing specific legislative grants of power with a broad grant of general power. It is also stated that the legislative intent was to eliminate many sections of the present Village Law which are outdated or supplanted by New York State Constitution, Article IX or by general provisions of the Municipal Home Rule Law." (John J. Sauerwald, Director of Office for Local Government, May 30, 1972).

It further stated, inter alia, that:

> "The purpose of this bill is to recodify the Village Law which was last recodified in 1909. This recodification creates a new updated and
>
> simplified Village Law which give the villages flexibility to meet their varying problems without having each year to come to the Legislature for extension of their powers....
>
> PURPOSE OF THE BILL
>
> The purpose of the bill is to repeal the village law and to create a new updated and simplified village law. The new village law will serve as a guideline for villages throughout the state. Villages may then adopt local legislation to meet their individual needs and aspirations....
>
> JUSTIFICATION OF THE BILL
>
> ...It must be recognized that the needs and aspirations of a village in one part of the state may vary from those of a village in another part of the state. Strigent (sic) enforcement of the uniformity of the procedures and policies as set forth in the village law is likely to result in the inability of villages to meet the emerging needs of our time....The bill creates a village law which may be used by villages as a guide and outline. The village law could then be implemented through local legislation by each village in order to meet its own needs." (Senator Ralph J. Marino, Chairman, Committee on Towns and Counties, May 12,1972).

Clearly, the Village Board was statutorily authorized to enact the legislation that it did without submitting it to a permissive referendum.

CPLR §6301 also states that "a preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the

commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

In order to prevail on a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence , (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position. See Aetna v. Capasso, 75 N.Y. 2d 860, 552 N.Y.S. 2d 918 (1990); APA Security, Inc. v. Steven Apa, et al., 37 A.D. 3d 502, 831 N.Y.S. 2d 201 (2nd Dept. 2007). The plaintiffs have failed to meet their burden of demonstrating that the appointment of Chief Heine has or will cause the plaintiffs to suffer irreparable harm and that there is a likelihood that they will succeed on the merits.

Accordingly, the plaintiffs' application for a preliminary injunction is denied. The aforesaid constitutes the decision and order on the Order to Show Cause.

Dated: June 20, 2007
White Plains, New York

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Justice of the Supreme Court

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