

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

----- x Index No.  
JAMES E. SWEENEY, F. WARREN BENTON, SAM :  
ORANS, BRIAN PAYNE, RAY MALDONADO, DAN :  
HEUBEL, PAUL J. ABRAHAMSEN, CHRISTOPHER :  
MACDONALD and MICHAEL WEINER, :

Plaintiffs, :

-against- :

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

Defendants. :

----- x

**AFFIRMATION**

**KATHERINE ZALANTIS** an attorney duly licensed to practice law in the State of New York affirms under penalty of perjury as follows:

1. I am a member of the firm of Silverberg Zalantis LLP attorneys for the plaintiffs JAMES E. SWEENEY, F. WARREN BENTON, SAM ORANS, BRIAN PAYNE, RAY MALDONADO, DAN HEUBEL, PAUL J. ABRAHAMSEN, CHRISTOPHER MACDONALD and MICHAEL WEINER (collectively, "Plaintiffs") herein and make this affirmation upon information and belief, based upon a review of the files maintained in our office.

2. I submit this affirmation, in accordance with CPLR §§ 6301 and 6313, in support of the Plaintiffs' application for a temporary restraining order and preliminary injunction, restraining and enjoining the defendants ELIZABETH N. FELD, Mayor, MARLENE

KOLBERT, Trustee, ANNE McANDREWS, Trustee, JIM MILLSTEIN, Trustee, RICHARD WARD, Trustee, constituting the Village of Larchmont Board of Trustees (“Village Board”) and RICHARD HEINE, “Chief” of the Fire Department of the Village of Larchmont (“Heine”) (the Village Board and Heine are collectively referred to as “Defendants”) from taking any action in furtherance of the purported appointment of defendant Richard Heine as Chief of the Village of Larchmont Fire Department, as well as the other authority improperly granted to Heine and the Village in the resolutions annexed to the Verified Complaint as **Exhibit “B”**.

3. This application seeks to maintain the status quo pending a determination by this Court of the propriety of the purported appointment of defendant Heine as chief of the Village of Larchmont Fire Department and the partial abolition of the Village of Larchmont Fire Department (“Department”) without waiting the required thirty days for an action subject to permissive referendum.

4. By maintaining the status quo, the Department shall continue to operate in the same manner it has operated since 1891 and defendant Heine, who is employed as a paid fire lieutenant in the Department can continue his employment as a paid lieutenant of the Department.

5. Failure to issue a temporary restraining order and preliminary injunction will create a confusing and potentially dangerous situation where the Department will have two chiefs, its duly elected chief, Chris MacDonald, who continues in office pursuant to Village Law (see Plaintiffs’ Memorandum of Law) and defendant Heine who has been improperly appointed chief of the Department by the Village Board.

#### Background

6. The Plaintiffs are and have been active volunteer members of the Fire Department of the Village of Larchmont and all except Sweeny and Weiner are presently members of the Fire Council of the Department.

7. Plaintiffs have also held and/or continue to hold various offices and positions within the Department.

8. The structure and governance of the Department is established by New York State Village Law (sections 10-1000 through 10-1022), the Village Code of the Village of Larchmont and the By-Laws of the Department (the By- Laws are annexed as **Exhibit "A"**).

9. Under New York State Village Law ("Village Law"), the Department is governed by a Fire Council which is elected by the volunteer members of the Department with certain actions of the Council subject to approval and/or ratification by the Village Board.

10. The Department has 15 paid firemen who are appointed by and have their compensation fixed by the Village Board and approximately 30 volunteer members who are elected by the volunteer members, subject to approval by the Village Board.

11. The volunteer members of the Department are required to undergo extensive training and maintain certain levels of competence in order to continue as active members.

12. The Chief of the Department is a volunteer member of the Department elected by the volunteer members of the Department, subject to approval of the election by the Village Board.

13. In the event the Village Board does not approve the election of a chief the incumbent chief remains in office until the volunteer members elect a chief who is then approved by the Village Board.

14. The deputy chiefs and other officers of the Department are elected in the same manner with the same authority of the Village Board to accept or reject the elected officers.

15. On or about April 5, 2007 an election was held and Thomas Broderick ("Broderick") was elected chief along with several other individuals who were elected to the other offices of the Department in order to form the Department's Fire Council for the coming year and on April 6, the Department's nominations were presented to the Village Board for approval.

16. On or about May 7, 2007 the Village Board accepted all of the officers elected by the volunteer membership except Broderick who had been elected chief.

17. As a result, pursuant to Village Law and the By-Laws of the Department, plaintiff, Christopher MacDonald, who is the incumbent Chief remains in office as Chief until a new chief is elected by the membership and approved by the Village Board (Village Law 10-1012).

18. On May 16, 2007, the Village Board on its own motion and without selection by the members of the Department purported to appoint defendant Heine, as Chief of the Department and to grant itself the authority to appoint the Chief.

19. Heine, is not a volunteer member of the Department and was not elected by the membership of the Department to the office of Chief of the Department.

20. The action of the Village Board in appointing defendant Heine chief of the Department is without authority in law and this action seeks *inter alia* that the appointment be annulled.

Authority of the Parties

21. The Village of Larchmont has no separate Board of Fire Commissioners.

22. Village Law § 10-1014 provides that where, as in Larchmont, there is no separate Board of Fire Commissioners, the Fire Council takes over certain of the powers of the Board of Fire Commissioners, subject to approval by the Village Board.

23. Village Law § 10-1012 provides that the chief and assistant chiefs of the Department shall be **elected** each April by the members of the Department from among the members of the Department.

24. Members of the Department are the volunteers.

25. Village Law § 10-1014 provides that where, as here, there is no separate Board of Fire Commissioners, the chief, the assistant chiefs and the wardens of the several companies of the Department shall constitute the Fire Council.

26. There are four fire companies within the Department and plaintiffs Orans, Payne, Maldonado and Heubel are the presidents of the four companies who have been elected by the members of each of the four companies.

27. Village Law § 10-1018 sets forth the duties of the chief and assistant chiefs of the Department including presiding over the elected fire council.

28. Village Law § 10-1020 allows for the abolition of all or part of the fire department, **subject to permissive referendum** and grants other limited authority to the Village Board with respect to allowing paid “fireman” to have authority over equipment of the department and to give orders to the volunteers.

29. There is no provision in law for the Village Board to appoint a chief of the Department.

30. The chief of the Department may only be elected by the members, subject to final approval by the Village Board.

31. In addition there is no authority for the Village Board to appoint an individual not selected by the members to be in charge of or to modify the operations of the Fire Council.

The Need to Maintain the Status Quo:

32. As noted above the Department has run in the same manner since 1891. The Department members are on call 24 hours a day 7 days per week to respond to calls in the Village of Larchmont and to provide mutual aid to departments throughout Westchester.

33. As noted in the annexed affidavits of plaintiff Sweeney, the need for a clear chain of command is critical at the scene of a fire, automobile accident or other emergency.

34. For over a century it has been clear to the firefighters, police, property owners and others that the chief or deputy chief on the scene who has been elected by the members is in charge of the scene, and is in possession of the property at risk to ensure the safety of the fire fighters, the occupants of a structure and the property.

35. As the Sweeney affidavit points out at any one time there are only 3 or 4 paid firefighters on call and the majority of responders are generally volunteers.

36. With the purported “appointment” of defendant Heine by the Village Board the members of the Department are faced with a two-headed monster.

37. Just one example of the potential confusion is in the By-Laws adopted by the Department, which amplify the Village Law and note, for example at Article VII section 2, that mutual aid is to be given other communities but “...no such aid is to be given, or apparatus removed, without the consent of the **Chief...**”

38. As of today who is the Chief? Is it plaintiff MacDonald who was duly elected by the membership and appointed by the Village Board last year and who under State Law holds over in the absence of the elected chief being approved by the Village Board or is it defendant Heine who is not a volunteer member of the Department and was not elected by the membership as called for by State Law?

39. Who is in charge? Whose orders should be followed?

40. This brings back memories of situations in New York City more than a decade ago when police and fire fighters were confused over who had authority at certain emergencies resulting potential indecision in an emergency.

41. Hopefully this would never happen in Larchmont, but the catalyst for such an occurrence is there while this issue remains in flux and there are two “chiefs”.

42. The potential confusion is even recognized indirectly in the resolutions adopted by the Village Board which state in part that defendant Heine and the Fire Council should

“formulate recommendations for the future division of responsibilities between himself and the Fire Council which shall then be subject to the Village Board approval.”

43. Like the appointment of the Chief the statutory structure adopted by the State Legislature for the creation and governance of a village fire department does not contemplate any such process.

44. In effect the Village Board has abolished the Fire Council as it exists under law and created a new system for governance of the Department.

45. Such an action is under Village Law 10-1020 – a partial abolition of the Department – is subject to permissive referendum.

46. Any action which is subject to permissive referendum may not “take effect until thirty days after its adoption (Village Law 9-902).

47. Therefore, the attempt to immediately implement the changes illegally adopted by the Village Board rather than waiting the thirty days mandated by statute deprive the plaintiffs of the right to seek a referendum by petition (Village Law 9-900).

48. As creatures of the State, the Village, the Village Board and the Fire Department are all governed and limited to the authority granted by the State.

49. Therefore what makes the most sense is to continue to maintain the status quo and have the Department run as it has for over a century while the issue is resolved by this Court.

50. To do otherwise invites chaos and a true danger to lives and property.



51. There will be no irreparable injury to the defendant if the status quo is maintained as defendant Heine is already employed as a paid lieutenant in the Department and will continue his employment and the Department, as already noted, will simply operate as it always has.

52. As set forth in greater detail in Plaintiffs Memorandum of Law there is no legal basis for the appointment of a chief of the Department who has not been elected by the members of the Department.

53. While the Village may believe it has a legal “theory” as to why it should be permitted to make such an appointment, as noted in Plaintiffs’ Memorandum of Law there is neither case law nor opinions of the State of New York Attorney General and Comptroller, who have opined on this issue, which support the Village’s unfounded “theory”. To the contrary there are cases and opinions that support the proposition that the Village Board may not appoint an unelected paid chief.

54. As noted in Plaintiff’s Memorandum of Law the Village Board’s “theory” of its authority is in fact contradicted by the clear language of the statute. While the Village Board may grant certain authority to paid fire fighters over the volunteers there is no provision in the statutes for the appointment of a “chief” who has not been elected by the members of the Department, absent the abolition of the Department.

55. If it is in fact the position of the Village Board that it has abolished all or a part of the Department then in that case the Village Board’s actions would be subject to permissive referendum (Village Law section 10-1020). But to the best of your affirmants’ knowledge it is not the position of the Village Board that is has abolished any part of the Department but rather that it can just make whatever changes it likes regardless of the law.

56. Therefore, until the legal status of all concerned is determined by this Court the status quo should be maintained. In this way clear chain of command will be maintained and if this Court determines the Village Board may take some or all of the actions challenged herein the plaintiffs given an opportunity during the next thirty days to petition for a referendum

57. As set forth in plaintiffs Memorandum of Law, there is a high likelihood of success in this matter and plaintiffs meet all of the other criteria needed to support the granting of the relief sought herein.

58. No previous application for the relief sought herein has been made and there has been no prior request for preliminary injunctive relief.

59. The Village attorney of the Village of Larchmont has been notified of the intention by the plaintiffs to seek this temporary restraining order as set forth in **Exhibit "1"** annexed hereto.

WHEREFORE it is respectfully requested that this Court sign the proposed order to show cause granting a temporary restraining order and on the return of this motion, issue a preliminary injunction along with and such other and further relief as the Court may be deemed just and proper.

Dated: White Plains, New York  
May 18, 2007

  
Katherine Zalantis

**Exhibit 1**



Law Offices  
3 Barker Avenue, Suite 180  
White Plains, New York 10601  
Tel. (914) 682-0707  
Fax. (914) 682-0708  
[www.szlawfirm.net](http://www.szlawfirm.net)

**BY FAX**

James Staudt, Esq.  
McCullough, Goldberger & Staudt  
1311 Mamaroneck Avenue  
White Plains, New York 10601

Re: James E. Sweeney, et al. v. Elizabeth N. Feld, Mayor, et al.

Dear Jim:

We represent the plaintiffs James E. Sweeney, F. Warren Benton, Sam Orans, Brian Payne, Ray Maldonado, Dan Heubel, Paul J. Abrahamsen, Christopher MacDonald and Michael Weiner (collectively the "Plaintiffs") in the above action. Please be advised that in accordance with the newly enacted 22 N.Y.C.R.R. § 202.7(f), Plaintiff intends to submit an Order to Show Cause to the Court seeking a temporary restraining notice. Please be advised that we intend to submit the Order to Show Cause to the Court **today, May 18, 2007 at 3:30 p.m.** If you intend to appear, please call me so that we can arrange to meet at the Courthouse and therefore, we will be together when Plaintiffs make their application to the Court. Thank you.

Very truly yours,

SILVERBERG ZALANTIS LLP

A handwritten signature in cursive script, appearing to read 'Katherine Zalantis', written in black ink.

Katherine Zalantis, Esq.

KZ:tlm  
Enclosures