

**(RePAC)**  
**Rehoboth Public Access Corp. Inc**

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Kathleen Conti, Town Clerk  
Keeper of the Records  
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Rehoboth, MA 02769

Kevin McBride  
Board of Selectmen  
148R Peck Street  
Rehoboth, MA 02769

Frederick Vadnais  
Board of Selectmen  
148R Peck Street  
Rehoboth, MA 02769

On or before April 23, 2010, Rehoboth Public Access Corporation (“RePAC”) herein responds to the allegations of breach contained in the February 23, 2010, 60-Day Notice of Breach and Demand for Cure (“Notice”), issued by Board of Selectmen ( the “Board”) members Frederick Vadnais (“Fred”) and Kevin McBride (“Kevin”). The Notice is brought pursuant to Section 17 of an agreement between the Town of Rehoboth (“Rehoboth”) and RePAC, effective April 3, 2008 ( the “Agreement”).

**BACKGROUND AND TRAVEL OF THE CASE**

Rehoboth entered into a cable television renewal license (hereinafter the “License”) with Comcast of Massachusetts I, Inc. (hereinafter “Comcast”), effective April 10, 2004. Pursuant to Article 6 of the License, Comcast promised to continue to provide three (3) access channels, including the Public Access Channel as the third (3<sup>rd</sup>) Access Channel for RePAC’s public use. To date, Comcast has refused to either continue to provide, or to activate, or to make operational the third Access Channel for RePAC’s programming. The availability and operation of the third Access Channel is an essential prerequisite to Rehoboth’s and RePAC’s ability to perform its duties and obligations of the Agreement.

The Board is comprised of three (3) members as the Issuing Authority of the License. The Board has a fiduciary duty to uphold and defend Rehoboth’s interests and benefits by causing Comcast to perform its obligations and promises of the License. More particularly, the Board has a duty to cause Comcast, within the meaning of the License, to continue to provide, to activate, and to make operational the third Access Channel for RePAC’s programming for public use. Article 11 of the License provides

liquidated damages for Rehoboth, in the amount of \$250.00 per day, in the event that Comcast refuses to continue to provide, to activate, and to make operational the third Access Channel (Public Access Channel) for RePAC's programming for public use. Rehoboth was entitled to enjoy the public use of the third Access Channel (the Public Access Channel) beginning on April 19, 2004, to the present. Board members Frederick Vadnais, John P. Ferreira, and John M. Krasnianski, as signatories of the License, had a fiduciary duty, and ample opportunity, to cause Comcast to perform its promises and obligations of the License. To date, the Board members, particularly Fred and Kevin, have breached their fiduciary duty to Rehoboth by their continued refusal to cause Comcast to continue to provide, to activate, and to make operational the third Access Channel for RePAC's programming and by failing to demand, prosecute, and collect the liquidated damages, now amounting to over \$500,000.00, for Comcast's failure to perform under the License and deprive Rehoboth of its third Access Channel. More particularly, during the entire 2009 term, two Board members, Fred and Kevin, have repeatedly opposed RePAC's requests for the Board to cause Comcast to continue to provide, to activate, and to make operational the third Access Channel for RePAC's programming for public use at its studio at 320 Anawan Street.

Pursuant to the Agreement, effective April 3, 2008, RePAC shall provide programming for, and on, the third Access Channel (Public Access Channel) for public use. However, in light of Fred's and Kevin's breach of their fiduciary duty by their continued refusal to cause Comcast to activate and to make operational the third Access Channel, it was impossible for RePAC to program and operate the third Access Channel (Public Access Channel). Thus, on February 16, 2010, RePAC served Rehoboth a thirty (30)-day Demand requesting that the Board cause Comcast to activate and make operational the third Access Channel (Public Access Channel) at the RePAC studio. In response to RePAC's 30-day Demand, Fred and Kevin served on RePAC the Notice pursuant to Section 17 of the Agreement. Board member Kenneth Foley did not participate in either the signing or the issuance of said Notice. During a recent Rehoboth election, held on April 5, 2010, Donald Leffort was elected to replace incumbent member Fred on the Board.

In light of the recent election outcome, RePAC's response to Kevin's and Fred's allegations, as set forth in the Notice, shall be addressed to Kevin and Fred on grounds that neither Mr. Foley nor Mr. Leffort participated in, or acted in furtherance of, the

execution of said Notice either in their individual or in their official capacity.

In accordance with the effective time frame of the Agreement, RePAC's response to the allegations contained in the Notice shall be limited to the relevant period of April 3, 2008, to February 22, 2010. Any matter concerning the alleged breaches of the Agreement, as contained in said Notice, but are alleged to have occurred prior to April 3, 2008, or otherwise lie outside the effective temporal scope of the Agreement, shall be referred to Frederick Vadnais, John P. Ferreira, Albert W. Berry, and John M. Krasnianski as former members of the Board and to Norman Spring as former RePAC's salaried manager and chairman of RePAC's Board of Directors. The named persons are expected to possess the necessary and sufficient knowledge, with supporting records and documents, of the events that allegedly occurred prior to April 3, 2008.

On March 19, 2010, because Rehoboth and the Board ignored RePAC's 30-day Demand and RePAC received no other response from either Rehoboth or the Board as to its 30-Day Demand, RePAC filed a Complaint against Rehoboth, the Board, and Comcast concerning the failure to continue to provide, to activate, and to make operational the third Access Channel (Public Access Channel) at the RePAC studio. Fred, Kevin, and David Marciello are named in a claim for conspiracy with, and aiding and abetting, Comcast in avoiding and evading the activation and installation of the third Access Channel (Public Access Channel). See Bristol County Superior Court BRCV2010-00353-C.

#### RePAC's RESPONSES TO THE NOTICE OF BREACH AND DEMAND FOR CURE

RePAC responds to each paragraph of the Notice as follows:

1) RePAC Denies Violating Sections 4(a) and 4(b) Of The Agreement:

In paragraph 1 of the Notice, Mr. McBride and Mr. Vadnais allege that: a) Section 4(a) obligates RePAC to provide access to the use of equipment, facilities, channel and services on a non-discriminatory basis to all authorized qualified users; and b) Section 4(b) obligates RePAC to keep PEG Access Channels open to all potential users regardless of viewpoint. Kevin and Fred further allege that RePAC has repeatedly violated Sections 4(a) and 4(b) of the Agreement by refusing to air the programs "Life Matters" and "Just in Time" over a public access channel.

Broadcasting of programs "Life Matters" (a religiously oriented anti-abortion program) and "Just in Time" (a program portraying the art and methodology of criminal

incarceration at detention centers operated by the Bristol County Sheriff, a political elected office) over the Public Access Channel is impossible until the Board causes Comcast to activate and make operational the third Access Channel (Public Access Channel) at the RePAC studio. According to the License, effective April 10, 2004, Comcast has an obligation to continue providing an operational third Access Channel (Public Access Channel) for public programming such as "Life Matters" and "Just in Time" programs. Although Article 11 of the License provides the Board the necessary authority for it to cause the activation of the third Access Channel (Public Access Channel), Kevin and Fred have refused to act, within the provisions of the License and the Agreement, during their entire 2009 elected term.

Once the third Access Channel ( the Public Access Channel) is operationally available at the RePAC studio, memberships will be available for authorized and qualified persons to perform volunteer services and use RePAC equipment, training facilities, and the Public Access Channel. But, in light of Kevin's and Fred's failure to cause Comcast to continue to provide, to activate, and to make operational the third Access Channel (Public Access Channel), RePAC denies violating Sections 4(a) and 4(b) of the Agreement.

2) RePAC Denies Violating Section 5(b) Of The Agreement As To Campaigning:

In paragraph 2 of the Notice, Mr. McBride and Mr. Vadnais allege that: a) Section 5(b) of the [A]greement prohibits RePAC from political campaign or political issue advertising, and prohibits any funding granted to RePAC to be used to participate or intervene in any political campaign; and b) RePAC has violated Section 5(b) by producing and airing a promotion advocating the passage of the Community Preservation Act. Mr. McBride and Mr. Vadnais intentionally misrepresent the intent of Section 5(b) in light of the relevant provisions of 26 U.S.C. §501(c)(3) and 26 U.S.C. §4911, in light of 26 U.S.C. §501(h).

Although it is understandable that Mr. McBride and Mr. Vadnais would have some difficulty in reading complex legislation such as the Internal Revenue Code (the "Code"), it is, at the same time, impermissible for the Board members to take unwarranted literary liberties in deliberately misreading the Code to achieve an ignoble end by fabricating circumstances that are prejudicial to RePAC.

The intent and plain reading of Section 5(b) of the Agreement must conform with

the provisions of RePAC's tax-exempt status. To begin, RePAC is an organization exempt from taxation pursuant to 26 U.S.C. §501(c)(3) provided that RePAC as a "[c]orporation ... does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Clearly, this provision of the Code only refers to the prohibition against political campaigning on behalf of a natural person who is a candidate for public office. Obviously, the Community Preservation Act (hereinafter the "CPA") is legislation and is neither a natural person nor a **candidate for public office**. Thus, Section 5(b) of the Agreement does not apply to legislation such as the CPA.

The municipal legislative process of adopting the CPA in Rehoboth was part of a proceeding whereby the adoption of this legislation appeared as an article on the ballot at a municipal election. The CPA was endorsed by members of Rehoboth municipal departments, to wit, by member(s) of the Finance Committee and by member(s) of the Agricultural Natural Resource Preservation Committee who were **not** campaigning as candidates for public office. The CPA was democratically adopted by a majority vote at said municipal election. Prior to the municipal election, RePAC broadcasted background information, including the legislative history of the CPA, on its Government Access Channel (Channel 9). This government program was produced by member(s) of the municipal Finance Committee and by member(s) of the municipal Agricultural Natural Resource Preservation Committee who were **not** campaigning as candidates for public office. RePAC broadcasted said program for the sole purpose of promoting a well-informed electorate within the Rehoboth voter community. The promotion of a well-informed electorate, concerning the adoption of legislation such as the CPA, is, or should have been, an easily distinguishable concept from that of a political campaign or political issue advertising on behalf of a candidate for public office.

The allegations in paragraph 2 of the Notice, concerning Mr. McBride's and Mr. Vadnais' absurd and unsupported statements about funding, also constitutes a misrepresentation of Section 5(b), in light of 26 U.S.C. §501(h) and 26 U.S.C. §4911, concerning the expenditure of funds for lobbying on behalf of public interest legislation. In broadcasting the legislative history of the CPA, RePAC did not use any of its funding received from Comcast pursuant to Section 6.3 of the License. Notwithstanding the fact that RePAC did not use Comcast funding, the Code, at 26 U.S.C. §4911, in light of 26 U.S.C. §501(h), does, in fact, allow RePAC, to make limited expenditures for lobbying

on behalf of socially and environmentally redeeming legislation and for the purpose of lobbying for the promotion of a well-informed voter community in a democratic society. Thus, RePAC denies that it violated Section 5(b) of the Agreement.

3) RePAC Denies Violating Section 5(b) Of The Agreement As To Announcements:

In paragraph 3 of the Notice, Mr. McBride and Mr. Vadnais allege that: a) Section 5(b) of the Agreement prohibits RePAC from participating or intervening in a political campaign; and b) RePAC refused to air a posting for a meet the candidate night event hosted by a candidate RePAC did not support. Kevin and Fred have failed to understand the distinction between political campaigning and RePAC's broadcasting of a calendar of events, via a bulletin board display, that are of interest to, and could affect, the public.

RePAC provides broadcasting of the Rehoboth calendar of events on the Government Access Channel (Channel 9). The calendar of events is produced by a digital signage display (the Magic Box Avelin at Town Hall has recently been replaced with more advanced hardware and software at the RePAC studio) includes announcements concerning public safety emergency notices, the dates, time, and location of noticed public hearings, dates and time of social events, and certain services performed by Rehoboth departments. RePAC also provides broadcasting of a calendar of events for educational and athletic activities and events at the Dighton-Rehoboth Regional High School on the Educational Access Channel (Channel 15).

Announcements on RePAC's bulletin board also include social events hosted by individuals residing in Rehoboth and wishing to perform public service in elected offices. From time to time, such citizens wish to meet others in the community and will arrange and host a social event which, by some, is labeled "meet the candidate night". Once the host provides RePAC the information concerning the date, time, and location of the social event, RePAC staff will include such information on the Channel 9 bulletin board only if the individual, who is sponsoring the social event, submits his or her request to RePAC in a timely manner and only if the digital signage display system is available for broadcasting. Thus, Kevin's and Fred's allegation that announcements of social events on RePAC's bulletin board constitutes political campaigning is patently false and does not constitute a violation of Section 5(b) of the Agreement. In all cases, posting of social events would certainly occur once RePAC receives the information in a timely manner and if the digital signage display is available for broadcasting.

4) RePAC Denies Violating Section 10 Of The Agreement As To Timely Filing:

In paragraph 4 of the Notice, Mr. McBride and Mr. Vadnais allege that: a) Section 10 of the Agreement obligates RePAC to file a duplicate copy of its annual report prior to June 30<sup>th</sup> [with the selectmen]; and b) RePAC violated Section 10 of the Agreement by failing to timely file copies of its annual reports with the selectmen for the years 2004, 2005, 2006, and 2008. Kevin's and Fred's allegations are misrepresentation of facts and law. The Agreement is effective on April 3, 2008, and pursuant to prevailing contract law, RePAC's obligation for annual report filing with the selectmen commences on April 3, 2008. RePAC complied with all its obligations and duties governed by the Agreement, effective April 3, 2008. However, RePAC suggests that Kevin and Fred seek assistance from John P. Ferreira, Albert W. Berry, and John M. Krasnianski, former selectmen, and Norman Spring, former RePAC's salaried manager and chairman of RePAC's Board of Directors, as persons who may have had an opportunity to either file or receive the annual reports for the years 2004, 2005, 2006, and 2007. Clearly, RePAC had neither a reason nor an obligation to timely file annual reports with the selectmen prior to the effective date of the Agreement on April 3, 2008.

5) RePAC Denies Violating Sections 16 and 17(a) Of The Agreement As To Filings:

In paragraph 5 of the Notice, Mr. McBride and Mr. Vadnais allege that RePAC violated Sections 16 and 17(a) of the Agreement and they further allege that: a) Section 16 obligates RePAC to be governed and operated in accordance with applicable laws and regulations; b) RePAC violated the corporate laws of Massachusetts for charitable corporations by failing to timely file its annual reports; and c) RePAC has placed itself at risk of forfeiting its tax-exempt status under 26 U.S.C. 501(c)(3) because of the alleged noncompliance under M.G.L.c.180, §11B, and M.G.L.c. 12, §8F. Clearly, Kevin and Fred do not comprehend the limits of their authority as municipally elected officials.

Assuming, arguendo, that RePAC is a charitable corporation or a public charity organized under the laws of the Commonwealth, M.G.L.c. 12, §8 requires that only the attorney general shall enforce the due application of funds given or appropriated to RePAC and prevent breaches of trust in the administration thereof. Obviously, neither Kevin nor Fred have the jurisdictional authority to enforce the due application of funds given or appropriated to RePAC.

RePAC has filed its annual accounting with the director of the division of public

charities of the Department of the Attorney General, as required by M.G.L.c. 12, §8F, for the years 2004, 2005, 2006, and 2008. To date, the director has accepted RePAC's filings for the years 2004, 2005, 2006, and 2008 without any objection whatsoever. Naturally, RePAC is mindful of the provisions under M.G.L.c. 12, §8F(¶3), that "[i]n the event that any public charity shall fail to file a report required [under M.G.L.c. 12, §8F], the division *may* bring an action to restrain the charity from transacting any business in the commonwealth or may take such other action as may be appropriate to compel compliance with the provisions of this section." Pursuant to M.G.L.c. 180, §11B, only the Department of the Attorney General *may* petition the Supreme Judicial Court for the dissolution of RePAC for noncompliance with M.G.L.c. 12, §8F. To date the Department of the Attorney General has not commenced any action against RePAC arising under violations of M.G.L.c. 12, §8F. Because the division of public charities has the sole discretion to bring an action against RePAC for failure to file timely reports, neither Kevin nor Fred have the jurisdictional authority or standing under the Agreement to commence any action against RePAC arising under a violation of M.G.L.c. 12, §8F.

Pursuant to Title 26 of the United States Code, only the Commissioner of the Internal Revenue Service has the statutory authority to withdraw RePAC's tax-exempt status under 26 U.S.C. 501(c)(3). To date, the Internal Revenue Service has accepted RePAC's filings for the years 2004, 2005, 2006, and 2008 without any adverse action as to RePAC's status under 26 U.S.C. 501(c)(3). Thus, Kevin's and Fred's allegation that RePAC violated Sections 16 and 17(a) of the Agreement, in light of M.G.L.c. 12, §8F, constitutes an impermissible extension of their limited authority and is an abuse of their municipal office by pretending to possess the authority of the Department of the Attorney General and the powers of the Commissioner of the Internal Revenue Service.

6) RePAC Denies Violating Sections 6 and 16 Of The Agreement As To Copyright:

In paragraph 6 of the Notice, Mr. McBride and Mr. Vadnais allege that: a) Section 16 obligates RePAC to be governed and operated in accordance with applicable laws and regulations; and b) Section 6 obligates RePAC to obtain or require an access user to obtain all rights to all cable material and clearances from any source necessary to transmit their program over the access channel. In support of this allegation, Kevin and Fred state that RePAC has used copyrighted materials in the production of its programs without

receiving permission or a license to do so and erroneously concludes that this is a violation of United States copyright laws and could subject RePAC, its access programs, as well as the Town of Rehoboth to injunctive orders, sanctions of penalties, judgments, or other sanctions.

Clearly, Section 6 of the Agreement is intended as an assurance that RePAC complies with the provisions of Title 17 of the United States Code. Mr. McBride's and Mr. Vadnais' allegations lack support in law and are contrary to the facts of this case. Obviously, Rehoboth, the Board, including Kevin and Fred, lack the authority and jurisdiction to make a determination of copyright infringement as a violation of Title 17 of the United States Code. In fact, pursuant to 28 U.S.C. §1338(a), only the Federal District Court has original and exclusive jurisdiction in copyright infringement cases, arising under 17 U.S.C. §501, to determine a violation of United States copyright laws.

Almost all of RePAC's programs comprise works that were produced by RePAC and for which RePAC could claim exclusive copyright ownership. On a few occasions, RePAC's programming comprised copyrighted works, where, pursuant to 17 U.S.C. §401, et seq., the copyright notices were clearly shown, and where RePAC received prior authorization for use from the owner of the copyright or where the use would fall within the umbrella of limitations on exclusive rights, including copyright exemptions under 17 U.S.C. §107 (Fair Use), 17 U.S.C. §108 (Reproduction by Archives), 17 U.S.C. §110 (Exemption of certain performances), 17 U.S.C. §111 (Secondary Transmissions), and 17 U.S.C. §112 (Ephemeral Recordings). Kevin's and Fred's erroneous and false conclusion that RePAC's use of copyrighted works without permission or license violates United States copyright laws is not only nonsensical but also defamatory per se. To date, RePAC has neither received, nor has it been served, a summons from a Federal District Court or a notification from the Register of Copyrights concerning an infringement proceeding against RePAC for use of a copyrighted work registered pursuant to 17 U.S.C. §411 and §412. Thus, RePAC denies that it violated Sections 6 and 16 of the Agreement.

7) RePAC Denies Violating Section 16 Of The Agreement As To Animal Cruelty:

In paragraph 7 of the Notice, Mr. McBride and Mr. Vadnais allege that Section 16 obligates RePAC to be governed and operated in accordance with applicable laws and regulations. In support of this allegation, Kevin and Fred state that RePAC has conducted unlawful activity by video and audio taping of individuals without their consent in

violation of M.G.L.c. 272, §79. In paragraph 7 of the Notice, Kevin and Fred also allege that this is a violation of Section 16 of the [A]greement, and is currently the subject of an investigation by the Bristol County District Attorney's office, for possible criminal prosecution.

M.G.L.c. 272, §79, states as follows:

"A corporation violating either of the two preceding sections shall be punished by a fine as therein provided, and shall be responsible for the knowledge and acts of its agents and servants relative to animals transported, owned or used by it or in its custody."

The two preceding sections, M.G.L.c. 272, §77 and §78, prohibits cruelty to animals and the selling, leading, or using horses not fit for work.


RePAC categorically denies Kevin's and Fred's allegation that RePAC conducted unlawful activity by committing an act of cruelty to animals by video and audio taping of individual animals without their consent. Thus, RePAC denies that it violated Section 16 of the Agreement concerning any violation of M.G.L.c. 272, §79.

#### CONCLUSION

For all the reasons, arguments, facts, and law stated above, RePAC denies that it has breached any of the terms and provisions of the Agreement, effective April 3, 2008, and rejects Mr. Kevin McBride's and Mr. Frederick Vadnais' demand for cure on grounds that such demand is unreasonable, is without support of facts, is contrary to the prevailing Federal and Commonwealth law, and would constitute an unfair and prejudicial pretext of a wrong motivated by Mr. McBride's and Mr. Vadnais' thinly-veiled politically driven agenda.

Respectfully answered and submitted on behalf of Rehoboth Public Access Corporation by

Dated: 4/31/10

  
\_\_\_\_\_  
Roger Breault, Chairperson

cc.: Kenneth Foley, Chairman of Board of Selectmen  
Donald Leffort, Member Board of Selectmen