TOWN OF TIVERTON
MUNICIPAL COURT

In re JEROME LARKIN, SALLY BLACK, :
DIANE FARNWORTH, and :
ELAINE PAVAO, and TIVERTON SCHOOL :
COMMITTEE :
Respondents :

MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

This Charter Complaint came before this Honorable Court on December 5, 2017. Prior to that hearing, the Respondents had filed a Motion to Dismiss. That Motion to Dismiss had two bases. First, the Respondents argued that Complaint had failed to assert any cognizable claim of a Charter violation. Second, the Respondents argued that this Court lacked jurisdiction over this matter because neither the Town Clerk nor the Town Council completed their review of this matter as required by the Charter.

Our Motion to Dismiss had also confronted Complainant Katz with the fact that a Charter Complaint would have the effect of punishing those School Committee members for exercising their express right to originate an Elector Budget Petition under the Charter, and also punishing the School Committee for exercising its express right to support that origination. Our Motion to Dismiss had also expanded upon how punishing the exercise of Elector Budget Petition rights had the effect of chilling participation in the Elector Budget Petition process. That chilling of participation, we noted, was in direct contravention of the stated intention of those individuals who had initially created the Elector Budget Petition process. We also observed that Complainant Katz was one of the most enthusiastic and vocal supporters of that Elector Budget Petition process from the beginning.

When confronted with this inconsistency between his initial intention for supporting the Elector Budget Petition Process, and his current action in bringing the instant Charter Complaint, Complainant Katz backtracked. His Objection to the Motion to Dismiss now claims that he does not intend to bring the penal machinery of the Charter Complaint process to bear upon the School Committee and its members. Instead, Complainant Katz claims that all he sought was some clarification of the Charter provisions regarding the authority of the School Committee and its members with respect to the Elector Budget process. As he himself expresses it, he seeks ". . something more like a declaratory judgment." (Obj. to Motion to Dismiss, p. 4.)

It is thus apparent that Complainant Katz has abandoned his Charter Complaint. On that basis alone, this matter should be dismissed. If a declaratory judgment is truly all that Complainant Katz now desires, he has come to the wrong place. This Court lacks jurisdiction over actions for declaratory relief. In the alternative, the Respondents also expand on their additional arguments as to why this Court lacks jurisdiction.

II. LEGAL ARGUMENT

A. THIS COURT LACKS JURISDICTION OVER DECLARATORY ACTIONS.

The trouble with Complainant Katz's new position is that he now seeks to change the nature of the Charter Complaint process into a declaratory judgment process that its drafters never intended, and is beyond the jurisdiction of this Court. An examination of the Charter Complaint process shows that it was clearly intended to penalize "knowing" violations of the Charter that had already taken place. Sec. 1211(a)(2), (d). By contrast, a declaratory judgment action does not seek to punish past behavior. Its net is much broader: "The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable *without proof of a wrong committed by one party against another*, and thus

facilitate the termination of controversies." *Millett v. Hoisting Engineers' Licensing Div. of Dep't of Labor*, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977) (Emphasis added).

This Court, however, was never given jurisdiction to grant declaratory judgments. The Municipal Court is a statutory court, and, accordingly, may only act within the authority conferred upon it by statute. *See, e.g., Chambers v. Ormiston*, 935 A.2d 956, 958 (R.I. 2007). An examination of the statutes and ordinances describing this Court's jurisdiction make no reference to any declaratory relief authority.

> RIGL § 45-2-34. Town of Tiverton--Municipal court:
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> (1) The town council of the town of Tiverton may establish a municipal court and confer upon that court original jurisdiction, notwithstanding any other provisions of the general laws, to hear and determine causes involving the violation of any ordinance, including minimum housing ordinances of the town and any violation of the provisions of chapter 24.3 of this title, entitled the Rhode Island Housing Maintenance and Occupancy Code; provided, however, that any defendant found guilty of any offense, excluding violations of the minimum housing ordinances or chapter 24.3 may, within seven (7) days of conviction, file an appeal from the conviction to the superior court and be entitled in the latter court to a trial de novo; and provided further, however, that any defendant found guilty of any violation of a minimum housing ordinance or of chapter 24.3, may within seven (7) days of conviction, file an appeal from the conviction to the second division of the district court and be entitled to a trial de novo in accordance with §§ 8-8-3(a) (4) and 8-8-3.2.
>
> (2) With respect to violations of either municipal ordinances dealing with minimum housing or chapter 24.3 et seq., of this title dealing with housing maintenance and occupancy, the town council may also confer upon the municipal court, in furtherance of the court's jurisdiction, the power to proceed according to equity:
>
> (i) To restrain, prevent, enjoin, abate, or correct a violation;
>
> (ii) To order the repair, vacation, or demolition of any dwelling existing in violation; or
>
> (iii) To otherwise compel compliance with all of the provisions of those ordinances and statutes.

(3) The town council of the town of Tiverton is authorized and empowered to appoint a judge of the municipal court. The town council of the town is authorized and empowered to enact ordinances governing the personnel, operation, and procedure to be followed in the court and to establish a schedule of fees and costs and to otherwise provide for the operation and management of the court. The municipal court may impose a sentence not to exceed thirty (30) days in jail and impose a fine not in excess of five hundred dollars ($500), or both. The court is empowered to administer oaths, compel the attendance of witnesses, and punish persons for contempt, and to execute search warrants to the extent the warrants could be executed by a judge of the district court.

Ordinances, Sec. 30-32. - Jurisdiction.

(a) The council hereby confers on the municipal court original jurisdiction to hear and determine causes involving violations of:

1. Any ordinance of the town.

2. Minimum housing ordinances, including any violation of G.L. 1956, § 45-24.3-1, the Rhode Island Housing, Maintenance and Occupancy Code.

(3) Any other jurisdiction conferred by state law.

(b) Any defendant found guilty of any offense, excluding violations of the minimum housing ordinances, or G.L. 1956, § 45-24.3-1 et seq., may within seven days of such conviction file an appeal from such conviction to the superior court and be entitled in the latter court to a trial de novo; and provided further, however, that any defendant found guilty of any violation of a minimum housing ordinance, or of G.L. 1956, § 45-24.3-1 et seq. within seven days of such conviction file an appeal from such conviction to the Second Division of the District Court and be entitled to a trial de novo in accordance with G.L. 1956, §§ 8-8-3(a)(4) and 8-8-3.2.

(c) With respect to violations of municipal ordinances dealing with minimum housing, or G.L. 1956, § 45-24.3-1 et seq., the council hereby confers upon the municipal court, in furtherance of such jurisdiction, the power to proceed according to equity to:

1. Restrain, prevent, enjoin, abate, or correct a violation;

2. Order the repair, vacating, or demolition of any dwelling existing in violation; or

> 3. Otherwise compel compliance with all provisions of such ordinances and statutes.
>
> (Code 1967, § 25-7)

This jurisdictional language closely tracks that in *Duffy v. Milder*, 896 A.2d 27 (R.I. 2006). The *Duffy* case involved disputes over whether the maintenance of horses violated various zoning ordinances. At one point, the municipality had issued a summons for violation of the zoning ordinances. The municipal court dismissed the summons, finding that the maintenance of horses was a permitted non-conforming use. Ultimately, the parties reached the Superior Court for a declaratory judgment on the question of whether or not the zoning ordinances permitted the maintenance of horses. The Superior Court ruled that the municipal court's dismissal had a *res judicata* effect. The Supreme Court overturned this ruling, noting that the municipal court lacked any jurisdiction over declaratory relief authority:

> In our opinion, the doctrine of res judicata does not apply to the municipal court's decision in this case because the municipal court did not have statutory authority to determine whether conducting equestrian activities on lot No. 24 was a lawful nonconforming use. In *RICO Corp. v. Town of Exeter,* 787 A.2d 1136 (R.I.2001), the Superior Court gave res judicata effect to a lawful nonconforming use determination made by the Exeter Zoning Board of Review. In reversing the Superior Court, we noted that for res judicata principles to apply to any judgment or decision, "the court or tribunal entering the judgment or decision must first have subject matter jurisdiction over the case before it." *Id.* at 1144. We ruled that zoning boards are statutory bodies whose powers are legislatively delineated: "They are empowered to hear appeals from the determinations of administrative officers made in the enforcement of the zoning laws," and do not have the authority to confirm the legality of a preexisting use. [footnote omitted] *Id.* (quoting *Olean v. Zoning Board of Review of Lincoln,* 101 R.I. 50, 52, 220 A.2d 177, 178 (1966)).
>
> Similarly, the General Assembly vested the East Greenwich Town Council with the power to "establish a municipal court and confer upon such court original jurisdiction * * * to hear and determine causes involving violation of any ordinance." P.L.1998, ch. 171, § 1 (enacting G.L.1956 § 45-2-48). Therefore, the East Greenwich Municipal Court's jurisdiction is limited to determining violations of ordinances; it does not possess the power to issue declaratory judgments, such as deciding whether a lawful nonconforming use exists with respect to a particular parcel of land. The jurisdictional limit of the municipal court was to determine

> whether the Milders had violated the zoning ordinance. The municipal court was not of "competent jurisdiction" to determine whether the keeping of horses on lot No. 24 was a lawful nonconforming use, and its decision cannot be afforded res judicata effect.

Id. at 36.

Similarly, this Municipal Court is charged solely with hearing *violations*, but the statute is silent on the question of whether it may hear declaratory judgments. Under *Duffy*, that authority is not to be inferred from the authority to hear violations. For this reason, this Court lacks jurisdiction to grant declaratory relief.

Additionally, if indeed this were a declaratory action brought before a court of proper jurisdiction, Complainant Katz would not have had standing to bring it in the first instance. A citizen or taxpayer may have standing to bring declaratory judgments regarding the legality of the actions of government officials – but only if that citizen or taxpayer can establish that that conduct of the government official caused him actual and concrete damage over and above a general grievance suffered by the citizens or taxpayers in general. *See, e.g., Meyer v. City of Newport*, 844 A.2d 148 (R.I. 2004), *citing West Warwick School Committee v. Souliere,* 626 A.2d 1280, 1284 (R.I.1993) and *Ianero v. Town of Johnston,* 477 A.2d 619, 621 (R.I.1984) (same). Complainant Katz has not made any showing of personal damage -- other than his general sense of outrage that the School Committee members might exercise the Elector Petition provisions that he himself supported so enthusiastically.

In conclusion, if all that Complainant Katz truly desires is a declaratory ruling, he has come to the wrong place, and is the wrong person to press it. Because this Court lacks any jurisdiction to grant declaratory rulings, any declaratory ruling that it might purport to give would be a nullity, with no precedential value. *See, e.g., Noonan v. Zoning Bd. of Review,* 90 R.I. 466, 159 A.2d 606, 608. For that reason, this matter should be dismissed.

B. BECAUSE THE INSTANT COMPLAINT WAS FACIALLY INVALID, IT SHOULD HAVE BEEN DISMISSED BY THE TOWN CLERK.

Complainant Katz also vociferously argues that his Charter Complaint passed the first hurdle of the process, that is, examination by the Town Clerk, Nancy Mello. He argues that the Town Clerk's role in this process is determine whether ". . . the complaint describes the violation, names the alleged violator, and points to the section of the charter that has been violated." (Obj. to Motion to Dismiss, p. 13-14.) In other words, in Katz's view, even if the Charter Complaint on its face describing actions that plainly do not violate the Charter, the Town Clerk must still process the complaint.

This view of the Town Clerk role is impermissibly narrow. Acceptance of Complainant Katz' interpretation of the Town Clerk's role is to invite chaos. If we were to accept Complainant Katz' interpretation, Town officials could potentially be required to process Charter complaints that have no basis on the face of the Charter.

Nevertheless, the prosecution of patently baseless complaints is precisely the irrational result that Complainant Katz seeks here. As we described in our earlier Motion to Dismiss, the Elector Budget Provision in the Charter gave the School Committee members the express right to originate Elector Budget Petitions, and gave the School Committee itself the express right to support such provisions. The Charter, however, does not impose any conditions on these rights other than the submission of the correct paperwork. In other words, the ability to submit an Elector Budget Petition and to support an Elector Budget Petition is not dependent upon whether or not there was any ulterior motive to expand the rights given to the School Committee.

What the Katz complaint attempts to read these rights out of the Charter. Katz argues that the School Committee sought the ability to exercise rights to submit budget proposals over and above what is granted them by the Elector Budget Petition provisions. Katz claims that the

School Committee's actions gave them a "third swing" at submitting a budget, and ". . . tilted the balance of power away from the traditional New England direct democracy about which the respondents' motion waxes poetic." (Obj. to Motion to Dismiss, p. 2.) In fact, when the drafters of Section 301(d) expressly permitted individual School Committee members to submit Elector Budget Petitions, and the School Committee to support said Petitions, those drafters expressly left the door open to the possibility that a public body might act as the School Committee did in this instance.

The Charter Complaint, then, failed to set forth an adequate Charter Complaint on its very face. For that reason, it should have been dismissed.

C. COMPLAINANT KATZ LACKS STANDING TO PROSECUTE THE INSTANT ACTION.

Another matter that is troubling is Complainant Katz's apparent and growing role in prosecuting this action. Pursuant to Section 803, the Town Solicitor is authorized to ". . . appear for and protect the rights of the Town in all actions, and/or proceedings (civil or criminal), brought by or against the Town or its officers, departments or agencies."

Ordinary citizens may file complaints, but are not entitled to prosecute them. Furthermore, under Section 1211 of the Charter, the action of bringing a Charter complaint for probable cause proceedings is not the role of the complainant, but the Town Solicitor. Section 1211(b) of the Charter clearly labels the process of bringing a Complaint to the Town Council, and ultimately, a trial on the merits, as an "Action By the Town":

(a) Complaints by Citizens

1.) If the Town Clerk determines that the charges are "sufficiently set forth", he or she shall schedule a public hearing before the Town Council acting in its capacity as the Charter Monitoring and Complaint Review Board, such hearing to be held no later than thirty (30) days from the date on which the charges were filed. If the Town Clerk fails to find that the

charges are "sufficiently set forth", he or she shall so notify the complainant in writing, providing the reason(s) for dismissal.

2.) In the event a "sufficiently set forth" complaint is against a majority of the Town Council members, the Town Clerk, within ten (10) days from the date on which the charges were filed, shall file the complaint in the Municipal Court.

(b) Action by the Town

1.) At the public hearing, the Review Board shall receive testimony from the complainant and from the official, board, or commission, or the members of the official body, against whom or which the charges were made, and from such witnesses as either party may bring forward. In the event the complaint is against a member of the Town Council, such member shall not take part in review of the complaint.

2.) If, following the hearing, the Review Board, by a two-thirds vote of those present - but in no event fewer than four (4) affirmative votes - concludes that the charges have been supported by the testimony, and the evidence presented, it shall direct the Town Administrator to cause a complaint to be filed within ten (10) days of the hearing against the alleged violator(s) in the Municipal Court.

3.) The Municipal Court shall have jurisdiction to determine violations of this Charter, Town ordinances and rules or regulations adopted under the authority hereof and to enter appropriate orders, decrees or judgments with respect to such violations.

At this juncture, then, Complainant Katz may be heard on the merits of his Complaint at the probable cause portion. He himself may not bring the Complaint to the probable cause stage or beyond. However, that is precisely what he is apparently being permitted to do.

D. <u>THIS COURT LACKS AUTHORITY TO MAKE "PROBABLE CAUSE" DETERMINATIONS IN THE CASE OF CHARTER VIOLATIONS.</u>

Finally, the Town Solicitor's office argues that because the Town Council has recused itself from performing its duties at the "probable cause" stage of this action, this Court should undertake that role itself. We have already discussed the question of whether or not the entire

Town Council is truly disqualified from fulfilling its duty to act on the question of "probable cause", and will not belabor the point here. What is untenable is the Town Solicitor's insistence that this Court possesses the ability to take that role in light of the Town Council's refusal to fulfill it.

The Charter prescribes one, and only one instance in which the Municipal Court may take over in the stead of the Town Council at the "probable cause" stage:

> . . . In the event a "sufficiently set forth" complaint is against a majority of the Town Council members, the Town Clerk, within ten (10) days from the date on which the charges were filed, shall file the complaint in the Municipal Court.

The present situation clearly does not fall in this narrow provision. The complaint is not against a majority of the Town Council members; it is against *none* of the Town Council members. Moreover, even if we accepted Katz's claims that Council members Lebeau, Chabot, and Edwards have conflicts of interest, we would still have a majority of the Council left.

During the colloquy on December 5, 2017 the "rule of necessity" was referenced in passing as a possible basis for the Municipal Court's accepting the Town Council's role. That "rule of necessity" actually works in the opposite direction. The "rule of necessity" actually imposes a duty to hear and decide a case if the case cannot otherwise be heard. As our Supreme Court has noted:

> This rule had its genesis over five and a half centuries ago when in 1430 it was decreed that the chancellor of Oxford would act as judge of a case in which he was a party when there was no provision for the appointment of another judge. Y.B.Hil. 8 Hen. VI, f. 19, pl. 6. This court has recognized and invoked the rule in *Poirier v. Martineau,* 86 R.I. 473, 136 A.2d 814 (1957), where it was emphasized that the rule of disqualification must give way to the demands of necessity in cases in which a disqualification would destroy the only tribunal in which relief could be provided. The United States Supreme Court has recognized the continued vitality of this principle in *United States v. Will,* 449 U.S. 200, 213-16, 101 S.Ct. 471, 480-81, 66 L.Ed.2d 392, 405-06 (1980).

Reilly v. United States, 538 A.2d 155, 156 (R.I. 1988).

The instant case is remarkably "on fours" with the scenario described above. The Town Council is the only body authorized to determine probable cause in this case. The Town Council *en masse* has declared itself disqualified. However, there is no provision for any other body or official to act. Under these circumstances, the Town Council must on the question of probable cause, even if its protestations of disqualification were valid. *See Poirier v. Martineau*, 86 R.I. 473, 136 A.2d 814, 816-17 (1957).

The Town Council, then, cannot wash its hands of its duty to make a "probable cause" determination with respect to this particular complaint. For that reason, this Court cannot relieve the Town Council of that duty, but instead must remand this matter to the Town Council.

III. CONCLUSION

For the above-referenced reasons, this matter should be dismissed, either on the grounds that the Charter Complaint is without merit on its face, or because this Court is without jurisdiction to rule upon it at this time.

Respondents,
By their attorney,

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