TOWN OF TIVERTON
MUNICIPAL COURT

JUSTIN KATZ
Complainant
Vs.
JEROME LARKIN, SALLY BLACK DIANE FARNWORTH, and ELAINE PAVAO, in their individual capacities; and TIVERTON SCHOOL COMMITTEE
Respondents

OBJECTION TO MOTION TO DISMISS

I. INTRODUCTION.

The central challenge in objecting to the respondents' motion to dismiss my charter complaint against them is that it isn't so much a motion to dismiss as a presentation of their attorneys' argument, shot through with ad hominem attacks, errors of fact, and faulty legal reasoning.

The Supreme Court of Rhode Island has explained that, in assessing a motion to dismiss, "the trial justice must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor. … The motion may then only be granted if it appears beyond a reasonable doubt that a plaintiff would not be entitled to relief under any conceivable set of facts." *Laurence v. Sollitto,* 788 A.2d at 456 (quoting Page 417 *Rhode Island Affiliate, ACLU, Inc. v. Bernasconi,* 557 A.2d at 1232).

The respondents spend page after page maligning my character and presenting facts that may be relevant in determining whether my complaint has merit (although many errors would have to be corrected). When the motion finally arrives at a relevant argument, their central point is essentially that they do not see the complaint.

Under the standard of "beyond a reasonable doubt," the court would not only have to find my articulation of the violation implausible, but find it inconceivable that I could explain it sufficiently in an expanded presentation. Given that the complaint in question asks the court to review the processes of a Home Rule Charter written largely by residents of the town, such a finding would require an uncommon belief in the clarity of Tiverton's governing document.

The substance of my complaint was as follows:

> Section 301(d)(1) of the Tiverton Home Rule Charter provides a mechanism to any elector of the town to submit a budget petition. (See Attachment B.) The subsection states that elected officials are not barred from submitting such petitions *as electors,* but the process is intended for "electors of the town," not for government bodies. The School Committee's access to the ballot comes in the separate subsection, 301(c)(2). (See Attachment B.)
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> In acting as a body to exercise rights reserved for individual electors, the committee abused the democratic processes for which our charter allows and claimed the right to act officially through all three separate mechanisms for accessing the ballot. The rationale that the committee's third swing at the budget involved an activity in their private capacities is a mere pretense, as the committee decisively proved when it subsequently voted to authorize its attorney to represent the petitioners following a complaint that the petition was invalid.

The charge could not be clearer. The School Committee and its members took actions that the Home Rule Charter does not authorize, in such a way as to tilt the balance of power away from the traditional New England direct democracy about which the respondents' motion waxes poetic. Whether this constitutes a violation justifying action in accordance with **Section 1211 Enforcement** is for the court to decide, but only after a proper hearing.

The respondents' failure to understand the nature of the complaint is most evident in their perplexity that the complaint did not include Town Council members Joan Chabot and Randy LeBeau, both of whom signed on to the same elector petition. The reason, obviously, is that the complaint does not allege a violation based on any elector's decision to originate a budget

petition, but that the School Committee *acted in its official capacity* to do so, not as an elector, but as a body. The two council members did not do so; indeed, Chabot and LeBeau participated in the petition largely at odds with the votes of the Town Council as a body, which voted to accept the Budget Committee's recommendation.

II. OBJECTION TO TONE AND REASON FOR COMPLAINT.

Inexplicably (especially for officials and legal counsel associated with children through the school department), the respondents' motion to dismiss devotes inordinate energy to irrelevant attacks on me. Even if every insult and insinuation were true, that would still have no bearing either on my right to due process and right to petition for redress of grievances under the law or on the merits of my legal argument. The only conceivable reason for the attorneys to have used this tactic is to prejudice the court against me.

Although conducting a comprehensive survey of examples of ad hominem in the respondents' motion would be more time consuming than the last-minute motion allows, some instances demand response. Others illustrate the lack of concern that the respondents have for accuracy.

A. ASSUMPTIONS OF INTENT

In multiple places, the respondents profess to see the hidden motivations within my heart as if they aren't making a legal argument so much as presenting a psychological evaluation:

- I have filed the complaint "in order to punish citizens and Town officials" (1).
- I am "seeking to penalize members of the School Committee and the School Committee as a whole" (4).
- I feel I "can disregard the rights of others to have input into the budget process when [I do] not like that input" (9).
- I feel "others should be prosecuted for putting forth proposals that [I do] not like" (9).

- I feel "a need to punish those who even attempt to put forth the proposal in the first instance" (9).

None of this is true. In pursuing this complaint, I will not request any punishment or penalization. Rather, I am seeking something more like a declaratory judgment.

Even the respondents' repeated insistence that I make a practice of filing charter complaints is false; as this is only the second that I have filed. So egregious is their falsehood that they tell the court that my very first charter complaint proved me to be "even then something of a perennial Section 1211 complainant."

B. PURPOSE OF COMPLAINT

Given the importance of the financial town referendum process both as a tool for setting the town's annual budget and as a standard for the electors' relationship with their local government, I want clarity for those who participate in the future.

The complaint process described in Section 1211 of the Tiverton Home Rule Charter is extremely broad in its application in order to allow the people of Tiverton to *enforce* the charter. Complaints may cover **"any"** official, body, or employee taking or failing to take "**any** action… in violation of **any** of the terms or provisions of this Charter, or of **any** ordinance, rule, or regulation adopted under the authority thereof."

Complaints such as the two that I have now filed are appropriate exercises to establish the boundaries of what, exactly, officials and employees are required, authorized, or forbidden to do. Moreover, the Charter gives the authority to answer such questions to the Municipal Court.

Ironically, the respondents show the importance of this use of charter complaints when they attempt to argue their case based on precedent from my prior complaint, against the Town Clerk. I will argue below that they overstate the precedential value of the Town Council's action and

that they present those prior arguments in a misleading way, but they clearly see the value of electors' using complaints to clarify the law.

The court should also bear in mind that the members of the School Committee are well represented with a taxpayer-funded legal team. The notion that I, a private citizen representing myself as complainant, am somehow bullying them is therefore preposterous. Rather, their extensive legal representation only further illustrates how appropriate it is to test the Home Rule Charter in this way.

III. CORRECTIONS OF ERROR

Given that a motion to dismiss requires the court to construe all facts in favor of the plaintiff, the respondents' expansive narrative is largely irrelevant. However, I cannot allow plain errors and misleading characterizations to taint the record without correction.

This complaint was not made in my capacity as a member of the Budget Committee.

The respondents make clear their desire to present themselves as the victimized private citizens under the intimidating attack of a government official. This presentation is so inverted as to be offensive. While the complaint is against them in their official capacities, I filed it entirely in my capacity as an elector of the Town of Tiverton and would have done so regardless of my status as an elected official. The most significant practical illustration of this difference is that, while they receive a stipend for their work on the School Committee and rely on taxpayer-funded legal representation to make personal attacks and file a last-minute disruptive motion, I

write this response on my own behalf and must make room for the disruption in the midst of an unrelated strain on my family.

Town Solicitor Anthony DeSisto did not "frustrate" the School Committee's efforts to submit an alternative budget proposal.

After the Budget Committee finalized its budget proposal, then-Town Council President Joan Chabot sought to put forward an alternate budget from the Town Council. Solicitor DeSisto advised the council that it could not change its alternate budget from its original request. This was his advice to his client, not an injunction against the School Committee.

Just as the municipal side of government has no control over the School Department's use of its funds, the Town Solicitor has no direct role in advising the School Committee. Far from challenging the degree to which the solicitor's advice to his clients applied to the School Committee or, for that matter, was accurate, the committee chose at its April 11, 2017, meeting to adopt his opinion in order to avoid conflict and withdrew its alternate budget proposal.

Now that they face a complaint charging that their next course of action was equally contrary to the charter, the respondents are once again playing the victim. If they agreed with the solicitor that they could not modify their alternate budget proposal, then *the charter* "frustrated" their efforts, not the solicitor. If they did not agree with the solicitor, then the time to challenge his read of the charter would have been before they took official action abusing the charter's budget process with an inappropriate elector petition, not in a last-minute attempt to avoid defending their decision in court.

School Committee Members Jerome Larkin and Sally Black did not independently "determine[] that they would exercise their rights as electors to include an Elector Budget Proposal on the ballot" (3).

This claim by the respondents gets to the heart of my charter complaint against them. Had Dr. Larkin and Mrs. Black independently developed their budget proposal, we would not be in the midst of this controversy.

Rather, at the April 11 meeting of the School Committee, while acting in their official capacities, Larkin, Black, and the other respondents determined who would submit the proposal and what its contents would be. This action came after deciding to withdraw the committee's own alternative budget proposal and before taking official action to expend taxpayer resources in defense of the elector petition after Larkin and Black failed to submit it according to the process laid out in the Home Rule Charter.

The Board of Canvassers did not reject the respondents' elector petition in answer to my complaint, but because they determined that it was faulty, and the Superior Court agreed.

While it is true that I filed documentation with the town alerting the Board of Canvassers to the fatal flaw in the respondents' petition, the board agreed independently, not in answer to my correspondence. As the respondents note, there is no process for such a "complaint"; I called it such only because that seemed to be the most appropriate title. That is why the respondents joins the Town Solicitor in stating that I "styled" the filing as a complaint; it could just have easily been called a "letter" or "statement."

The court should also recognize how coy the respondents are being when they report that their resulting action in Superior Court "was unsuccessful." More accurately, Justice Brian Van Couyghen found against their arguments, ultimately agreeing with my "complaint." Note, as well, that my name appears nowhere in the transcript of the court's proceedings.

The School Committee did not submit the elector petition under the charter provision allowing for an alternate budget proposal from the School Committee.

Attempting to have their arguments both ways, the respondents insist that ambiguity about the requirements for alternate budgets from the Town Council and School Committee also creates ambiguity about the requirements for elector petitions (7). I will contradict the legal aspects of their scienter claim below, but even if knowledge of the law were required to substantiate a violation, confusion about the committee's official alternate budget is separate from the rules for elector petitions.

The Town Council, acting as the Charter Monitoring and Complaint Review Board, did not set any precedent for a scienter element, much less a binding precedent.

When the Town Council heard my single prior charter complaint on March 11, 2013, it was acting in a way analogous to a grand jury, not with any presumed competence for interpreting the law. As the complainant, I thought that its dismissal of the complaint against the clerk was incorrect, but I lacked the availability to pursue the matter further at the time.

The respondents quote a carefully chosen snippet from the minutes of that hearing to give the impression that the council ruled not only that a town official or employee must have been aware of violating the charter in order for a complaint to succeed, but also that the clerk has an

affirmative duty to investigate charter complaints prior to scheduling a public hearing of the council (6). These claims are the subject of extended treatment as legal argument below, but in this section of corrections, the relevant point is that the council set no precedent at all.

A review of the video record of that hearing shows that the actual motion of the council was simply to dismiss the complaint.[1] One by one, the council members expressed their thinking prior to taking a vote, but their reasons varied and were not included in any action of the body. Their expression wasn't even as formal as, say, a written dissent or secondary judicial opinion in a legal proceeding.

IV. LEGAL ARGUMENT

A. KNOWLEDGE OF A VIOLATION IS NOT NECESSARY UNDER THE CHARTER

As stated above, the purpose of this complaint is not to instigate punishment of the respondents, but to evoke from the Municipal Court clarity about the provisions of Tiverton's Home Rule Charter. Specifically, the complaint asks the court to rule on the availability of the charter's elector petition option to government bodies acting as government bodies. However, the respondents' reliance on a supposed precedent for charter complaints under Section 1211 having to do with a scienter element raises another issue on which I've been seeking opportunity for clarity.

When the Town Council heard my single prior charter complaint, some members expressed their opinion that the clerk did not know that she was violating the charter when she conducted an unauthorized investigation of a complaint and presented a ruling based on her findings. The relevance of this scienter element was the subject of extended discussion during that hearing, and

[1] https://www.youtube.com/watch?v=auvpLD-dapE

to the extent that the council voted to dismiss the complaint on these grounds, it did so erroneously. The plain language of the charter proves this is so.

Charter Section 1211(a)(2) articulates a complaint as a statement:

> That any elected or appointed official or member of any board or commission, or that any official body, board or commission in its corporate capacity, or any Town employee, has knowingly taken any action or failed to take any action, in his or her official capacity, in violation of any of the terms or provisions of this Charter, or of any ordinance, rule, or regulation adopted under the authority thereof.

The critical distinction is whether the adverb "knowingly" applies to the "action" taken (or not taken) or to the fact that it was a violation of the charter. An analogous example would be if it were a charter violation for an employee to have alcohol in his or her office. Two forms of knowledge might be required in order for the employee to face consequences: (1) knowledge that the alcohol was in the office and (2) knowledge that its presence violated the charter. If the language of 1211(a)(2) applies to *the action,* rather than the violation, the employee could avoid consequences by proving that he or she did not know the alcohol was in the office. If the scienter element applies to *the violation,* then the employee could excuse him or her self for knowingly having it in the office by claiming ignorance about the rule against it.

Fortunately, the charter resolves any ambiguity about this distinction further along in Section 1211. In 1211(d), describing allowable penalties for violations, subsection (2) reads as follows:

> Every expenditure or obligation incurred in violation of the provisions of this Charter, and the rules and regulations made pursuant thereto, shall be deemed illegal, and in addition to any other penalties provided by law for such violations, every official authorizing such payment or any part thereof, knowing the same to be in violation, shall be jointly and severally liable to the Town for the full amount so paid or received.

In this scenario, the charter contemplates an official or employee who has already been found to have violated the charter and who will face additional penalties for having known that the

action was a violation when taking it. Specifically, a town official who authorized an expenditure in a way that the charter did not allow could face the same penalties allowed for any violation of the charter, but if he or she *knew* the expenditure was a violation, then the official would also have to pay the money back.

Clearly, if a violation cannot be found without knowledge of its being violation, as the respondents argue, then there would never be any circumstances in which the official would not be liable for the expenditure. If this court agrees with the respondents that *all* violations must be made in full knowledge that they are violations, then an expenditure would never be a violation unless the official knew that it was.

The respondents claim that this circumstance would be "sound public policy" (6), but the advantage that such a policy would give to government officials would create copious opportunity for corruption and trampling of the public trust. Giving every elected or appointed official a first-offense-free card for every conceivable violation of the charter would grant public officials and employees incentive to be ignorant of the law.

Imagine if residents of the town had a similar advantage for every law of the charter or ordinance. Every first speeding ticket would be waived. Every first late tax bill would go without penalty. Each individual zoning regulation would get an initial pass.

In practice, our system creates leniency not by such blanket exemptions, but by leaving discretion to enforcement officers and courts. Just so, the Municipal Court should account for the complexities of complying with the charter by finding a violation, but without imposing a penalty, rather than by dismissing the complaint altogether.

B. THIS COMPLAINT CONCERNS THE ORIGINATION OF A PETITION BY SCHOOL COMMITTEE MEMBERS IN THEIR OFFICIAL CAPACITY, NOT AS ELECTORS

For the reasons articulated in the respondents' motion to dismiss, this complainant does not dispute the right of School Committee members to originate elector petitions or the right of the School Committee to offer some statement of support for such a petition (although the allowable degree of support is an open question). The contention of my complaint is that, in this specific case, the School Committee crossed the line to the point at which it effectively originated a petition itself.

Had the School Committee withdrawn its alternate budget proposal in the expectation that an elector petition would arise, had Larkin and Black independently submitted a petition that accorded with the School Committee's interests, and had the School Committee then voted to "circulate" it (with Larkin and Black recusing themselves from the discussion and vote), there would be no grounds for this complaint.[2]

Instead, at their April 11 meeting, the School Committee members openly and brazenly treated the elector petition as if it were their own, effectively developing and voting on the matter and then expending public resources on its behalf thereafter. This may seem like a fine distinction, but laws bearing on the process of government are full of such rules designed to create guardrails against the risk of corruption. Precisely because these ambiguities can arise, the law requires absolute clarity about who is taking what actions in what capacities; if that is not a

[2] For the purpose of this objection, we leave aside the plain fact that the charter repeatedly states that there can be only a single originator per petition. The complainant is satisfied that additional names on the petition are essentially expressions of support. Indeed, if the complaint were against School Committee members for originating a petition in their private capacity, it would arguably be appropriate only to file the complaint against the first petitioner, Dr. Larkin. However, that the charter repeatedly refers to a single elector as the petition originator drives home the further point that a majority of elected officials on a body, or the body itself, cannot originate elector petitions.

matter worthy of legal exploration, then the countless hours and resources devoted to training and compliance for everything from campaign finance to the Code of Ethics to the Open Meetings Act are all overkill.

Thus this complaint asks the court to affirm the boundaries for official action in Tiverton's budget process.

C. THE TOWN CLERK PERFORMED HER PRESCRIBED DUTY UNDER THE CHARTER

The respondents claim that Town Clerk Nancy Mello did not adequately determine whether this complaint was "sufficiently set forth." To do so, they rely on the flawed and possibly politically motivated opinions of former Town Council members, as discussed above. Although their motion to dismiss quotes extensively from the charter's section on complaints, it conspicuously ignores the fact that the charter has a detailed definition for what constitutes "sufficiently set forth." From Section 1211(a):

> Any such statement shall set forth the particulars as to the charges made. A "sufficiently set forth" complaint shall specify (a) the section or sections of the Charter which are charged to have been violated, (b) the nature of the violation, and (c) the person, persons, or body charged with having committed the violation.
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> 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.

The repeated quotation marks around the phrase, "sufficiently set forth," indicate that it is not an ambiguous term of art requiring the clerk to perform an investigation for which he or she has no authority or expertise, but rather that the phrase means exactly and only that the complaint

contains the three elements listed in the paragraph above. In keeping with his or her role throughout the charter, the clerk's duty is clerical. The only relevant questions are whether the complaint describes the violation, names the alleged violator, and points to the section of the charter that has been violated. That is all.

As the respondents well know, the charter leaves it to the Town Council, in its capacity as the Charter Review and Complaint Monitoring Board, to determine "that the charges have been supported by the testimony and evidence presented" (Section 1211(b)(2)). What the respondents seek to impose on all complainants is a burdensome double hurdle of reviews.

In any event, the court should take into consideration that the respondents have not thus far, to my knowledge, taken any steps to file a complaint against the clerk for what they see as an egregious failure to fulfill her duties.

D. THE TOWN COUNCIL'S RECUSAL HAS NOT DEPRIVED THE RESPONDENTS OF DUE PROCESS

As with the Town Clerk, the respondents have taken no action with respect to their view that the Town Council failed to perform its duties as the Charter Monitoring and Complaint Review Board. To my knowledge, they have not written a letter of objection to the council; they have not attempted to appeal the solicitor's advice or sought injunctive relief from a court of relevant jurisdiction; and they have not filed a charter complaint against the council. Rather, they have waited until nearly the eve of a scheduled hearing and attempted to cause further delay and disruption of the process by including their opinion in a scattershot motion to dismiss designed to seek any rationale that might stick.

On whether the Town Solicitor's advice was legally sound, this complainant offers no opinion, although the respondents' citations seem to be of dubious relevance, much from out of state. However, in the interest of time and the prudent use of taxpayer resources, the court should note a significant omission from this section of the respondents' motion to dismiss. Namely, the solicitor's memorandum does not propose to skip the review stage for this charter complaint, but rather to assign it to the court because the council considers itself to be unable to sit on the matter.

In Section 1211(b)(3), the charter explicitly gives the Municipal Court jurisdiction over charter complaints, so clearly, the council cannot be seen to have any special expertise in matters of law that the court is not competent to address in its stead. That is especially true in this case, which has entirely to do with legal interpretation of the charter.

By the implicit admission of the respondents' own motion, none of the facts of my complaint are in dispute, merely the question of whether a violation has occurred. Moreover, coming at such a late date, a successful motion to dismiss will save no parties any effort in preparation for the hearing.

V. CONCLUSION

Solely for the purpose of clarifying the law, the complainant is asking the court to find a specific set of actions of the various School Committee members and the committee as a whole to have been a violation of the budgeting process laid out in Tiverton's Home Rule Charter. As the respondents, themselves, emphasize in their motion, their budget petition failed to appear on the ballot, leaving no harm to be remedied within the scope of this complaint. Inasmuch as they

are well represented at taxpayer expense, continuation of the matter to hearing imposes no undue vulnerability or burden.

With another budget season fast approaching and a number of contentious budgetary matters looming, it is in the manifest interest of the Town of Tiverton, its taxpayers and residents, and its employees to enter the process without lingering legal questions. The court should therefore reject the respondents' motion to dismiss and proceed with the hearing scheduled for Tuesday, December 5, 2017.

Respectfully,

Justin Katz
Complainant