

Budget Proposals (at issue in Larkin v. Tiverton, C.A. No. NC-2017-0192, last year, but not this year) are a clearly defined term in the Charter. The word “Proposal” appears 35 times in Article III of the Tiverton Home Rule Charter and in every single instance it is immediately preceded by the word “Budget”. On the other hand, the Charter uses the word “resolution” no less than 24 times, often as a capitalized term, in Article III and not one time does the word “budget” come before “resolution” and is only in the vicinity of the word “Budget” ten times. And the phrase “ballot questions” never includes the word “Budget”. See Tiverton Home Rule Charter § 301(b)2.

Budget Proposals are called Budget Proposals, Resolutions are called Resolutions, and ballot questions are called ballot questions, and the only constraint on Resolutions and ballot questions is that they must not interfere with the five line items on the ballot for Budget Proposals (and the Blocked Resolutions undisputedly do not interfere).

Furthermore, this Plaintiff disagrees, as a matter of fact, with the Defendants’ characterization that his Elector Resolution “would obligate Town officials, including the Council, to submit all proposals drafted by the Tiverton Charter Commission to the electors for vote.” Def. Memo at 6. In fact, what the Resolution says is (emphasis added):

*RESOLVED, that the voters/electors of Tiverton **express their desire** (1) to have the opportunity to vote on all charter amendment proposals as approved by the elected Tiverton Charter Review Commission; and (2) that the Board of Canvassers, the Charter Review Commission, the Town Clerk, the Town Council, and all other town officials take all necessary actions within their powers to ensure that the voters/electors have the opportunity to vote on all said proposals.*

There is no reasonable way to read the words “express their desire” other than that those words apply to both clauses (1) and (2) and an expression of desire does not, of course, create a binding obligation.² This is readily apparent on a plain reading of the text of the Resolution.

Argument

I. By Being Deprived of Access to the Ballot, the Plaintiffs Are Suffering Actual, Concrete, Particularized Injury.

The Defendants have raised a standing issue before this Court, which is curious because there is no indication that they did so in the Larkin v. Tiverton case which was before this Court over last year’s FTR and no standing issues appear in the oral decision rendered by this Court. See Exhibit A (Transcript).

The Defendants rely on the case of Warfel v. Town of New Shoreham, 178 A.3d 988 (R.I. 2018), but the plaintiffs in Warfel complained, after the fact, about a vote which happened at their town’s financial town meeting that they were able to participate in. Here, the Plaintiffs are trying to ensure that a vote happens in the first place.

Also, the plaintiffs in Warfel were taxpayers situated exactly the same as every other one in New Shoreham. But the Plaintiffs here do not come before this Court as any other resident or taxpayer; they come as originators of Elector Resolutions by petition exercising their rights under the Tiverton Home Rule Charter which were blocked from the ballot and formal public hearing by Defendants. Being deprived of ballot access to which they are entitled is the actual, concrete, and particularized individual harm, perhaps one of the gravest harms in democracy. There are some

² Several – perhaps a couple dozen – proposals approved by and/or under review by Tiverton’s elected Charter Review Commission (of which this Plaintiff is the current chair) have bearing upon matters of revenues, expenses, budgets, taxation, and the FTR and other budget adoption processes. The only requirement in the Charter as to resolutions or ballot questions is they do not conflict with any of the five enumerated ballot line items of Budget Proposals, and this Resolution does not. See Tiverton Home Rule Charter § 301(b)2.).

16,000 residents and 12,000 eligible electors in Tiverton, but only six electors originated Elector Resolutions and only eight electors gathered signatures on official sworn petition forms. This easily clears the hurdle of showing that the wrong the Plaintiffs are suffering is “beyond a general grievance common to all taxpayers.” See Warfel, 178 A.3d at 991 (quoting West Warwick School Committee v. Souliere, 626 A.2d 1280, 1284 (R.I. 1993)). The injury is being deprived of a right to access to the ballot. Unlike in Warfel, there is nothing “uncertain,” “vague,” “potential,” “speculative,” or “hypothetical” about it. Id. If the FTR and its associated hearing come and go without the Plaintiffs’ Resolutions on the ballot and on the agenda, the harm will be irreparable.

In actuality, if anything the Warfel case cited by the Defendants supports the Plaintiffs’ standing here. The Supreme Court in Warfel, discussing a prior case of Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992), stated that it “decided the [Burns] case despite a lack of standing because it presented the fundamental question of whether the plaintiffs could vote on an issue at a public referendum.” The Warfel case also reminds that the courts will liberally construe standing when access to the ballot is at issue. See id. citing Gelch v. State Board of Elections, 482 A.2d 1204, 1207 (R.I. 1984) (“conferring standing liberally” to allow the Court to address a candidates eligibility to run for public office). Just as in the cases gathered in Warfel, the cases before this Court today involve fundamental questions of voting in a referendum and access to the ballot.

In any event, we cannot rely on the political process as a remedy when the political process itself – access to the ballot and equal debate at public hearings – is under attack. The Defendants would deprive the Plaintiffs of their political voices at the FTR and suggest that the only forum for political expression is through supporting Town Council candidates or running for office themselves.³

³ Query what would happen if the Plaintiffs take up the Defendants suggestion and, all being electors, declare as candidates for Town Council and, just as they did here, properly return their forms with the requisite 50 signatures

II. Board of Canvassers Actions are Subject to Review by this Court

The Defendants cite the 114-year-old case of Williams v. Champlin, 26 R.I. 416, 420 (1904), for the proposition that boards of canvassers are “judicial” in nature and, as the Defendants apparently would have it, not subject to review by this Court.

To begin with, the Williams case involved the board of canvassers holding hearing on claims that two individuals voted illegally. This is an entirely different situation than the Defendants preventing access to the ballot. Whatever adjudication may have been happening in Williams over unregistered voting in the year 1904, in the present cases the duties of the Defendants are ministerial and non-discretionary. Section 301(c) of the Charter provides that ... “Qualified Resolutions submitted by elector petition in accordance with Section 301 (d) **shall appear on the ballot**” and Section 301(d)3.) states “...All Elector Budget Proposals and **Elector Resolutions shall be included on the ballot** for the Financial Town Referendum and presented at the Financial Town Hearing provided that they are accompanied by 50 qualified elector signatures.” (Emphases added.)

III. The Balance of the Equities Favors Ballot Access

The FTR is fast approaching on May 19, 2018 and the associated public hearing is imminent on May 3, 2018. Without immediate intervention by this Court the Plaintiffs and the at-large electorate of Tiverton will suffer immediate and irreparable harm in that they will be deprived of very clear rights to access to the ballot and voting rights under the Tiverton Home Rule Charter, and deprived of the opportunity to debate the Blocked Resolutions at the associated official public hearing set for May 3, 2018. The public interest favors the upholding of the rule of law and the

before the deadline. If the Board of Canvassers deprives their access to the ballot again, and if the Defendants arguments were accepted, the Plaintiffs would have no rights of review and once again suffer irreparable harm without the invited political remedy. Access to the ballot in a general election is no different than access to the FTR ballot.

enforcement of laws to provide for access to ballots, robust speech and debate, voter participation, the integrity of election process, and the finality of elections.⁴ The status quo, which should not be disturbed, is that the Board of Canvassers has never before blocked a ballot question on substantive⁵ grounds. The Charter language is clear and the Plaintiffs' Resolutions meet the requirements⁶ to be placed on the ballot, so the Plaintiffs are likely to succeed on the merits and the balance of the equities is in their favor. The matter is greatly urgent because of the timing of the FTR and the need to prepare for ballots beforehand, including mail-in and absentee ballots, and the associated public hearing required by the Tiverton Home Rule Charter is scheduled this year for May 3, 2018. For these reasons injunctive relief and/or mandamus is called for.

⁴ Defendant Mello was aware of the Plaintiffs' Resolutions as early as April 17, 2018 and no Defendant advised any Plaintiff that their Resolutions would be blocked until the Board of Canvassers meeting on April 23, 2018 on an agenda providing insufficient notice. Further, the Board of Canvassers was advised in writing on April 23, 2018 and April 24, 2018 that litigation was imminent. The Board was also requested in writing to reconsider its April 23, 2018 decision at its April 27, 2018 but it refused to do so. The Town, the Town Clerk, and three present members of the Board of Canvassers were served with the Motion for Temporary Restraining Order in civil action number NC-2018-0157 on Friday, April 27, 2018, not Monday, April 30, 2018 as the Defendants state in their memorandum. In other words, the Defendants had ample time to prepare for this matter and the Court should not allow the intentional decision by Defendants to deprive the Plaintiffs' election, due process, and debate rights to somehow become contorted into being in the "public interest" not to grant relief. Other than a single vague allusion in their memorandum, there has been no suggestion by any Defendant, and certainly no evidence, that it is too late to place the Blocked Resolutions on the FTR ballot.

⁵ The Budget Proposal petitioners in Larkin did not meet the Charter's procedural requirements (they did not fill out the Budget Proposal petition form properly and they missed the filing deadline). Here, there is no disagreement that the Blocked Resolutions met procedural requirements. Instead, for the known time in Tiverton history, the Board of Canvassers blocked ballot access based on policy preferences and predictions as to the effects or enforceability of ballot questions. Action on such grounds is wholly improper for a board of canvassers.

⁶ Again, the only requirement is that resolutions and ballot questions do not conflict with Budget Proposals. The Defendants ask this Court to allow a board of canvassers (or its solicitor) to create new substantive boundaries out of thin air, and then allow that board to patrol those boundaries itself without review. Capone v. Nunes, 132 A.2d 80 (R.I. 1957), cited by the Defendants, is of no relevance here. In Capone, not all voters, but only a subset of taxpaying voters, attempted to create a new harbor commission and then appoint officers to that commission at a financial town meeting and the Supreme Court (i.e. a court of law, not a board of canvassers) ruled that action as ultra vires because not all electors were able to vote in that town's meeting at the time. In any event, the reasoning for the Court's holding in Capone was eliminated by a constitutional amendment over 40 years ago.

RESPECTFULLY SUBMITTED by,

/s/

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Dated: May 1, 2018

* * *

Certification of Service

I hereby certify that a true copy of the above Reply Memorandum was delivered to the Tiverton Town Solicitor by electronic mail on May 1, 2018.

/s/

Robert Coulter

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Exhibit A

Decision Transcript from Larkin v. Tiverton

WEDNESDAY, MAY 3, 2017

MORNING SESSION

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2
3 THE CLERK: The matter before the Court is
4 NC-2017-0192, Jerome Larkin, et al, vs. the Town of
5 Tiverton, et al. Will the attorneys identify themselves
6 for the record, please.

7 MS. BEJMA: Vicki Bejma for plaintiffs.

8 MR. ROBINSON: Stephen Robinson for plaintiffs.

9 MR. DeSISTO: Anthony DeSisto for the defendant,
10 Town of Tiverton.

11 THE COURT: This matter is before the Court on
12 plaintiff's emergency motion for injunctive relief and
13 writ of mandamus. The complaint was filed late Monday
14 afternoon, which was May 1st. The parties presented
15 evidence and argued yesterday, which was May 2nd.
16 Plaintiffs are the Tiverton School Committee and various
17 individual electors of the town. The electors are also
18 members of the school committee and two of the plaintiffs
19 are also Town Council members. The defendant is the Town
20 of Tiverton Board of Canvassers and the Town Clerk.

21 Plaintiffs seek to have the Court mandate that an
22 election budget proposal submitted by plaintiff electors
23 be included in the town's budget referendum process. The
24 town's board of canvassers has, on the advice of its
25 solicitor, refused to include the proposal in question

1 because they believe it does not meet the requirements
2 set forth in the charter. Apparently, the referendum
3 process starts Thursday evening, on May 4th, 2017, with a
4 town meeting where the public is invited and electors who
5 submitted budget proposals are permitted to speak. The
6 parties stipulated to entry of a variety of exhibits, one
7 through six, as well as the fact that the board of
8 canvassers refused to include plaintiffs budget
9 referendum submission in the process. That decision by
10 the board of canvassers was rendered, I believe, on
11 April 27th, 2017; is that correct, Counsel?

12 MR. DeSISTO: Yes, your Honor.

13 THE COURT: In order for plaintiffs to be entitled
14 to injunctive relief, they must prove the following
15 elements: One, irreparable harm; two, substantial
16 likelihood of success on the merits; three, the balancing
17 of the equities must lean in their favor and the public
18 interest must be served; and four, the preservation of
19 the status quo. Further, a preliminary injunction is
20 mandatory in nature when it commands action from a party
21 rather than preventing action. A mandatory injunction
22 requires a showing of a very clear right and great
23 urgency. **King vs. Grand Chapter of Rhode Island Order of**
24 **the Eastern Star**, 919 A.2d 991 (2001).

25 Plaintiffs demand for relief asks this Court for a

1 preliminary and permanent injunction "mandating that the
2 electors of the budget submission at issue before this
3 Court is included in the referendum process". Plaintiffs
4 are, therefore, seeking a mandatory injunction. Further,
5 a writ of mandamus can only be issued if petitioners
6 prove three elements: One, they have a clear and legal
7 right to the relief sought; two, the respondent has a
8 ministerial duty to perform the requested act without
9 discretion to refuse; and three, the petitioner has no
10 adequate remedy at law. Muschiano vs. Travers, 973 A.2d
11 515, all three elements must be satisfied.

12 The referendum proposal at issue has been marked as
13 Joint Exhibit 1. It does not contain a line-by-line
14 description of the budget. Rather, it sets forth changes
15 in the bottom line to the school budget and the municipal
16 operations budget. In other words, it changes the amount
17 appropriated to each budget but does not set forth the
18 detailed expenditures. It also contains a statement of
19 the budget originators intent and purpose. At the end of
20 that statement it states as follows: "It is remanded to
21 the town council and school committee to determine their
22 final budget." In other words, if passed, it is remanded
23 to the town council and school committee to determine
24 their final budget including expenditures.

25 Upon filing the proposal, the town clerk then

1 prepares and provides a form to the originator for
2 collecting the amount of signatures which also reflects
3 the proposal. Also attached to the signature form is the
4 budget statement prepared by the originator which was
5 part of the original submission. That form with the
6 budget statement attached has been marked as Exhibit 6.
7 The parties have not contested at this point that the
8 requisite signatures were obtained and that issue is not
9 before the Court.

10 The board of canvassers found that the budget
11 statement attached to Exhibit 1 and Exhibit 6 was
12 defective because it requires that the referendum, if
13 passed, be remanded to the town council and school
14 committee to determine their final budget and not the
15 budget committee. The town argues that that language is
16 in direct conflict with the charter, which was marked as
17 Joint Exhibit 5.

18 Section 301 of the Tiverton charter sets forth the
19 procedure which must be followed with regard to the
20 formulation of and the passage of the town budget.
21 Section 301(d) deals with elector budget proposals that
22 may be filed in addition to the one filed by the budget
23 committee. In other words, electors for the town, if
24 they follow this process, may submit their own budget
25 proposals to be before the town for the referendum. In

1 pertinent part, 301(d) states as follows: "Elector
2 budget proposals. Electors of the town may petition that
3 an alternate budget proposal be included in the financial
4 town referendum. No later than 35 days before the
5 financial town referendum, the clerk shall make petition
6 forms available which include fields for the name of the
7 elector who is the petition originator and the ballot
8 entry amounts of Section 301(d) (a-e). The town shall
9 record the dollar amount sought by the petition
10 originator on the petition form, shall prepare a typed
11 version of this petition form to be verified by the
12 petition originator and record a petition originator's
13 statement, if any, as the purpose of the petition. The
14 petition originator shall provide, and the clerk shall
15 record either, one, the specific docket line items to be
16 increased, decreased or created, or two, a statement to
17 remand the docket to the budget committee for final
18 determination of docket line items in accordance with
19 said petition originator's budget proposal."

20 The town argues that the budget proposal at issue in
21 this case is void because the charter specifically states
22 that if a line-by-line change to the budget are not
23 specified but the bottom line appropriations are
24 specified, then 301(d) requires that the proposal be
25 remanded to the budget committee which has final

1 authority. There is obviously no need to remand a budget
2 that has line-by-line changes to the budget committee.
3 That would be under the first part of that sentence in
4 question because the electors would have approved those
5 individual line-by-line items. I will read the sentence
6 in question regarding 301(d) that is in contention here
7 again. "The petition originator shall provide", shall
8 provide, "and the clerk shall record either the specified
9 docket line item or items to be increased, decreased or
10 created, or two," which the town argues is pertinent
11 here, "a statement to remand the docket to the budget
12 committee for final determination of docket line items in
13 accordance with said petition originator's budget
14 proposal."

15 Plaintiffs argue that the proposal was in
16 substantial compliance and, therefore, failure to specify
17 that the proposal be referred back to the budget
18 committee is inconsequential.

19 After reviewing the arguments of counsel and the
20 exhibits presented as well as the stipulated facts, the
21 Court believes that plaintiffs have failed to establish
22 that they're entitled to injunctive relief in the case
23 before the Court. The primary flaw in plaintiffs prayer
24 for relief is that they have failed to prove the
25 likelihood of success on the merits. It's clear that the

1 budget statement was incorrect when it stated the
2 proposed budget modifications would be remanded to the
3 town council and school committee to determine their
4 final budget. The actual determination is made by the
5 budget committee. Plaintiffs argue that this is
6 irrelevant because the school committee has the final say
7 regarding its line-by-line expenditures. However, that
8 argument does not encompass the municipal portion of the
9 budget to which it proposed modification. In fact, the
10 proposal seeks to restore funding to a variety of
11 expenditures to the municipal budget as a result of the
12 cuts made by the budget committee. See Exhibit 6.

13 It seems to this Court that the body that is
14 actually making the expenditure decisions is an integral
15 component to the proposal. The electors who support a
16 proposal and sign their names to it should be properly
17 advised regarding who is ultimately making the decisions
18 how to expend those funds. In fact, 301(d) requires it.
19 301(d) states, "The originator shall provide and the
20 clerk shall record a statement to remand the docket to
21 the budget committee for final determination." Because
22 the budget statement was inaccurate in this regard,
23 signatures obtained cannot be relied upon. Regardless of
24 whether or not the signatures can be relied on, the
25 mandatory provisions of the charter were not complied

1 with.

2 As it relates to the prospect of irreparable harm,
3 plaintiffs have not persuaded this Court that the school
4 committee or the electors will suffer irreparable harm.
5 Plaintiffs have represented that the difference in the
6 school budget is approximately \$250,000 more based on
7 their proposal, while the total school budget as it is
8 currently proposed is \$29,893,257. Nothing has been
9 submitted to this Court to establish that that reduction
10 translates into irreparable harm.

11 As it relates to the balancing of the equities and
12 the public interest, plaintiff argues that the electors
13 of the town deserve a choice. The Court observes that
14 the purpose of 301 is to provide an orderly process
15 whereby various budget proposals can be submitted so the
16 electors can vote on whichever one they choose. However,
17 electors also deserve the right to have the mandates of
18 the charter complied with, otherwise the rule of law
19 would be meaningless and subject to the whim of town
20 officials. In other words, the Court finds that the
21 public interest leans in favor of maintaining the
22 integrity of the process rather than ignoring the
23 mandates of the charter solely to provide a choice to the
24 electors.

25 Plaintiffs also argue that they would be denied

1 their right to propose alternative budget proposals under
2 the charter. This argument misstates the issue.

3 Plaintiffs were not denied their right to put forth an
4 alternative budget proposal. In fact, they did. They
5 just failed to satisfy the obligations and the
6 requirements of the charter.

7 The Court also believes that plaintiffs have failed
8 to establish that granting injunctive relief would
9 maintain the status quo.

10 The Court also denies petitioner's request for
11 mandamus which is wrapped into the previous statements
12 made by the Court, but in particular, this Court finds
13 that plaintiffs have failed to establish that they have a
14 clear and legal right to the relief sought.

15 MR. DeSISTO: Thank you, your Honor.

16 MR. ROBINSON: Thank you, your Honor.

17 THE COURT: We'll be in recess and we'll proceed
18 with the trial.

19 (A D J O U R N E D)

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, Sc.

SUPERIOR COURT

JEROME LARKIN, ET ALS)
)
)
VS.)
)
)
TOWN OF TIVERTON, ET ALS)

CASE NO: NC-2017-0192

HEARD BEFORE THE HONORABLE

MR. JUSTICE BRIAN VAN COUYGHEN

DECISION

MAY 3, 2017

APPEARANCES:

STEPHEN ROBINSON, ESQUIRE.....FOR THE PLAINTIFFS
AND VICKI J. BEJMA, ESQUIRE

ANTHONY DeSISTO, ESQUIRE.....FOR THE DEFENDANTS

LINDA A. BARRETT, RPR/CCR
COURT REPORTER

C E R T I F I C A T I O N

I, Linda A. Barrett, hereby certify that the succeeding pages, 1 through 9, inclusive, are a true and accurate transcript of my stenographic notes.

LINDA A. BARRETT, RPR/CCR
COURT REPORTER