



Board prepares the ballot for the FTR. There is a public hearing held on the FTR ballot and, following the hearing, a referendum is held to determine the Town budget for the upcoming fiscal year.

On April 23, 2018, the Tiverton Board of Canvassers met to prepare the ballot for the 2018 FTR. As part of the proposed FTR ballot, eight elector budget resolutions had been submitted. The Tiverton Town Solicitor attended the Board of Canvassers meeting and advised the Board that five of the eight elector budget resolutions were illegal and should not be placed on the 2018 FTR ballot. Pursuant to the Town Solicitor's advice, the Board of Canvassers voted to not include the five illegal elector budget resolutions. The five elector budget resolutions at issue read as follows:

- 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.
- RESOLVED, that for the avoidance of doubt, Section 1214 of the Tiverton Home Rule Charter applies to all property taxes, casino gaming revenue funds, hotel and beverage tax sharing, or other payments received by the Town relating to Tiverton Casino, and such funds shall remain in the General Fund unless and until disposed of pursuant to a Budget Proposal or a Resolution approved at this or a future Financial Town Referendum.
- RESOLVED, that any and all casino gaming revenue funds received by the Town for fiscal year 2018-2019 in excess of the amount estimated as part of the Budget Proposal which is adopted by the Electors at this Financial Town Referendum shall be rebated to, RESIDENTIAL taxpayers or credited to their accounts, pro rata based on valuations (net of exemption) on current residential real property accounts, as the Town Treasurer and Tax Collector may reasonably administer, including the Treasurer may deduct a reasonable servicing fee to issue rebates.
- RESOLVED, that in the event a resolution similar to this resolution but applicable to residential accounts only is not approved or is approved with fewer votes than this resolution, any and all casino gaming revenue funds received by the Town for fiscal year 2018-2019 in excess of the amount estimated as part of the Budget Proposal which is adopted by the Electors at this Financial Town Referendum shall be rebated to real property taxpayers or credited to their accounts, pro rata on valuations (net of exemption) on current real property (RESIDENTIAL AND COMMERCIAL) accounts, as the Town Treasurer

and the Tax Collector may reasonably administer, including that the Treasurer may deduct a reasonable servicing fee to issue rebates.

- RESOLVED, that the Electors hereby confirm that any line item on the budget which is adopted by the Electors at this Financial Town Referendum showing one dollar (\$1.00) or less are not to be deemed "unanticipated shortfalls or requirements", and the Town Council is prohibited from funding or adding to any such accounts unless and until approved by Electors at a future Financial Town Referendum.

The Plaintiffs are seeking a temporary restraining order, mandamus, and a mandatory injunction requiring the Board of Canvassers to place these five proposed budget resolutions on the ballot for the 2018 FTR, despite the fact that the Town Solicitor has advised the Board that these proposed resolutions are illegal and should not be included on the ballot, and despite the fact that the Board of Canvassers voted not to include these resolutions on the ballot, pursuant to the Solicitor's advice.

#### Standard of Review

First, the Plaintiffs are seeking a temporary restraining order requiring the Board of Canvassers to take action, rather than to refrain from taking action, as the Plaintiffs are seeking to require the Board to place five resolutions on the 2018 FTR ballot. "When a preliminary injunction is mandatory in nature - in that it commands action from a party rather than preventing action - a stricter rule applies and such injunctions should be issued only upon a showing of 'very clear' right and 'great urgency.'" King v. Grand Chapter of R.I. Order of the Eastern Star, 919 A.2d 991, 995 (R.I. 2007). Further, the mandatory preliminary relief sought by the Plaintiffs is identical to the ultimate relief sought, which is the inclusion the five resolutions on the FTR ballot. Courts "disfavor preliminary relief that is essentially identical to the ultimate relief sought." Id. at 1001 (citing Crowley v. Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers, 679 F.2d 978, 995 (1st Cir. 1982)).

Beyond the heightened scrutiny for a mandatory preliminary injunction, Plaintiffs must also meet the other elements for a preliminary injunction. "The primary factors a trial justice must consider in granting a preliminary injunction are a showing of irreparable harm to plaintiff, plaintiff's substantial likelihood of success on the merits, balancing the parties' interests, and preserving the *status quo*." Id. at 995.

Because the Plaintiffs cannot meet these elements and cannot pass the heightened scrutiny for a mandatory preliminary injunction, the Town respectfully requests that this Honorable Court deny Plaintiffs' motion for a temporary restraining order.

#### Argument

Plaintiffs will not be able to meet the elements for a mandatory preliminary injunction.

First, Plaintiffs will not be able to show a very clear right to the relief sought or a likelihood of success on the merits for several reasons. Plaintiffs do not have standing to bring the instant action, as they do not allege an injury distinguishable from any of the other electors in the Town. The Rhode Island Supreme Court has long held that mandamus is not available against a local board of canvassers, as the acts of a local board are discretionary and judicial in nature. Further, when the five resolutions are examined, it is clear that they are illegal and should not be placed on the FTR ballot.

Second, Plaintiffs will not be able to show irreparable harm as they allege no impact distinct from the impact on the other electors in the Town. The Rhode Island Supreme Court has held that this type of harm does not even allow standing to bring suit, let alone constitute irreparable harm sufficient to obtain a mandatory preliminary injunction. The Court has indicated that this type of alleged harm is better handled through the political process, rather than by the Courts.

Third, a balancing of the equities weighs in favor of denying Plaintiffs' request for a preliminary mandatory injunction. If the FTR process is delayed or if illegal ballot measures are placed on the FTR ballot, it will have a negative fiscal impact on the Town of Tiverton.

Finally, the *status quo* will be preserved if a mandatory preliminary injunction is not issued and the Town is allowed to proceed with the FTR budget process, in a timely manner, as mandated by the Town's Charter.

### **I. Plaintiffs have no likelihood of success on the merits.**

Plaintiffs have no likelihood of success on the merits of their claim because (1) they lack standing, (2) mandamus is not available against the Board of Canvassers, and (3) the resolutions in question are illegal.

First, in order to establish standing to bring suit, Plaintiffs must demonstrate "that they have suffered 'any actual or concrete wrong beyond a general grievance common to all taxpayers.'" See Warfel v. Town of New Shoreham, 178 A.3d 988, 991 (R.I. 2018) (quoting West Warwick School Committee v. Souliere, 626 A.2d 1280, 1284 (R.I. 1993)). In Warfel, certain electors in New Shoreham were "[d]iscontented with the outcome of the [New Shoreham] financial meeting." Id. at 990. The electors brought suit in Superior Court claiming that the New Shoreham FTM acted *ultra vires*. The Superior Court dismissed the suit by the electors for lack of standing and the Supreme Court affirmed the dismissal. Id. In concluding that a general grievance common to all taxpayers does not give standing to sue, the Court stated that it was "comforted by the safeguards of the local political process." Id. at 992.

Here, like in Warfel, Plaintiffs cannot demonstrate that they have suffered any actual or concrete wrong beyond a general grievance common to all taxpayers. Plaintiffs would like to seek certain preferred policies enacted through a resolution at the FTR. However, Plaintiffs have no

greater right to have these policies enacted than any other elector in the Town. Further, the local political process will give all the Plaintiffs a voice in having these policy concerns addressed. Plaintiffs can support candidates for the Tiverton Town Council that will support their policy goals, or the Plaintiffs could run for the Town Council themselves to seek to have these policies enacted. However, the general grievance of not getting the policies enacted through the FTR does not give the Plaintiffs standing to sue.

Second, Plaintiffs' claim for mandamus has no likelihood of success. The Rhode Island Supreme Court has long held that "the action of a board of canvassers is judicial in its nature, and its action cannot be reviewed . . . by mandamus proceedings." See Williams v. Champlin, 26 R.I. 416, 420 (1904). It is well-established that mandamus is not available when a public official is required to exercise discretion in implementing a public duty. See Wood v. Lussier, 416 A.2d 690, 693-94 (R.I. 1980) (building official exercises discretion in deciding whether to issue a permit, so cannot be subject to mandamus). Since the Tiverton Board of Canvassers was acting in a manner that "is judicial in nature," it is afforded discretion in exercising its duties, and it is not subject to review "by mandamus proceedings." See Williams, 26 R.I. at 420.

Finally, if each of the five resolutions at issue are examined, it is clear that the resolutions are illegal and the Board of Canvassers properly decided not to include those resolutions on the ballot.

One elector resolution would obligate Town officials, including the Council, to submit all proposals drafted by the Tiverton Charter Commission to the electors for vote. Another elector resolution ostensibly wants to clarify what Sec. 1214 of the Charter means and how it should be applied. The flaw in both of these resolutions is that they are not budget resolutions. Section 301(f)(1) of the Tiverton Charter states that "[t]he Financial Town Referendum may

order any tax which lawfully may be ordered, make appropriations, and transact any other business pertaining to the affairs of the Town which may legally come before such referendum via Budget Proposals and Resolutions." (Emphases added).

The FTR is intended to allow electors to vote on the finances of the Town and there is a method for making budget proposals and budget resolutions to that end. The FTR is not authorized to exercise the general powers of the Town through resolutions that do not touch on the budget. Sec. 407 of the Charter provides that "[a]ll powers of the Town shall be vested in the Town Council except as otherwise provided by the Charter or by the Constitution and laws of the State." Accordingly, all powers of the Town must be exercised by the Council, unless there is a specific delegation of authority to another Town body. Since the FTR is only delegated authority over the budget, it may not exercise the general powers of the Town.

There is a case regarding this issue concerning the Bristol Financial Town Meeting. In Capone v. Nunes, 132 A.2d 80 (R.I. 1957), the Bristol FTM attempted to create a harbor commission and appoint members to the same, for the purpose of supervising the construction of docks in the town. In determining that the FTM's action was *ultra vires* and not properly within the scope of the FTM, the Court explained that "[t]he electors qualified to vote in financial town meeting do not constitute the town." Likewise, the electors in the Tiverton FTR are not the Town and do not exercise the general authority of the Town. That authority is assigned to the Town Council through Sec. 407 of the Charter.

Another two elector resolutions purport to require certain casino revenues to be used for a tax rebate, either to residential taxpayers solely, or, alternatively, to residential and commercial taxpayers jointly. These resolutions violate the Rhode Island constitution, as the resolutions attempt to provide a tax rebate without specific enabling authority from the General Assembly

authorizing the rebate. The Rhode Island Supreme Court has held that "[d]espite the addition of the home rule article to Rhode Island's Constitution in 1951, cities and towns remain powerless to levy, assess and collect taxes or to borrow money, except as authorized by the general assembly. . . . If a city or a town cannot levy, assess, and collect taxes without General Assembly authorization, then it certainly cannot abate, exempt, or allocate payments it would otherwise be entitled to receive as taxes (or to negotiate for their receipt as payments in lieu of taxes) without such authorization." See Warwick Mall Trust v. State, 684 A.2d 252, 253-54 (R.I. 1996). Since these two elector resolutions would provide a tax rebate without General Assembly authorization, they are unconstitutional and void.

The fifth elector resolution would require that any line item depleted to \$1 or less during the course of the fiscal year could not be subject to a transfer. This violates Sec. 407(14) of the Charter, which specifically empowers the Town Council to "[o]rder such budget reductions or transfers of funds within the Municipal budget as may become necessary to meet unanticipated requirements or shortfalls during the fiscal year, as recommended by the Administrator." The discretion to determine whether there are budget short falls and to authorize transfers is vested by the Charter in the Council, with a recommendation from the Administrator. This resolution purports to override that discretion and violates the Charter. Since this resolution would violate this provision of the Charter, it is not valid.

Lastly, it is worth noting that, for the 2017 FTR, the Plaintiffs in this case made a complaint to the Tiverton Board of Canvassers regarding an elector petition filed that year. The Plaintiffs in this case asked the Board of Canvassers, last year, to not place a certain elector petition on the 2017 FTR ballot due to an alleged illegality with the petition. The Board of Canvassers agreed and kept the petition off the ballot. The electors that proposed the petition



kept off the ballot last year sued the Town for mandatory injunctive relief. The electors in last year's case also sought to have their petitions included on the ballot. In Larkin, et al., v. Tiverton, et al., NC-2017-0192, injunctive relief was denied. The Plaintiffs in this case supported the right of the Board of Canvassers to keep last year's petition off the ballot for legal reasons and the Plaintiffs in this case affirmatively asked the Board of Canvassers, last year, not to include an elector petition on the ballot. Plaintiffs cannot now complain that the Board of Canvassers has no power to keep a question off the ballot for legal reasons. As the Rhode Island Supreme Court has held, "the action of a board of canvassers is judicial in its nature." See Williams, 26 R.I. at 420. It is entirely appropriate for the Board to make legal determinations regard the matters brought before it.

For all of these reasons, Plaintiffs do not have a likelihood of success on the merits and cannot demonstrate a very clear right to relief, as required for a mandatory preliminary injunction. Plaintiffs do not have standing to bring suit, as they do not allege a harm "beyond a general grievance common to all taxpayers." See Warfel, 178 A.3d at 991. Any generalized harm alleged through failure of the FTR to enact their preferred policies may be appropriately addressed through the local political process. Further, Plaintiffs cannot obtain mandamus to require the Tiverton Board of Canvassers to include the resolutions on the ballot, because "the action of a board of canvassers is judicial in its nature, and its action cannot be reviewed . . . by mandamus proceedings." See Williams, 26 R.I. at 420. Finally, when each resolution is examined, it is clear that Tiverton Board of Canvassers correctly concluded that the elector resolutions were illegal and not appropriate for inclusion on the ballot.

## **II. Plaintiffs have not alleged any irreparable harm.**

The only harm alleged by the Plaintiffs is that their choice of policies will not be enacted through the FTR, because the Board of Canvassers determined, upon the advice of the Solicitor, that the FTR does not have legal authority to enact these policies. As discussed above, this is merely a "general grievance common to all taxpayers." See Warfel, 178 A.3d at 991. This does not amount to irreparable harm. Further, any alleged harm in not having their choice of policies enacted may be addressed through the local political process. If the Plaintiffs would like to have certain amendments made to the Tiverton Charter, they may petition their Town Council representatives to propose the amendments to the Tiverton voters. If the Town Council does not propose the amendments Plaintiffs ask for, the Plaintiffs are free to attempt to vote someone else onto the Council who will.

If the Plaintiffs would like to see casino gaming revenue used for a tax rebate to Town residents and/or business, the Plaintiffs may petition the General Assembly to introduce legislation authorizing such a rebate. If the current members of the General Assembly will not enact such enabling legislation, the Plaintiffs can attempt to vote in General Assembly members who will.

If the Plaintiffs are unhappy with the manner in which the Town Council transfers funds, Plaintiffs can either vote in Town Council members that make transfers in a manner they approve of, or they can vote in Town Council members who will propose an amendment to Sec. 407(14) of the Charter that modifies the manner in which transfers are made.

Because failure to enact the preferred policies of the Plaintiffs through the FTR is a "general grievance common to all taxpayers," see Warfel, 178 A.3d at 991, and because Plaintiffs have ample alternative avenues for pursuing these policies through the political process,

Plaintiffs have not demonstrated that they will suffer irreparable harm. Accordingly, the Town respectfully requests that Plaintiffs' motion for a temporary restraining order be denied.

### **III. Balancing of the equities falls in favor of denying the Plaintiffs' motion.**

In reviewing a request for injunctive relief, "the court must balance the equities between the parties: the relief which is sought must be weighed against the harm which would be visited upon the other party if an injunction were to be granted. . . . In connection with any such balancing equation, the court is obliged to consider, as an integral factor, the public interest." See In re State Employees' Unions, 587 A.2d 919, 925 (R.I. 1991) (adopting the decision of the Superior Court). "[T]he Court must weigh the relief which the [Plaintiffs] seek against the harm or damage which may redound to the disfavor of the [Town's] legitimate interests. In making this determination the cases direct the court to be cognizant and mindful of the general public's interest, as well as minding the practicality of imposing the desired relief." Id. at 927. The Court has recognized that the interest of the public in enacting a budget is a legitimate interest that can outweigh a request for injunctive relief. Id. ("The budget must be balanced.").

Here, the Town of Tiverton is currently pursuing its tight deadline for getting a budget approved for the 2018-2019 fiscal year. If the Plaintiffs are granted the injunctive relief they request, it will either delay the process of approving the budget or it will cause illegal proposals to be included as part of the budget process. The public interest weighs in favor of denying Plaintiffs' request for injunctive relief. Considering Plaintiffs only allege a generalized grievance common to all the electors in the Town and considering that Plaintiffs have ample other opportunities to pursue their preferred policies through the political process, the balancing of the equities falls in favor of denying the Plaintiffs' request for injunctive relief.

#### **IV. Denying the Plaintiffs' request for injunctive relief will maintain the status quo.**

The last factor that is ordinarily considered in granting injunctive relief is whether the relief requested will maintain the *status quo*. However, the Plaintiffs are seeking a mandatory injunction requiring the Tiverton Board of Canvassers to take affirmative action to place certain resolutions on the 2018 FTR ballot. A mandatory injunction, by definition, does not maintain the *status quo*. "When an injunction mandatory in its nature is asked for, a stricter rule obtains than when an injunction that preserves the *status quo* is sought. Owing to the extraordinary character of the remedy, it should be granted on preliminary application only in cases of great urgency, and when the right of the complainant is very clear." King, 919 A.2d at 1000 (quoting Giacomini v. Bevilacqua, 118 R.I. 63, 65, 372 A.2d 66, 67 (1977)).

As discussed above, the Plaintiffs cannot show that their right to relief is "very clear." They lack standing, because they only assert a generalized grievance. See Warfel, 178 A.3d at 991. They are seeking mandamus against the Tiverton Board of Canvassers, even though "the action of a board of canvassers is judicial in its nature, and its action cannot be reviewed . . . by mandamus proceedings." See Williams, 26 R.I. at 420. Further, when each of the resolutions are examined, it is clear that the resolutions are illegal and the Board of Canvassers properly voted not to include the resolutions on the ballot.

The Plaintiffs also cannot show that there is a "great urgency" for the requested relief. If the Plaintiffs preferred policies are not included on the FTR ballot, they are free to continue to pursue these policies through other political means. Since the Plaintiffs cannot meet the elements of a mandatory injunction, the Town asks this Court to deny Plaintiffs' motion so that the *status quo* may be maintained. The Board of Canvassers appropriately exercised its authority in

developing the FTR ballot. To maintain the *status quo*, that ballot should be presented to the voters at the FTR in a timely manner.

Conclusion

For the reasons stated above, the Town respectfully asks this Honorable Court to deny the Plaintiffs' motion for a temporary restraining order.

Town of Tiverton,  
By its attorneys,

/s/ Anthony DeSisto  
Anthony DeSisto #3146  
Peter Skwirz #8809  
Anthony DeSisto Law Associates, LLC  
450 Veterans Memorial Parkway, Suite 103  
East Providence, Rhode Island 02914  
Tel: (401) 421-0170  
Fax: (401) 270-4878

**CERTIFICATION**

I hereby certify that a copy of this memorandum was served via the e filing system on this 1st day of May, 2018, to all parties listed as service contacts on the Odyssey file & serve system. Further, the I hereby certify that I attempted to email a copy of this motion to all named Plaintiffs in this case.

/s/ Peter Skwirz