STATE OF RHODE ISLAND **SUPERIOR COURT**
NEWPORT, SC.

JUSTIN KATZ,	:	
	:	
Plaintiff	:	
	:	
vs.	:	**C.A. No. NC-2018-0153**
	:	
TOWN OF TIVERTON, by and through PAUL AMARAL, BOBBY HARRIS, DEETTA MORAN, SUSAN SCANLON, and JEAN VEEGH, in their official capacities comprising the TIVERTON BOARD OF CANVASSERS and NANCY MELLO, in her official capacities as the TOWN CLERK and the CLERK OF THE BOARD OF CANVASSERS,	:	
	:	
Defendants	:	

PLAINTIFF'S MEMORANDUM IN RESPONSE TO TOWN OF TIVERTON

Introduction

Prior to continued legal argumentation in response to the defendants' memorandum objecting to a temporary restraining order in this case, the court should consider the practical reality of what happened in Tiverton to bring us to this point:

- Tiverton Town Solicitor Anthony DeSisto advised the Board of Canvassers that, in his opinion, some resolutions submitted for inclusion in this year's financial town referendum (FTR) were "illegal" and might be challenged if they passed. "Illegal" in this context effectively means "unenforceable." (It is worth noting that the solicitor holds his position at the pleasure of the Town Council, which has institutional and political interests in the resolutions that were blocked.)
- The Board of Canvassers was always extremely unlikely to act contrary to the (overstated) advice of the solicitor.
- No notice, formal or otherwise, that the "blocked resolutions" would be the subject of a legal hearing was given to the petitioners, their supporters, or the people of Tiverton.
- The board did something it has no authority to do — something that exceeds its authority — and blocked these resolutions as if they had already been deemed illegal or unenforceable by an appropriate authority.

For a sense of the injustice of this process, the court need only look at the solicitor's own memorandum to which this is a response. Again and again, the attorney for the defendants misstates what the resolutions actually do:

- The attorney writes that one resolution would "obligate Town officials" to take some action, when the plain language of the relevant resolution is purely an "expression of desire" by the voters. The only obligation imposed by voters' expression of desire is upon the consciences and political judgment of the officials implicated.
- He asserts that another resolution addresses any budget line item "depleted to $1 or less during the course of the fiscal year," when clearly the resolution in question only applies to "any line item on the budget which is adopted by the Electors at this Financial Town Referendum showing one dollar ($1.00) or less." That is, if the start point for a line item is effectively zero, the council would be able neither transfer funds into it nor out of it. Such line items can't possibly have "unanticipated shortfalls," nor can they be a source of funds with which to cover unanticipated shortfalls in other line items.

These are just two obvious examples. Given the Town Solicitor's dubious summary of the legal effect that the resolutions would have if enacted, how could it possibly be the case that the Board of Canvassers can rule resolutions out of order:

- Based on advice from a solicitor who isn't characterizing the resolutions correctly,
- With no notice that it might do something that has never been done before and rule resolutions out of order on content (arguably in violation of the state Open Meetings Act),
- With no formal hearing for the petitioners, giving them full access to legal representation
- And having no authority anywhere in law to make such judgments?

Standing

The defendants assert that this plaintiff lacks standing based on his having only a "generalized grievance." However, they misstate that grievance.

The plaintiff and those with similar suits are not in court to enforce their right to a particular policy outcome. They are in court because they followed the process to put resolutions on a ballot and were denied their rights. That they followed the process is proven by the fact that the Board of Canvassers accepted three other resolutions that followed the very same process with nearly identical signatures.

These circumstances make the several plaintiffs unique in that only a handful of people filed resolutions, and only two more participated in the process of gathering signatures. That process included coordination to ensure that the petitions all received sufficient signatures and followed the process described in Tiverton's Home Rule Charter. Some five to eight dozen electors participated in this process by signing the petitions. The general population of Tiverton is not similarly situated in this regard.

The plaintiffs may be similarly situated to their fellow townspeople when it comes to the implementation of resolutions that win a majority vote, but they are not similarly situated with

respect to the fulfillment of the political process that they, as a limited group of individuals, initiated and followed through. The Charter is clear: Electors take certain steps, and they receive a hearing and a vote. The plaintiffs, uniquely among electors, followed that process and have been denied the prescribed outcome: a hearing and vote.

Board of Canvassers' Fundamental Lack of Authority

The Board of Canvassers has no authority to block resolutions based on their content, even if they might be unenforceable if passed. Such authority is granted nowhere in federal, state, or local law. The closest language may be found in charter section 301(g)(5), which states, "The Board of Canvassers shall have jurisdiction over the Financial Town Referendum." However, without some detail, that statement of jurisdiction can't be read as granting the Board authority that it doesn't already have under the law — namely, authority to conduct the election.

Granting such authority in the FTR process was necessary because otherwise their may have been ambiguity about whether the event should be handled by the same body. It puts the FTR under the jurisdiction of the Board of Canvassers to do what the Board of Canvassers does; it does not grant new and unique powers to the body. If somebody assaulted an elector at an FTR, would the Board of Canvassers hear the case? Can the Board adjudicate parking tickets that arise during the FTR? Of course not.

These hypothetical situations, as well as the current circumstances that gave rise to this lawsuit, are all in contrast to the budget proposal that the Board of Canvassers kept from the ballot last year. In that case, Jerome Larkin, et al, vs. the Town of Tiverton, et al., NC-2017-0192 (2017), the problem with the petition was entirely procedural, and it is process that falls within the jurisdiction of the Board of Canvassers. Nowhere does the charter provide for the Board of Canvassers to judge the enforceability of resolutions should they become law.

As Superior Court Judge Brian Van Couyghen stated in the transcript of his ruling in that case: "electors… deserve the right to have the mandates of the charter complied with, otherwise the rule of law would be meaningless and subject to the whim of town officials." Far from making the defendants' case, Larkin v. Tiverton proves the plaintiffs' argument. Three other resolutions were approved for the ballot, and they followed exactly the same process, with almost exactly the same electors signing, so clearly the process is not in question with these five.

The Board of Canvassers' authority on this matter is bound very closely with the argument that the defendants make with regard to mandamus. The 1904 case that they cite, Williams v. Champlin, 26 R.I. 416, 420 (1904), is about a matter clearly within the Board of Canvassers' purview: the qualification of voters. The court was deciding whether it could review a Board of Canvasser's judgment on that issue.

Such circumstances aren't even in the same ballpark as finding that a Board of Canvassers can act as a panel of judges on the legality or enforceability of a resolution if it is enacted. In this case, the plaintiffs are asking the court to tell the Board of Canvassers to do its job (mandamus). Namely, if a resolution does not violate any of the rules over which the Board of Canvassers has

actual authority to pass judgment, it must put the questions before voters. Saying, as the defendants do, that the Board's role is "judicial" skips the question of what they're authorized to judge.

No Authority to Determine Legality

Even if the Board were granted authority to block resolutions based on a clear conflict with the law, it has no authority to determine whether these resolutions do violate the law. As explained above, the Board of Canvassers is susceptible to inaccurate advice from its solicitor. The Board also has no basic standard of due process for hearing the matter and followed no such process in this case.

In other words, even if the court finds that a Board of Canvassers would be acting within its purview by blocking a resolution that some appropriate authority has held to be illegal, no such authority has done so in this case. The Town Solicitor offered some advice about the likelihood of a complaint against the town if the resolutions passed. However, he declined advise the board whether such a complaint would be more likely to prevail in court than complaints like those before the court now. That is, the solicitor was not presenting his opinion as an official ruling as to legality.

Reasoning Wrong in These Five Cases

Even if the Board of Canvassers were granted the authority to determine that resolutions would be legally unenforceable if enacted by voters, the reasoning of the defendants' attorney on these five resolutions is clearly wrong.

In his latest filing, the attorney repeats over and over — and even underlines — the phrase "budget resolution." This phrase appears nowhere in Tiverton's Home Rule Charter. The phrase "budget proposals and resolutions" does appear, but it is a phrase of convenience to encompass everything that might appear before voters at the FTR.

The adjective, "budget," doesn't apply to both nouns, as can be seen when the charter breaks the two apart. Under 301(b), "Ballot," the charter breaks out section 1 to be "Budget Proposals" and section 2 to be "Resolutions," not "Budget Resolutions." Furthermore, section 301(b)(2) never uses the word "budget," even as it expands "resolutions" to include "ballot questions." (See exhibit A2.) Then again in section 301(d), "Petitions," the charter breaks out section 1 to be "Elector Budget Proposals," while labeling section 2 as "Elector Resolutions," not "Elector Budget Resolutions." (See exhibit A3.)

If the point must be driven home, one need only move on to 301(d)(3), "Qualification of Petitions," which is the single-most-relevant section to our dispute, here. In this case it reads:

> 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.

The plaintiff cannot sufficiently emphasize the phrasing: "Elector Budget Proposals" versus "Elector Petition." There is no chance the adjective "budget" is meant to apply to both nouns.

For further final clarity on this point, the court should consider the language in effect in the Tiverton Home Rule Charter as it existed prior to the FTR and the language that the current process replaced. In that iteration of the charter, the ability for electors to put resolutions on the docket fell under the heading "Section 303 Additional Financial Proposals." The section is explicit that the ability to gather 50 signatures and put a resolution on the docket was limited to "any proposal for the expenditure of money." (See exhibit B.)

The drafters of the language that now governs Tiverton's FTR process deliberately took out that limitation and expanded electors' authority when it came to placing questions before voters at the FTR. Contrary to the defendants' argument, this gives the FTR authority beyond the catch-all "all powers of the Town" language that the solicitor cites in support of the Town Council's authority.

One final point on the supposedly non-budgetary resolutions: The attorney for the town cites the 1957 case Capone v. Nunes, 132 A.2d 80 (R.I. 1957), which reads in relevant part, "the electors qualified to vote in a financial town meeting do not constitute the town." Attorney Skwirz has written a law review article on this case, in which he explains that the reason the court ruled the way it did was that the meeting was limited to taxpayers, not all electors. A constitutional amendment in 1973 mooted this reasoning by giving all electors a vote. Therefore, they do "constitute the town."

When the defendants switch to the two resolutions that would create a rebate using excess gambling revenue from the Twin River casino, their attorney has to switch tactics, because clearly these have to do with the budget. He turns to Warwick Mall Trust v. State, 684 A.2D 252, 253-54 (R.I. 1996), which is completely inapplicable. In that case, the plaintiffs were seeking to have a state statute declared unconstitutional because, they argued, municipal voters should be able to vote on an enabling act of the General Assembly. The town wasn't the entity enacting a tax treaty; the state Economic Development Corporation was. In describing the relationship of taxation and rebates, the court was saying that, because the state had the authority to authorize local taxes, it had the authority to exempt entities from them.

Conveniently, the attorney for the defendants uses ellipses to skip over an interior citation of Crafts v. Ray, 22 R.I. 179, 183, 46 A. 1043, 1043 (1900), emphasizing that the "power to tax necessarily implies a power to exempt." Obviously, the Town of Tiverton has the power to tax residents on their real estate and, by this very precedent, therefore has the authority to offer rebates.

As further evidence, the plaintiff points to a resolution put before the financial town meeting (FTM) in 2010 following the aforementioned process. In a very similar fashion, the resolution would have provided a tax rebate equivalent to "any revenue the Town receives from state aid or local taxation relating to motor vehicles above and beyond the anticipated local Motor Vehicle Tax amount." The electors voted this resolution down, but at no point did anybody,

including the solicitor and separate parliamentarian present in the room in their official capacity suggest that the resolution was out of order.

Conclusion

Within the confines of these suits, the plaintiffs are not seeking to have the court order a change of policy through the FTR. They are simply seeking to have these questions put on the ballot so that they can pursue the appropriate political channels. The *status quo,* in this case, is to preserve electors' ability to put resolutions on the ballot by following the clear process of the charter. The gargantuan change would be to invest the Board of Canvassers with a brand new authority to judge resolutions based on their content. If the plaintiffs lose their cause among voters, they lose, but their due process rights and their franchise would have been preserved.

The defendants repeatedly cite the plaintiffs' ability to seek political remedy, but this FTR is their political remedy. They have been blocked from the political process. Members of the Town Council, which has authority to hire and fire the Town Solicitor, might prefer that electors be forced to follow a different political process, but electors can have no confidence in their rights if the Board of Canvassers can claim new powers to block access to the ballot without due process of the law.

The proper action in this case is to put the resolutions on the ballot, and the voters at that election are the appropriate body for making decisions on behalf of the town. Throughout the process, the solicitor and others can make their case that some resolutions won't be enforceable even if they win majorities. If those resolutions are voted down, then the legal questions are moot. If they pass, then an aggrieved party can take appropriate action, or the Town Council can decide on its own that a resolution is unenforceable and ignore it, which leaves others to take action, in turn, if they disagree.

In short, putting these resolutions on the ballot not only preserves the rights of the petitioners and the *status quo* of a clear process for petitioning, but it also leaves plenty of opportunity for legitimate authorities to weigh in on enforceability without creating a new and dangerous power for the local Board of Canvassers.

Otherwise, the plaintiffs will have been denied their access to the political process, which, as Judge Van Couyghen stated last year, is their right. Such distortions of the political process are the seed stock of disenfranchisement. A town's lawyer offers advice to a board that truly isn't prepared for extensive legal analysis, and that board rules as the lawyer advises. Few residents whose rights are thus violated will go to the lengths of seeking court relief. (Note that the plaintiffs in Larkin used the school district's attorney to bring the case at taxpayer expense for representation.)

If this court does not grant immediate relief, the threshold for residents to assert their rights on local matters won't even be a couple of weeks of intensive research, but months or years of litigation. The plaintiffs will have been grievously harmed, the *status quo* will have been radically altered, and the public interest would manifestly have been trampled.

RESPECTFULLY SUBMITTED by,

/s/

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Dated: May 2, 2018

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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 2, 2018.

/s/

Justin Katz

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