STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 38-1-18 Wrcv

Flinn vs. Hartford Town School District et al

FINDNGS, DECISION, AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Count 1, Review of Governmental Action (38-1-18 Wrcv)
Count 2, Review of Governmental Action (38-1-18 Wrcv)

Title: Motion for Preliminary Injunction (Motion 4)
Filer: F.X. Flinn
Attorney:
Filed Date: January 31, 2018

No response filed

The motion is DENIED.

This motion for preliminary injunction is before the court for decision following a hearing on February 1, 2018.

Facts

The Plaintiff is a resident of the Town of Hartford. He has no children. He is one of 597 Hartford citizens who signed a petition filed with the Defendants seeking to have three questions placed on the ballot for the Hartford town meeting on March 6, 2018. There is no dispute that the petition was timely filed with the Defendant's in the proper manner and that it included the required number of signatures. The petition questions are generally intended to put the question of whether the school district should undertake to construct a track facility to the voters. The specific questions set forth in the petition are as follows.

a. Shall the Hartford Town School District appropriate up to Fifty Thousand Dollars ($50,000) to design a track and field facility?

b. If Question (a) is approved, Shall the appropriation be managed by a committee consisting of the district athletic director, the town recreation director, the chair of Friends of Hartford Track, a person selected by the board of directors of the Hartford Town School District, and one member selected by the other four members?

c. If Questions (a) and (b) are both approved, Shall the Hartford Town School District, upon receipt of detailed design and engineering documents and related materials, immediately pursue construction bids for the 2019 construction season in order to have an accurate dollar amount to propose for bonding during the 2018 general election?

The petition language was drafted primarily by Plaintiff, with input from other citizens in the community who are also signatories on the petition, and who are advocates for the construction of a track facility on school district property. One or more citizens actively involved in the petition effort attempted to communicate with the school board, and the board of selectmen, about the proposed petition, to obtain input on the content of the petition so that it would meet the requirements of the law and hopefully find favor with the school board and board of selectmen. The local officials contacted declined to provide meaningful assistance to the Plaintiff and the others involved in the petition effort.

After the petition was presented to the town clerk, the town clerk reported that the petition was in proper form, and that it would be presented to the school district for action. Without notice to the Plaintiff, or to the other involved citizens on the petition, the school board added an item to the agenda for the meeting on January 24, 2018, calling for the board to go into executive session to receive legal advice. The topic to be discussed in executive session was not stated on the agenda, or otherwise communicated to the community. At the meeting, a motion was made to go into executive session based on a finding that "premature public knowledge would place a person or entity at a substantial disadvantage" and for the purpose of receiving confidential legal advice. There was no explanation given as to the basis for the finding. The board went into executive session. No notice was given to the community that one issue to be addressed in the executive session was the track petition.

The members of the board emerged from the executive session, and in public session reported that the board acknowledged receipt and sufficiency of the track petition. The board reported in substance that the petition would not be placed on the ballot because if approved by the voters, the result would be that the school district would be required to take actions that are beyond the authority of the school district to do. The board voted unanimously to reject the petition, and not to place the questions stated in the petition on the ballot for the March 6, 2018 town meeting.

There have been numerous unsuccessful efforts in past years to cause the school district to construct a modern track facility. On at least one prior occasion the issue was put to the voters and it was defeated. Some residents, including high school students interested in track, believe a modernized track facility is in their personal best interest, and in the best interest of the entire community.

Based on the evidence received at this preliminary stage of the proceedings, the court finds that the Hartford school system has a track team and a cross country team. There is a coach, and the teams compete with other schools. The existing track facilities are not of high quality when compared to some other communities near the Town of Hartford. The lower quality of the facilities has the effect of limiting the athletic development of high school

students interested in competitive track. One witness stopped participating in the program because of the quality of the facilities.

The Plaintiff is one signatory on the petition. Plaintiff resides in the Town of Hartford. Plaintiff does not have children, and he is not impacted by the quality of the current track facilities in Hartford. His involvement is related to his desire as a member of the community to support and advocate for those citizens in the community who would like to have improved track facilities and who are affected by the lack of modern track facilities. Plaintiff believes that his right to petition government will be denied if a preliminary injunction is not granted.

Decision

The Plaintiff seeks a preliminary injunction directing the Defendant's to place three questions on the ballot for town meeting on March 6, 2018. Motions for preliminary injunction are governed by V.R.C.P. 65. This motion is made in the context of an appeal of government action under V.R.C.P. 75. Plaintiff claims that the Defendant's denial of the request to place the question on the ballot is unlawful.

"A preliminary injunction is an extraordinary remedy never awarded as of right. "When deciding a motion for preliminary injunction the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." The party seeking a preliminary injunction has the burden of proof. The primary factors guiding the court's decision are: (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest. *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19 (citations omitted). Also, a motion for preliminary injunction will usually be denied "if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief." *Id.* ¶ 40.

In is inherent in a request for the issuance of a preliminary injunction that the question is generally decided early in the case, before the parties have conducted discovery, and before final hearing. It is an equitable proceeding. In this case, as in most cases involving a request for a preliminary injunction before final hearing, the court places great significance on the question of whether the Plaintiff will suffer irreparable harm if an injunction is not granted before final hearing. On this question, the court's focus must be on harm suffered by the named Plaintiff who is the real party in interest, not other individuals in the community.

There is no evidence that the named Plaintiff in this action participates in the sport of track. The court does not conclude that delay, or denial, of a vote on the question of whether a track facility should be investigated, or constructed, will cause the named Plaintiff to suffer substantial, or irreparable, harm in the sense that he would be personally deprived of access to improved track facilities. Indeed, Plaintiff makes no such argument. Instead, Plaintiff argues that he will be irreparably harmed because his right to petition government will be unlawfully denied or restricted.

The court is not persuaded that denial of a preliminary injunction will have the effect of depriving Plaintiff of a constitutional right to petition government. Plaintiff has offered no legal authority supporting the claim. In the short time available the court has not identified legal authority supporting the claim. A similar claim, that denial of a request to place a question on the ballot constituted a violation of constitutionally protected petition rights, was rejected by the Vermont Supreme Court in Clift v. City of S. Burlington, 2007 VT 3, ¶ 9, 181 Vt. 571. The court recognizes that the argument made here is different than the argument advanced in Clift. Nevertheless, just as in Clift,

Plaintiff has not supplied the court with legal authority supporting the argument he has advanced. While the court does not reject the notion outright today, we are not persuaded, on the record before us now, that the named Plaintiff will suffer irreparable constitutional injury if the requested preliminary injunction is not entered. Accordingly, we find that Plaintiff has not carried his burden on the question of irreparable harm.

Turning to the question of the likelihood of success on the merits of the Rule 75 complaint, Plaintiff argues here that under the Hartford Town Charter, (24A V.S.A. Chapter 123A, §§ 101-401), and/or under the provisions of 17 V.S.A. 2641 and 2642, the Defendants are required to call a special meeting, or place a question on the ballot for a vote by Australian Ballot at the annual town meeting, when requested to do so in a timely and complete citizen petition properly presented to the town clerk. Defendant argues in response that the decision whether to place such a matter on the ballot is discretionary, not mandatory. The relevant language of the charter is as follows:

> "(f) Special Town and School District meetings. A special Town or School District meeting **may** be called at any time by a majority of the applicable board or by the Town Clerk upon receipt of a petition signed by no fewer than 350 registered voters. A special Town or School District meeting shall be called and warned in accordance with State statute." 24A V.S.A. Chapter 123A, §291(f) (emphasis added).

The language of the charter is plain and unambiguous. The use of the word may, instead of shall, is critical to the courts understanding of the meaning of the charter on this issue. The court is persuaded that the proper interpretation of the charter is that the obligation to call a special meeting is discretionary, not mandatory.

Also, the Vermont Supreme Court has consistently held that municipalities must have some discretion over the issues that are presented to voters at town meeting. The Court has interpreted our law to compel municipalities to present an article to voters only when "the purpose stated in such petition set[s] forth a clear right which [i]s within the province of the town meeting to grant or refuse through its vote." 128 Vt. 153, 160, 260 A.2d 203, 207 (1969). In *Whiteman v. Brown*, the Court determined that the predecessor statute to 17 V.S.A. § 2642(a) implicitly limited a municipality's duty to warn to "business to be transacted." 128 Vt. 384, 387, 264 A.2d 793, 795 (1970). "If the article sought to be included does not, in any way, constitute business proper and appropriate for transaction by the meeting, the statute ought not to be construed to compel its inclusion." *Id.* The Court addressed the question of whether a properly petitioned advisory article must be warned in *Brewster v. Mayor of Rutland,* 128 Vt. 437, 266 A.2d 428 (1970). The Court held that the effect of the advisory article petitioned by local voters would be nugatory and serve no lawful purpose and therefore declined to issue a writ of mandamus to compel its inclusion in a special-meeting warning.* *Id.* at 440, 266 A.2d at 430. More recently, in *Town of Brattleboro v. Garfield*, the Court stated that the statutory right of voters to petition an article for a municipal vote is "subject to the restriction that the business petitioners seek to conduct at that meeting is properly delegated to the voters' authority." 2006 VT 56, ¶ 12, 180 Vt. 90, 904 A.2d 1157.

In this case, the evidence is that the School Board rejected the petition because under the plain language of the petition, if approved by the voters, the School District would be required to deliver up to $50,000.00 to a committee of interested citizens over which the School District has no control, and without the benefit of a contract governing the use of the funds. Plaintiff argues that this issue can be worked out after the election. The Defendant's believe that the issue voted on must be clear and unambiguous on this issue so that the school district is not required to take action that would be

unlawful and expose it to potential liability. There is enough doubt in the court's mind about the merit of the competing positions that he court is unable to make a finding at this early stage of the proceedings that the Plaintiff's likelihood of success on the merits of the claim is high. The court expresses no view regarding Plaintiff's likelihood of success on the merits at the final hearing.

For these reasons, the court is not persuaded that the named Plaintiff will suffer substantial irreparable harm if the request for preliminary injunction is denied. Also, the court is unable to affirmatively find that the likelihood of success on the merits is high.

Order

The motion for preliminary injunction is denied. The matter remains pending. The court will address the pending motion to dismiss by separate order when time is available.

Electronically signed on February 02, 2018 at 12:31 PM pursuant to V.R.E.F. 7(d).

Robert P. Gerety, Jr.
Superior Court Judge

Notifications:
Plaintiff F.X. Flinn
Joseph Farnham (ERN 1970), Attorney for Defendant Hartford Town School District
Joseph Farnham (ERN 1970), Attorney for Defendant Town of Hartford, Vermont