

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Index No. 20860/07

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F. WARREN BENTON, MICHAEL P. WEINER, JANICE :
A. RING, FRANCES P. O'CONNOR, ANTHONY C. :
PAVIN, NORA J. CARLSON, and JOHN TROY :

Petitioners,

-against-

ELIZABETH N. FELD, Mayor, MARLENE KOLBERT, :
Trustee, ANNE McANDREWS, Trustee, JIM :
MILLSTEIN, Trustee, RICHARD WARD, Trustee, :
constituting the Village of Larchmont Board of Trustees, :
and EILEEN A. FINN, Clerk of the Village of Larchmont, :

Respondents

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PETITIONERS' MEMORANDUM OF LAW

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PRELIMINARY STATEMENT¹

Under New York State law, the abolition, or even the partial abolition, of a fire department by a village board is subject to permissive referendum (also known as a referendum on petition). Petitioners timely submitted two sets of petitions, each signed by more than 20% of the registered voters in the Village of Larchmont, seeking a vote on two resolutions adopted on May 16, 2007 by the respondent Larchmont Village Board which resolutions resulted in the abolition in part of the Larchmont Village Fire Department. No objection was filed with the Village Clerk within five days of filing the two sets of petitions, as required by New York State Village Law § 9-902 (9) and no proceeding challenging the two sets of petitions was commenced in the Supreme Court, as required by New York State Village Law § 9-902(9) in order to prevent an election being held on the two sets of petitions.

Therefore petitioners have brought this proceeding seeking a judgment directing the respondents to schedule and hold an election on referenda as is required by Election Law 16-116 and Village Law sections 9-900, 9-902 and 10-1020. The adoption of the two challenged resolutions and the resultant partial abolition of the Department has resulted in a large scale exodus of the Members of the Department. This has several potential impacts on the petitioners who are electors, residents of the Village of Larchmont, and in some cases as property owners and tax payers including: (a) reduction in the forces available to provide protection to the petitioners and the resultant potential danger to petitioners, their families and property, and (b) the strong likelihood of the need to hire additional paid fire fighters resulting in increased village taxes to pay these additional costs, which will have a financial impact either directly or indirectly on each of the petitioners. Petitioners, as registered electors in the Village of Larchmont are

¹ The Defined Terms are set forth in the petition.

entitled, by law, to vote on the changes instituted in the two resolutions. Respondents have deprived Petitioners of their fundamental right to vote by failing and refusing to schedule an election on referenda in response to the two sets of petitions.

BACKGROUND

The procedural and factual history is set forth in detail in the supporting affidavit of F. Warren Benton sworn to on the 10th day of October, 2007 and the Verified Petition dated October 10, 2007.

ARGUMENT

A. The Law Requires that the Right to Petition Be Strictly Construed in Favor of the Voters

The Appellate Division, Third Department has conclusively established that “any attempt to prevent a permissive referendum should be viewed with utmost circumspection since the right to petition the government is deeply rooted in our democracy.”² As explained by the Court in *Potash v. Molik*,³ “statutory permissive referendum is the implementation of the ancient grant of petition to government,” which grant “became a right and has been perpetrated in almost every charter of free men from the Magna Carta to and including the Constitution of the United States and the Constitution of the State of New York.”⁴ After noting that this right is protected by statutes in New York’s Village Law, the *Potash* Court ruled that “[t]his ancient and hallowed

² *Millar v. Tolly*, 252 A.D.2d 872, 675 N.Y.S.2d 440 (3d Dep’t 1998).

³ 35 Misc. 2d 1, 230 N.Y.S.2d 544 (Sup. Ct., Erie County 1962), *aff’d*, 17 A.D.2d 111, 232 N.Y.S.2d 993 (4th Dep’t 1962).

⁴ *Id.* at 546.

right of petition can be destroyed and lost to the electors if circumscribed by restrictive legislation or narrow interpretation of statutes thereto.”⁵ Thus, the *Potash* Court ruled that “[e]very liberal interpretation must be given to the legislative enactments to the end that the right of petition be preserved to the electors.”⁶

While every liberal interpretation must be given to statutes granting the right of permissive referendum, a “heightened scrutiny” is applied to any attempt to challenge or prevent a permissive referendum.⁷ Accordingly, the Court in *Millar v. Tolly* strictly construed Town Law § 91, which requires both: (i) the filing of objections to a petition seeking a referendum with the Supreme Court; and (ii) the commencement of a judicial proceeding challenge to a permissive referendum, in ruling that the lower court properly dismissed the proceeding based upon petitioner-objector’s failure to comply with the applicable statutory requirements.⁸

Here, the petitioners timely filed two petitions seeking a review upon referendum at an election of the two challenged resolutions. No objection to the petitions was filed with the village clerk within five (5) days as required by law.⁹ However, no action was taken by the respondents to schedule a special election to consider the referendum, within no less than 10 nor more than 60 days, as is also required by law.¹⁰

In view of the failure of the respondents to schedule a vote on the questions raised in the petitions, and the passage of more than 60 days from the filing of the petitions with the Village Clerk, on June 13 and June 15, 2007, petitioners are entitled to judgment directing that an

⁵ *Id.* at 546-47.

⁶ *Id.* at 547.

⁷ *Millar v. Tolly*, 252 A.D.2d 872, 675 N.Y.S.2d 440 (3d Dep’t 1998).

⁸ *Millar v. Tolly*, 252 A.D.2d 872, 675 N.Y.S.2d 440, 441 (3d Dep’t 1998).

⁹ Village Law § 9-902 (9)

¹⁰ Village Law § 9-902 (5)

election be held on the two referenda challenging the two resolutions of the Larchmont Village Board.

B. The Abolition of the Fire Department Triggers a Permissive Referendum

1. Governance of a Fire Department

The structure and governance of the Department is established by New York State Village Law (sections 10-1000 through 10-1022), the Village Code of the Village of Larchmont and the By-Laws of the Department.¹¹ Prior to the actions complained of herein, the Department was governed by a Fire Council which was elected by the volunteer members of the Department with certain actions of the Council subject to approval and/or ratification of the Village Board.

Village Law § 10-1012 provides that the chief and assistant chiefs of the Department shall be elected each April by the members of the Department from among the members of the Department. Members of the Department are the volunteers. Village Law § 10-1018 sets forth the duties of the chief and assistant chiefs of the department including presiding over the elected fire council.

Village Law § 10-1014 provides that where, there is no separate Board of Fire Commissioners, the chief, the assistant chiefs and the wardens of the several companies of the fire department shall constitute the Fire Council. Village Law § 10-1014 further provides that where (as here) there is no separate Board of Fire Commissioners, the Fire Council takes over certain of the powers of the Board of Fire Commissioners, subject to approval by the Village Board.

¹¹ The By-Laws are annexed to the petition as Exhibit "A".

Village Law § 10-1020 allows for all or part of the abolition of the fire department, **subject to permissive referendum** and grants other limited authority to the Village Board with respect to allowing paid fireman to have authority over equipment of the department and to give orders to the volunteers.

2. Board's Resolutions Abolish the Department

The resolutions passed by the Board of Trustees on May 16, 2007, abolish the Fire Council — the governing body of the Fire Department — in every significant respect, except its name. First, under the purported authority of Village Law § 10-1020, Village Board's resolutions granted Richard Heine "the authority over all Fire Department personnel, both paid and volunteer" and placed him in "charge of all apparatus and equipment of the Larchmont Fire Department." But the Fire Department's By-Laws provide that the Fire Council has the power without oversight from the Village Board "to make and prescribe By-Laws as shall be by them deemed necessary for the proper management of affairs and the disposition of the funds of the Fire Department"¹² and further provide that the Chief shall be under the direction of the Board of the Trustees **and the Fire Council.**¹³ The By-laws are entirely consistent with New York State law as under Village Law § 1014, the Fire Council has "all the powers and subject to all the liabilities and perform all of the duties of a separate board of fire commissioners" with respect to self-governance.

Under Village Law § 10-1014, the Fire Council "shall have all the powers and be subject to all the liabilities and perform all of the duties of a separate board of fire commissioners" with respect to self-governance, including:

¹² See By-Laws, Article III, section 2.

¹³ See By-Laws, Article V Section 2.

- having “the care, custody and control of all village property of the fire department;”
- adopting “rules for the admission, suspension, removal and discipline of the members, officers and employees of the fire department” and prescribing “their powers and duties;”
- adopting “rules and regulations governing fire companies and fire department, prescribing the duties of the members thereof . . .” provided that no rule or regulation is adopted that would “interfere with the duties of the fire chief or assistant fire chief as such times as the fire department or any company or squad thereon is on duty;” and
- appointing “persons other than members or officers of the department to take charge of village property.”¹⁴

But, the Village Board’s resolutions abolish this authority and assigns all authority over personnel and equipment to the Fire Chief.

Second, not only do the Village Board resolutions abolish the authority of the Fire Council, but the resolutions further provide that fire chief, who was appointed by the Village Board without selection by the Members of the Department, shall work with the Fire Council “to formulate recommendations for the future **division of responsibilities** between himself and the Fire Council which shall then be submitted to the Village Board for approval.”

¹⁴ See N.Y. Village Law § 10-1014 and 10-1000 (McKinney 2007). With respect to powers and duties relating to finances and capital improvement, such as fixing a compensation, purchasing equipment, erecting buildings for the fire department and constructing reservoirs, a Fire Council only has the authority to make recommendations. It does not assume the powers and liabilities of the Board of Fire Commissioners with respect to these activities (N.Y. Village Law § 10-1014 (McKinney 2007)).

Accordingly, the Village Board has abolish the grant of authority by New York State law (Village Law § 10-1014) to the Department to have a Fire Council by providing that the Fire Council's authority and powers are immediately subject to a negotiation between the appointed chief and the remaining members of the elected volunteer leadership.

Further, the Village Board, in the two challenged resolutions, abolish or partially abolish the Department by abolishing the role of Members in the leadership of the Fire Council and the leadership of the Department, abolishing the role of the Members in selecting leadership, abolishing the requirement that the leader of the Fire Council and the leader of the Fire Department be a Member and abolishing the Fire Council's specific statutory grant of authority. The result is that an entity would survive which would be a fire department but not the Department or Fire Council established and authorized by the By-laws of the Department and the Village Law of the State of New York and there would remain an entity the respondents will still call a "Fire Council," but this anemic, powerless, scaled down entity bears no resemblance to the Fire Council as provided under the By-laws and the laws of the State of New York.

As the abolition of the Fire Council, in all but name, is an abolition in part of the Department, the resolutions trigger the permissive referendum provision of Village Law § 10-1020. The Village was therefore required to wait the required 30 days following the approval of their resolutions to implement their resolutions by notice¹⁵ and upon the submission of the two sets of petitions to the Village Clerk, each containing the signatures of more than twenty percent of the electors of the Village, the respondents were required to schedule a special election in no less than 10 nor more than 60 days.¹⁶

¹⁵ Village Law § 9-902.

¹⁶ Village Law § 9-902

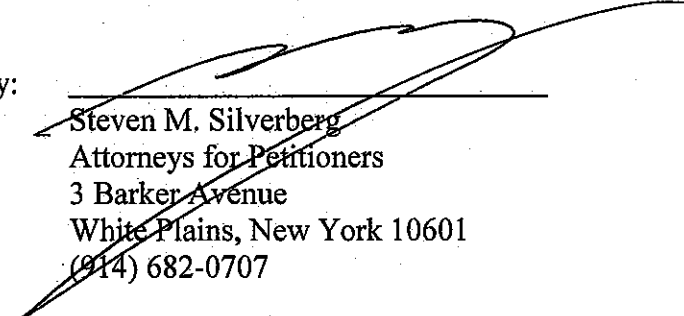
CONCLUSION

The actions of the respondent members of the Village Board constitute an abolition or partial abolition of the Department and the petitioners are entitled to judgment directing a referendum/election on the two questions raised.

Dated:
White Plains, New York
October 11, 2007

Yours, etc.
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By:



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