At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 28TH day of MARCH, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

DAVID WOODBURN and ARDEN PAUL BENNETT, JR.,

Petitioners,

-vs-

VILLAGE OF OWEGO, NEW YORK; VILLAGE OF OWEGO BOARD OF TRUSTEES; KEVIN MILLAR AS MAYOR OF VILLAGE OF OWEGO, NEW YORK,

Respondents.

DECISION AND ORDER

Index No. 46251
RJI No. 2015-0335-M

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon the combined proceeding pursuant to CPLR §78 and an action for declaratory judgment brought by David Woodburn and Arden Paul Bennett, Jr ("Petitioners") against the Village of Owego, *et al* ("Respondents"). Petitioners seek to annul resolutions of the Village Board which authorized the hiring of Siena College Research Institute ("SRI")[1] to conduct public opinion surveys regarding various options for the future structure and funding of police services in the village. Petitioners also seek an order prohibiting Respondents from utilizing village funds to conduct any public opinion poll regarding police services in the village.

Facts

On October 19, 2015, Respondent Village Board adopted a resolution authorizing the hiring of SRI to conduct a "police survey". Thereafter, at a Board meeting on November 16, 2015, the Board adopted specific survey language to be utilized by SRI. The survey was comprised of eight questions. As relevant here, recipients were asked whether they are registered voters. They were then asked to identify their status as recipients of the survey. Recipients were then asked to respond to four options for police service in the Village by indicating whether they "strongly support", "support", "oppose", "strongly oppose" or "need more information" as to the proposition. The last question asks for an opinion as to whether there should be no change to the police department, an increase in the size of the department, elimination of the police department or police coverage provided by the sheriff's department.

This Court signed an Order to Show Cause which temporarily enjoined the Respondents from expending any village funds for the conduct of the survey. The Court then issued a decision dated January 8, 2016 which continued the injunction pending a hearing scheduled for January 28, 2016. The Respondent Board then modified its survey to, *inter alia,* exclude the question regarding voter registration (the "January survey"). The revised survey was adopted by the

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[1]SRI was joined as a necessary party and a named Defendant/Respondent in the Amended Petition filed January 28, 2016, but has opted to not to interpose a position on the merits.

Respondent Board on January 19, 2016, although the Respondent Board did not rescind the earlier survey, and continues to claim that he earlier survey was also permissible. In a motion dated January 21, 2016, Respondents seek to have the Petition dismissed pursuant to CPLR §3211 (a) (3), (7) and (10) for failure to name a necessary party, lack of standing and failure to state a cause of action.

At the hearing of January 28, 2016, the Court noted that the Respondent had argued that SRI was a necessary party. As such, the Court ordered that SRI be joined pursuant to CPLR §1001 (b). Based thereupon, Petitioners filed an Amended Petition on January 28, 2016 which included SRI. The hearing was adjourned to March 28, 2016 to allow SRI to appear.

Discussion

Standing

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 NY2d 761, 769 (1991). It has been repeatedly held that standing principles should not be applied in a heavy handed way such that "the result would be to completely shield a particular action from judicial review" *Sierra Club v. Village of Painted Post*, 26 NY3d 301, 311 (2015) *citing Assoc. For a Better Long Island, Inc. v. New York State*, 23 NY3d 1, 6 (2014).

As a threshold issue, Respondents argue that Petitioners lack standing. Petitioners submit that they have common law standing as taxpayers. "This doctrine permits 'taxpayers to challenge important governmental actions, despite such parties being otherwise insufficiently interested for standing purposes, when the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action'" *Feminist Choosing Life of N.Y., Inc. v. Empire State Stem Cell Board*, 87 A.D.3d 47, 50 (3rd Dept. 2011) *citing Matter of Colella v. Board of Assessors of County of Nassau*, 95 NY2d 401, 410 (2000) [internal quotation

marks and citation omitted]. Common law standing allows "taxpayers to challenge important governmental actions, despite such parties being otherwise insufficiently interested for standing purposes, when 'the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action'" *Colella* at 410, *citing Boryszewski v. Brydges*, 37 NY2d 361, 364 (1975).

Respondents assert that there is no important governmental action being challenged by Petitioners since the expenditure for the survey is minimal in light of the Village budget. Additionally, Respondents rely on *Colella* as standing for the principal that local government actions cannot be challenged based upon taxpayer standing. The Court in *Colella* noted "[t]hat doctrine should not be applied, however, to permit challenges to the determinations of local governmental officials having no appreciable public significance beyond the immediately affected parties, by persons having only the remotest legitimate interest in the matter." *Colella* at 410-411. However, *Colella* is readily distinguished from the present matter as it involved a challenge to a *determination* of local government regarding tax exempt status. The present matter involves the expenditure of village funds to conduct a survey which petitioners allege is an unlawful non-binding referendum. This is not a case of a village exercising discretion or making a determination of existing law, but rather adopting a resolution to conduct an alleged unlawful non-binding referendum.

Likewise, Respondents suggest that there is no impenetrable barrier to any judicial scrutiny. Respondents suggest that others would have standing including the police union or individual police officers. However, the Court is unable to recognize any basis for standing for either of these groups since whatever interest they may have would not be in the conduct of the survey, but rather with the use the Village made of the results. In short, if taxpayers such as Petitioners are unable to challenge an alleged unlawful expenditure of Village funds, then it does not appear that there is anyone who would have standing to do so.

The Court concludes that Petitioners are challenging important governmental action in seeking to prevent the village from expending taxpayer funds on a survey which they allege is a non-binding

referendum proscribed by law. The action taken by the Village was in the form of legislation. The Court concludes that if the Petitioners are not granted common law taxpayer standing, the matter would avoid judicial scrutiny. Therefore, the Court concludes that the Petitioners do have common law taxpayer standing to challenge the board resolutions pertaining to the police service "surveys".

Village Authority to Conduct a "Survey" or Solicit Responses to Questions By Way of a Mailed Questionnaire

The parties disagree as to the characterization of the proposed questions to be presented through the mailing. Petitioners argue that it represents a non-binding advisory referendum or poll, and there is no statutory authority for the referendum or poll. Per the Petitioners, absent specific state law authority, a Village may not expend money to conduct advisory referendum, not authorized under relevant state law. Respondents argue that it is a survey, with several questions, and simply seeks the public's general views about various options for the police force, while a referendum would ask only if the police department should be abolished. There is dispute between the parties as to whether this is a survey or an advisory referendum/poll, although neither provides case law on how to draw the distinction.

Respondents characterize their mail inquiry as a "survey", and assert that the Village is not prohibited from conducting a "survey." They highlight that the questionnaire is not being sent only to registered voters, but will also go to property owners and Village residents, who may or may not be registered voters. In addition, the questions provide for various responses, as opposed to a "yes" or "no" and the responses will then need to be analyzed to determine public sentiment and continue an ongoing discussion on the issue.

As this Court previously stated "[a]lthough it is true that [the questionnaire] asks more than just whether the police department should be abolished, that alone does not determine its true character and purpose. *See e.g. Silberman v. Katz* [54 Misc.2d 956, *affd.*, 28 AD2d 992 (1st Dept. 1967)]. The Court must consider whether the proposed solicitation from the Village is truly a

survey, or whether it is a non-binding referendum by another name." *(Decision and Order of this Court dated 1/8/16 at p.4).*

Village Law §4-412(1)(a) provides the following authority to Village Boards:

> In addition to any other powers conferred upon villages, the board of trustees of a village shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice, the benefit of trade, and the preservation and protection of public works. The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions.

Previously, the Village Law contained a section of law which was entitled "Surveys, studies, polls, research programs." (Village Law section 89 subsection 68, pre-1973 version). Respondents contend that the current Village Law §4-412 was a re-codification in 1973 of the former subsection 68 of section 89, and that section permitted surveys and polls. However, as noted by Petitioners, the heading for that section used the word "poll" but the text of subsection 68 of section 89 does not use the word "poll." A Memorandum from the Comptroller to the governor stated that "poll" was deleted from the text "to eliminate power which otherwise would have been given to conduct advisory polls on questions which might be raised under the scope of the section." (Memorandum dated April 14, 1953 from Comptroller's Office). Thus, public opinion polls were not authorized in Village Law §89(68). Accordingly, the Court concludes that public opinion polls are not included under the powers of Village Law §4-412.

"It is ... clear that a local law referendum is not authorized unless specifically required by statute." (*Matter of McCabe v. Voorhis*, 243 NY 401, 413.) "Further, the use of a referendum at the taxpayers' expense to determine public opinion by poll is not authorized in law or precedent."

Meredith v. Monahan, 60 Misc2d 1081 (Sup. Ct. Rensellaer County 1969) *citing Silberman v. Katz, supra.* A "transparent attempt to formulate a mandatory legislative referendum on some technical basis will not suffice, if in fact the attempt is really to avoid governmental responsibility and shift the burden of decision to a public poll." *Silberman,* 54 Misc. 2d at 959 (citations omitted)

The purpose of the both questionnaires is to understand public opinion as it relates to future police services in the Village. It is prefaced with language indicating that it is being presented to the recipients to determine if the Village taxpayers want to explore economic options for the police force, with the options ranging from keeping it as it is, to contracting out for police services (and potentially abolishment of the Village police force). Regardless of whether it is termed a "survey", "referenda", "proposition", "public opinion poll" or some other moniker, it seeks to use government funds to obtain public input, on a question that, according to Respondents, "has been ongoing for years"-whether the police department should remain intact. The survey at issue here is to determine public sentiment about policing in the Village. Respondents concede that "the survey will provide some indication of voter sentiment on the police department, but this is inherent in any public outreach project and it is no more problematic than the Village Board holding a public hearing on the issue." (Respondents Memorandum at p.13) The difference, in the Court's view, is that the questionnaire will utilize public funds to obtain the voter or public sentiment. The results will be a non-binding advisory opinion of the public, whether it be conducted at the ballot box, or by a mailed survey. A local government may not expend public funds to "conduct a non-binding referendum or opinion poll, unless specifically authorized by state law...". 1991 N.Y. Op. Atty. Gen. 19. The information sought could be obtained, as noted by the Attorney General opinion, through local neighborhood meetings.

Following this Court's decision in January, Respondents, while still taking the position that the November questionnaire was legally permissible, adopted an alternate questionnaire in January. Respondents contend that this alternate questionnaire should be legally acceptable. Respondents eliminated questions 1, 2 and 3 which dealt with the responders status such as if they lived or owned property in the Village and if they were registered to vote in the Village. It

also eliminated question 8 presenting with options for the police department. Respondents then added 3 other questions. Questions 1 and 2 focused on taxes and whether the responder would be agreeable to paying higher taxes for increased local services. Respondents contend that the January "survey" focuses entirely on the balance between taxes and services, and eliminated the question dealing specifically with the size, or existence, of the police department.

However, even with these changes, the January "survey" still suffers from the same infirmities. Whether it is sent only to voters, or voters can be identified, or it is sent to all residents and business owners, it still seeks public opinion and utilizes government funds, on a matter that lies within Legislative purview, and no statute specifically permits it. It would still be an improper shifting of legislative responsibility and expenditure of government funds to seek this public opinion. Elimination of question 8 also does not cure the problem. The recipient responders' answers to questions 4 through 7 can be extrapolated to obtain the answer to 8.

For all the foregoing reasons, the Court finds that both the November and January questionnaires are impermissible, and the Petition and Amended Petition are granted.

Petitioners are to submit a Proposed Order to the Court, on notice to Respondents, within 20 days of the date of this Decision.

IT IS SO ORDERED.

This constitutes the Decision and Order of the Court.

Dated: June 6, 2016
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice