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| <b>Woodburn v Village of Owego</b>   |
| 2016 NY Slip Op 30024(U)   |
| January 8, 2016  |
| Supreme Court, Tioga County  |
| Docket Number: 46251   |
| Judge: Eugene D. Faughnan  |
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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 22<sup>nd</sup> day of DECEMBER, 2015.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TIOGA COUNTY

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DAVID WOODBURN and ARDEN PAUL  
BENNETT, JR.,

Petitioners,

DECISION AND ORDER

-vs-

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

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

Respondents.

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**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court upon David Woodburn and Arden Paul Bennett, Jr.'s ("Petitioners") Order to Show Cause signed by this Court on December 22, 2015, wherein this Court restrained the Village of Owego, *et al* ("Respondents") from disseminating, releasing or mailing any "opinion poll" regarding police services in the Village.<sup>1</sup> The Petitioners are residents, registered voters and taxpayers of the Village.

Petitioner submitted a Verified Petition dated December 21, 2015 (with exhibits) and a Memorandum of Law dated December 22, 2015. Respondents submitted a responding letter memorandum (with exhibits) dated December 22, 2015. Petitioners submitted an additional Attorney Affirmation dated December 31, 2015 and Respondents submitted an Attorney Affirmation and Memorandum of Law dated January 4, 2016.

The facts are not in dispute. On October 19, 2015, the Village of Owego Board of Trustees adopted a resolution approving the hiring of Siena College to conduct a survey of Village residents and businesses regarding police service in the Village. The survey is comprised of eight questions.<sup>2</sup> As relevant here, recipients are asked whether they are registered voters. They are then asked to identify their status as recipients of the survey. Recipients are 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.

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<sup>1</sup>Petitioner has submitted a Verified Petition in connection with this answer. The Court conferenced with attorneys for the parties on December 22, 2015 prior to signing the Order and provided a return date of January 28, 2016 regarding the Petition. However, the Court, recognizing the extraordinary nature of injunctive relief, consented to issuing an interim decision regarding the stay granted in the Order.

<sup>2</sup>The survey was revised and the number of questions has varied amongst the drafts. The final form of the survey contains eight questions, and will be the focus of the Court's decision.

Petitioners obtained a stay of the dissemination of the survey which was scheduled to be mailed to residence and business owners in the Village on January 4, 2016. Petitioners argue that absent specific state law authority, a Village may not expend money to conduct surveys and that the police survey is an advisory referendum which is not authorized under relevant state law. They argue that the taxpayer petitioners are irreparably harmed if the Village improperly expends Village funds, as they can not be later recovered once spent. They also argue likely success on the merits in light of the long held bar on conducting advisory referenda.

Respondents argue that there is no irreparable harm in allowing the surveys to be disseminated as some of the money has already been expended in the preparation of the surveys, and it is unclear whether the Village would be responsible for making contractual payments to Siena even if the Court finds that the survey is impermissible. Respondents also argue that the small amount<sup>3</sup> expended to conduct and tabulate the survey is minimal to each individual taxpayer in light of an overall operating budget for the Village of \$3,337,045.00. They also argue the survey is not an advisory referendum, but a survey of residents and businesses that will inform Board Members as to public opinion. They assert that as part of the Board's fact finding, this is a proper and authorized expenditure.

### **Discussion**

It is the general rule that a preliminary injunction is a drastic remedy and should be issued cautiously. *See, Uniformed Firefighters Assn. v. City of New York*, 79 NY2d 236, 241 (1992). "A preliminary injunction may be granted when there is a likelihood of ultimate success on the merits, a prospect of irreparable injury if the relief is withheld and a balancing of the equities favoring the moving party..." *Rick J. Jarvis Assocs. v. Stotler*, 216 AD2d 649, 650 (3<sup>rd</sup> Dept. 1995); *see Doe v. Axelrod*, 73 NY2d 748 (1988).

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<sup>3</sup>The survey cost is reportedly \$7,500

### **Likelihood of Success on the Merits**

As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings. *McLaughlin, Piven, Vogel, Inc. v. W. J. Nolan & Co.*, 114 AD2d 165 (2<sup>nd</sup> Dept 1986). “[I]t is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits....[T]he showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued must not be equated with the showing of a certainty of success.” *Tucker v. Toia*, 54 AD2d 322, 325-326 (4<sup>th</sup> Dept. 1976).

Petitioners challenge the survey with three main arguments: the survey is, in fact, a non-binding advisory referendum; a local government cannot submit questions to the voters in an advisory non-binding fashion without statutory authority; and there is no statute authorizing the expenditure of funds for such a survey.

The purported purpose of the survey is to understand public opinion on future police services in the Village of Owego. There is dispute between the parties as to whether this is a survey or an advisory referendum, although neither provides case law on how to draw the distinction. Petitioners contend it is an advisory referendum, and impermissible because it is not specifically authorized by a statute. 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. A referendum would ask only if the police department should be abolished.

In reviewing the survey, the Court cannot conclude at this stage, that Petitioners will be unable to show it is actually a non-binding referendum. Although it is true that it 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*. 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.

Question number two asks whether the recipient is a registered voter. This is clearly information that could be obtained from the Tioga County Board of Elections and on its face, there is nothing unusual or objectionable about this inquiry. This question will be discussed further, *infra*.

Questions four through seven ask general questions about the structure of the police department and whether each recipient “strongly supports”, “supports”, “opposes”, “strongly opposes” or “need[s] more information”. Question eight asks the recipient to choose between four options for the police department. Specifically, recipients are asked whether their should be “no change” to the police department, “increase the size of” the police department, “eliminate” the police department or “replace” the police department with the sheriff’s department.

From these questions, it is clear that the results from Questions 2 and 8 can be combined to assess the probability of success of any effort to abolish the police department. Questions 6 and 7 can provide additional information concerning the possible success. The Court finds that there is a persuasive argument that questions impermissibly seek an advisory opinion through a “survey” that is not authorized by state law.

There is no specific statutory authorization to conduct a survey about public sentiment on policing issues. The Court does note that Questions 6, 7 and 8 deal with abolishing the police department. As respondents concede, a referendum vote to abolish the police department would only be proper after the Board voted to abolish the police department. Village Law §8-800. The statute is clear as to the mechanism to abolish the police department. The initiative lies with the Board to vote, in the first instance, for abolishment, after which it can be submitted for a referendum. The Respondents seek to add another preliminary step, by sending out a survey.

Respondent argues that since the survey is not being sent just to registered voters, but to all residence and business owners, it cannot qualify as a referendum “by other means”. However, this ignores the fact that question number two inquires as to whether the recipient is a registered voter. Although the actual identity of the respondent will only be known to Siena, it will be possible for Siena to cross reference registered voters with their responses to question eight. This

further supports the contention that question eight represents an improper and unlawful advisory referendum. It is a sort of pre-referendum, in that the results can be used to create a subsequent referendum.

Thus, the Court finds there is a colorable argument that this survey is actually a non-binding referendum.

The parties seem to agree that the Village is not permitted to conduct an advisory referendum at an election and the case law supports this proposition. *McCabe v. Voorhis*, 243 NY 401 (1926); *Mills v. Sweeney*, 219 NY 213 (1916); *Kupferman v. Katz*, 41 Misc.2d 124, *affd.* 19 AD2d 824 (1<sup>st</sup> Dept. 1963); *affd. without opin.* 13 NY2d 932 (1963); *Greene v. Town Board of Town of Warrensburg*, 90 AD2d 916 (3<sup>rd</sup> Dept. 1982), *lv. app. den.* 58 NY2d 604 (1983); *Citizens for Orderly Energy Policy v. County of Suffolk*, 90 AD2d 522 (2<sup>nd</sup> Dept. 1982), *app. dismiss.* 57 NY2d 1045 (1982); *Elkind v. City of New Rochelle*, 5 Misc.2d 296, *affd.* 4 AD2d 761, *affd.* 5 NY2d 836; *Silberman v. Katz*, 54 Misc.2d 956, *affd.*, 28 AD2d 992 (1<sup>st</sup> Dept. 1967).

The Court observes that the cases submitted by Petitioner involve ballot propositions offered to registered voters on election day. Such a proposition, if advisory in nature, is prohibited. *Citizens for an Orderly Energy Policy*, *supra*; *see Silberman v. Katz*, *supra*. The Court is unable to identify any case where there has been a challenge to a survey, the subject of which *would be barred* if presented as a ballot initiative. However, this may be in part due to the fact that there has been a long standing opinion from the New York State Attorney General which stands for the proposition that 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. That opinion also noted that “[g]overnment by representation is the general rule and direct action by the people must be specifically authorized by State law.” 1991 N.Y. Op. Atty. Gen. 19 (citations omitted). There was no ballot initiative in that instance. However, the opinion seems to equate non-binding referendum with opinion poll.

Respondents attempt to distinguish between presenting the questions at an election and presenting them by a mailing. However, the case law and Attorney General opinion focus on the unauthorized expenditure of public funds to conduct polls or surveys, not the venue. 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). It is not dependent on whether it is done at the poll, or otherwise. If the expenditure is not permitted, it would not matter when, or how, it was done. The information sought could be obtained, as noted by the Attorney General opinion, through local neighborhood meetings.

The survey at issue here is to determine public sentiment about policing in the Village. 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. The Court, at this point, cannot draw a distinction between a non-binding referendum at the polls, and this current survey.

Villages may conduct surveys and other studies as authorized for specific purposes. *See e.g.* Village Law §7-722; General Municipal Law §239-n. Respondents have not identified any specific statutory authorization to conduct a survey such as they propose here. Thus, any such authority would have to be under more general powers granted to villages. The Court is cognizant of the broad powers granted to under Village Law 4-412 and the need to accord deference to legislative acts. *See Eddyville Corp. v. Town Board of Town of Ulster*, 45 Misc3d 1217A (Ulster Co. Sup. Ct. 2011). However, the Court is also cognizant that the cited Attorney General Opinion would seem to bar any sort of public opinion survey not specifically authorized by law, notwithstanding a Comptroller opinion to the contrary<sup>4</sup>. The Court finds that the Board’s authority does not extend to submitting referenda items in the guise of a “survey.”

Village Law §8-800 does not authorize the usage of public funds to conduct a preliminary survey prior to abolishing the police department. Certainly, the statute does not expressly authorize the

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<sup>4</sup>See 11 Op. State Compt. 599 (1955).

expenditure. Seeking public opinion about an issue by use of public funds, if not authorized by law, is an improper shifting of legislative responsibility. *See e.g. Silberman v. Katz, supra; Mills v. Sweeney, supra.*

The procedure to abolish the police department is set forth in Village Law §8-800, which provides that the Board must vote for the abolishment, which can then be presented to voters by referendum. There is nothing in that statute which expressly authorizes a survey beforehand. Such a survey would also shift the decision to a public inquiry, rather than the Board.

Respondents contend that Petitioners cannot show a likelihood of success because Petitioners cannot cite a specific precedent in support. However, as noted above, that may be because of the 1991 Attorney General Opinion. But, conversely, Respondents have also not cited any precedent showing that Petitioners cannot prevail. Again, all that is required is a prima facie showing at this stage.

The Court concludes that Petitioners have made a prima facie showing of a likelihood of success on the merits. *See McLaughlin, supra; Tucker, supra.*

### **Irreparable Harm**

For Petitioners to show irreparable harm, they must show that they have no other remedy available at law if the action is not enjoined. *McNeary v. Niagara Mohawk Power Corp.*, 286 AD2d 522 (3<sup>rd</sup> Dept. 2001). Petitioners assert that if the Village is allowed to expend funds unlawfully, there is no mechanism for recovering such funds. Although it is unclear whether the Court's findings with regard to the suspect nature of questions will in any way alter the cost of the "survey" and hence the potential expenditure of funds, the Court is persuaded that since this is a provisional remedy, the maintenance of the *status quo* pending further argument and/or hearing is warranted. *See Uniformed Firefighters Ass'n v. New York*, 79 NY2d 236, 239 (1992).

### Balancing of the Equities

The Petitioner correctly points out that when considering the relative equities, the Court must weigh the relative harm to each party if the *status quo* is maintained. See *Nassau Roofing & Sheet Metal Co., v Facilities Development Corp.*, 70 AD2d 1021 (3<sup>rd</sup> Dept. 1979). In this regard, the Petitioner argues that if the Village is allowed to disseminate the “survey”, the money will be expended and cannot be recovered. Respondent argues that the “survey” is time sensitive and must be sent, received and tabulated prior to elections in March. Essentially, if the current Board wishes to act upon the results of the “survey”, they need to do so prior to the election.

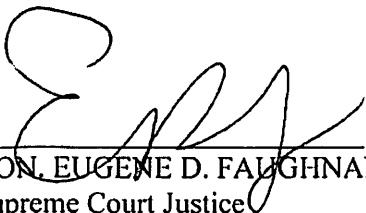
The Court has considered the relative equities and finds that, in light of its ruling regarding the suspect nature of the questionnaire, the equities weigh in favor of the Petitioner, since if the moneys are spent now, they will not be recoverable; whereas, the slight delay to Respondents should not have significant financial impact as the budget is not adopted until July. This matter is scheduled for argument January 28, 2016 after which a new decision will be issued. This will afford ample time for the Respondents. To the extent that they argue the survey results are sought prior to the March elections, such argument supports a conclusion that the proposed survey is in fact a non-binding advisory referendum.

For the foregoing reasons, the Court continues the stay in this matter, pending the January 28, 2016 hearing.

IT IS SO ORDERED.

This constitutes the Decision and Order of the Court.

Dated: January 8, 2016  
Owego, New York

  
HON. EUGENE D. FAUGHNAN  
Supreme Court Justice