

KNL-CV22-6059392-S : SUPERIOR COURT
JASON LACHAPELLE : JUDICIAL DISTRICT
 : OF NEW LONDON
V. : AT NEW LONDON, CONNECTICUT
TOWN OF COLCHESTER : DECEMBER 30, 2022

TRANSCRIPT OF PROCEEDINGS

EXCERPT

BEFORE THE HONORABLE KAREN A. GOODROW, JUDGE

A P P E A R A N C E S :

Representing the Plaintiffs, Jason LaChapelle & Taras Rudko:

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32 Pine Tree Lane
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Representing the Defendant:

ATTORNEY ANDREW M. ZEITLIN
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1 THE COURT: The Court has carefully considered
2 the evidence, testimony of the witnesses, and
3 argument of counsel, and the applicable law. The
4 Court credits some, but not all of the evidence
5 presented by the parties. The Court has applied the
6 preponderance of the evidence standard. And just so
7 that counsel and the parties are aware, I have
8 prepared these notes and comments before me, so I'm
9 literally reading from what I've prepared last night
10 and this morning.

11 The Motion for Temporary Injunction is denied.
12 The plaintiffs have not met their burden of proving
13 that they will suffer irreparable harm if the
14 injunction is not granted. This ruling and the
15 Court's findings apply to both of the ~~defendants~~ ^{plaintiffs} in
16 their role as taxpayers, residents, and/or present or
17 former board of selectman members of the Town of
18 Colchester.

19 In essence, the plaintiffs seek to have the
20 Court order an injunction to prevent the town from
21 entering into the contract for the senior center with
22 the lowest bidder, BRD Builders. Plaintiffs also
23 seek other relief, which is also denied for the
24 reasons articulated herein.

25 The standard for granting an injunction pursuant
26 to the law, and as recently articulated in *Local 062*
27 *v. Town of Hamden, Et. Al*, 209 Conn. App. 116, at

1 pages 123 through 124, a 2021 case, are the
2 following.

3 Number one. Irreparable harm if the injunction
4 is not granted. Number two. No adequate remedy at
5 law. Number three. The plaintiff or plaintiffs will
6 likely prevail on the merits. And number four.
7 Balancing of the equities tip in favor of the
8 plaintiffs. The plaintiffs bear the burden of proof
9 and they have not met their burden, and I'll go
10 through each section separately.

11 The evidence is insufficient for the Court to
12 find that the alleged harm will result, and whether
13 if it did occur, it would be irreparable. And again,
14 these are based -- these findings are based upon the
15 allegations in the complaint. And I'll go through
16 each of the allegations alleged.

17 Number one. It is it alleged that the town's
18 actions will violate the town charter. The evidence
19 does not support a finding that the town's intended
20 action of entering into the low-bid contract will
21 violate the town charter. Per the charter the
22 referendum passed, that the town shall appropriate
23 and authorize the board of selectman to expend a sum
24 not to exceed 9.5 million dollars for costs related
25 to the design and construction of a new senior
26 center, and authorize the issuance of bonds and notes
27 to finance the portion of the appropriation not

1 defrayed from grants.

2 Number two. It is alleged that the town's
3 actions will subvert the voting rights of the town's
4 residents. There is no evidence that the town has
5 engaged in actions that subvert the voting rights of
6 the residents. There is insufficient evidence that
7 entering into the BRD contract will subvert the
8 voting rights, and again, the referendum prohibited
9 the town from appropriating funds beyond 9.5 million.
10 The town has not appropriated funds in excess of 9.5
11 million.

12 Number three. It is alleged that the town is
13 exceeding its authority under the referendum,
14 authorizing and capping the expenditure. The
15 evidence does not prove or establish that claim. The
16 projected cost are estimates, i.e., they are by their
17 very nature speculative, and there is no evidence
18 that the town has authorized appropriating more than
19 9.5 million dollars towards the senior center.

20 Number four. It is alleged that the town may
21 become liable to issue bonds and notes in excess of
22 the spending cap. Again, there is no evidence of
23 that claim, the claim is merely speculative.

24 Paragraph 18 of the complaint alleges variation --
25 I'm sorry, various violations of the plaintiff's
26 rights. I'll go through each of those.

27 Number five. It is alleged that plaintiff's

1 residents were deprived of their civil rights by the
2 action of the town. There's no evidence that the
3 plaintiffs or the residents of the town have been
4 deprived of their civil rights.

5 Number six. It is alleged that the town will be
6 engaging in ultra vires conduct, in violation of the
7 charter and state law. There's been no evidence to
8 support that allegation.

9 Number seven. It is alleged that the town will
10 be impacting its bond rating if it enters into the
11 contract. Again, there's no evidence to support that
12 claim.

13 Number eight. It is alleged that the town will
14 be acting in derogation of state law. Again, there
15 is no evidence to support that claim.

16 Number nine. It is alleged that the town will
17 be causing real estate taxes to rise abnormally with
18 the proximate cause being to resolve the legal
19 fallout from any of its acts deemed improper at a
20 later date. Again, there is no evidence to support
21 that claim.

22 Number ten. It is alleged that the town may
23 become emboldened to circumvent the civil rights of
24 the townspeople, voters, and taxpayers. Not only is
25 this speculative, again, there is no evidence to
26 support that claim.

27 And finally, again, these are allegations

1 contained in paragraph 18 of the complaint. It's the
2 11th allegation that I'm addressing in my decision.
3 It alleges, quote, there may even be a violation of
4 federal constitutional rights under the Fourteenth
5 Amendment, equal protection and due process of law,
6 end quote. Again, this allegation is speculative and
7 supported by no evidence.

8 The second factor that the Court has to consider
9 in determining whether or not to grant an injunction
10 is whether there exists no adequate remedy at law.
11 Because the Court has found that there is no
12 irreparable harm, this section is not applicable
13 because no remedy is required.

14 The third factor is whether the plaintiff will
15 likely prevail on the merits. The plaintiff will --
16 the plaintiffs, rather, will likely not prevail on
17 the merits for all the reasons articulated herein.

18 And finally, the fourth factor is the balancing
19 of the equities, and whether or not in so balancing
20 the equities tip in the favor of the plaintiffs. The
21 Court finds that the equities in fact tip in favor of
22 the defendant, town; the evidence was uncontroverted
23 that the low bidder, BDR, need only adhere to the bid
24 until January 11th, 2023, at which time the Court --
25 the town, rather, may be in the position to incur
26 higher costs.

27 The Court makes the following factual findings.

1 This is not an inclusive list of factual findings.

2 Number one. The town adopted the following
3 referendum, which was stipulated to by the parties.
4 Again, I've articulated this earlier - I'll do so
5 again - that the town of Colchester shall appropriate
6 and authorize the board of selectman to expend a sum
7 not to exceed 9.5 million dollars for costs related
8 to the design and construction of a new senior center
9 and authorize the issuance of bonds and notes to
10 finance the portion of the appropriation not defrayed
11 from grants.

12 Number two. The term appropriate, as used in
13 the referendum, does not equate with the budget cost
14 estimates testified to by the witnesses and presented
15 in documentary evidence. By its very nature, an
16 appropriation is not the same as an estimated cost.
17 The Court rejects the plaintiff's contention that for
18 purposes of this litigation, they are one in the
19 same.

20 Number three. With regard to Plaintiff's
21 Exhibit Seven, the Court has reviewed Plaintiff's
22 Exhibit Seven in its entirety. It is a 439-page
23 exhibit. Much of what is contained in the exhibit is
24 not relevant nor material to the issues before the
25 Court. As an example, there are many documents
26 within Exhibit Seven that explain the bid process.
27 There's also some completed bid-process

1 documentation. The bid process is not at issue here.

2 The Court finds relevant and material the
3 documents produced by PACS, LLC, an entity which
4 Construction Solutions Group, CSG, the construction
5 management company on the project, engaged to provide
6 a design development cost estimate. PACS, LLC
7 consistently states in its cost estimate
8 documentation that the basis of its pricing is on
9 fair market value, and, quote, is not intended as a
10 prediction of the lowest bid, end quote. As an
11 example of that language that's at page 180 of the
12 exhibit.

13 Further, under probable cost, that term is, in
14 quotes, PACS, LLC consistently states that PACS,
15 quote, can suggest and evaluate alternate methods to
16 assist bringing the project back in line with the
17 desired budget, end quote, in the event that the
18 estimate is not in line with the budget. And again,
19 just by way of illustration, that appears at page 167
20 of Exhibit Seven, but also is repeated further in the
21 exhibit.

22 The Court finds that the estimated project cost
23 is just that, an estimate, and that the estimates do
24 not reflect the amount of the town's appropriation.

25 Factual finding number four. BDR Builders is
26 the low builder -- bidder, rather, for the new senior
27 center construction project, at a bid of 8.625

1 million, with the original bid of 8.995 million.

2 Number five. The contract with BDR would not
3 violate the 9.5 million dollar spending cap in the
4 referendum.

5 Number six. The testimony of the witnesses that
6 the project is, quote, over budget, end quote, is
7 based upon estimates. There is insufficient evidence
8 that the actual cost of the project will exceed the
9 9.5 million dollar cap from the referendum, and the
10 testimony and argument is speculative with regard to
11 that. Again, the town has not appropriated funds
12 towards the project in excess of 9.5 million dollars.

13 Number seven. To date, the town has expended or
14 paid \$350,046.99, and has committed or encumbered
15 \$702,677.38. Those numbers are supported in
16 Defendant's Exhibit A, and by the credible testimony
17 of First Selectman Bisbikos.

18 Number eight. The town received a private
19 donation in the amount of \$575,000 to be used for the
20 new senior center, without -- I'm sorry, without
21 restriction on the form of its use.

22 Number nine. The original budget amount for the
23 project was 9.5 million dollars. The present total
24 projected budget cost is estimated at \$10,075,000,
25 which includes the additional bequest of \$575,000.
26 This was credibly testified to by Mr. Tarnowski.

27 Number nine (sic). David Stein, the principal

1 of Silver and Petrucelli, the architectural firm
2 hired by the town on the senior center project,
3 testified with regard to the estimates that were
4 prepared for the cost of the project throughout the
5 duration of the project, and that the present
6 estimate for the project exceeds 10 million dollars.
7 The estimate can be reduced by removing certain items
8 from the budget, also referred to as alternates. Mr.
9 Stein's testimony was uncertain and not reliable as
10 to the reason for the, quote, construction shortfall,
11 end quote, i.e., the difference between the amount
12 originally projected and what is currently estimated
13 as the cost of the project. The total fee owed to
14 Mr. Stein's firm is \$449,057.12.

15 Number 11. The evidence presented was
16 inconsistent regarding the amount that the project is
17 estimated at present cost, however, the estimates
18 given exceed 9.5 million dollars. Mr. Tarnowski
19 credibly testified that the project was estimated to
20 be over budget by \$976,000 as of November of 2022.
21 Plaintiff's Exhibit Four reflects an estimated
22 construction shortfall of \$976,030. Mr. Stein
23 credibly testified that the estimated projected cost
24 is \$10,848,047. Mr. Rudko credibly testified that
25 the estimated cost was 10.2 to 10.8 million dollars,
26 quote, depending on whose numbers are used, end
27 quote. The Court finds that the present estimated

1 cost of the senior center is between 10.2 million
2 dollars and \$10,848,047, but that the estimated cost
3 does not equate to an appropriation of the town's
4 funds.

5 Number 12. The Court finds that design
6 alternatives are available to reduce the estimated
7 cost of the project. Mr. Stein credibly testified
8 that so-called, quote, value engineering, end quote,
9 is a method by which the cost of a project may be
10 reduced. If the town entered the contract -- excuse
11 me. If the town entered the contract with BRD for
12 8.625 million dollars, the cost of the project could
13 be reduced with value engineering. Stein credibly
14 testified that the budget contained in Plaintiff's
15 Exhibit Four are based upon estimates. Mr. Tarnowski
16 credibly testified that value engineering could be
17 utilized with this project to make alternates to the
18 design, which could result in cost savings.

19 Number 13. First Selectman Bisbikos credibly
20 testified that the Town of Colchester does not intend
21 to enter a contract which exceeds 9.5 million
22 dollars, and the Court so finds. The estimated
23 projected cost has not yet been value engineered to
24 reduce the cost. The evidence is insufficient to
25 find that the cost of the project will exceed 9.5
26 million dollars, because the evidence at this point
27 is speculative.

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Bisbikos credibly testified that if the project cost exceeds the 9.5 million dollar appropriation per the referendum, he will seek the use of the donation of \$575,000 or call for a town meeting for appropriate funding as may be available through other funds or seek another referendum, and the Court makes that finding that that is what the first selectman will do.

The Court agrees with Bisbikos' testimony that it is presently premature for the town to seek additional funds beyond the 9.5 million dollars approved in the referendum because employing value engineering and other cost-reduction methods may reduce the estimated cost.

Finally, the Court finds that the actual appropriation for the senior center to date does not exceed 9.5 million dollars. The actual cost of the senior center currently does not exceed 9.5 million dollars. The town has not violated the referendum because it has not appropriated more than 9.5 million dollars to the senior center project.

Additionally, the town has not violated other alleged laws and rights as previously articulated by the Court. In short, again, the plaintiffs have failed to meet their burden of proof. Therefore, the Motion for Temporary Injunction is denied.


* * *
Proctor, J.
1/3/2023

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E L E C T R O N I C
C E R T I F I C A T I O N

I hereby certify the electronic version is a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, Judicial District of New London, New London, Connecticut, before the Honorable Karen A. Goodrow, Judge, on the 30th day of December, 2022.

Dated this 30th day of December, 2022 in New London, Connecticut.



Taylor Thompson

Court Recording Monitor