

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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February 20, 2018

FILE COPY

Case Name: **Neal Kurk v Thomas Clow, et al**
Case Number: **216-2018-CV-00086**

You are hereby notified that on February 20, 2018, the following order was entered:

RE: COMPLAINT AND MOTION TO DISMISS:

See copy of order attached - Nicolosi, J.

W. Michael Scanlon
Clerk of Court

(539)

C: Richard J. Lehmann, ESQ; Laura Spector-Morgan, ESQ

THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.
NORTHERN DISTRICT**

SUPERIOR COURT

Neal Kurk

v.

Thomas Clow, et al.

Docket No. 216-2018-CV-00086

Order

Plaintiff has brought the present action against defendants seeking a declaratory judgment, permanent restraining order, and a writ of mandamus. The case arises out of the Town of Weare Board of Selectmen conduct in creating a default budget pursuant to RSA 40:13. Defendants have moved to dismiss, arguing plaintiff lacks standing. The Court held a hearing on February 9, 2018. For the reasons that follow, defendants' motion to dismiss is DENIED and plaintiff's requested relief is GRANTED.

Factual Background

The Town of Weare is an "SB2" town that passes its budget via public ballot referenda pursuant to RSA 40:13. Under to the statute, the Town must present both a proposed and a default budget to its residents for a vote. In the event the proposed budget fails to pass, the Town shall adopt the default budget unless it elects to proceed to a special meeting under RSA 40:13, XVI. The statute defines "default budget" as:

the amount of the same appropriations as contained in the operating budget authorized for the previous year, reduced and increased, as the case may be, by debt service, contracts, and other obligations previously incurred or mandated by law, and reduced by one-time expenditures contained in the operating budget. For the purposes of this paragraph, one-time expenditures shall be appropriations not likely to recur in the succeeding budget, as determined by the governing

body, unless the provisions of RSA 40:14-b are adopted, of the local political subdivision.

RSA 40:13, IX(b).

The Town's Board of Selectmen has recently published a document titled "2018 Budget Worksheet" which purports to present the default budget for 2018. Plaintiff has identified approximately \$60,000 worth of budget increases he alleges are improperly included in the default budget. These increases are the result of contracts entered into by the board of selectmen after the last Town meeting. While the contracts were not approved by the legislative process, plaintiff does not contest their validity. Rather, he asserts they do not qualify as "contracts . . . previously incurred" under the statute, and thus cannot be included in the default budget.

Analysis

I. Motion to Dismiss

Defendants move to dismiss, arguing plaintiff lacks standing to bring the present complaint. "When a motion to dismiss challenges a [plaintiff]'s standing to sue, the trial court must look beyond the [plaintiff]'s allegations and determine, based on the facts, whether the [plaintiff] has sufficiently demonstrated [his] right to claim relief." Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 766–67 (2013). "The standing required by our constitution is not satisfied by the abstract interest in ensuring that the State Constitution is observed" or by claiming an "indistinguishable, generalized wrong allegedly suffered by the public at large." Duncan v. State, 166 N.H. 630, 643, 646 (2014). Rather, "standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute which is capable of judicial redress." Id. at 642–43

(citations omitted). The party must show that his "own rights have been or will be directly affected." Eby v. State, 166 N.H. 321, 334 (2014).

In his complaint, plaintiff argues he has standing because the allegedly unlawful inflation of the default budget will deprive him of "his right to vote for or against the selectman's proposed budget with knowledge that a default budget consistent with New Hampshire law will result if the selectman's budget fails to garner a majority of votes cast." (Compl. ¶ 24.) The Court disagrees. Being presented with unsavory choices does not rob one of the right to vote, and nothing the Town has done would prevent plaintiff from actually casting a vote one way or another.

At the hearing, plaintiff also argued he would suffer an actual, concrete harm in the form of paying higher taxes as a result of the default budget going into effect. The Court finds this adequately states a specific harm to establish standing. Plaintiff's alleged injury is distinguishable from the speculative, generalized harms alleged in the cases cited by defendants. In Duncan, the plaintiffs challenged a tax credit program, claiming it would result in a net fiscal loss on New Hampshire governments and remove funding from public schools. 166 N.H. 645. In Baer v. New Hampshire Department of Education, 160 N.H. 727 (2010), the plaintiffs challenged the grant of lot size waivers for schools, claiming they would be harmed because of the presence of "substandard" schools in their community. Id. at 730. In Babiarz v. Town of Grafton, 155 N.H. 757 (2007), the plaintiff challenged the results of a vote recount, claiming that he had an interest in the outcome of the vote as a resident and taxpayer of the town. Id. at 758.

In each of those cases, the Court properly found no standing because none of the plaintiffs could demonstrate a specific, concrete injury caused by the defendants'

actions. Here, on the other hand, plaintiff has established that he will personally face an increased tax burden as a direct result of the increased default budget. In Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007), the United States Supreme Court noted that:

As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. Of course, a taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.

Id. at 599. Other jurisdictions have likewise found that incurring an increased tax obligation can provide sufficient grounds for standing. See West Farms Mall, LLC v. Town of West Hartford, 901 A.2d 649, 657 (Conn. 2006) (articulating two-prong taxpayer standing analysis requiring "taxpayer status and conduct that has caused or will cause increased taxes"); Henson v. Healthsouth Medical Center, Inc., 891 So. 2d 863, 868 (Ala. 2004) (finding standing to challenge tax abatement "so long as the taxpayer can demonstrate a probable increase in his tax burden from the challenged activity"); Beattie v. EastChina Charter Twp., 403 N.W.2d 490, 494 (Mich. App. 1987) (finding standing where plaintiffs alleged their property taxes would increase by 10% as a result of tax exemption provided to power agency); Jenkins v. Swan, 675 P.2d 1145, 1153 (Utah 1983) (finding standing where plaintiff would pay increased property tax as result of government action). While plaintiff's injury here is shared by the other taxpayers in Weare, it is a specific, concrete injury that is sufficient to provide him standing to bring the present complaint.

Accordingly, for the foregoing reasons, plaintiff's motion to dismiss is DENIED.

II. Declaratory Judgment

Plaintiff argues the phrase “contracts . . . previously incurred” in RSA 40:13, IX(b) applies only to contracts voted on at a prior Town meeting. Defendants object, arguing the phrase simply means contracts entered into by the Town prior to the upcoming budget vote. When construing a statute’s meaning, the Court first examines its language, ascribing “the plain and ordinary meanings to words used.” Garand v. Town of Exeter, 159 N.H. 136, 141 (2009). The Court does not look beyond the words to determine legislative intent if the language of the statute is clear and unambiguous, and will construe all parts of a statute together to avoid an unjust or absurd result. Id. (citing Formula Dev. Corp. v. Town of Chester, 156 N.H. 177, 178–79 (2007)). “The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.” Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008). The Court also “presume[s] that the legislature does not enact unnecessary and duplicative provisions.” State v. Gifford, 148 N.H. 215, 217 (2002). Finally, the Court “interpret[s] statutes in the context of the overall statutory scheme and not in isolation.” State v. Balliro, 158 N.H. 1, 4 (2008).

On its own, the word “previously” does not indicate a date prior to which it is intended to refer. Neither does the remainder of the subsection provide context beyond a reference to the previous year’s budget. Therefore, the Court finds some degree of ambiguity in the phrase “previously incurred” as it could be reasonably read to support both plaintiff’s and defendants’ interpretations.

However, the Court finds the ambiguity is resolve by examining the overall statutory scheme, in particular RSA chapter 32, entitled Municipal Budget Law. That

chapter provides extensive guidance for the creation of a budget and restrictions on alterations thereto before and after the vote takes place. For example, RSA 32:5, II prohibits the governing body or budget committee from making alterations to a proposed budget without providing a hearing. RSA 32:6 provides that “[a]ll appropriations in municipalities subject to this chapter shall be made by vote of the legislative body of the municipality at an annual or special meeting” and that “[n]o such meeting shall appropriate any money for any purpose unless that purpose appears in the budget or in a special warrant article.” RSA 32:8 provides that “[n]o board of selectmen . . . shall pay or agree to pay any money, or incur any liability involving the expenditure of any money, for any purpose in excess of the amount appropriated by the legislative body for that purpose, or for any purpose for which no appropriation has been made.” Finally, 32:10 allows the governing body to transfer appropriations to compensate for unexpected costs, but limits the total expenditures to the “total amount appropriated at the town . . . meeting.” The New Hampshire Supreme Court has noted that the purpose of RSA chapter 32 was “to establish some uniformity in the manner of appropriating and expending public moneys in the various municipalities of the State . . . and to establish the safe ceiling on the total indebtedness beyond which a municipality could not expend money.” Ashley v. Rye School Dist., 111 N.H. 54, 56–57 (1971).

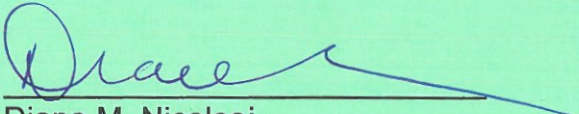
Here, the practical effect of including the challenged contracts in the default budget is the appropriation of money by the governing body without any meaningful input by the voters of the Town. None of the safeguards set forth in RSA chapter 32 have any force and effect if the board of selectmen is capable of unilaterally increasing the default budget by an unchecked amount. The Court thus finds defendants’

interpretation of RSA 40:13, IX(b) undermines the overall purpose of the statutory scheme governing municipal budgets and is therefore unreasonable. On the other hand, the Court finds plaintiff's interpretation—requiring contracts included in the default budget to have been previously voted on at a Town meeting—to be in line with the legislature's intent and ensures the proper enforcement of the safeguard on unlawful or excessive spending by the Town.

In light of the foregoing, the Town shall remove the contracts identified by plaintiff from the default budget before presenting the budget at the upcoming deliberative session.

SO ORDERED.

2/20/2018
Date



Diane M. Nicolosi
Presiding Justice