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**MEMORANDUM**

**TO: Hon. Tiverton Town Council, c/o Nancy Mello, Town Clerk  
Hon. James Goncalo, Town Administrator**

**FROM: Andrew M. Teitz, Town Solicitor**

**DATE: June 8, 2011**

**SUBJECT: Proposed Amendments to Town Charter – Replace FTM with Referendum**

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You have asked me to review the proposed Charter Amendment, which would replace the FTM with a Budget Referendum, for conformance with state and federal law.

**1. Authorization**

The Rhode Island Constitution and General Laws provide no explicit authorization for budget referenda; however, neither provides an explicit prohibition against them either. The only mention of budget referenda in the General Laws can be found in § 45-3-25 which states that:

- (a) At the request of the council of a city or town, the board of elections shall furnish a sufficient number of voting machines for use in connection with votes taken at any municipal budget referenda. Any request shall be made to the board of elections not later than fifteen (15) days prior to the date of the municipal budget referenda.
- (b) Nothing in this section makes the provisions of title 17 applicable to municipal budget referenda.

R.I. Gen. Laws § 45-3-25. This express mention of budget referenda demonstrates implicit approval by the General Assembly.

There is also evidence of implicit approval by the Rhode Island Supreme Court. See Algieri v. Fox, 404 A.2d 72, 74 (R.I. 1979). The case of Algieri v. Fox involved a Westerly budget referendum similar to the proposed referenda in Tiverton. See id. at 73. After a budget was approved by the Westerly Town Council, electors were allowed to submit a petition to amend the Council's budget if the signatures of 200 electors were obtained. See id. Amendments to the budget would then be voted on by the people of Westerly in a referendum. See id. In Fox, the plaintiff sought to include an amendment on the referendum ballot which removed all appropriations, essentially leaving the Town with no budget. Id. The Court held that the Westerly Board of Canvassers was not required to place his proposed amendment on referendum ballot because it did not include an alternative budget which the Court said was required by the Town Charter. Id. at 74.

Although no party raised the issue of whether budget referenda may legally be conducted, this case demonstrates the Court's tacit approval of municipal budget referenda though the Court did not explicitly rule on that issue. See id. The argument can be made that the Court would not have analyzed the issue of whether a specific proposed amendment should appear on a budget referendum ballot if budget referenda themselves are illegal.

Thus, despite having no explicit authorization in the Constitution or General Laws, municipal budget referenda appear to have implicit approval from both the General Assembly and the Supreme Court. See § 45-3-25; See also Fox, 404 A.2d at 74.

## **2. Possible Challenges to the Proposed Budget Referendum**

### **a. Possible Statutory Challenges**

There are four sections of the General Laws which could form the bases of a potential challenge to

the proposed budget referendum system. The first three sections are related in that they could be construed to require a meeting instead of a referendum. § 45-2-2 states that “[t]owns and cities may raise by a tax on real or personal estate, or on both, any money necessary to [perform certain enumerated tasks]; provided, that the tax is voted on at a *legal meeting* of the electors of the town or city.” § 45-2-2 (emphasis added). Additionally, § 45-2-3 states that “[t]owns or cities may, at any *legal meeting*, grant and vote sums of money that they judge necessary [for certain enumerated purposes].” § 45-2-3 (emphasis added). Finally, § 44-5-1 states that “[t]he electors of any city or town qualified to vote on any proposition to impose a tax or for the expenditure of money, when *legally assembled*, may levy a tax for the purposes authorized by law.” § 44-5-1 (emphasis added).

These three sections could be construed as prohibiting budget referenda because referenda do not constitute “legal meeting[s]” and electors are not “legally assembled” during all-day referenda. §§ 45-2-2, 45-2-3, 44-5-1. However, if the terms are read more broadly, a referendum could constitute a “legal meeting” or legal assembly of electors. §§ 45-2-2, 45-2-3. To date, no court has clarified these terms nor defined them to include or exclude budget referenda.

#### **b. Possible Constitutional Challenges**

A separate possible challenge to the proposed budget referendum stems from the Freedom of Speech guarantees under the First Amendment of the United States Constitution. Such a challenge would address Section 301(d)(1) of the proposed amendments to the Tiverton Town Charter which only allows electors to originate a petition for a budget proposal to be added to the referendum.

The Supreme Court has held that circulation of a petition to gather signatures in order to place an amendment on a referendum is political speech. Am. Const’l. Law Foundation v. Meyer, 120 F.3d 1092,

1097 (10<sup>th</sup> Cir. 1997). While the states have considerable leeway in regulating elections and referenda in order to protect state interests, they still may not place an unjustified burden on political expression.

Buckley v. Am. Const. Law Foundation, 525 U.S. 182, 195 (1999).

In Buckley, the Supreme Court held that a requirement that petition circulators be *registered* voters violated the First Amendment. Id. at 197. The Court did not reach the issue of whether a requirement that petition circulators be *eligible* voters was constitutional because the issue was not raised. Id. However, the Court assumed *arguendo* that such a restriction was constitutional without expressly holding so. Id. Additionally, the Supreme Court of Arizona has held that a similar restriction requiring that petition circulators be eligible voters was constitutional. Direct Sellers Ass'n v. McBreyer, 503 P.2d 951, 952 (A.Z. 1972).

These rulings may have an implication on Section 301(d)(1) of the proposed amendments to the Tiverton Town Charter which only allows electors to originate a petition for a budget proposal to be added to the referendum. While the line of Supreme Court cases invalidating petition requirements only dealt with petition circulators, not petition originators, these cases could serve as adverse precedent for the proposed amendment. Nonetheless, these cases are clearly distinguishable because they only address restrictions on petition circulators, not petition originators. See e.g., Buckley, 525 U.S. at 195.

Furthermore, the U.S. Supreme Court has hinted and the Arizona Supreme Court has held that requiring petition circulators to be eligible voters is constitutional. See Buckley, 525 U.S. at 197; McBreyer, 503 P.2d at 952. Therefore, it is unlikely that Section 301(d)(1) which restricts petition originators to electors only would be found to violate the First Amendment.

### **c. Additional Point to Consider**

While the task was to review the language of the proposed amendment to find any potential conflicts

with the law, in order to be thorough, it should be noted that the procedure for amending the Town Charter must follow Article 13, § 7 and 8 of the Rhode Island Constitution as someone could challenge the procedure for adoption as well as the language of the amendment.

### **III. CONCLUSION**

It appears as though municipal budget referenda are authorized by Rhode Island law, though not explicitly. Furthermore, though there are possible statutory and constitutional challenges that may arise, and no guarantee can be provided, none are likely to be successful.

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