

VERMONT SUPERIOR COURT
CHITTENDEN COUNTY

CIVIL DIVISION
Docket No. _____

JACK EDWARD DAGGITT)	
ANTHONY L. REDINGTON)	
LEANORA TERHUNE)	
LYNN R. MARTIN)	
CHARLES SIMPSON)	
ANITA RAPONE)	
BARBARA WYNROTH)	
LOUIS MANNIE LIONNI)	
Plaintiffs,)	
)	
v.)	
)	
CITY OF BURLINGTON; d.b.a)	
BURLINGTON CITY COUNCIL;)	
MIRO WEINBERGER, MAYOR;)	
BOARD OF PARK AND RECREATION COMMISSIONERS;)	
BURLINGTON PARKS, RECREATION & WATERFRONT;)	
)	
Defendants)	

**MOTION FOR PRELIMINARY INJUNCTIVE RELIEF WITH
INCORPORATED MEMORANDUM OF LAW**

Plaintiffs hereby move for a preliminary injunction based on the facts set forth in their Verified complaint, and the legal memorandum set forth below.

I. INTRODUCTION

Plaintiffs bring this action for equitable relief on behalf of the voters of Burlington. The Burlington City Charter requires City Council to seek voter permission before pledging City credit or acquiring bonds. City Council has gone rogue, and is

rushing to complete a project that it lacked authority to approve in the first place. Circumventing its obligation to submit the true purpose for the \$4 million City Park overhaul to a vote, the Council seeks to cheat the Plaintiffs and the entire city out of their rightful role in town governance. To prevent the Council from rushing through an illegal bid and expending bond funds from unrelated bond financed projects in violation of the City Charter, Plaintiffs seek a preliminary injunction, an injunction, declaratory judgement, and a mandamus to preserve the park as it is until City officials properly present this issue to the voters.

II. PARTIES

Jack Edward Daggitt is a natural person residing at [REDACTED] Burlington, Vermont 05401. Daggitt is a registered voter and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park [REDACTED]

Anthony Redington is a natural person residing at [REDACTED] [REDACTED], Burlington, Vermont 05401. Redington is a registered voter in Ward 2 and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park.

Leanora Terhune is a natural person residing at [REDACTED] Burlington, Vermont 05401. Terhune is a registered voter and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park.

Lynn R. Martin is a natural person residing at [REDACTED] Burlington, Vermont 05401. Martin is a registered voter and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park.

Charles R. Simpson is a natural person residing at [REDACTED] Vermont 05401. Simpson is a registered voter and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park.

Anita Rapone is a natural person residing at [REDACTED] Vermont 05401. Rapone is a registered voter and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park.

Barbara Wynroth is a natural person residing at [REDACTED] Burlington, Vermont 05401. Wynroth is a registered voter and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park.

Louis Mannie Lionni is a natural person residing at [REDACTED] Burlington, Vermont 05401. Lionni is a registered voter and a signatory of the petition to place the advisory question before the voters regarding the City Hall Park

The abovementioned natural persons are taxpayers in the City of Burlington.

The City of Burlington is a municipality in Chittenden County, Vermont.

Burlington City Council is the legislative body of the City of Burlington.

Miro Weinberger is a natural person and the Mayor of Burlington.

The Board of Park and Recreational Commissioners is a Board of the City of Burlington, created by §§ 120, 203, and 213 of the City Charter. This advisory board is to undertake “any park-related duties” that City Council delegates to it, and can request

that the City Council and the mayor submit bonds to purchase or improve park property for voter approval.¹

Burlington Parks, Recreation & Waterfront is a commission of the City of Burlington, and is “managing” the City Hall Park project.²

III. JURISDICTION AND VENUE

Venue is proper in the Chittenden County Superior Court according to the Vermont Court Rules statute. “An action before a Superior Court shall be brought in the unit in which one of the parties resides, if either resides in the State... Actions concerning real estate shall be brought in the unit in which the lands, or some part thereof, lie.³” All Plaintiffs reside in Chittenden county. This action concerns City Hall Park, which lies in Chittenden county.

This Court has jurisdiction over these proceedings because of its authority to adjudicate “mandamus,” “civil actions,” and “prohibitions,” which constitute the substance of this complaint.⁴

¹ City of Burlington, *Position Description for Member of Board of Park and Recreation Commissioners*, <https://www.burlingtonvt.gov/CityCouncil/Member-of-the-Board-of-Park-and-Recreation-Commissioners>

(last visited Feb. 15, 2019)

² Burlington Parks Recreation Waterfront Vermont, *City Hall Park FAQs*, <https://enjoyburlington.com/city-hall-parks-faqs/> (last visited Feb. 15, 2019).

³ 4 V.S.A. § 402 (a).

⁴ 4 V.S.A. § 31 (1), (3).

IV. FACTS

For well over two centuries, the people of Burlington have cherished and defended their urban greenspace known as City Hall Park. In 1798, attendees at the Burlington Proprietor's Meeting voted to set aside a modest plot of land in the heart of Burlington for common use.⁵ Three decades later, Burlington citizen John Norton Pomeroy filed a successful lawsuit against the City of Burlington to remove the government buildings that had begun encroaching on this public oasis.⁶

On June 23, 1983, the Division for Historic Preservation notified then-mayor Bernie Sanders that the Division had officially added the City Hall Park Historic District to the National Register of Historic Places.⁷ This district includes the park as well as several surrounding residences.⁸

Generation after generation of Burlington residents and visitors have used this space for recreation, reflection, and civic engagement.

The Burlington City government first began contemplating a City Hall Park redesign in 2011.⁹ Despite widespread opposition, the City proposes an elaborate and extensive overhaul of public property. The construction bid promises to demolish and reconstruct sidewalks, utilities, and curbs; remove the central fountain; add a splash pad

⁵ Suzanne Mantegna, University of Vermont Historic Research Preservation Program. *Burlington, Vermont: Early 20th Century Postcard Views* (2012) www.uvm.edu/~hp206/2012/mantegna/cityhallparkse.html

⁶ *Id.* at 3-82.

⁷ Letter from Eric Gilbertson to Mayor Bernie Sanders (June 23, 1983), *available at* www.burlingtonvt.gov/sites/default/files/PZ/Historic/National-Register-PDFs/CityHallParkHD.pdf

⁸ National Register of Historic Places Inventory Nomination Form, *City Hall Park Historic District, Burlington Vermont* (1983), *available at* www.burlingtonvt.gov/sites/default/files/PZ/Historic/National-Register-PDFs/CityHallParkHD.pdf.

⁹ Sara Katz, *City Hall Park Artist Request for Qualifications*. Burlington City Arts, <http://www.burlingtoncityarts.org/CityHallPark> (last visited Feb. 15, 2019).

and granite walls; add substantial additional paving; deforest and partially replant the tree population; and overhaul the landscaping and irrigation. The City plans to replace the public's access to nature with access to Ethernet.¹⁰

These structural overhauls will destroy the cherished character of City Hall Park.

At no point was this plan ever submitted for voter approval.

To mollify public outrage and to obscure the fact that City Council has seized control of bond funds earmarked and approved by the voters for other purposes, the City has been encouraging residents to submit comments. Since 2011, about 1,000 citizens have given City planners their opinions on the project through the nonbinding forum of public comment, which planners have total freedom to ignore.¹¹ This is a far cry from the City Charter's requirement that the *voters*, not City Council, must approve bond funding for specific projects.

In an attempt to eschew its obligation to obtain voter consent, City Council plans to tap into bond funding that voters have approved for other purposes. None of these other, properly approved purposes include commercializing City Hall Park in the name of public good.¹²

On June 25, 2018 City Council approved the design plan. The City prepares to spend upwards of an additional \$4 million dollars to perform this extensive overhaul. The project may actually cost significantly more than the original estimate: the City

¹⁰ City of Burlington, *Invitation for Bids, Burlington City Hall Park Improvement Project* (Jan. 10, 2019), www.burlingtonvt.gov/RFP/city-hall-park-improvement-project (last visited Feb. 15, 2019).

¹¹ Katie Jickling, *Will of the People? Advisory Questions Offer High Hopes but Get Few Results*, Seven Days VT. (Jan. 23, 2019).

¹² Appendix A, Sample Ballots: 3/3/15, Question 3; 11/8/16, Questions 1 and 4; 11/6/18, Question 2.

received and opened two bids on February 11, 2019: \$5,170,561 from SD Ireland and \$6,464,375 from Engineering Construction.

A Burlington City official announced on December 27, 2018, that the city would commandeer funding for the City Hall project from three previously approved City bonds that voters had already approved for other purposes. The City Council has shown no qualms about violating Charter provisions preconditioning the City's ability to issue bonds on approved ballot articles *listing the purpose of those bonds*.

On December 27, 2018, the Burlington Free Press reported that "Burlington's share will likely be a combination of tax-increment financing,¹³ stormwater funds, and capital building funds, according to Olivia LaVecchia, spokeswoman for the Mayor's Office.¹⁴" All three of these funding sources are bonds for which the City Council had obtained voter approval by listing the purpose of each bond on the Town Meeting day ballot.

Following an increase in public scrutiny of this project's funding sources, Mayor Weinberger told the Vermont Digger on January 21, 2019 that the funding will come from property taxes (\$1.2 million), the TIF (\$1.2 million), and an institutional bond that UVM and Champlain College use to pay the city for its services to them (\$1 million). As with the funding sources that City officials reported in the previous month's version of their story, voters had already approved spending these funds for purposes that Town Meeting Day ballots explicitly described. Again, none of the approved purposes for these

¹³ Tax increment financing ("TIF") is a bond that the city anticipates to pay off with revenue from upticks in property taxes and new construction projects.

¹⁴ Joel Banner Baird. *City Hall Park Project: Opponents Seek Burlington Ballot Measure*, Burlington Free Press, (Dec. 27 2018).

bonds included anything remotely related to cutting iconic trees, demolishing historic walkways, and otherwise replacing the cherished character of City Hall Park with a corporate plaza.

The language in the TIF from the March 2015 Town Meeting Ballot included a detailed list of five specific purposes of the bond, but mentions nothing about City Hall Park or its proposed reconstruction.

The bond from UVM and Champlain College pays for salaries and infrastructure (such as bus service for students). Nowhere does the City explain how that fund could somehow have a \$1 million surplus, or why students can expect \$1 million in benefits from the park reconstruction that might justify allowing their tuition to foot that bill.

While City Council may have certain discretion over budgetary decisions, the City Charter preconditions bond fund use for any given purpose upon voter approval of that specific purpose. The Council makes no attempt to source its funding for the City Hall Park renovation from the annual appropriation that is “expended for the purpose of providing necessary funds for the care and improvement of city park property,¹⁵” and thus this Court need not ask whether the Defendants could prove that the city park overhaul project is either “necessary” or an “improvement.”

At no point did the City Council ever submit to a vote the question of spending \$4 million of its taxpayers’ resources (plus interest, as most of the funds are from borrowed money) on this controversial project, with which a substantial segment of the public have expressed serious qualms.¹⁶ Should the Council argue that a public majority

¹⁵ 24 App. V.S.A. ch. 3, § 67.

¹⁶ Petitioners collected so many signatures for the petition to place this issue on the ballot that the town Clerk stopped counting after reaching 5% of the registered voters, 1,999 signatures. To put this into

approves this project, the Council should have nothing to lose by letting the voters clarify this assumption on town meeting day.

The City has violated the City Charter by wresting the rightful decision-making authority on whether and how to spend bond funds away from the voters. This maneuver attempts to avoid the necessary public vote on the City Hall Park project, demonstrating the Council's attempt to seize unlimited spending power over the public coffers, including from bonds.

The voters have challenged City Council's wrongful attempt to exclude them from this process by petitioning to submit the park reconstruction project to a vote. Following the proper procedures for inserting an article on the town meeting day ballot, Plaintiffs collected over 3,300¹⁷ petition signatures to insert the following language onto the town meeting ballot:

"Whereas, City Hall Park needs work, but the city's current redevelopment plan removes approximately 40% of the trees and increases paved area to cover about $\frac{1}{3}$ of the park, at an estimated cost of \$4 million; Shall we, the citizens of Burlington, advise the Mayor and City Council to: (A) cancel the current plan for City Hall Park that was approved by the City Council ... and (B) instead, repair, maintain, and improve the Park by preserving more existing trees and shaded areas, repairing grass and existing walkways, increasing lighting and benches, and retaining the historic character of the park?"

The voters were forced to raise this issue through the only avenue left available to them, an "advisory" article on the Town Meeting Ballot. Had the City Council abided

perspective, Burlington's March 2018 voter participation data revealed that 12,064 people voted. The under-counted petition signatures alone amount to over 16% of the typical voter turnout. City of Burlington, *Election Results* (2018) www.burlingtonvt.gov/CT/Elections/Results (accessed Feb. 15, 2019).

¹⁷ As of January 16, 2019, the Burlington City Clerk acknowledged in an email that the petition had more than the 2,000 valid signatures necessary to submit the City Hall renovation to a vote on the Town Meeting Day ballot.

by the City Charter, a Town Meeting Ballot article would have vested the voters with *binding* authority to decide whether to allow bond spending for the City Hall Park project. An advisory opinion still falls short of the power that the City Charter, by its plain terms, vests in Burlington voters. Still, the City Council refuses to even allow voters to *advise*, let alone *decide* this issue.

On January 29, 2019, by a vote of 6-6, the Burlington City Council voted to refuse to put the petitioned question on the ballot. Despite abundant support for this article, the City Council is charging forward with the project without putting the matter before the voters or even allowing the petitioned advisory article onto the ballot.

The City began soliciting bids for the construction contract last month and opened bids on February 11, 2019. According to a statement from Mayor Weinberger, the contractor will receive the notice to proceed and will start cutting the approximately 20 large, mature, healthy, and valuable trees in February. If the project adheres to the City's schedule, irreparable harm will occur before the March 5 Town Meeting vote. The City Council is rushing to begin construction before Town Meeting day in order to solidify their illegal progress and to further encumber voters trying to assert their rightful veto over spending city bonds on this purpose.

Moving forward with permanent changes to the City Hall Park without a vote by the public on whether to use bond funds for the project would allow the Council to flaunt its disregard for the City Charter. Hastily commencing demolition would cement the procedural sidesteps and unauthorized expenditures before the voters could properly approve or deny using bonds for this purpose. The more steps the City takes in

violation of its own Charter, the harder the task becomes to resolve this aberration. Once the trees are cut, this task becomes impossible.

V. STANDING

Plaintiffs have standing as taxpayers in the City of Burlington. In Vermont, “the basis of municipal taxpayer standing is not that any direct loss has been caused to the plaintiff, but that municipal assets have been improperly wasted.¹⁸” Case law on this point is definitive: “resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation.¹⁹” Plaintiffs pay taxes to the City of Burlington. Without judicial or other intervention, the City intends to spend City bond money (with repayment derived from tax revenues) illegally, in violation of the City Charter.

VI. COUNT I: **By pledging City Credit without obtaining voter approval to use bonds for park renovation the Council has violated the Burlington City Charter and by refusing to put a petitioned question within the voter’s authority to decide on the Town Meeting day ballot, the Council has violated the Burlington City Charter.**

In order to pledge city credit or obtain bonds for a certain purpose, the Council must first list that purpose on a duly warned ballot, which two thirds of the city’s voters must then approve. The Board of Park and Recreation Commissioners must similarly obtain voter approval before using municipal bonds to enter contracts to improve or obtain city park property. The Mayor must, without discretion, place a validly petitioned

¹⁸ *Taylor v. Town of Cabot*, 2017 VT 92 ¶ 10 (2017)

¹⁹ *Id.* at ¶ 11 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)).

article on the warning for Town Meeting if the issue is within the voter's authority to decide.

A. Council violated § 63 of the City Charter by attempting to pledge city credit for the City Hall Park project without first asking the voters to approve the credit's purpose.

City Council lacks inherent authority to pledge city credit. The voters of Burlington must decide to confer this power for each purpose the Council wishes to use a bond for. Burlington's City Charter specifies the process:

Whenever the legal voters of said City, by two-thirds vote of all voters present and voting on the question at any special or annual City meeting *duly warned for the purpose ...* shall give authority to the City Council thereof to pledge the credit of said City.²⁰

Before Council may pledge the City's credit, a duly warned ballot question *naming the purpose for using the credit* must pass by at least a two thirds majority.

No ballot question has yet referenced City Hall Park as a purpose. Depending on which of the Mayor's conflicting statements this court decides to evaluate, the funding to demolish and rebuild the City Hall Park will come from: the tax-increment financing bond, the stormwater funds bond, the capitol building funds bond, property taxes, private donations, and the bond from UVM and Champlain College.²¹

The ballot questions that originally created the TIF bond, the stormwater funds bond, and capitol building funds bond made no mention of City Hall Park as a purpose.

²² Item 3 on the March 3, 2015 ballot and item 4 on the November 8, 2016 ballot each

²⁰ 24 App. V.S.A. ch. 3, § 63(a) (emphasis added).

²¹ Joel Banner Baird. *City Hall Park Project: Opponents Seek Burlington Ballot Measure*, Burlington Free Press (Dec. 27 2018).

²² Burlington Sample Ballots: 3/3/15, Question 3; 11/8/16, Questions 1 and 4; 11/6/18, Question 2. See Appendix A.

listed five specific purposes for the downtown TIF district bond and the waterfront TIF district bond, respectively. These thorough lists each described specific locations where work would be done and stated the specific activities at each of those locations that the bond would pay for. The TIF bond purposes do not mention City Hall Park as a location. Nor do they make any mention of City Hall Park at all or otherwise reference activities to take place at City Hall Park in conjunction with the planned redesign.

Item 2 on the November 6, 2018 ballot also listed five purposes for revenue bonds for wastewater and stormwater utility projects. These five purposes fail to mention either City Hall Park or any proposed actions at that location.

The Institutional bond pays for resources and staff to provide UVM and Champlain College for services according to existing contracts, which make no mention of reconstructing City Hall Park.

City Council may not use funding allocated to a properly warned and voter-approved purpose on an unrelated, unapproved project that would otherwise require independent voter approval.²³

The City Charter vests voters with the authority to approve or deny bonds; City Council unlawfully seeks to deprive the voters of their legal right to decide how their officials pledge public resources.

²³ See, e.g., *E.B. & A. C. Whiting Co v. City of Burlington*, 106 Vt. 446, 466 (1934) (holding that Burlington lacked authority to issue bonds to pay for public improvements without receiving approval from two-thirds of the votes cast at town meeting).

B. City Officials have violated § 213 of the City Charter by pledging bond funding to reconstruct City Hall Park without submitting this proposition to the voters.

Burlington's City Council may not issue bonds to acquire or improve parks without following the procedures outlined in the City Charter:

[T]he Mayor of said City shall call a meeting of the qualified voters of the City and submit to them the proposition to issue bonds of the City, the proceeds of the sale of which shall be exclusively applied, under the direction and at the discretion of the Board of Park and Recreation Commissioners, to the acquisition and improvement of land and facilities for public Parks and Recreation Programs, *but the said Board shall make no contract of expenditure thereof involving liability to the City of Burlington exceeding the amounts of the bonds thus issued.*²⁴

The Mayor failed to call a meeting of the city's voters to approve bonds using this mechanism.

The Board of Park and Recreation Commissioners may not enter a contract to spend money on any Burlington park space because any amount of money would exceed "the amount of the bonds thus issued," which is \$0 for City Hall Park.

Siphoning funding from other, unrelated bonds and funding sources subverts the process that the City Charter requires for spending money to purchase or improve parks. The board is prohibited from entering any contracts that involve spending bond money on park improvement without submitting this proposal to a vote.

Skimming money from a myriad of other sources, slated for other projects, cheats voters out of their right to vote on how the City allocates their tax money. If the City can list the purpose of a bond as one activity and then pledge that bond for a completely unrelated purpose, this renders the voter approval procedures a meaningless, worthless

²⁴ 24 App. V.S.A. ch. 3, § 213.

fallacy. Allowing this practice to continue empowers City officials to bait and switch their constituents with impunity, devoid of any accountability to established procedures.

C. By refusing to put a petitioned question containing matters within voters' authority on the ballot, City Officials have violated § 6 of the Vermont City Charter under the criteria established by the Supreme Court in *Skiff v. South Burlington School District*.

Section 6 of the City Charter says “the Mayor shall insert in the warning for the annual City meeting any special article for any legal purpose beyond the jurisdiction of the City Council” for which petitions were filed that were signed by five percent of the legal voters.

In *Skiff v. South Burlington School District*, the Vermont Supreme Court set the standard for when petitioned articles must be submitted to the voters: The Burlington City Council has discretion to omit a petitioned question from the ballot when the question is related to a matter outside the authority of the voters to decide and is advisory for that reason.

The article that Plaintiffs sought to place on the ballot was listed as advisory, but the subject matter of the petitioned question **is within the authority of the electorate under the City Charter** because the city is pledging the credit of the city and using bonds to pay to demolish and rebuild City Hall Park.

In *Skiff*, the court emphasized that the school board (or, in the instant matter, the city council) has discretion to omit a petitioned ballot question if two criteria are met: the question must be nonbinding *and* outside the voters' authority to decide.

"Because the article involved nonbinding, advisory questions outside of the electorate's authority to grant or refuse at town meeting, the District was not required to present the article to voters.²⁵"

"In other words, officials cannot be compelled to include items for a town vote where the result of the vote is not legally binding because it is beyond the authority of the voters to decide at town meeting.²⁶"

"Because the petition sought a vote on an item that was outside of the voters' authority to decide and its result would have no binding effect, the District was not required by statute to include it in a district-wide vote, but could have elected to do so if it wished.²⁷"

The standard in *Skiff* prohibits a school board or City Council from omitting an article from the ballot unless the petitioned item meets two criteria: the item must be (1) advisory **and** (2) beyond the authority of the electorate to decide. Both of these elements must categorize the item in order for the city council to withhold it from the ballot. A school board or City Council may not exclude a merely non-binding, advisory question from the ballot. The issue must also be outside the electorate's authority to decide.

In *Skiff*, neither statute nor city charter provision gave authority to the voters to decide the school mascot.²⁸ The voters petitioned to place an advisory item on the ballot to change the mascot.²⁹ Because the item was both advisory and outside the voters'

²⁵ *Skiff V. South Burlington School District*, 2018 VT 177, ¶ 11 (2018).

²⁶ *Id.* at ¶ 21.

²⁷ *Id.* at ¶ 24.

²⁸ *Id.*

²⁹ *Id.*

authority, the school district had discretion to omit the petitioned question from the ballot.

In the present case, only one of these criteria is present, that the petitioned article is advisory. The City announced that previously approved bonds would be used to demolish and rebuild City Hall Park. The matter of bonds and their purpose are fully within the electorate's authority to decide: A vote of the electorate for the amount of the bond and its purpose is mandatory under the City Charter. Two thirds of the electorate is required for approval. Both the amount and the purpose of the bonds must be on the ballot. Whether to use bonds and the purpose to which bond money would be applied is and remains within the electorate's authority to decide.

Whether petitioners chose to make their resolution binding or non-binding is not by itself dispositive. For the Burlington City Council to have had discretion to omit the City Hall Park question on the ballot the matter must also have been beyond the authority of the voters to decide. Because the city admitted that the project needed money from bonds, the question involves bonds and their purpose, a matter within the authority of the voters to decide. So the Burlington City Council lacks discretion to omit this petitioned question from the ballot.

Even if the previously approved bonds the City wishes to commandeer for had stated an amount of money and a purpose on the ballot for reconstruction of City Hall Park (no ballot for a bond included mention of City Hall Park or of demolishing and rebuilding City Hall Park as a purpose), the City Council would still lack discretion to keep the petitioned question off the ballot because the bonds and their purpose

remained matters within the authority of the electorate to decide. The electorate would retain authority to reconsider or cancel what it had previously approved.

Unlike the advisory vote at issue in *Skiff*, petitioners seek the opportunity to vote to cancel the purpose the city assigned to the approved bonds, a matter within their authority to decide. Because the voters, not the city council, have statutory authority to accept or cancel a specified purpose for which the credit of the city is pledged, the City Council lacks authority to omit the petitioned City Hall Park question from the ballot.

VII. COUNT II: Burlington city officials violated 42 U.S.C. § 1983 by depriving voters in Burlington of their statutory and constitutional right to vote on issues prescribed by statute.

A government official who deprives a constituent of “any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”³⁰

“Once a plaintiff demonstrates that a statute confers an individual right, that right is presumptively enforceable by Section 1983,” which requires courts to ask “whether or not a statute [or Constitution] confers rights on a particular class of persons.”³¹

Here, the US Constitution and provisions in the City Charter confer upon eligible voters the fundamental right to vote on how the City will pledge its credit and spend its bonds. The City officials, as state actors, deprive Plaintiff and other voters of this

³⁰ 42 U.S.C. § 1983.

³¹ *Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002).

fundamental right by circumventing the required voter approval through the use of unauthorized funding.

The United States Constitution “undeniably” protects “the right of all qualified citizens to vote,” including “in local elections and referendums.”³² The “right to vote is ... a fundamental political right, at the heart of our democracy.”³³

The Due Process clause in the 14th Amendment guarantees this right.³⁴ To constitute a due process violation, the government actor must intentionally deprive the plaintiffs of their right to vote.³⁵ The Second Circuit found that while an unintentional voting machine malfunction does not support a Due Process or § 1983 claim, a Constitutional violation would include “willful conduct that undermines the organic [voting] processes.”³⁶

“Controlling precedent in this Circuit requires that in order to find a violation of § 1983 there must be evidence of an intentional deprivation of the right to vote.”³⁷

Unlike in *Shannon v. Jacobowitz* and *Gold v. Feinberg*, supra, where voting machines arrived late and an agent of the City accidentally miscounted ballots, here Burlington government officials have actively sought to preclude voters from deciding an issue that the City Charter authorizes those voters to make.

The right to vote protects the right to place certain articles on a Town Meeting day ballot.³⁸ Officials violate this right by refusing to place an article on the town

³² *Griffing v. Burns*, 570 F.2d 1065, 1074-75 (1st Cir. 1978).

³³ *Shannon v. Jacobowitz*, 394 F.3d 90, 93 (2d Cir. 2005).

³⁴ *Id.* at 94.

³⁵ *Id.* at 97.

³⁶ *Id.* at 96.

³⁷ *Gold v. Feinberg*, 101 F.3d 796, 798 (2d Cir. 1996).

³⁸ *Mooney v. Town of Stowe*, 2008 VT 19 (2008).

meeting ballot when voters have an established constitutional or legislatively sanctioned right to vote on that topic.³⁹ In *Mooney v. Stowe*, supra, the plaintiffs alleged a constitutional violation after their selectboard refused to conduct a line-by-line budget vote.⁴⁰ The Vermont Supreme Court found that the selectboard could refuse the plaintiffs without violating their fundamental right to vote because neither the Constitution nor any statute or other legislation guaranteed Stowe voters the right to a line-by-line budget approval.

Unlike the *Mooney* plaintiffs, Burlington voters *do* have an explicit statutory right in their charter to vote on bonds used for park improvement as well as to approve or veto the purpose of any pledges of city credit.

The Mayor and the City Council, with the help of other city officials, have revised their funding proposals for this project in an attempt to keep this issue out of the rightful control of the voters. Within a three-month period, the City website, the Mayor, and other official representatives have presented three conflicting versions of the list of funding sources for this project.

These contortionist's tactics are a deliberate attempt to deprive Plaintiff and all voters in the City of Burlington of their fundamental right to vote.

The members of the City Council, acting in their official capacity, have intentionally deprived Plaintiffs of their fundamental right to vote by purporting to use bond funding for City Hall reconstruction without submitting this purpose to the voters, according to § 213 or § 63 of the City Charter.

³⁹ *Id.* at 602.

⁴⁰ *Id.*

Mayor Weinberger intentionally deprived Plaintiffs of their fundamental right to vote by refusing to put a validly petitioned article on the ballot, as the Vermont Supreme Court has found § 6 of the City Charter to require when the matter is within the voters' authority to decide.

When a state action infringes upon any fundamental right, such as the right to vote, the government must first meet the exceedingly high bar of “strict scrutiny.”⁴¹ Strict scrutiny puts the burden on the government to prove that its action is necessary to achieve a compelling public interest.⁴²

As discussed above, the right to vote is fundamental. The City and its officials have infringed upon this right by depriving voters of their right to vote on an issue that the City Charter specifically places within the voters' ultimate control. The City has not proved that using misappropriated funding to demolish a cherished historic landscape somehow furthers a compelling government interest nor that such nonexistent interest gives the City no alternative but to deprive its voters of their right to approve municipal bond spending.

VIII. RELIEF REQUESTED

The accelerated construction timetable, if allowed to continue, would limit Plaintiffs' available relief to monetary damages. Because the litigation concerns

⁴¹ *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (Holding that when “the right of qualified voters ... to cast their votes effectively ... [is] at stake, a State must establish that its classification is necessary to serve a compelling interest.”).

⁴² *Id.*

permanent alterations of real property, monetary damages are inadequate and equitable relief must be sought to preserve the status quo before irreparable harm is done.

Preliminary and permanent injunctions are appropriate where monetary damages would not suffice.⁴³ Misusing municipal funds and denying Plaintiffs the right to vote on an issue clearly within their own authority is surely a “deprivation of liberty or constitutional freedom that cannot be undone through the payment of money.”⁴⁴ Injunctive relief is necessary because no amount of monetary damages could replace a transparent, responsive government that adheres to its own governing Charter.

A preliminary injunction is available where the harm would be immediate and irreparable. Four factors bear on this determination: (1) the significance of the threat of irreparable harm to the plaintiff if the injunction is not granted, (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant, (3) the probability that the plaintiff will succeed on the merits, and (4) the public interest.⁴⁵

Without this injunctive relief, the City could selected a contractor from among the two bids it has already received, contracts could be signed, costly supplies could be ordered, trees could be cut, and demolition of City Hall Park could begin, all as soon as this week. This would cause Plaintiffs to suffer two types of significant irreparable harm. First, Plaintiffs’ would be denied their chance to participate in the requisite public vote on using bond funds as required by the City Charter and to vote on their petitioned ballot question requesting cancellation of the project. Second, a sacred space will forever

⁴³ *Taylor v. Town of Cabot*, 2017 VT 92 ¶ 40 (2017).

⁴⁴ *Id.* at ¶ 41.

⁴⁵ *Malletts Bay Homeowners’ Ass’n v. Mongeon Bay Props., LLC*, 2005 BL 119743 (Vt. Super June 3, 2005).

be destroyed: 21 valuable mature healthy trees will be cut, all the park's walkways demolished, the historic fountain displaced, and substantially more of the greenery paved over. If the City enters a contract with a bidder who begins demolishing the park, Plaintiffs will suffer the significant harm of not only witnessing the destruction of this revered space but also witnessing their own governing officials blatantly deprive them of their statutory right to participate in their local government, as the City Charter guarantees.

The defendants would suffer no harm from having to delay picking a winner in the bidding process and starting demolition; government officials have no right to break the laws that prescribe their duties. Ordering Burlington and its officials to follow their own rules is in no way an "injury." Even if this court should find that Plaintiff's claims lack merit, City Council itself has admitted that waiting to begin the project will not have much negative impacts: during the January 28, 2019 meeting, no Burlington City Council member disputed the fact put forward by Council member Ali Dieng that the park redesign could be delayed for as much as a year without harm.

Plaintiffs' case is sound, evidence is ample, and both case law and statute unequivocally vest control over this decision with the voters.

The public interest lies in a transparent, accountable government that adheres to its own rules. The City Charter establishes limits and procedures in recognition of the fact that the government is a tool to promote the public good, empowered by the consent of the governed and by the rules its founders set forth in its governing documents.

The proverbial axes are poised. The City has already received two bids. The further that the City is allowed to proceed, the more damage the City does to the voters by spending more bonds without the requisite approval. Once demolition or construction begins, the damage becomes truly irreparable. The City hastens to get this project underway. In response, Plaintiffs must seek a swift remedy.

These facts set a plain case for injunctive relief. Plaintiffs respectfully request that this Court impose a moratorium on all proceedings relating to the reconstruction of the City Hall Park, including but not limited to soliciting or accepting bids, forming and executing contracts, dispensing city funds, and otherwise demolishing or altering the City Hall Park landscape.

The facts make an equally compelling case for this Court to grant a mandamus.

A mandamus is a “command from a court requiring an official to perform a specific act.”⁴⁶ This remedy is appropriate when “the right sought to be enforced is certain and clear.”⁴⁷ Plaintiffs here have met their burden to “demonstrate that [they] have a clear, legal right to the [official’s] performance of the particular duty ... and that the law affords no other adequate remedy.”⁴⁸

Voters may use mandamus to compel their governing bodies to place a question on a ballot so long as the voters have the authority to decide that issue.⁴⁹ Governing

⁴⁶ *Skiff v. South Burlington School District*, 2018 VT 17 ¶ 10 (Vt. 2018) (citing *Wool v. Menard*, 2018 VT 23, ¶ 11 (Vt. 2018)).

⁴⁷ *Id.*, (quoting *Royalton Taxpayers’ Protective Ass’n v. Wassmansdorf*, 128 Vt. 153, 159 (1969))

⁴⁸ *Id.* (quoting *Royalton Taxpayers’ Protective Ass’n* at 159.).

⁴⁹ *Id.* ¶ 16, (citing *Whiteman v. Brown*, 128 Vt. 384 (1970) (denying voters’ request for mandamus because “the authority to employ auditors was a matter within the district’s rather than the voters’ control.”)).

bodies may only refuse to place validly petitioned articles on the ballot if those articles are *both* nonbinding *and* outside the voters' authority.

The name and likeness of the school mascot at issue in *Skiff* are outside the voters' authority to decide; no statute or other legislative provision vested the *Skiff* petitioners with a right to vote on the matter contained in their petitioned article. However, the purpose for which City bond funding is spent is a matter fully within the electorate's authority to decide. Sections 213 and 63 in the City Charter specifically grant voters this right.

Therefore, the underlying decision behind Plaintiffs advisory article is one that the City Council should itself have submitted to the voters on the ballot. The subject matter of this article, pledging City credit for a specific purpose, **is within voter discretion**. The voters have a clear legal right for their officials to allow them to vote on and ultimately decide this issue.

Petitioners here seek the opportunity to vote on an issue that the City Charter specifically assigns to them to decide. The voters, not the city council, have statutory authority to decide by a two thirds vote whether to pledge the city's credit for a specific purpose. The mandamus should force the City Council to put the petitioned ballot item on the ballot for a vote at the next town meeting.

The mandamus should also force City Council to submit to the voters its own request to use Bonds for the purpose of reconstructing City Park as required by the City Charter, with a two thirds vote of the electorate (be they TIF, stormwater, Institution, or

whichever the latest financial arrangement is that the Mayor announces at the next press conference).

The voters have a clear right to be heard on the decision of whether city bonds should be used for a certain purpose and to vote to cancel a decision regarding use of their previously approved bonds. As explained above, monetary damages would be an insufficient remedy because the harm would be permanent damage to a cherished piece of public real estate. Accordingly, the City Council must place questions on a ballot item for each bond they hope to use, listing the City Hall Park reconstruction as a purpose, and the City Council must place the petitioned question on the ballot.

A mandamus is an appropriate and necessary remedy to prevent the City Council from running afoul of their legal obligations.

WHEREFORE, the Plaintiffs respectfully request the following relief from this Honorable Court:

- A. Plaintiffs seek a preliminary injunction on the City of Burlington and its officials, to prevent irreversible change to the park while the Court reviews these proceedings.*
- B. Plaintiffs ask this Court for a permanent injunction, to preclude the City of Burlington and its officials from pledging City credit for the purpose of reconstructing City Hall Park, without having properly submitted that purpose to the voters for approval.*
- C. Plaintiffs seek a mandamus to compel the City Council to place the properly petitioned advisory article on the ballot, and to properly list the purpose of reconstructing City Hall Park on a duly warned ballot item to attempt to secure bonds to use for this project.*
- D. Plaintiffs seek entry of appropriate declaratory judgement that any contract the City or an agent thereof enters with any party concerning*

the implementation of the City Hall reconstruction project be declared illegal and void.

E. Plaintiffs seek Attorney's Fees and Costs as provided in 42 U.S.C. 1988.

Respectfully submitted for:

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Dated this ___ Day of February, 2019 in Burlington Vermont.

APPENDIX A

Burlington Sample Ballots:

March 3, 2015 (Question 3)

November 8, 2016 (Questions 1 and 4)

November 6, 2018 (Question 2)