

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
C.A. NO. 12-2821-G

TWENTY-FOUR TAXPAYERS AND OTHERS,

Plaintiffs,

v.

MARILYN M. PETITTO DEVANEY, AND
OTHERS IN THEIR OFFICIAL CAPACITY, and
HIS EXCELLENCY, DEVAL L. PATRICK, as he
is Governor of Massachusetts,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Twenty-four taxpayers filed this action against members¹ of the Governor's Council² and the Governor, challenging certain events preceding the Council's vote to confirm the Governor's nomination of Kenneth W. Salinger as an Associate Justice of the Superior Court. The only substantive relief the complaint sought was (1) a declaration that the Council's July 18, 2012 hearing regarding the nomination was "constitutionally infirm," and (2) an injunction against the Council taking its July 25, 2012 confirmation vote on the nomination. The complaint should now be dismissed under Mass. R. Civ. P. 12(b)(1) and 12(b)(6), for four reasons. First, the Declaratory Judgment Act does not apply to the Governor or Council, and so the Court is without jurisdiction to issue the requested declaration. Second, the Council's July 25, 2012 vote

¹ The complaint names all members except Councillor Christopher A. Iannella.

² The Council's formal name is the Executive Council. E.g., Pineo v. Executive Council, 412 Mass. 31, 35 (1992) (holding that Constitution precluded applying Open Meeting Law to Council in connection with its meetings to consider and confirm judicial nominees).

has now taken place, resulting in confirmation of the nominee, and so the request for an injunction is moot. Third, the 24-taxpayer statute, G.L. c. 29, § 63, does not apply here, because plaintiffs do not challenge any expenditure of state funds, meaning that plaintiffs lack standing and thus the Court lacks jurisdiction over the entire action. Fourth, plaintiffs' claims that the Governor and Council followed invalid procedures are not based on any specific provision of the Constitution or statute, and thus plaintiffs fail to state a claim on which relief can be granted.

FACTUAL BACKGROUND

The material allegations of the complaint, which solely for purposes of this motion must be assumed to be true, are as follows. By letter dated June 13, 2012, the Governor nominated Kenneth W. Salinger to the position of Associate Justice of the Superior Court.³ Complaint ¶ 3 & Ex. A. The Council scheduled a hearing on the nomination for July 18, and notice of the hearing was posted 48 hours in advance. Id. ¶ 14. Councillor Marilyn M. Petitto Devaney presided over the hearing, and four other Councillors were present for all or parts of the hearing. Id. ¶ 3. Councillor Devaney had met with the nominee before the hearing.⁴ Id. The Councillors

³ Salinger was at the time an Assistant Attorney General for the Commonwealth. As in past cases, the Attorney General appears in this litigation not to further the nomination or appointment of any particular nominee, but instead to defend the state officials responsible for the nomination and appointment process. E.g., Lambert v. Executive Director of the Judicial Nominating Council, 425 Mass. 406 (1997) (holding that public records law did not require disclosure of judicial nominees' applications to JNC); Pineo, 412 Mass. at 35 (Constitution precluded applying Open Meeting Law to Governor's Council's confirmation meetings). The Attorney General does so pursuant to her overall responsibility to represent state officials in litigation and thereby set a uniform, consistent legal policy for the Commonwealth. G.L. c. 12, § 3; see Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth, 425 Mass. 534, 538 n.7 (1997); Feeney v. Commonwealth, 373 Mass. 359, 366 (1977); Secretary of Administration and Finance v. Attorney General, 367 Mass. 154, 163 (1975).

⁴ The complaint repeatedly and gratuitously refers to and mischaracterizes Councillor Devaney
(footnote continued)

present at the hearing heard statements by persons supporting and opposing the nomination and a statement by the nominee, and asked questions of witnesses and the nominee. *Id.* The number of Councillors present varied during parts of the meeting, and the Governor and Lieutenant Governor were not present.⁵ *Id.* ¶¶ 3, 4. The complaint alleges that the Council intended to vote on the nomination on July 25, 2012. *Id.* ¶ 4. Indeed, as is its custom, the Council voted on the nomination at its next formal assembly, which was held on July 25. This Court may take judicial notice that the Council confirmed the nomination by a 4-2 vote. *See, e.g.*, “Salinger Confirmed to Superior Court,” *Massachusetts Lawyers’ Weekly*, July 30, 2012, at p. 2.

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs’ Request for Declaratory Relief Against the Council.

Under the express terms of G.L. c. 231A, the Court lacks jurisdiction over plaintiffs’ request that the Court declare the Council’s July 18, 2012 proceedings “constitutionally infirm.” Section 1 of the Declaratory Judgment Act, G.L. c. 231A, § 1, grants the Superior Court and other courts, “within their respective jurisdictions,” the authority to issue declaratory judgments.⁶

(footnote continued)

and her actions in a disrespectful manner. Except to note that the complaint’s claims of improper action are wholly without legal merit, and are inconsistent with the factual record, this memorandum will not dignify those references and characterizations by any further response.

⁵ The complaint alleges that the Council lacked a “quorum,” *id.* ¶ 3, but this is a legal conclusion, not an allegation of fact. As nothing in the Constitution even requires the Council to hold a hearing on a judicial nomination, *see infra*, and the complaint does not allege that the Council took any formal action on the nomination at the hearing, no quorum requirement applied to the July 18 hearing.

⁶ This has been viewed as a grant of jurisdiction. *E.g., Ten Persons of the Commonwealth v. Fellsway Development LLC*, 460 Mass. 366, 380 (2011) (plaintiffs lacked standing and

(footnote continued)

Section 2 of the Act extends this authority to cases involving certain state officials, “provided, however, that this section shall not apply to the governor and council or the legislative and judicial departments.” G.L. c. 231A, § 2 (emphasis added). Thus, “[d]eclaratory relief is not available against the Governor,” Town of Milton v. Commonwealth, 416 Mass. 471, 475 (1993); nor is such relief available against the Council. Plaintiffs’ request for declaratory relief is beyond this Court’s jurisdiction.

II. Because the Council has Already Voted to Confirm the Nominee, Plaintiffs’ Request to Enjoin the Vote is Moot.

The Council voted on July 25, 2012, to confirm the nominee, thus rendering moot plaintiffs’ request to enjoin the vote based on alleged constitutional infirmities. The claim for injunctive relief should therefore be dismissed. See, e.g., Lockhart v. Attorney General, 390 Mass. 780 (1984) (where case was moot, constitutional questions should not and would not be decided, and case would be dismissed).

III. Plaintiffs Lack Standing Under the 24-Taxpayer Statute, Because They Fail to Challenge Any Expenditure of State Funds.

Plaintiffs lack standing under the 24-taxpayer statute--their sole claimed basis for standing--because they do not challenge any particular expenditure of state funds. The 24-taxpayer statute, G.L. c. 29, § 63, provides in pertinent part that if a state official “is about to expend money or incur obligations purporting to bind the commonwealth for any purpose or

(footnote continued)

therefore could not “invoke the court's general equity jurisdiction under c. 231A”); Villages Development Co. v. Secretary of Executive Office of Environmental Affairs, 410 Mass. 100, 105-106 (1991) (“the Superior Court had subject matter jurisdiction under G.L. c. 231A, to decide all issues raised by Villages' complaint”).

object or in any manner other than that for and in which such . . . officer . . . has the legal and constitutional right and power to expend money or incur obligations,” the Superior Court may, upon the petition of 24 taxpayers, enjoin the expenditure and determine its legality.⁷

Here, plaintiffs’ complaint does not allege that any state funds will be expended, let alone expended unlawfully. Moreover, the statute (with emphasis added) only allows challenges where a state official “is about to expend money or incur obligations[.]” Here, however, any expenditures or obligations in connection with the Governor’s nomination and the Council’s confirmation have presumably already been made or incurred, rendering the statute inapplicable.

Finally, and most fundamentally, the mere fact that official actions may cost money to implement does not allow the use of the 24-taxpayer statute to challenge the legality of those actions themselves. Tax Equity Alliance for Massachusetts v. Commissioner of Revenue, 423 Mass. 708, 712-713 (1996) (holding that, even though Commissioner of Revenue would have to expend state funds to implement new statute governing taxation of capital gains, 24 taxpayers could not use G.L. c. 29, § 63, to challenge constitutionality of new statute itself, where it did not directly authorize any expenditures). Were it otherwise, G.L. c. 29, § 63, could be used to

⁷ The statute provides in full as follows:

If a department, commission, board, officer, employee or agent of the commonwealth is about to expend money or incur obligations purporting to bind the commonwealth for any purpose or object or in any manner other than that for and in which such department, commission, board, officer, employee or agent has the legal and constitutional right and power to expend money or incur obligations, the supreme judicial or superior court may, upon the petition of not less than twenty-four taxable inhabitants of the commonwealth, not more than six of whom shall be from any one county, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such right and power.

challenge virtually every action by any state official or employee, because every such action indirectly involves the expenditure of some state funds, if only for personnel costs or supplies. The statute is simply not that broad. See Tax Equity Alliance, 423 Mass. at 713-14 (rejecting expansive reading of 24-taxpayer statute, especially when compared to 10-taxpayer statute applicable at municipal level).

Standing is “an issue of subject matter jurisdiction” and is “of critical significance.” Ginther v. Comm’r of Ins., 427 Mass. 319, 322 (1998). “[O]nly persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of government.” Id. (citations and internal quotations omitted). Because plaintiffs here cannot demonstrate standing under the 24-taxpayer statute or on any other basis, the entire complaint should be dismissed for lack of subject matter jurisdiction.

IV. Because Neither the Constitution Nor Any Statute Governs the Council’s Internal Procedures, Plaintiffs’ Challenges to the Council’s Actions Are Substantively Meritless.

There is no merit to plaintiffs’ claims that the Council could not lawfully consider or discuss a judicial nomination (1) without the Governor or Lieutenant Governor being physically present; (2) without a quorum; (3) in a hearing presided over by a Councillor; (4) where a Councillor had met with the nominee beforehand. “Nowhere does the Constitution . . . establish the procedure for conducting [Council] meetings. Neither does it grant any power to the Legislature so to prescribe.” Pineo v. Executive Council, 412 Mass. at 36. “[T]he powers of the Governor and Council bestowed by the Constitution include the power to determine the Council’s own rules of procedure and other internal matters.” Id. at 37.

Plaintiffs do not and cannot point to any specific provision of the Constitution that imposes any of the requirements plaintiffs claim were violated in connection with the July 18 Council hearing. Indeed, although it has long been the Council's practice to hold a public hearing prior to the formal assembly at which the Council votes on a judicial nomination, nothing in the Constitution requires that the Council do so.⁸ Nor could plaintiffs challenge the validity of the Council's action, at its July 25 formal assembly, of confirming the nominee by a 4-2 vote.

Just as Mass. Const. art. 30's separation of powers requirements bar the Legislature from requiring that the Governor and Council's proceedings comply with the Open Meeting Law, Pineo, 412 Mass. at 37, so does art. 30 bar the judiciary from instructing the Governor and Council how to order their internal affairs. "[T]he Governor and the Council form the executive branch of government[.]" Pineo, *id.* "In accordance with the separation of powers principles expressed in art. 30 . . . [the courts] 'should not infer specific constitutional procedures that the executive and legislative branches of government must follow[.]'" Wylar v. Secretary of the Commonwealth, 441 Mass. 22, 26 (2004) (quoting Backman v. Secretary of the Commonwealth, 387 Mass. 549, 555 (1982)). Given art. 30, "[t]he courts should be most hesitant in instructing" a co-equal branch of government "when and how to perform its constitutional duties." LIMITS v.

⁸ The Constitution says only, "All judicial officers . . . shall be nominated and appointed by the Governor, by and with the advice and consent of the Council; and every such nomination shall be made by the Governor, and made at least seven days prior to such appointment." Mass. Const. pt. 2, c. 2, art. 9. As for formal Council assemblies, "The Governor shall have authority from time to time, at his discretion, to assemble and call together the Councillors of this commonwealth for the time being; and the Governor with the said Councillors, or five of them at least, shall, and may, from time to time, hold and keep a Council, for the ordering and directing the affairs of the Commonwealth, agreeably to the Constitution and the laws of the land." *Id.* art. 4.

President of the Senate, 414 Mass. 31, 35 (1992).⁹

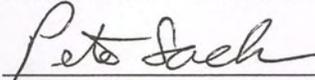
Because no specific constitutional requirement has been violated, and because the judiciary is not free to fashion procedural requirements for the Governor and Council that do not appear in the Constitution itself, plaintiffs' claims of procedural irregularity are meritless and should be dismissed.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed with prejudice pursuant to Mass. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, or pursuant to Mass. R. Civ. P. 12(b)(6), for failure to state any claim on which relief can be granted.

Respectfully submitted,

MARTHA COAKLEY
ATTORNEY GENERAL

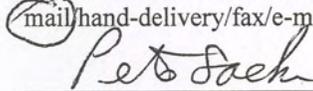


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August 14, 2012

CERTIFICATE OF SERVICE

I certify that I have today served a true copy of this document on all parties by:
mail/hand-delivery/fax/e-mail.

 8/14/12
Peter Sacks Date

⁹ For these reasons, plaintiffs' allegations regarding the administration of an oath to the nominee and witnesses at the Council's July 18 hearing, Complaint ¶ 12, fail to state a claim appropriate for judicial resolution.