

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CHRIS BEUTLER,)
IN HIS CAPACITY AS MAYOR OF)
THE CITY OF LINCOLN,)
NEBRASKA,)

Case No. CI 16-3328

Applicant,)

v.)

ORDER

ROY CHRISTENSEN, JON CAMP,)
CARL ESKRIDGE, TRENT FELLERS,)
LEIRION GAYLOR BAIRD, CYNTHIA)
LAMM, and JANE RAYBOULD, THE)
CITY COUNCIL OF THE CITY OF)
LINCOLN, NEBRASKA, IN THEIR)
OFFICIAL CAPACITIES,)

Respondents.)

THIS MATTER came before the court on September 28, 2016, for a hearing on the Application for Writ of Mandamus (Application for Writ) filed on September 20, 2016, by Chris Beutler (the Mayor) in his official capacity as the Mayor of Lincoln, Nebraska. Rodney Confer and Jeanelle Lust appeared for the Mayor. David Bargaen and Sheila Bentzen appeared for Respondents, who are sued in their official capacities as members of the Lincoln City Council (the Council). The parties adduced evidence, advanced arguments, and submitted briefs. The court now enters its findings and order.

LANCASTER COUNTY
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DISTRICT COURT



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BACKGROUND AND FACTS

The Mayor seeks a “writ of mandamus commanding the Council to approve a tax levy for the 2016-2017 fiscal year for the City of Lincoln in the amount of \$0.33366.”¹ The Council filed an Answer in Response (Answer)² to the Application for Writ by making certain claims more fully discussed below.

The parties agree on the facts of this case as well as the corresponding timeline of events.³ Summarized, the facts are: on July 11, 2016, the Mayor submitted a proposed biennial budget to the Council. The Mayor’s proposed budget included a tax request of \$62,964,397. On August 22, 2016, the Council introduced a revised budget which included a tax request of \$60,752,736. The Council passed a resolution to adopt the revised budget by a vote of four to three. On August 23, 2016, the Mayor (purportedly) vetoed that resolution. On August 29, 2016, the Council failed to obtain the five votes required to override the Mayor’s veto. On September 19, 2016, the Council passed a resolution which set the tax levy for the 2016-2017 fiscal year in an amount which balanced the Council’s revised budget rather than the Mayor’s proposed budget. On September 27, 2016, the Mayor (purportedly) vetoed the tax levy. As of the date of this order, the court is unaware of whether the Council has voted to override the Mayor’s veto.

As a result of the stipulations, the court need not independently determine the facts and is left to consider the meaning and intentions of the controlling legislation which includes the Charter and applicable statutes and ordinances. In particular, the parties agree the Lincoln City

¹ Application for Writ at 8.

² Filed Sept. 23, 2016.

³ Stipulation (Ex. 1).

Charter (the Charter) and certain Lincoln Municipal Code ordinances set out below control the outcome here.

SELECT LEGAL AUTHORITIES

Lincoln City Charter:

1. Art. IV § 8 – Council Powers and Duties.

All legislative powers of the city shall be exclusively vested in the council and shall be exercised by it in the manner and subject to the limitations set forth in this charter. The council shall have the power to pass, amend, and repeal any and all ordinances and other enactments necessary or proper to execute or carry into effect any of the provisions of this charter or any of the powers herein granted, except as otherwise provided in this charter

In addition to exercising its general legislative, investigatory, and audit powers, the council shall make or confirm appointments as provided by the charter, adopt a budget, set the tax levy, equalize taxes and assessments, and take such other actions as it deems necessary and as are consistent with this charter.

2. Art. IV § 13 – Legislative Power and Veto of Mayor.

The mayor shall have the power to veto legislation in the manner, and subject to the limitations hereinafter provided. Within forty-eight hours after the adjournment of any council meeting, the city clerk shall present to the mayor all ordinances and resolutions adopted at the meeting. The mayor, within seven days after the receipt of an ordinance or resolution, shall return it to the city clerk with his approval, or with his veto. If he approves an ordinance or resolution, he shall sign it. If he vetoes an ordinance or resolution, the mayor shall attach a written statement explaining the reason for his veto. Ordinances or resolutions vetoed by the mayor shall be considered by the council at its next regular meeting, and at that meeting the council may pass an ordinance or resolution over the mayor's veto by an affirmative vote of five of its members. The effective date of an ordinance passed over the mayor's veto shall not be less than fifteen days after the date of final passage, which shall be considered to be the date on which the council originally passed the ordinance or resolution and it shall then become law notwithstanding the objections of the mayor. The mayor shall not have the power to veto emergency ordinances or any enactments relating to emergency appropriations or emergency borrowing.

3. Art. IX § 26a – Biennial Budget.

The City may by ordinance establish a process for the adoption of a balanced biennial budget for biennial periods, which biennial periods shall consist of two fiscal and budget years commencing in odd-numbered years or even-numbered years, notwithstanding any existing provisions of this charter referencing an annual budget. The biennial period shall begin on the first day of September and shall end on the last day of August unless the council by ordinance establishes a different biennial period. Each biennial budget shall be balanced

The mayor shall have the power and shall be required to submit to the council for its consideration a recommended biennial operating and capital improvement program budget. The mayor shall submit the recommended biennial budget no later than forty days prior to the beginning of the biennial period. Amendments provided by the mayor to the recommended biennial budget no later than forty days prior to the beginning of the biennial period shall be considered part of the mayor's recommended budget as if they were part of the original submission to the city council. The council shall have full power at any time prior to the adoption of the biennial budget to revise revenue estimates and to increase or decrease appropriations of departments or divisions or capital improvement program projects. No later than five days prior to the beginning of the biennial period the council shall, by a vote of four of its members, adopt the biennial budget by resolution and thereafter authorize appropriations for the ensuing biennial period. Any legislation pertaining to the biennial budget shall be subject to the power provided in Article IV, Section 13 of this charter. Should the council fail to adopt the biennial budget on or before the prescribed adoption date, the biennial budget proposed and submitted by the mayor shall be deemed to have been adopted by the council and shall become the basis for expenditure during the ensuing biennial budget period and for the property tax rates for the ensuing biennial period.

Lincoln Municipal Code 3.06 – Biennial Budget

4. § 3.06.010 – Biennial Budget.

The budget of the city government shall be for a biennial period. The biennial period shall consist of two fiscal and budget years commencing in even numbered years. Each fiscal year shall begin on the first day of September and end on the last day of August of the following year.

5. § 3.06.040 – Biennial Budget, Adoption.

The council shall have full power at any time prior to the adoption of the biennial budget to revise revenue estimates and to increase or decrease appropriations of departments or divisions or capital improvement program projects.

Not later than five days prior to the beginning of the biennial period, the council shall by a vote of at least four of its members adopt a biennial budget by resolution and thereby authorize appropriations for the ensuing biennial budget period. Should the council fail to adopt a biennial budget on or before the prescribed biennial budget adoption date, the biennial budget proposed by the mayor shall be deemed to have been adopted by the council and shall become the basis for expenditure during the ensuing biennial budget period and for the property tax rates for the ensuing biennial period.

Not more than ninety percent of the total levy for any fiscal year in the biennial budget shall be included in the budget revenue estimates for each fiscal year, but each fiscal year in the biennial budget shall be balanced in that total estimated revenues, including applicable borrowing proceeds, shall be equal in amount to total appropriations.

Any legislation pertaining to the biennial budget shall be subject to the power provided in Article IV, Section 13 of the Charter.

STANDARD OF REVIEW

In addition to an agreement as to the facts and timeline of events, the parties have stipulated to the applicable legal standard of review for a mandamus action.⁴ Summarizing that standard, the party seeking mandamus has the burden of proof and must clearly and conclusively show that such party is entitled to the particular thing requested and that the respondent is legally obligated to act.⁵ The duty must be so clear as to be free of doubt.⁶

In addition, the parties agreed at the hearing and in their briefs that there is no ambiguity, nor is there any conflict, in the controlling legislation. This means the controlling legislation is to be interpreted and understood in its most natural and obvious meaning and that the court is not to supply unwise omissions or add words which substantially add to or take from the construction.⁷ The court's obligation here is to construe the Charter to effectuate the object of

⁴ (Ex. 1 at 4-5).

⁵ *State ex rel. Parks v. Council of Omaha*, 277 Neb. 919, 922, 766 N.W.2d 134, 138 (2009).

⁶ *State ex rel. Herman v City of Grand Island*, 145 Neb. 150, 15 N.W.2d 341 (1944).

⁷ *Elmen v. State Bd. of Equalization and Assessment*, 120 Neb. 141, 149, 231 N.W. 772, 776 (1930).

the legislative intent rather than place a meaning upon the Charter which would defeat such intent.⁸ The key legislative provisions are to be construed *in pari materia*, which means that all laws relating to the same subject must be construed together.⁹

DISCUSSION

A. Preliminary Matters

1. Standing

The first issue for the court's determination is whether the Mayor has standing.¹⁰ Standing relates to a court's jurisdiction to address the issues presented.¹¹ Standing requires that a litigant have a personal stake in the outcome of a controversy to invoke a court's jurisdiction and justify the exercise of the court's powers.¹² The Council argues the Mayor lacks standing because the Council's duties are performed for the benefit of the taxpayers and not the Mayor, therefore the Mayor lacks a personal stake in the outcome.

In *Cooperrider v. State*¹³, county board members in their official capacities applied for a writ of mandamus to compel other members of the same board to convene and divide the county into districts. The court found the board members had standing to sue.¹⁴ "No citizen can more appropriately bring the action than a member of the board, *upon whom the duty is imposed*, and whose efforts to perform it are thwarted by the recalcitrant majority of the board."¹⁵ The same

⁸ *State v. Coffman*, 213 Neb. 560, 562, 330 N.W.2d 727, 728 (1983).

⁹ *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Ass'n*, 267 Neb. 158, 168-69, 673 N.W.2d 15, 24 (2004).

¹⁰ *Hauxwell v. Henning*, 291 Neb. 1, 5-6, 863 N.W.2d 798, 802 (2015).

¹¹ *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

¹² *Id.*

¹³ *Cooperrider v. State*, 46 Neb. 84, 64 N.W. 372 (1895).

¹⁴ *Id.* at 87, 64 N.W. at 373.

¹⁵ *Id.* (emphasis added).

analysis applies in this case. The Mayor is the most appropriate party to bring this action.¹⁶

The Mayor has both the power and the duty to enforce the Charter, city ordinances, and all applicable laws.¹⁷ The Application for Writ alleges the Council has acted contrary to its obligations under the Charter by thwarting the city budget process. The Mayor has standing because he has the public duty to address the Council's conduct and enforce the budget process dictated by the Charter. The Application for Writ alleges a justiciable injury particular to the office of the Mayor that, if proven, would entitle the Mayor to relief.¹⁸ The Mayor has standing in this action.

2. Motion to Strike

Another preliminary consideration is the Motion to Strike¹⁹ filed by the Council. The Council argues this court should strike from the record legal opinions of former Lincoln city attorneys which the Mayor has offered into evidence.²⁰ The Council argues these opinions are irrelevant and intrude upon questions of law which are solely left for the court to decide. The court agrees. As exhibits used for evidentiary purposes, these opinions have no relevance to this proceeding.

While not evidence, the Mayor argues the opinions are akin to Attorney General Opinions and should be considered as persuasive legal authority.²¹ While the court may consider the opinions, the court is certainly not bound by them.²² The court acknowledges the opinions

¹⁶ *Ritchhart v. Daub*, 256 Neb. 801, 808, 594 N.W.2d 288, 293 (1999).

¹⁷ Charter at Art. IV, § 12(2).

¹⁸ *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 657-59, 642 N.W.2d 132, 137-38 (2002).

¹⁹ NEB. CT. R. PLDG. § 6-1112(f).

²⁰ (Ex. 4, Aff. of Mayor Chris Beutler at ¶ 6, September 20, 2016; Ex. 6, John Hendry Memo dated April 23, 2009; Ex. 7, Bill Austin Memo dated July 24, 1996).

²¹ Applicant's Reply Brief at 23-24.

²² *Coffman*, 213 Neb. at 561, 330 N.W.2d at 728.

contain a reference to the Charter's history. The court sustains the Motion to Strike and reaches its decision here independent of the legal opinions offered by the Mayor.²³

3. Local Versus Statewide Concern

The Council submits the Application for Writ should be denied because of "statewide concerns." Specifically, the Council argues that it has passed a resolution setting the tax request for the current year which, under NEB. REV. STAT. § 77-1601.02, must be certified and forwarded to the county clerk.²⁴ The Council argues certification of the levy is a matter of statewide concern which has priority over municipal affairs. Therefore, Nebraska statutes govern this process to the exclusion of the Charter.

The court finds nothing within NEB. REV. STAT. § 77-1601.02 that conflicts with the Charter or would interfere with Lincoln's city budget approval process. Rather than expressing the intent to make the setting of a local municipality's tax levy a matter of state concern, the statute preserves a municipality's right to set a levy upon its own terms. As a city of the primary class, Nebraska law permits Lincoln to adopt its own budget according to the terms set forth by the Charter.²⁵ There is nothing within NEB. REV. STAT. § 77-1601.02 that supports the process or outcome suggested by the Council.

B. Mandamus

The court turns to the central issue: whether to grant the Application for Writ. The Council's primary arguments relate to the budget process discussed below. Generally stated, the Council argues (i) the Mayor does not have authority to veto the Council's revised budget, (ii)

²³ The court also reaches its conclusion independent from references to these legal opinions contained in Ex. 4 at ¶ 6. But the Charter requires the Mayor to explain his reasons for exercising his veto power. Authorities at 2. The Court will admit Ex. 4 at ¶ 6 and Ex. 5 for that limited purpose. The Council's objections to those exhibits are overruled.

²⁴ NEB. REV. STAT. § 77-1601.02.

²⁵ NEB. REV. STAT. § 15-801.

even if the Council's budget was subject to veto, the Mayor's proposed budget has not been adopted, and (iii) mandamus is not available because setting a tax levy is a discretionary, not ministerial, action. Those issues are addressed in the discussion below.

1. An Extraordinary Writ

Mandamus is an extraordinary writ in that it is a judicial remedy in the form of an order requiring an action (or forbearing an action) of a specific act under the law.²⁶ In order for this court to direct the Council by writ of mandamus to set a tax levy, this court must find (1) the Mayor's proposed budget was deemed to be adopted, (2) setting a tax levy which balances the Mayor's budget is purely a ministerial act, (3) the Mayor has a clear right to the relief he seeks, and (4) there is no other plain and adequate remedy available in the ordinary course of law.²⁷

A duty is ministerial if the official has no discretion as to the required behavior so that the behavior is done without regard to judgment or opinion. For example, the Nebraska Supreme Court has found where a proposal is placed on the ballot for a statewide vote, the Secretary of State has a ministerial duty to remove that proposal if it was submitted after the statutory filing deadline.²⁸ Ministerial duties arise where the law dictates a specific outcome and the acting official must obey the law.

A seemingly discretionary decision to act may, in fact, be purely ministerial.²⁹ The Nebraska Supreme Court has determined that decisions based on a mistaken view of the law are ultimately not discretionary and that by mandamus a court can correct the mistake and compel the proper application of the law, thereby converting an otherwise discretionary act into a purely

²⁶ NEB. REV. STAT. § 25-2156.

²⁷ *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 814, 523 N.W.2d 518, 524 (1994).

²⁸ *Id.* at 814, 523 N.W.2d at 524.

²⁹ *See, e.g., State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984).

ministerial duty.³⁰ Legal or factual determinations made at the outset of the inquiry do not make the decision to act discretionary.³¹

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law and must, therefore, in a certain sense, construe it in order to form a judgment from its language as to what duties he is directed by statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one."³² The requirement to act upon certain factual findings is still ministerial if there is a requirement to act at all.³³ Where the duty is ministerial, mandamus is available where the official has refused to carry out its statutory obligation.³⁴

2. Home Rule Charter

The Constitution of the State of Nebraska allows for cities of the primary class to adopt a home rule charter.³⁵ Lincoln is a city of the primary class.³⁶ The parties agree that Lincoln has adopted the Charter. The Charter is, relative to the budget, the operative legislation, generally to the exclusion of state statutes that might govern cities that have not adopted a home rule charter.

3. Lincoln's Budget Process

a. Step one – Proposing the budget

Lincoln has adopted a biennial budget process.³⁷ Lincoln's biennial budget period begins on September 1 in even numbered years.³⁸ The controlling legislation requires the biennial

³⁰ *Id.*

³¹ *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968).

³² *State ex rel. Herman*, 145 Neb. at 157-58, 15 N.W.2d at 346 (quoting 34 Am. Jur., sec. 72, p. 862).

³³ *Beermann*, 246 Neb. at 815, 523 N.W.2d at 524.

³⁴ *Id.*

³⁵ NEB. CONST. Art. XI, § 2.

³⁶ NEB. REV. STAT. § 15-101 et seq.

³⁷ LINCOLN, NEB., CODE § 3.06.010 (2011).

³⁸ *Id.*; Charter at Art. IX, § 26a.

budget to be balanced.³⁹ The Mayor is required to submit a proposed biennial budget to the Council at least forty days prior to September 1.⁴⁰ The parties agree that the Mayor properly proposed a biennial budget to the Council on July 11, 2016.⁴¹ The Mayor's proposed budget included a property tax request of \$62,964,397.⁴²

b. Step two – Revisions to the budget

The Council has the power to revise the Mayor's proposed budget.⁴³ The parties agree that on August 22, 2016, the Council passed a revised budget.⁴⁴

c. Step three – Mayor's authority to veto the revised budget

On August 23, 2016, the Mayor vetoed the Council's revised budget.⁴⁵ This occurred within seven days after the Mayor received the Council's revised budget resolution.

The Council argues the terms of the Charter preclude the Mayor from vetoing the Council's budget. In support, the Council refers this court to the sentence: "Any legislation pertaining to the biennial budget shall be subject to the power provided in Article IV, Section 13 of this charter." This provision is found both in the Charter⁴⁶ and ordinances.⁴⁷ Article IV, Section 13, in turn, provides: "The mayor shall have the power to veto legislation in the manner, and subject to the limitations hereinafter provided."

The Council argues the phrase "pertaining to" *limits* the Mayor's veto authority as applicable to only appropriations passed after the Council has adopted a budget, and not the budget itself. The Council also argues the phrase "pertaining to" is not clear enough and could

³⁹ Charter at Art. IX, § 26a; LINCOLN, NEB., CODE § 3.06.040.

⁴⁰ Charter at Art. IX, § 26a.

⁴¹ Application for Writ at ¶ 9; Answer at ¶ 9.

⁴² Application for Writ at ¶ 17; Answer at ¶ 17.

⁴³ Charter at Art. IX, § 26a; LINCOLN, NEB., CODE § 3.06.040.

⁴⁴ Application for Writ at ¶ 10; Answer at ¶ 10.

⁴⁵ Application for Writ at ¶ 11; Answer at ¶ 11.

⁴⁶ Charter at Art. IX, § 26a.

⁴⁷ LINCOLN, NEB., CODE § 3.06.040

have been expressed even more directly and in “no uncertain terms” if the Mayor’s veto authority was intended to extend to the budget.⁴⁸ The Council provides no supporting authority, however, and the court could find none which suggests “pertaining to” is a limiting, rather than expansive, phrase.

Given its plain and ordinary meaning, “pertain” means: “To belong or relate to, whether by nature, appointment, or custom.”⁴⁹ Other courts have stated “pertaining to” and “relating to” are synonymous terms.⁵⁰ Both “pertaining to” and “relating to” are sweeping terms that should be broadly interpreted.⁵¹

The Council’s argument requires applying a strained interpretation to the Charter which is contrary to the rules of construction. Finally, the Council’s argument does not correspond to its own actions. The Council would not have held a vote to override the Mayor’s veto if it believed, under the Charter, the Mayor lacked the authority to veto the Council’s revised budget. The only limitation to the Mayor’s veto authority as contained within the Charter relates to legislation for emergency appropriations or borrowing.⁵² That exception does not apply in this case.

It is clear that the Charter grants the Mayor the authority to veto the Council’s revised biennial budget legislation, as the Mayor did in this case.

d. Step four – Veto override

The Charter grants the Council the ability to override the Mayor’s veto with a supermajority of five votes.⁵³ The parties agree that at its next regularly scheduled meeting of

⁴⁸ Respondents’ Brief at 10.

⁴⁹ *Black’s Law Dictionary* 1301 (4th ed. 1968).

⁵⁰ *Clark v. People*, 221 P.3d 447, 449 (Colo. App. 2009).

⁵¹ *Id.*

⁵² Charter at Art. IV, § 13.

⁵³ *Id.*

August 29, 2016, the Council considered the Mayor's veto and failed to obtain the five votes necessary to override the veto.⁵⁴

The Council's next argument is that even if the Mayor's veto was effective and was not overridden, the Mayor's budget does not have the force of law. The Council relies on a provision from the Charter which states: "Should the council fail to adopt the biennial budget on or before the prescribed adoption date, the biennial budget proposed and submitted by the mayor shall be deemed to have been adopted by the council"⁵⁵ The Council argues the condition precedent necessary to result in the adoption of the Mayor's budget was not satisfied because the Council did not fail to "adopt" a budget prior to the deadline. This argument is based on the interpretation that "adopt" has a single fixed meaning: to receive four affirmative votes from the Council. By this logic, the Council's revised budget received four votes and was therefore "adopted," which means the Mayor's budget was not "deemed to have been adopted."

"Adopt" means to "put into effective operation."⁵⁶ Though four members of the Council voted for a biennial budget prior to the deadline, that budget was invalidated by the Mayor's veto. Therefore, the Council's budget was not "adopted" because it was not put into effective operation. The court finds no support for the Council's limited interpretation of "adopt." Rather, the same section within the Charter uses the term "adopt" in other contexts which disprove the interpretation that "adopt" can only occur with four affirmative votes.⁵⁷

⁵⁴ Application for Writ at ¶ 12; Answer at ¶ 12.

⁵⁵ Charter at Art. IX, § 26a.

⁵⁶ *Black's Law Dictionary* 70 (4th ed. 1968).

⁵⁷ The Charter makes clear there is more than one way for public officials to put a budget into effective operation. For example, the Council could have "adopted" its budget by obtaining five votes from the Council to override the Mayor's veto. In addition, the Charter makes unmistakably clear, where the Mayor vetoes the Council's budget and the Council fails to advance any other budget legislation, the biennial budget proposed and submitted by the mayor *shall be deemed to have been adopted* by the council. Charter at Art. IX, § 26a. Therefore, the Council's interpretation depends on removing key, operative provisions from the Charter and Code.

Furthermore, it is irrelevant whether the Council adopted *a* budget prior to the deadline. The Charter language requires the Council to adopt *the* biennial budget prior to the deadline.⁵⁸ The word “the” is an “article which particularizes the subject spoken of.”⁵⁹ The word “a” is indefinite, but the word “the” refers to a certain object.⁶⁰ For example, the phrase “the house” means only one house.⁶¹ Therefore, the Charter allows for the adoption of only one budget. Because the Mayor vetoed the Council’s budget, and the Council did not override the Mayor’s veto, the Council failed to adopt *the* budget prior to the statutory deadline. Therefore, under the Charter, the condition precedent necessary to result in the adoption of the Mayor’s budget was satisfied. The Council is deemed to have adopted the Mayor’s budget.

e. Step five – Setting the tax levy

The court must now determine whether the Council, in exercising its legislative powers, has discretion in setting the tax levy to fund the Mayor’s budget.

On August 29, 2016, the Mayor’s office introduced a resolution to set the tax levy for 2016-2017 at \$0.33366, the amount necessary to balance the Mayor’s budget, which included a property tax request of \$62,964,397.⁶² The Council failed to enact that resolution.⁶³ Instead, the Council enacted a resolution to set the tax levy for 2016-2017 at \$0.32194, the amount necessary to balance the Council’s revised budget, which included a property tax request of \$60,752,736.⁶⁴

The Charter requires the Council to “set the tax levy.”⁶⁵ Further, the Charter requires that

⁵⁸ Charter at Art. IX, § 26a.

⁵⁹ *Black’s Law Dictionary* 1647 (4th ed. 1968).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Application for Writ at ¶ 17; Answer at ¶ 17.

⁶³ Application for Writ at ¶ 20; Answer at ¶ 20.

⁶⁴ Application for Writ at ¶¶ 19-20; Answer at ¶¶ 19-20.

⁶⁵ Charter at Art. IV, § 8.

each “biennial budget shall be balanced.”⁶⁶ Moreover, the clear terms of the Charter dictate the Mayor’s budget “shall become the basis for expenditure during the ensuing biennial budget period and for the property tax rates for the ensuing biennial period.”⁶⁷

In arguing the Council has discretion in setting the levy, the Council refers to generalized language from the Nebraska Supreme Court which states that the “levy of a tax is not a judicial function, nor is it merely the ministerial action of ascertaining the rate percentage; but it is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power.”⁶⁸ The court is not persuaded by the cases cited by the Council.⁶⁹ The outcome in each of those cases was driven by facts and laws significantly different than those now at issue. *Kurth* is a zoning case, not a levy case. *Frye* is a due process case, not a mandamus case. *Lynch* did not involve a dispute between the mayor and city council where the council’s budget and corresponding tax levy were vetoed by the mayor. Rather, the issue was whether the county board of equalization, which had no legislative powers, could alter the operative tax levy legislation.⁷⁰ (*Lynch* actually seems to support the Mayor’s position because the outcome of that case was the issuance of a writ of mandamus to compel the setting of the correct levy, which corresponded with the operative city budget.⁷¹)

On the other hand, the Nebraska Supreme Court has on multiple occasions issued writs of mandamus to compel a levy of a sufficient tax.⁷² In *Percival*, a case decided in the late 1800s, the court issued a writ where the voters of a school district had approved a tax to be levied on the

⁶⁶ *Id.* at Art. IX, § 26a.

⁶⁷ Charter at Art. IX, § 26a.

⁶⁸ *State ex rel. Omaha v. Lynch*, 181 Neb. 810, 151 N.W.2d 278 (1967).

⁶⁹ *Frye v. Haas*, 182 Neb. 73, 75, 152 N.W.2d 121, 124 (1967); *Kurth v. Lincoln*, 162 Neb. 643, 76 N.W.2d 924 (1956).

⁷⁰ *Lynch*, 181 Neb. at 814, 151 N.W.2d at 281.

⁷¹ *Id.* at 813, 151 N.W.2d at 281.

⁷² *Percival v. Studheit*, 11 Neb. 359 (1881).

property in their district and a defendant district board member refused to carry out the levy.⁷³

The court held the board member had “a clear and specific duty of a ministerial nature” required by law and that the duty was “unquestioned, and mandamus is the proper remedy to compel the performance of such duty.”⁷⁴

Similarly, in *State ex rel. Long v City of Nebraska City*,⁷⁵ the Nebraska Supreme Court issued a writ of mandamus to set a tax levy. In that case, city voters approved a tax for the salary of a county employee and the city board refused to levy the tax. The court found the duty of the officials to certify the levy was a duty imposed by law and affirmed the issuance of the writ.⁷⁶

More important to deciding this case, the court looks to the Charter. The Charter lays out, in rather exacting detail, the responsibilities and duties of the Mayor and the Council. At each step in the budget process, the Charter provides a specific and direct course of action. While complex, each contingency along the budget path is met with a process. These steps are clearly laid out, as they provide the timing, authority, and guidance necessary to result in the adoption of a balanced biennial budget. By setting the levy in an amount which does not balance the Mayor’s budget, the Council has failed to act in accord with the Charter.

The court finds, under these facts, the Council has a ministerial duty to set a levy which balances the Mayor’s budget.

4. Adequate Remedy at Law

To bar the remedy of mandamus, any remedy at law must be as complete, effective, and speedy as mandamus.⁷⁷ Another remedy at law will not prevent the issuance of a writ of mandamus unless the other remedy is adequate to afford relief upon the very subject matter

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *State ex rel. Long v City of Nebraska City*, 123 Neb. 614, 243 N.W. 858 (1932).

⁷⁶ *Id.*

⁷⁷ *Dozler v. Conrad*, 3 Neb. App. 735, 743, 532 N.W.2d 42, 48 (1995).

involved, a remedy appropriate and effectual to enforce the right or compel performance of the particular duty in question, and a remedy to which the relator may at all times resort for full relief against the party from whom the duty is owing.⁷⁸

The Council argues the Mayor has an adequate remedy at law because he could file a taxpayer suit appealing the county's setting of an illegal levy. This is not an adequate remedy at law. The Council's suggested remedy does nothing to address the budget impasse. This action seeks to enforce the Council's duties under the Charter, not the duties of the county board. Further, the court is not convinced a taxpayer suit would provide any remedy to the Mayor because the county board could simply use the levy from the previous year.⁷⁹ Mandamus is the appropriate remedy in this case.

5. Conclusions as to Mandamus

To suggest the Charter was drafted and subsequently amended to allow the Council discretion in setting a levy to fund the adopted budget, so as to allow for an impasse to occur immediately before the biennium, without any sort of process for resolution, and expecting that matter to be resolved by open-ended negotiations between the Mayor and the Council, relies on an interpretation that is contrary to the plain and ordinary meaning of the Charter. Adopting the Council's reading would subvert the checks and balances established by the Charter and would be to be adverse to the drafters' intentions. Ultimately, the court finds the Charter is intricate, but the process as to the adoption and balancing of the budget is clear and the action the Council must take is free of doubt.

The Mayor has met his burden of proof as to the elements for mandamus. The court finds (1) the Mayor's proposed budget was deemed to have been adopted by the Council, (2) the

⁷⁸ *State ex rel. Herman*, 145 Neb. at 160, 15 N.W.2d at 347.

⁷⁹ NEB. REV. STAT. § 77-1601.02.

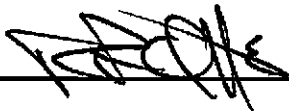
Council has a ministerial duty to set a tax levy which balances the Mayor's budget, (3) the Mayor has a clear right to the relief he seeks, and (4) there is no available adequate remedy at law.

CONCLUSION

For the reasons set forth herein the court finds mandamus is the proper remedy. The Court hereby enters judgment and grants the Mayor's Application for Writ. Accordingly, the Council shall forthwith set a tax levy for the 2016-2017 fiscal year in the amount of \$0.33366, which corresponds with the tax request contained in the Mayor's biennial budget.

SO ORDERED this 5th day of October 2016.

BY THE COURT:



**Robert R. Otte
District Judge**