

MEMORANDUM

TO: Bonnet Shores Fire District Charter Commission

FROM: William J. Conley, Jr., Esq.

SUBJECT: Effects of Decision and Consent Judgment in *Patterson v. The Bonnet Shores Fire District*, C.A. No. WC-2020-0130

DATE: September 23, 2022

This office has been retained by the Bonnet Shores Fire District's ("BSFD") Charter Commission (the "Commission") to advise the Commission regarding intended changes to the BSFD Charter in the wake of the litigation known as *Patterson v. The Bonnet Shores Fire District*, C.A. No. WC-2020-0130. That litigation was filed by a number of residents of BSFD who alleged that the provisions of the BSFD Charter which established and defined who has the right to vote in BSFD elections were unconstitutional. BSFD filed a motion to dismiss which resulted in a decision dismissing one count of the Complaint, filed by the court on December 17, 2020 (the "Dismissal"). The litigation ultimately ended in a decision on motions for summary judgment filed by both parties which was filed by the court on January 27, 2022 (the "Decision"), and a consent judgment filed by the parties and entered as an order of the Superior Court on May 26, 2022 (the "Consent Judgment").

This Memorandum is intended to explain the terms of the Decision and the Consent Judgment, and how these documents affect the charge of the Commission and the scope of changes which the Commission may and may not consider. In order to do this, it will explain the legal theories underlying the *Patterson* litigation as well as the nature of BSFD's legal existence, and will provide a tour through the text of both the Decision and the Consent Judgment. While the reader is not expected to have read any of the relevant documents, nor any of the cited cases, both documents and all cases are included in an Appendix to this Memorandum, and all readers are generally encouraged to read these documents for themselves as well, if they wish. In addition, this Memorandum will necessarily address—and in several cases, will contradict—two statements previously made regarding the *Patterson* litigation, one from BSFD's counsel in that litigation, Thomas M. Dickinson, and another by the District Council.

I. THE PATTERSON LITIGATION

A. What Was *Patterson* About?

As stated above, the plaintiffs in *Patterson* brought suit against BSFD, alleging that the election provisions in BSFD's Charter were unconstitutional. *See generally* Complaint, ¶¶ 42-75. To briefly summarize, those provisions extended the franchise to all owners of real estate located within BSFD, whose interests included a minimum of \$400 in equity over and above all liens on that real estate. *See* Charter, § 2. These provisions did not include any minimum value the real estate needed to be worth, any limit on subdivision or co-ownership of the real estate, or any requirements that the real estate be residential. *Id.* They also did not provide for adult

residents of BSFD whose names may not be on their deeds—adult children, parents, or other relatives of owners, as well as long-term renters. *Id.*

The *Patterson* plaintiffs alleged that this distribution was unconstitutional, and that because BSFD was endowed with and exercises general governmental powers, its elections had to meet the requirements imposed by the United States Constitution. *See generally* Complaint, ¶¶ 42-75. They also alleged that it was unconstitutional to exclude residents from voting in BSFD elections because they are not record landowners, and that it was a form of unconstitutional voter dilution to include non-resident voters. *Id.* This theory follows a number of U.S. Supreme Court cases which have held that, under the U.S. Constitution, restrictions on the franchise for the leadership of any entity that exercises general governmental powers, except for restrictions on the basis of age, citizenship, and residence within the area governed by the entity in question—must pass strict scrutiny. This means they must be imposed in furtherance of a “compelling” state interest, and must be narrowly tailored to *precisely* meet that interest. *See Hill v. Stone*, 421 U.S. 289, 295 (1975); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 630-33 (1969); *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 485 (1968). This is the highest level of scrutiny applied by the U.S. Supreme Court, and when the Supreme Court determines that a particular provision of law is subject to strict scrutiny, that almost universally means that the Court will strike that provision down.

In short, the plaintiffs in *Patterson* sought to show:

1. That BSFD exercises governmental powers, making its elections subject to the U.S. Constitution;
2. That, therefore, BSFD may not legally restrict adult residents who are also U.S. citizens from voting in its elections, even if those residents did not hold an interest in real estate worth over \$400 over all liens (Counts I and II of the *Patterson* Complaint), and;
3. That BSFD must exclude non-resident property owners from voting, because including those non-resident property owners serves to unconstitutionally dilute the votes of BSFD residents (Counts III and IV of the *Patterson* Complaint).

This explains the *facts* that the *Patterson* plaintiffs relied upon, and the *overall theory* of their case. On a procedural level, the *Patterson* plaintiffs sought relief using two causes of action—two laws that allow them to sue and which spell out the remedies they are entitled to if they win—in connection with both of their overall claims. The first cause of action (Counts I and III) was a declaratory judgment action. *See* Complaint, ¶¶ 42-50, 59-67. Declaratory judgment actions are defined in Rhode Island law at R.I. Gen. Laws § 9-30-1 *et seq.* These actions allow parties to seek a declaration from the court regarding the validity of, or defining their rights or obligations under, a contract, deed, will, or similar writing, as well as under a law, ordinance, or regulation. The *Patterson* plaintiffs sought two declarations from the court: one declaring that BSFD could not continue to exclude adult residents of BSFD who are U.S. citizens on the basis of the requirement that voters must own real estate (Count I), and a second one declaring that the inclusion of non-resident voters in BSFD unlawfully diluted the votes of residents (Count III). *See* Complaint, ¶¶ 42-50, 59-67. While a declaratory judgment action may seek declarations that apply only to an individual, or under limited circumstances, the *Patterson* plaintiffs sought broad declarations, applicable to all of BSFD.

The second cause of action (Counts II and IV) was an action under 42 U.S.C. § 1983. See Complaint, ¶¶ 51-58, 68-75. Section 1983 is a federal law which allows individuals to bring suit against “persons”—including municipalities and other governmental subdivisions smaller than entire states—who violate the constitutional rights of the plaintiff “under color of law.” This law allows plaintiffs who prevail to collect any monetary damages they can prove, as well as attorneys’ fees. In order to prevail in an action under § 1983, a plaintiff must show that *their* constitutional rights were violated. While this cause of action requires establishing that the plaintiff *had* a constitutional right which was then violated—which might have implications for other persons facing similar facts—the recovery under § 1983 is limited to the plaintiff.

B. What Did the Court Rule in *Patterson*?

After the plaintiffs filed their Complaint, BSFD filed a motion to dismiss. In short, a motion to dismiss claims that even if all of the facts alleged in a given complaint are true, the court should dismiss some or all of that complaint because of an underlying defect in the plaintiff’s interpretation or application of the law, or in the procedural formalities followed by the plaintiff. Motions to dismiss generally do not reach the *merits* of cases, since those merits usually require evidence which courts generally do not consider at that stage. Rather, motions to dismiss allow defendants to exit a case early in cases where a plaintiff failed to fulfill some procedural requirement (such as exhausting administrative remedies, naming all interested parties, or presenting a claim to a town council prior to filing suit), or where the plaintiff has failed to allege an element necessary to prevail on a given cause of action (such as alleging a violation of a purported constitutional right which is not actually a constitutional right).

BSFD’s motion to dismiss succeeded in dismissing only one count of the Complaint, Count III, which sought a declaration that BSFD’s inclusion of non-resident real estate owners diluted the votes of residents who already owned real estate and who resided within BSFD. See *generally* Dismissal. The *Patterson* Court ruled that the plaintiffs could only proceed with that claim if they named not just BSFD itself, but also *all* of BSFD’s voters. See Dismissal, p. 10-11. This was because R.I. Gen. Laws § 9-30-11 provides, in relevant part, that “When declaratory relief is sought, *all persons shall* be made parties who have or claim *any interest which would be affected by the declaration*, and *no declaration shall prejudice the rights of persons not parties* to the proceeding.” R.I. Gen. Laws § 9-30-11 (emphasis added); see also Dismissal, p. 8-11. In other words, the *Patterson* Court determined that in order for the plaintiffs to obtain a declaration which would affect *all* BSFD voters, they would have to *name* all BSFD voters as defendants. See Decision, p. 8-11. However, this dismissal was not a statement regarding the *merits* of the claim. It was *only* a statement that the plaintiffs did not meet the procedural hurdles necessary to seek a declaration which would *take away* the voting rights of existing voters. See *id.* at p. 8-17.

That was followed, after a small amount of discovery, by motions for summary judgment filed by both the *Patterson* plaintiffs and by BSFD. Motions for summary judgment allow parties to seek judgment prior to a trial in cases where there is no question of material fact, and a party can show that they are entitled to judgment in their favor. Unlike with motions to dismiss, courts deciding motions for summary judgment *do* consider evidence, and *do* reach the merits of at least some questions. However, at this procedural stage judges are not permitted to make *determinations* regarding the credibility of witnesses, nor may they decide *between* competing versions of events *if there is conflicting evidence*. This means that a motion for summary

judgment *can* result in judgment for one or the other side on the merits of the case, *or* it can result in the court finding that resolving the question would require it to resolve a factual dispute, and remanding that issue to be determined at trial.

As stated above, on January 27, 2022, after briefs and a hearing, Judge Taft-Carter released the Decision, which decided the motions for summary judgment filed by the parties. *See generally* Decision. In the Decision, Judge Taft-Carter ruled that the *Patterson* plaintiffs prevailed outright on Count I. *See id.* at p. 13-20. In other words, Judge Taft-Carter agreed that BSFD is an entity which exercises general governmental powers, and that because it exercises those powers it cannot exclude adult citizen residents from voting in its elections. *See id.* at p. 20. However, Judge Taft-Carter reserved on Count II, remanding that question for trial. *See id.* at p. 29. This was because, in order for an entity like a municipality to be liable for a violation of a constitutional right under 42 U.S.C. § 1983, a plaintiff must show that that municipality acted in accordance with an official policy that *it* had adopted. *See id.* at p. 23-28. In this case, BSFD’s Charter is an act of the General Assembly, meaning that when BSFD enforced its voting restrictions, it was acting pursuant to state law. *See id.* at p. 22-23. Because of that, the court needed to determine whether BSFD had made a “meaningful and conscious choice” to enforce the voting restrictions in the Charter. *Id.* at p. 24-28. However, the parties’ briefs were not directed at that question, forcing Judge Taft-Carter to reserve that question for trial. *See id.* at p. 25-27.

Judge Taft-Carter also discussed Count IV, the remaining claim alleging that inclusion of non-resident property owners was unconstitutional voter dilution. *See generally id.* at p. 29-46. As part of this discussion, Judge Taft-Carter agreed with the plaintiffs that Count IV had survived the motion to dismiss, and that the plaintiffs *could* proceed with that claim. *See id.* at p. 29-33. However, Judge Taft-Carter reserved on the *merits* of Count IV, for two reasons. *See id.* at p. 46. The first was the same reason she reserved on Count II—the parties did not brief the question of whether BSFD had *adopted a policy* to continue to enforce the voting provisions of the Charter, making that determination impossible at the summary judgment stage. *See id.* at p. 34-35.

The second reason Judge Taft-Carter reserved on this question has to do with the applicable law. The parties had briefed the question at the heart of Count IV—whether BSFD could lawfully *extend* the franchise to non-resident property owners—by extending the well-known cases discussing *restrictions* on the franchise and schemes to dilute votes through *malapportionment* (e.g., creating one legislative district with 100 voters and another with 10,000 voters). *See id.* at p. 35-39. However, Judge Taft-Carter rejected this approach, and instead applied a line of less well-known cases which *specifically* deal with extending the franchise to non-residents. *See id.* These cases have almost universally held that while the Constitution creates a hard *floor* for voting rights—requiring that governmental entities *at minimum* extend the vote to adult citizen residents—that floor does not necessarily represent the *ceiling* of whom a governmental entity may enfranchise. *See id.* at p. 35-36. Instead, most courts asked to determine whether a governmental entity may enfranchise a class of voters beyond the constitutional floor have focused on whether the class of enfranchised voters have a “substantial interest” in the governance of that entity. *See id.* at p. 40-42. In turn, the “substantial interest” test relies on two questions:

1. The degree to which the non-resident voters finance the governmental entity, and;
2. The voting power of the non-resident voters, relative to the power of the residents.

See id.; see also *May v. Town of Mountain Village*, 132 F.3d 576, 580 (10th Cir. 1997); *Duncan v. Coffee Cnty., Tenn.*, 69 F.3d 88, 95 (6th Cir. 1995); *Day v. Robinwood W. Cmty. Improvement Dist.*, 693 F. Supp. 2d 996, 1004 (E.D. Mo. 2010); *Brown v. Bd. of Comm'rs of City of Chattanooga, Tenn.*, 722 F. Supp. 380, 398 (E.D. Tenn. 1989). In this case, because the parties did not directly brief the issue, the record was inconclusive as to whether non-resident owners did in fact have a “substantial interest” in BSFD elections. *See* Decision at p. 42-46. As a result, Judge Taft-Carter reserved the question for trial. *See id.* at p. 47.

C. What Did the Consent Judgment Do?

Based on this partial victory for the plaintiffs, and facing the prospect of a trial on the remaining issues, BSFD and the plaintiffs entered into negotiations which resulted in their agreeing to the Consent Judgment. A consent judgment, or consent order, is an order drafted by the parties and entered by the court at the request of the parties. Though the terms of a consent judgment are voluntary, once it is entered by the court it has the same force as any other order of the court. This allows parties to negotiate the terms of a settlement, and then rest assured that all parties are bound by that settlement.

The Consent Judgment in this case contains eight paragraphs. To summarize each as briefly as possible:

1. The parties agreed that BSFD had lost Count I, and agreed that, beginning with the next Annual or Special Meeting of BSFD, all adult citizens who had resided within BSFD during the 30 days immediately prior to that Meeting would be permitted to vote at that meeting.
2. The parties agreed that judgment for the plaintiffs should enter on Count II.
3. The parties agreed that Count III remained dismissed.
4. The parties agreed that judgment for the plaintiffs should enter on Count IV.
5. BSFD agreed to appoint a Charter Revision Committee, which would be made up of five members, at least one of whom would be one of the plaintiffs, “to address the issues raised in the Plaintiffs’ Complaint and to propose amendments to the Fire District Charter, such proposed Charter amendments to be presented for approval first to the Rhode Island General Assembly, and then to the voters at an Annual or Special Meeting.”
6. The parties disclosed that they had reached a private settlement regarding the claims under Counts II and IV for attorneys’ fees.
7. The parties agreed that the court would not award damages under Counts II and IV.
8. All parties agreed not to seek appeals regarding any of the issues remaining in the case.

See generally Consent Judgment. In other words, the parties agreed that the plaintiffs would prevail on Counts II and IV. *See id.* at ¶¶ 2, 4. They also agreed to hold all subsequent elections in a manner that would include all adult residents, and they agreed to establish the Commission. *See id.* at ¶¶ 1, 5.

II. BSFD's LEGAL EXISTENCE

A. What Exactly is BSFD?

BSFD is a fire district, which is effectively its own category of legal entity. It is organized as a corporation chartered by the General Assembly, and its Charter is an act of the General Assembly. This means it is imbued with whatever powers and duties the General Assembly wishes to provide it. This includes whatever functions of state power the General Assembly saw fit to grant to BSFD.

B. Why is BSFD a Governmental Entity?

In order to determine whether a given entity should be treated as a governmental entity, the Supreme Court has generally focused on the powers held and exercised by that entity. See *Ball v. James*, 451 U.S. 355 (1981); *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 53 (1970); *Avery*, 390 U.S. at 479-80. This is because, as the Court stated in *Avery v. Midland County, Texas*, “[t]he Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.” 390 U.S. at 479. That is why the Court ultimately held that the Fourteenth Amendment applies to elections for “units of local government having general governmental powers over the entire geographic area served by the body.” *Id.* at 485.

Of course, this raises the question of what exactly is, and is not, a “general governmental power.” Thankfully, the Supreme Court provided a list of examples of these powers in *Ball v. James*. *Ball* involved the right to vote in elections for the directors of a water reclamation district near Phoenix, Arizona which today supplies water and power to a significant portion of the Phoenix metropolitan area. See 451 U.S. at 360. That water district was also empowered to raise taxes based on the acreage owned by its residents, to issue tax-exempt bonds secured by its future revenues, and to condemn land. *Id.* Residents brought suit because the water district limited elections to otherwise-qualified voters who owned land within the water district, and distributed those votes on the basis of the total acreage each voter owned. *Id.* at 357. However, the Supreme Court held that the water district in question was not a governmental entity, stating:

First, the District simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.

Id. at 366.

In short, the Supreme Court has held that the line between an entity whose elections are subject to the requirements of the Constitution, and one whose elections are not, is the powers exercised by that entity. Moreover, *Ball v. James* provided a partial list of powers which, per the Supreme Court, are considered to be “general governmental powers;” that is to say, the kinds of powers which invite the reach of the Fourteenth Amendment. That list, which again is not necessarily exhaustive, includes:

- The power to impose taxes on the value (as opposed to the amount) of land within the area to be governed by the body;
- The power to impose sales taxes on sales within the area to be governed by the body;
- The power to enact laws governing the conduct of all citizens within the area to be governed by the body;
- The power to administer “normal functions of government,” including:
 - Maintenance of streets;
 - Operation of schools;
 - Operation of sanitation services;
 - Operation of health or welfare services.

See Ball, 451 U.S. at 366. This also means that the *label* given to that entity, and the fact that the entity was incorporated as an act of a state legislature, are irrelevant in determining whether a given body exercises governmental powers or is subject to Constitutional restrictions on its elections.

In this case, Judge Taft-Carter held that BSFD exercises general governmental powers, including charging and collecting taxes on the value of real estate and passing ordinances which regulate the conduct of all persons within BSFD. *See* Decision, p. 16. Those powers have traditionally belonged only to the state, and are available to BSFD only due to a delegation of the state’s governmental powers. *See* Decision, p. 17; *see also Amico’s Inc. v. Mattos*, 789 A.2d 899, 903 (R.I. 2002) (“[T]he Legislature continues to exclusively occupy the fields of education, elections, and taxation, thereby precluding any municipality’s foray into these areas, absent specific legislative approval.”); *Ramsden v. Ford*, 143 A.2d 697, 698 (R.I. 1958) (“[T]he levy, assessment and collection of taxes are governmental functions.”); *Kennelly v. Kent Cnty. Water Auth.*, 89 A.2d 188, 190 (1952) (distinguishing limited authority of water district from “fire districts heretofore created by the legislature which are vested with a portion of the state’s taxing power”).

C. Does the Fact that BSFD is a “Quasi-Municipality” Affect this Analysis?

The label “quasi-municipality,” along with similar labels such as “quasi-public entity,” has no separate legal significance. These terms can be used as shorthand for “entity which exercises general governmental powers,” or as a shorthand for a hypothetical entity that exists at approximately the same “level” of governmental subdivision as a municipality—that is to say, an entity whose existence is roughly parallel to that of a municipality. That said, there does not appear to be a single definition of the term “quasi-municipality,” either as a category of legal entity, or as a function of receiving more or less governmental power, either in Rhode Island law or in the federal case law. The label itself has no particular legal significance.

This reflects the fact that courts attempting to determine whether an entity is subject to the Constitution do not examine the labels used by those entities, nor do they compare those entities to a hypothetical ideal municipality or to some other hypothetical ideal entity. Instead, as discussed above, the focus is on the powers held and exercised by those entities. This means that the Supreme Court can examine a junior college district administering a junior college system for a metropolitan area, a school board, and a county commissioners court acting as the general

county-level government, and apply the same criteria for each, despite the fact that their operations are all vastly different from each other and from any municipality. *See Hadley*, 397 U.S. at 51-52, 54-55 (examining junior college district); *Kramer*, 395 U.S. at 622-23, 630-31 (examining school district); *Avery*, 390 U.S. at 476-77, 485 (examining county commissioners court). Indeed, the Supreme Court explained in *Hadley v. Junior College District of Metropolitan Kansas City, Mo.*, that:

When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator.

397 U.S. at 54-55. The Court added that “[i]f the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task.” *Id.* at 55. This underscores, once again, that what matters is whether a given entity exercises general governmental powers, not the kind of entity or the scope of the entity's authority.

III. THE COMMISSION

A. What Does the Consent Judgment Say About the Commission's Duties and Powers?

The best place to start this discussion is the language from the Consent Judgment. The paragraph of the Consent Judgment which established the Commission reads as follows:

5. Promptly upon the entry of this Consent Judgment, the Bonnet Shores Fire District Council shall appoint a Charter Revision Committee, consisting of five persons, at least one of whom shall be one of the Plaintiffs, to address the issues raised in the Plaintiffs' Complaint and to propose amendments to the Fire District Charter, such proposed Charter amendments to be presented for approval first to the Rhode Island General Assembly, and then to the voters at an Annual or Special Meeting.

Consent Judgment, ¶ 5. Breaking this paragraph down, this means that:

- a. BSFD agreed to form the Commission, to appoint five people to the Commission, and to include at least one of the *Patterson* plaintiffs on the Commission.
- b. The Commission is empowered to “address the issues raised in the Plaintiffs' Complaint.” This presumably means addressing the issues with the franchise at BSFD, both regarding inclusion of all adult citizen residents of BSFD, and the potential voter dilution caused by the inclusion of non-resident property owners in BSFD's electorate.

- c. The Commission is empowered to “propose amendments to the Fire District Charter” which must then be approved by the General Assembly, and then by BSFD’s voters. Notably, nothing limits the scope of the proposed amendments to the franchise alone—this office understands this language as allowing the Commission to propose amendments to the entire Charter.

See id. Those are the tasks entrusted to the Commission under the Consent Judgment. This office notes that, while the Consent Judgment contained language governing BSFD’s elections while the Commission’s work remains pending, that language is not directed *at* the Commission, and is not part of the Commission’s charge.

That said, the Commission may not be bound by the *precise language* used in the Consent Judgment, but it is absolutely bound by the limits of the law, including both the constitutional floor on the distribution of voting rights (adult citizen residents¹ who are otherwise qualified to vote), and the limitations on the expansion of the franchise reflected in the substantial interest test. However, with regards to the distribution of the franchise in BSFD, the Commission has flexibility to extend the franchise beyond the constitutional floor, up to the ceiling created by the substantial interest test, as well as to choose not to do so.

The Commission also has freedom, within those bounds, to choose any point *between* the floor and the ceiling. This is because individuals and classes of persons who may have a “substantial interest” in BSFD’s elections, but who do not form part of the constitutional floor, do not have a *constitutional right* to vote in BSFD elections. Several persons have been authorized to vote in BSFD elections pursuant to the BSFD Charter, which is an act of the General Assembly. However, that authorization depends on the Charter, and those persons would not have a *right* to vote in BSFD elections absent the Charter language authorizing them to do so. Because of this, the General Assembly may revoke those authorizations to vote for only *some* of the persons currently authorized, even if they fall squarely between the floor and ceiling.² Likewise, the General Assembly could extend the franchise to *some* of the persons with a substantial interest in BSFD elections, while leaving others out.

This also means that future Charter amendments may choose a different point in the continuum between the constitutional floor and all persons with a “substantial interest” in BSFD

¹ The concept of what constitutes “residence” in a given locality can be complicated in a number of legal contexts. However, in the electoral context it is generally a binary, since individuals generally cannot vote in two localities. For example, Rhode Island law provides that “A person’s residence for voting purposes is his or her fixed and established domicile. The determinant of one’s domicile is that person’s factual physical presence in the voting district on a regular basis incorporating an intention to reside for an indefinite period. This domicile is the place to which, upon temporary absence, he or she has the intention of returning. Once acquired, this domicile continues until another domicile is established. A person can have only one domicile, and the domicile shall not be considered lost solely by reason of absence for [one of four enumerated reasons].” R.I. Gen. Laws § 17-1-3.1(a). While BSFD is not necessarily bound by this statute, his memorandum follows this convention—the word “resident” means only full-time residents of BSFD, whose domicile is firmly within BSFD. By necessity, the word “non-resident” means everyone else, and includes both non-residents who have a “substantial interest” in BSFD elections, and those who do not.

² This office would note, for the sake of completeness, that this ability does not extend to exclusions which have the purpose or effect of excluding voters based on any protected categories, such as race, religion, or nationality. Even if such voters do not have a constitutional right to vote, they have a constitutional right to equal protection which would render any *discriminatory* provision unconstitutional.

elections than whatever balance is struck by the Commission. The Commission, the Council, and ultimately the General Assembly and the voters of BSFD may reach one determination regarding the need to include non-resident voters, but that determination would not bind BSFD in perpetuity. Future BSFD Councils may choose to revise this again, subject to the approval of the General Assembly and the voters, so long as whatever new balance is struck also falls within the space between the constitutional floor and the substantial interest ceiling.

B. Who Will Get to Vote on the Charter Amendments?

This question is, ultimately, up to the General Assembly. The BSFD Charter is an act of the General Assembly, and any amendment of the BSFD Charter will likewise be an act of the General Assembly. Moreover, just as the original Charter contained a provision defining the electorate which would go on to vote on the formation of BSFD, so too the General Assembly would be permitted to establish the electorate which will vote on these amendments. Notably, the General Assembly has amended the Charter both unilaterally (without need for a vote) and subject to a vote held under the provisions of the Charter. This further establishes that the General Assembly may establish any electorate, or no electorate, when passing amendments to its own act. Importantly, while the Consent Judgment states that any amendments must be approved by “the voters,” that term is not elsewhere defined. This strongly implies the extent of the electorate which will vote to approve or reject the amendments remains a prerogative of the General Assembly, within the bounds of constitutional law.

However, on a practical level the General Assembly is likely to take its cue from BSFD, and therefore from the Commission, which will presumably draft proposed language defining the electorate. Such language may be rejected or accepted by the General Assembly, but must conform to constitutional law. This means that the electorate which will vote on the Commission’s proposed amendments must at a minimum include all adult citizen residents of BSFD who are otherwise qualified to vote. This also means that this electorate must, at a minimum, exclude any voters who lack a “substantial interest” in the election. Making the determination of which voters lack a substantial interest in BSFD elections is an important part of the Commission’s charge.

It is notable that, as part of the Consent Judgment, judgment has entered in favor of the *Patterson* plaintiffs on Count IV of their Complaint. In other words, there is already a judgment against BSFD and in favor of plaintiffs who alleged that their votes were diluted by inclusion of a subset of voters who lack a substantial interest in the governance of BSFD. While that judgment does not include a determination of *which* voters lack that substantial interest, this office would advise against ratifying any proposed amendments in elections using the current electorate (as modified by the Consent Judgment), for the same reason it would advise against merely incorporating the residence test contained in the Consent Judgment—namely, that the current electorate is already constitutionally suspect.

That said, within the constitutional and legal bounds already discussed, the language to be presented to the General Assembly is ultimately a policy decision to be made by the Commission, and to be ratified (or not) by the General Assembly and ultimately by the voters of BSFD.

IV. FORMER COUNSEL'S STATEMENT

Finally, this office feels compelled to directly respond to a written statement drafted by the attorney retained by BSFD to defend the *Patterson* litigation (the "Statement"). This Statement, which purported to explain the terms of the Consent Judgment to the general BSFD community, contains a number of oversimplifications and misrepresentations of the Complaint, the Decision, and the Consent Judgment, presumably intended to assuage those who supported retaining the current electorate. Unfortunately, these oversimplifications and misrepresentations have continued to inform the discussion in the community. Insofar as the Statement has continued to cause discord in the BSFD community, and has caused difficulties in the work of the Commission, this office believes it is necessary not only to provide the above explanation, but also to respond directly to the Statement.

To start, this office would note that its explanation of the *Patterson* litigation and of the resulting Decision and Consent Judgment took the better part of five pages, and included citations to each of the relevant documents and to the relevant case law. The *Patterson* litigation involved application of complex points of constitutional law, and this office would question *anyone's* ability to provide a fair summary of the litigation in a single page, or to do so in terms as absolute as presented in the Statement. Indeed, this office determined that it would be worthwhile to expend the effort to explain this in detail precisely because while the *Patterson* litigation posed complex problems, the Statement provides an explanation that is clear, simple, and wrong.

The Statement oversimplifies the entire case by collapsing the four counts of the Complaint into two broad questions. This is not *necessarily* wrong per se, but creates problems when attempting to evaluate what the terms of the Dismissal, the Decision, and the Consent Judgment *mean*. Judge Taft-Carter did, unequivocally, rule that BSFD exercises general governmental powers and thus may not exclude adult citizen residents from its elections. The Statement then dovetails into something closer to a bald misrepresentation, where it implies that the dismissal of Count III and the limited remedies provided to the *Patterson* plaintiffs in the Consent Judgment have dispensed with the constitutional questions underpinning the voter dilution claim in BSFD's favor. It is true that the Court did not rule on the merits of that dilution claim. However, that simply means that no court has decided whether BSFD's electorate includes voters lacking a "substantial interest" in BSFD's elections. It does *not* mean that BSFD's electorate was constitutional save for the exclusion of non-landowning residents. The Superior Court remained silent on that question.

More to the point, the phrasing and emphasis in the Statement appears to obscure the fact that, as part of the Consent Judgment, BSFD *has admitted* that the *Patterson* plaintiffs' votes were diluted. The effects of this admission may not be as clear as they might be in other circumstances, but to be absolutely clear, the Consent Judgment resulted in judgment entering against BSFD on Count IV, which alleged voter dilution. The difference between Count III and Count IV is in the scope of available remedies—Count III sought a declaration while Count IV sought damages—but *both involved the same set of facts*.

The Statement states, in bold and underline, that the parties "acknowledged that [the] dilution declaratory judgment part of the case had been dismissed." This was preceded by a

series of statements, also in bold and underline, describing how BSFD had prevailed in obtaining that dismissal. This was also followed by a statement, in regular type, that the parties “acknowledged that the individual Plaintiffs had made out a case of dilution.” This choice of emphasis strikes this author as both personally flattering to the attorney, and as intended to leave readers with the inaccurate impression that the voter dilution claim had been dispensed with by the court on its merits. It would be more accurate to say that the *Patterson* plaintiffs were precluded from bringing another voter dilution suit, but nothing would stop another plaintiff or set of plaintiffs from bringing another challenge to the BSFD Charter on the basis of voter dilution if that electorate were not changed. Any such plaintiff would undoubtedly at least attempt to rely on the Consent Judgment, and would have the benefit of the Decision, which is akin to a roadmap for how the Superior Court would expect future plaintiffs to litigate this question.

It is unfortunate that this was the parting gift of our predecessor counsel. The BSFD community—one this office knows to be conscientious and well-informed—could have benefitted from a sober analysis of what the Consent Judgment entailed, even if on simpler terms than those presented here. Instead, what the BSFD community received is advocacy—advocacy for the position BSFD defended in court, advocacy for those in the community who favored the previous electorate, and perhaps most perniciously, advocacy for the attorney who delivered those results.

This office represents the Commission, not any special interests within it. Our role is not to argue for any particular “side,” other than perhaps the law, and to facilitate the decisions the Commission, and ultimately the BSFD community, will have to make. This document, therefore, is not intended as advocacy, but merely as an explanation of the law and the court decisions within which the Commission must carry out its work. We hope this document will help clarify the points of contention, and narrow the ongoing debates for the Commission and for the greater BSFD community, and we look forward to assisting BSFD in drafting the next chapter of its history.