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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-011432 08/18/2006

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
C.I. Miller
Deputy

LEAGUE OF ARIZONA CITIES AND TOWNS, et al. LISA T HAUSER

v.

JANICE K BREWER, et al. EMMA K MAMALUY

KENNETH A ANGLE
MELVIN R BOWERS JR.
JOHN D BURKHOLDER
BRYAN B CHAMBERS
COLLEEN CONNOR
HOLLY J HAWN
DEBORAH L HERBERT
CHARLES A IRWIN
WILLIAM J KEREKES
GARY L LASSEN
SCOTT MCDONALD
ALLEN C MCVEY
JASON MOORE
DEREK D RAPIER
THOMAS M STOXEN

RULING MINUTE ENTRY

Plaintiffs, League of Arizona Cities and Towns, et al., have filed this special action application for a permanent injunction claiming that Proposition 207 (Private Property Rights Protection Act) does not comply with the Funding Source Rule contained in Arizona

Constitution Article IX, § 23 because the proposition calls for a mandatory expenditure of state funds without providing for an increased source of revenues sufficient to cover the entire immediate and future costs of the program/benefit. Therefore, Plaintiffs argue that pursuant to A.R.S. § 19-122 the initiative is "not legally sufficient" and requests that the court permanently enjoin the named Defendants from submitting the proposition to the electorate.

Real Party in Interest, Arizona Homeowners Protection Effort, claims that Proposition 207 does not come within the funding source rule of Article IX, § 23 because the costs to the State's general fund are contingent on the legislature or some other authorized state actor passing land-use laws after the proposition becomes law. The Real Party in Interest maintains that the funding source rule is not implicated unless there is a direct and immediate drain on the State's general fund.

The court finds that Plaintiffs have made a *prima facia* showing that the proposition, as it relates to potential expenditures from the State's general fund, violates the spending source rule of Article IX, § 23. However, even assuming that the proposition's mandated expenditures would run afoul of the spending source rule, under *Winkle v. City of Tucson*, 190 Ariz. 413 (1997), this court lacks the authority to remove the proposition from the ballot.

SPENDING SOURCE RULE

In 2004, the electorate passed proposition 101 amending the Arizona Constitution to require that expenditures required by initiatives or referenda contain a funding source other than the State's general fund. The new constitutional section reads as follows:

§ 23. Expenditures required by initiative or referendum; funding source

> **A.** An initiative or referendum measure that proposes a mandatory expenditure of state revenues for any purpose, establishes a fund for any specific purpose or allocates funding for any specific purpose must also provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal. The increased revenues may not be derived from the state general fund or reduce or cause a reduction in general fund revenues.
>
> **B.** If the identified revenue source provided pursuant to subsection a in any fiscal year fails to fund the entire mandated expenditure for that fiscal year, the legislature may reduce the expenditure of state revenues for that purpose in that fiscal year to the amount of funding supplied by the identified revenue source.

Ariz.Const.Art. 9 § 23.

The publicity pamphlet's arguments for and against the measure framed the debate of the proposition. Those in favor of the proposition commented as follows:

> Proposition 101 requires that a voter-mandated expenditure or taxpayer funds must designate a new source of revenue to cover the costs of the new program or benefit. If the designated revenue source falls short, the new spending can be scaled back to the actual amount raised by the designated funding source.
>
> We agree with the principle that when government decides to create a new program or benefit, it must find a fair and responsible way to pay for the new spending. This common-sense principle should also apply to programs and benefits created through the initiative and referendum process.

C.A. Howlett, Chairman, Board of Directors, Arizona Chamber of Commerce, Scottsdale.

> An 'unfunded mandate,' whether it comes form the Federal Government or from the State's own citizens, has the exact same effect. Money must be taken away from somewhere to finance a new project. If the citizen's demand that the legislature provide a specific benefit then they should also describe what benefits they are currently receiving that should be scaled back or eliminated as well.

JP Melchionne, Secretary, Yuma Chapter, People for the USA, Yuma.

> Voters who wish to mandate new programs should understand how they are going to be paid for, and it is very reasonable to require the identification of the new sources of revenue to pay for the new or proposed program.

Kevin Rogers, President, Arizona Farm Bureau, Mesa.

> Too often, voters have passed initiatives creating new programs that place demands on the state general fund far exceeding what was sold to the voters on election day. Even when new funding was identified for a program, the costs have outpaced the revenue, forcing the Legislature to cut funding for other programs like education, health care, and public safety.

. . . .

> Make no mistake, the initiative process can be an excellent tool to facilitate a vigorous public debate about spending for new government programs. However, that debate should not be carried out in isolation of the revenues necessary to support that increased spending. Certainly, a more accurate reflection of the public's desire for higher government spending is when they are willing to pay for it.

Kevin R. Kinsall, Chairman, Arizona Tax Research Association, Phoenix.

> Proposition 101 would prevent future budget crises and protect Arizona's working families from new taxes by establishing that if an initiative or referendum measure mandates new spending, it must also identify a specific source of revenue to pay for the expenditure.

Russell K. Pearce, Chairman, Committee of Appropriations, House of Representatives, Mesa.

Those opposing proposition 101 argued the measure went too far and mandated a funding source for any program or benefit no matter how nominal the increase or drain on the State's general fund.

> Prop 101 requires that any program or measure passed by initiative must include a full, separate and new funding source for any expenses generated by the program, including any initial start-up costs, however minor. This would make it extremely difficult for citizens to pass any meaningful policy and could result in entirely new fees or taxes rather than reallocating existing revenues. Also, a program that addresses public needs may pass by initiative, but without any funding available to implement it, the citizens would be rendered powerless to affect any substantive change in policy.

Jeff Williamson, President, Arizona League of Conservation Voters Education Fund, Phoenix.

> It would apply no matter the expenditure required, whether it was simply for the addition of two members to an already established commission or for a new health care initiative. We believe that at the very least this proposition should have included a threshold amount, permitting funds below that amount to come from the General Fund.

Gini McGirr, President, League of Women Voters of Arizona, Tucson.

> Every new voter-approved program will require a new or increased tax or fee and a new special fund, just for that program. You think our tax code is complicated and unfair now? It doesn't matter if the program costs one dollar or a billion dollars, it means a new tax.

Joel Foster, President, Arizona Advocacy Network Foundation, Phoenix.

> Proposition 101 says that when an initiative or referendum requires expenditure of revenues (no matter how small and no matter whether or not it is temporary) it must also provide a new funding source. The funding source cannot be the general fund or impact the general fund. This may sound good in theory, but it effectively prohibits the public from directing the Legislature on how to spend any general fund revenues and also limits voters' ability to enact new programs that require perhaps a modest one time expenditure.

Kenneth P. Langton, Chairperson, Sierra Club—Grand Canyon Chapter, Tucson.

> The legislature's proposition, which requires all voter-approved measures that spend any money whatsoever to include their own special funding source other than the state's general fund, is a power play designed to reduce the power of the voters. It will result in more complex and confusing propositions; a hodgepodge of new or increased taxes or fees, with their own little pots of earmarked money and accounting systems; and an increasingly complex and unfair tax code.
>
> This requirement extends to propositions that result only in small administrative costs or on-time expenditures. There is no lower limit. If you spend one dollar, you need a new tax.

Karen Van Hooft, State Coordinator, Policy/Spokesperson, Arizona NOW, Scottsdale.

PROPOSITION 207

Proposition 207 would add, *inter alia*, the following new statutes:

A.R.S. § 12-1134:

A. If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

B. This section does not apply to land use laws that:

1. Limit or prohibit a use of division of real property for the protection of the public's health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control;

2. Limit or prohibit the use of division of real property commonly and historically recognized as a public nuisance under common law;

3. Are required by federal law;

4. Limit or prohibit the use or division of a property for the purpose of housing sex offenders, selling illegal drugs, liquor control, or pornography, obscenity, nude or topless dancing, and other adult oriented businesses if the land use laws are consistent with the constitutions of this state and the United States;

5. Establish locations for utility facilities;

6. Do not directly regulate an owner's land; or

7. Were enacted before the effective date of this section.

A.R.S. § 12-1136

In this article, unless the context otherwise requires:

1. "Fair Market Value" means the most likely price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with

knowledge of all the uses, and purposes to which it is adapted and for which it is capable.

2. "Just Compensation" for purposes of an action for diminution in value means the sum of money that is equal to the reduction in fair market value of the property resulting form the enactment of the land use law as of the date of enactment of the land use law.

3. "Land Use Law" means any statute, rule ordinance, resolution or law enacted by this state or a political subdivision of this state that regulates the use of division of land or any interest in land or that regulates accepted farming or forestry practices.

Under Proposition 207's new § 12-1134, landowners would be entitled to just compensation for the reduced fair market value of their land based on new land-use laws enacted after the effective date of the new law.[1] This is a new benefit. Landowners seeking the just compensation for diminished value based on new state land-use laws would have to seek money from the State's general fund as there is no other funding source provided for in the proposition. The court finds that this is a *prima facia* violation of Article IX, § 23.

Separation of Powers/Ripeness

In *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997), the Arizona Supreme Court noted that under the separation of powers requirement of Article III of the Arizona Constitution the judiciary must "refrain from meddling in the workings of the legislative process." *See Adams v. Bolin*, 74 Ariz. 269 (1952); *City of Phoenix v. Superior Court*, 65 Ariz. 139 (1946). The court in *Winkle* noted that part of the "legislative process is the people's power to create legislation through initiative." 190 Ariz. at 415; (citing Ariz. Const. Art. IV, pt. 1, § 1(8)); *Allen v. State*, 14 Ariz. 458, 467 (1913) ("[t]he people did not commit to the legislature the whole law-making power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes.").

The Arizona Supreme Court in *Winkle* stated clearly that the judiciary was not to get involved in determining an initiative's substantive validity prior to it becoming law.

[1] As noted above, the proposition lists those land-use laws that would be exempt from the new law. *See proposed* § 12-1134.B.

> [D]etermining an initiative's validity before the voters ha[ve] an opportunity to vote on it would be tantamount to claiming the power of life and death over every initiated measure by the people. It would *limit the right of the people to propose only valid laws,* whereas the other lawmaking body, the Legislature, would go untrammeled as to the legal soundness of its measures. The separation of powers doctrine dictates our deference to legislative functions. "The legislative power of the people is as great as that of the legislature." Voter initiatives, part and parcel of the legislative process, receive the same judicial deference as proposals before the state legislature-**courts are powerless to determine their substantive validity unless and until they are adopted**.
>
> As a true reflection of democratic principles, Arizona citizens are not precluded from legislating on any issue, even though the legislation might conflict with the Arizona Constitution or state law. The constitutionality of such a measure will only be tested *after* it becomes law. Thus, so long as it is uncertain whether an initiative will become law, this court will not intervene in a wholly legislative process.

Winkle, 190 Ariz. at 415 (*emphasis* in original, **emphasis** added, citations omitted).

In deference to the legislative process enjoyed by the people of Arizona, prior to the passage of an initiative courts are to "consider only procedural defects in form that bear directly on the integrity of the election process." *Winkle*, 190 Ariz. at 416. The statute governing initiatives requires only that a petition be legally sufficient to receive constitutional protection and be placed on the ballot. *See* A.R.S. § 19-122.C. In *Winkle*, the court reiterated that an initiative was "legally sufficient" as long as it was not fraudulent, and complied with the form and signature requirements. 190 Ariz. at 416. The court went on to identify only two kinds of defects that would warrant judicial intervention in the initiative process: first, the failure to structurally comply with the technical requirements of §§ 19-101 to -144; second, if the text of the initiative does not comprise legislation because it fails to enact anything. *Id*. Neither of these defects is alleged in this special action.

Plaintiffs claim that because Proposition 207 has a provision that may violate the funding source rule, the voters will be materially misled in the election. Therefore, Plaintiffs maintain that the funding source rule under Article IX, § 23 is a procedural rule to protect against

misleading voters, rather than a substantive requirement.[2] The court does not find Plaintiff's argument persuasive.

Under the funding source provision, an initiative could provide a very nominal funding source for a program or benefits that in actuality would be exorbitant to implement. In such a scenario, the electorate may in fact be materially misled regarding the cost to implement the initiative's benefits. However, such a scenario would not violate the funding source requirement. If a measure passes with an inadequate funding source, the legislature is authorized to reduce the expenditures required by the initiative to match the actual funds received by the inadequate funding source. *See* Art. IX, § 23.B. It appears that an initiative that passes with no funding source is simply unenforceable against the State's general fund.

Given the remedies available under the funding source provision, the court finds the funding source rule to be substantive not procedural. Therefore, it would be inappropriate for the court to remove from the ballot the initiative on this basis.

Plaintiffs make a similar argument that Article IX, § 23 is a new constitutional requirement related to the "form" of the initiative thereby allowing judicial review prior to the proposition becoming law. The court disagrees.

Before any court could determine if a proposed measure would cause a present or future drain on the State's general fund, the court would have to do a substantive review of the initiative. It is that substantive review, that *Winkle* condemned pre-election. This case is a prime example of why judicial restraint should be used in this area.

If adopted, Proposition 207 has many parts and subparts that will give additional benefits to landowners. Only one of those provisions, compensation for diminution in value, is challenged in this special action. If Proposition 207 is adopted, it will have a substantial effect on how municipal, county and state authorities conduct their business regarding land-use laws. The parties have conceded, however, that without question the greatest impact of the new measure of diminution in value will be on municipal and county authorities—not the state. The funding source rule in Article IX, § 23 does not apply to initiatives that mandate spending from

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[2] Plaintiffs argue that the funding source rule is similar in analysis to the single amendment rules for constitutional initiatives. *See Tilson v. Mofford*, 153 Ariz. 468, 470 (1987). However, the Arizona Supreme Court has repeatedly held that the "Arizona Constitution establishes a stricter test for determining whether a proposal involves more than one constitutional amendment." *Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241, ¶ 6 (2004). The court finds that the stricter test for constitutional amendments does not help in the analysis of whether Proposition 207 is legally sufficient.

municipal and county governments, only the State's general fund. The policy debate over Proposition 207, and its corresponding impact on local government, should not be thwarted because a small part of one provision may not be enforceable against the state because it violates the funding source rule.

> Grassroots democracy, exercised by initiative, is not always an efficient process; however, there are clear benefits to allowing the public to vote on an initiative, even though its validity may be questioned if it passes. In a democracy, the process itself is often as valuable as the result. A vote to enact legislation expresses more than a current whim of the people; it expresses the voters' preferred rule of governance. Ultimately, preemption may prevent enforcement of a law, but it cannot forbid the voters from voicing their views of a legislative proposal via the initiative process. If this process is deemed a waste of taxpayers' time or money, then the laws governing initiatives may be altered by legislative process, not by judicial decision.

Winkle, 190 Ariz. at 418.

CONCLUSION

Plaintiffs' objection to the lack of a funding source for one part of the initiative should not stop the policy debate regarding the substance of Proposition 207. The proposition raises many questions regarding property rights, including the question of who should shoulder the costs of land-use laws passed by governmental entities. The cost to taxpayers—city, county and state—is part of that debate. The voters should be allowed to voice "their views" regarding this proposal.

IT IS ORDERED denying Plaintiffs' application for permanent injunction and dismissing the special action.

IT IS FURTHER ORDERED denying all requests for costs and attorneys' fees.

IT IS FURTHER ORDERED signing this minute entry as a formal and final order of this court.

/S/ PAUL J. MC MURDIE

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PAUL J. MC MURDIE
JUDGE OF THE SUPERIOR COURT