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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2008-000413 04/03/2009

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

TRI-BAR L L C, et al.

PAUL J MOONEY

v.

PRESCOTT VALLEY PARKWAY COMMUNITY FACILITIES DISTRICT, et al.

PAUL F ECKSTEIN

MARTIN JAMES BRENNAN

UNDER ADVISEMENT RULING

(Defendants Prescott Valley Parkway Community Facilities District and Town Of Prescott Valley's Motion For Partial Summary Judgment Of Tax Appeal, Defendants' Motion To Dismiss Second Claim Of Relief, and Plaintiff's Rule 56(f) Motion For Continuance)

Factual Background

Certain taxpayers in Prescott Valley voted to form the Prescott Valley Parkway Community Facilities District Number 1. Pursuant to the requirement of A.R.S. § 48-723, the ballot issue stated that the maximum tax rate would be $3.76 per $100 assessed valuation. It developed that $3.76 was insufficient to cover the debt service on the bonds. The District board therefore asked Yavapai County, which is responsible for collecting the tax, to levy a rate of $6.67 per $100. For tax year 2007, the County, for whatever reason (the actual reason is immaterial), levied a rate of $3.30 per $100, then after the notices had been sent out changed the rate to the requested $6.67; for subsequent tax years, the rate was initially set at $6.67. In response to Plaintiffs' claim, the difference between the $6.67 and $3.30 rate was effectively refunded from another account for tax years 2007 and 2008, but the District announced that no such refund would be forthcoming for 2009 and beyond.

Motion For Partial Summary Judgment

The Court has reviewed the statutory scheme for Community Facilities Districts, A.R.S. § 48-701 et seq. A.R.S. § 48-719(E) provides, "After the [general obligation] bonds are issued, the district board … shall annually levy and cause an ad valorem tax to be collected on all taxable property in the district, sufficient, together with any monies from the sources described in § 48-717, to pay debt service on the bonds when due." The language of this section is mandatory: the District must set a tax rate high enough that its proceeds will cover the debt service. Plaintiffs point to § 48-723(A), which says, "the district board, or, if before formation, the governing body, may call an election to submit to the qualified electors … the question of authorizing the district board to levy an ad valorem tax on the assessed value of all the real and personal property in the district at a rate or rates which do not exceed the maximum rate or rates specified in the ballot." However, any potential conflict is resolved by Section 723(B), which contains the actual language prohibiting a tax in excess of the ballot rate: taxes for payment of debt service on general obligation bonds are specifically excluded from this prohibition. The Section 719(E) duty to insure the bondholders are paid overrides the Section 723(A) duty to the voters. Defendant's Motion asserts, and Plaintiffs do not contest, that the higher levy was necessitated by a shortfall in the Tax Account, which is used solely to pay debt service on the general obligation bonds. There is therefore no illegality and no error in the $6.67 rate at least for the tax years 2007 through 2009.

The Franklin Phonetic School has not been deleted from the District, which would be subject to A.R.S. § 48-714. Its District property tax is zero because it is a 501(c)(3) nonprofit educational organization statutorily exempt from taxation under A.R.S. § 42-11114(A). It remains in the District, and presumably, were its use to change so as to fall outside the statutory exemption, the property would be taxed. Whether, given its exempt status, it should have been allowed to vote as a taxpayer, or alternatively whether its property should have been excluded from the District, goes to the validity of the election. As will be discussed later, that is a matter outside this Court's jurisdiction.

As it is not contested that the excess taxes (if indeed the rate was legally excessive) imposed for tax years 2007 and 2008 have been returned to the Plaintiffs, albeit through another mechanism, that issue is moot. (Plaintiffs' contention that they have been repaid from their own funds is incorrect. The assets of any government entity, here presumably the District's proceeds from selling the bonds, belong to the government, not to the taxpayers who fund it. It makes no difference if the bond sale brought in more revenue than was necessary.) The higher rate for tax year 2009 was set pursuant to the proper procedure; the Court has no reason not to assume that the proper procedure will be followed for future tax years. There is therefore no need to address the broader question, raised only by the 2007 tax year, of whether a rate set even though insufficient to pay debt service and therefore in violation of Section 719(E) may lawfully be

raised once its inadequacy is discovered. The Court's ruling on Defendant's Motion For Partial Summary Judgment renders Plaintiff's Rule 56(f) Motion moot.

Second Claim for Relief

Plaintiffs' Second Claim for Relief is adequately pled. As it does not state a claim for fraud, Rule 9(a) is inapposite. However, many if not all of the questions raised are moot. The Court may not grant a declaratory judgment on a moot or advisory question. *Arizona State Bd. of Directors for Junior Colleges v. Phoenix Union High School Dist.*, 102 Ariz. 69, 73 (1967); *Thomas v. City of Phoenix*, 171 Ariz. 69, 74 (App. 1991).

A.R.S. § 48-706(A) permits judicial review of the order forming the District only if a petition for special action is filed with the Court of Appeals within thirty days after adoption of the resolution. Plaintiffs did not do this. A.R.S. § 16-673(A), which is extended to local elections by § 674(A), requires that an elector challenging the election must file his challenge within five days after completion of the canvass. Here, that date had long since passed when Plaintiffs filed their Complaint. It is done: the election is final, the proposition passed, the District exists. If there was misrepresentation or other impropriety by the Town, the Court no longer has jurisdiction to grant relief. *Donaghey v. Attorney General*, 120 Ariz. 93, 95 (1978). This issue is legally moot.

As for the operation of the District, the Court may not limit its official acts on the ground that its creation was flawed. Now that it has been formed, it enjoys to the full the powers granted to it by A.R.S. § 48-701 et seq., including the power to issue bonds and levy the taxes necessary to repay them. Declaratory judgment must therefore be limited to whether the present or future actions of the District are within its statutory authority. Plainly, completed actions fall under the bar of mootness: the Parkway cannot be unbuilt or the money paying for it unspent. And special action relief is limited to cases where there is no adequate remedy at law, so is not appropriate for claims of illegal collection of taxes, for which a legal remedy exists. *Estate of Bohn v. Scott*, 185 Ariz. 284, 291 (App. 1996).

To the extent Plaintiffs' claim for declaratory judgment falls within the scope remaining, it may stand, but it is not entirely clear just what may be left. The Complaint says, "Plaintiffs seek a declaration of their rights, status and legal obligations as it relates to the formation and operation of the District and its activities associated with the construction and funding of the Parkway project, and the imposition of the costs, tax assessments and fees associated with the Parkway project against Plaintiffs and the Subject Property." The formation of the District is out. The activities associated with the construction and funding of the Parkway project are out as moot. The imposition of costs, tax assessments and fees is required by statute to the extent they are necessary to repay the bonds, irrespective of what assurances were made to Plaintiffs, so, while declaratory judgment might be allowable, the issue would have to be resolved in the

District's favor. Whether there are significant costs, tax assessments, or fees for activities not involving repayment of the bonds has not been established by the parties.

Therefore, IT IS ORDERED:

1. Defendants' Motion For Partial Summary Judgment Of Tax Appeal is granted.

2. As to Plaintiff's claim that there are significant costs, tax assessments, or fees for activities not involving the repayment of the bonds, Defendants' Motion To Dismiss is denied. In all other respects and as to all other remaining claims, Defendants' Motion To Dismiss Second Claim Of Relief is granted.

3. Plaintiff's Rule 56(f) Motion is denied.

4. As Defendants' Motion to Dismiss has been denied in part, Plaintiff may take the deposition of Gwen Rowitsch.