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**IN THE SUPERIOR COURT OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

PHOENIX LAW ENFORCEMENT ASSOCIATION,  
an Arizona non-profit corporation; BARRY JACOBS,  
EARLE AKRE, and ROBERT RAMSEY, individually  
and on behalf of themselves and as representatives for  
similarly situated class members,

Plaintiffs,

vs.

CITY OF PHOENIX, a body politic,

Defendants.

Case No. CV2014-009114  
CV2014-008711  
(Consolidated)

**CONSOLIDATED REPLY TO  
PLAINTIFFS' RESPONSES TO  
MOTION TO INTERVENE**

*Honorable Robert Oberbillig*

Michael Dupuy and Jim Jochim, who are Phoenix taxpayers ("Taxpayers"), hereby reply to Plaintiff Phoenix Law Enforcement Associations' ("PLEA"), et al. and Plaintiff Theresa Clark's, et al. ("Supervisors") Response in Opposition to Taxpayers' Motion to Intervene. Defendant City of Phoenix ("City") does not oppose Taxpayers' application.

Given the significant overlap in objections raised by both Plaintiff groups, Taxpayers have consolidated their Reply for ease of review. While conceding that Taxpayers' Motion to Intervene is timely, Plaintiff PLEA appears to ignore the other criteria necessary to determine whether intervention is appropriate under Rule 24(a). Instead, PLEA opposes the intervention, arguing that Taxpayers lack standing (PLEA's Resp. at 3-5) and fail to state a justiciable issue (*id.* at 5-7). PLEA also asserts that this Court lacks jurisdiction over the question of whether the relief Plaintiffs request is unlawful under state statute (*id.* at 8-10). Plaintiff Supervisors join PLEA in their standing objection (Supervisors'

Resp. at 10-12), additionally arguing that Taxpayers lack an interest in this litigation that is not already adequately represented (*id.* at 6-8). All Plaintiffs claim that Taxpayers are not entitled to permissive intervention (PLEA's Resp. at 7-8); (Supervisors' Resp. at 8-10). Plaintiffs' assertions are both unconvincing and unsupported by the law. Because Taxpayers meet the criteria for both intervention of right and permissive intervention, we respectfully request that this Court grant Taxpayers' Motion to Intervene.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. Taxpayers Have Standing and an Interest in this Litigation that is Not Adequately Represented.**

##### **A. Taxpayers Have Clear Standing.**

Taxpayers have plain and obvious standing because they directly fund unlawful pension contributions that would immediately result if Plaintiffs receive the relief they have demanded in this litigation. As indicated in Taxpayers' Motion to Intervene, the Arizona Supreme Court has long-recognized that taxpayers may challenge government actions and public contracts that unlawfully expend public money. *Ethington v. Wright*, 66 Ariz. 382, 386, 189 P.2d 209, 212 (1948) ("It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds."). Arizona courts have regularly conferred broad taxpayer standing when municipal taxpayers challenge public contracts that violate state law or the Arizona Constitution. *See Secrist v. Diedrich*, 6 Ariz. App. 102, 104, 430 P.2d 448, 450 (1967) (school district taxpayers have standing to challenge expenditure of public funds that violated state law); *Turken v. Gordon*, 220 Ariz. 456, 461, 207 P.3d 709, 714 (App. 2008), *rev'd on other grounds*, 223 Ariz. 342, 224 P.3d 158 (2010) (finding standing where Phoenix taxpayers brought action against city to enjoin payments to private developer that violated the Arizona Constitution). "The right to maintain such suits is based upon the taxpayers' equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation." *Ethington*, 66 Ariz. at 386, 189 P.2d at 212.

Taxpayers will have standing to challenge unlawful government expenditures if taxpayers can show an

expenditure of funds generated through taxation or an increased levy of tax. *See Dail v. City of Phoenix*, 128 Ariz. 199, 202, 624 P.2d 877, 880 (App. 1980).

Plaintiff PLEA contends that “tax dollars are not directly in jeopardy of purported illegal expenditure merely because the Plaintiffs request relief to obtain benefits owed to them.” (PLEA’s Resp. at 4). PLEA continues, “[p]resently, there is no taxpayer interest at stake.” (*id.*). Plaintiff Supervisors add that Taxpayers “cannot demonstrate a direct expenditure of taxpayer funds through the subject matter that is actually at issue in this case.” (Supervisors’ Resp. at 11). On the contrary, the relief demanded by Plaintiffs is precisely what puts the lawful expenditure of taxpayer funds “directly in jeopardy.” Moreover, the law confers standing on taxpayers when an unlawful expenditure is either made or *threatened*. *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432, 600 P.2d 44, 45 (App. 1979) (“A taxpayer has sufficient standing in an appropriate action to question illegal expenditures made or *threatened* by a public agency.”) (emphasis added); *see also Secrist v. Diedrich*, 6 Ariz. App. 102, 104, 430 P.2d 448, 450 (1967).

In this case, Plaintiffs are requesting that this Court order the City of Phoenix to remit pension payments that violate the plain language of state law. Should the Court enter such an order, Taxpayers will be immediately liable to replenish the City’s public coffers for what Taxpayers maintain is an unlawful expenditure. *See Ethington*, 66 Ariz. at 386, 189 P.2d at 212.

The Court need look no further than the Public Safety Personnel Retirement System (“PSPRS”) statute mandating system contributions to establish that the threat of such an unlawful expenditure is imminent and direct. A.R.S. § 38-843. Each employer, including the City of Phoenix Police Department, contributes a specific percentage of each employee’s salary to its separate account in PSPRS based on actuarial valuation. *Id.* at § 38-843(B). The employer contribution rate for fiscal year 2013-2014 for the Phoenix Police Department is 34.50% of a member’s compensation. Since the employer contributions rate is based on the percentage of the member’s *compensation*, when a member’s compensation amount is artificially (and unlawfully) increased through payment in lieu of vacation, payment for unused sick leave and compensatory time, and payment for fringe benefits, then

the amount contributed to PSPRS by the City of Phoenix, and therefore Taxpayers, is *necessarily* higher. Taxpayers should be given the opportunity to demonstrate to the Court through intervention in this matter that the pension spiking scheme that Plaintiffs are requesting this Court to order is illegal as a matter of black letter law.

This litigation, initiated by Plaintiffs, and the relief demanded by them, imminently threatens the lawful expenditure of Taxpayer funds. The looming direct harm to Taxpayers as a result of this litigation is clear and unequivocal. Taxpayers have established standing to intervene.

**B. Taxpayers Have a Clear Interest in this Litigation to Ensure their Tax Dollars are Lawfully Spent.**

In an argument related to their standing objections, Plaintiff Supervisors also contend that Taxpayers do not have an interest in this litigation because they are not a party to the labor agreements between the City and Plaintiffs, and, therefore, “do not have an interest in the removal or performance of [the pension spiking provisions at issue.]” (Supervisors’ Resp. at 6). Setting aside for a moment the observation that Phoenix taxpayers have an inherent interest in contracts in which their government officials enter, as indicated, *supra*, Taxpayers in this litigation have a specifically recognized legal right to ensure their tax dollars are lawfully spent. *See Ethington*, 66 Ariz. at 386, 189 P.2d at 212; *Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. at 432, 600 P.2d at 45. It is immaterial that Taxpayers are not a “party” to an agreement between their elected representatives and two labor unions. The operative questions are whether they have an interest “relating to the *property* or *transaction* which is the subject of the action” and whether disposition of this action would impair that interest. Ariz. R. Civ. P. 24(a) (emphasis added). Taxpayers unquestionably have an interest in the lawful expenditure of their tax dollars which is imminently threatened by the relief Plaintiffs have demanded in this litigation and would be impaired should the Court grant that relief and order pension payments Taxpayers contend are unlawful.

**B. The City Does Not Adequately Represent Taxpayers’ Interest.**

Plaintiff Supervisors next argue that the City adequately represents Taxpayers’ interest because

“the City also seeks to prevent Plaintiffs’ requested relief.” (Supervisors’ Resp. at 8). It may certainly be true that the City wishes to defend the provisions of the 2014-2016 TCE document. Indeed, in any circumstance where a party seeks intervention, they likely share a desired outcome with one of the existing parties. However, even if Taxpayers and the City may desire the same outcome, they have different interests. While Taxpayers interest is in the lawful expenditure of funds they have an obligation to replenish, the City may have other concerns, such as positive labor relations. Additionally, the right to maintain a suit based on Taxpayers’ equitable ownership of the funds Plaintiffs seek to unlawfully spend belongs to Taxpayers, and not the City. *See Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 447-48, 784 P.2d 268, 273-74 (App. 1989). Finally, in this case, while the City may raise the issue of the illegality of the pension payments in question, given the City’s acquiescence to similar payments in the past, only Taxpayers can fully and reliably make the argument that the relief requested by Plaintiffs is patently illegal.

## **II. Taxpayers Assert a Justiciable Issue.**

There is a justiciable controversy because the relief requested by Plaintiffs imminently threatens the lawful expenditure of Taxpayer funds – an interest Taxpayers have a right to protect in this action.

Plaintiff PLEA argues that this case does not present a justiciable controversy because Taxpayers’ “purported interest is not at jeopardy if the Court decides Plaintiffs’ claims on the merits without Applicants.” (PLEA’s Resp. at 6). Relying on *Moore v. Bolin*, a case involving an electoral dispute between a gubernatorial candidate and the Arizona Secretary of State, PLEA appears to contend that Taxpayers’ interest in this litigation is not based on the “existing state of facts” but rather a “theoretical controversy.” *Id.*; 70 Ariz. 354, 220 P.2d 850 (1950).

For a court to grant declaratory relief, a justiciable controversy must exist. *Original Apartment Movers, Inc. v. Waddell*, 179 Ariz. 419, 420, 880 P.2d 639, 640 (App.1993). A justiciable controversy exists if there is “an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party.” *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 45, ¶ 10, 13 P.3d 785, 787 (App.2000).

Applicants' interest in this case is derived from their status as Phoenix taxpayers. As described *supra*, it is a well-established principle that Taxpayers may seek to enjoin the illegal expenditure of public funds – their right to maintain such suits deriving from their equitable ownership of taxpayer dollars and their liability to pay for unlawful expenditures. *Ethington*, 66 Ariz. at 386, 189 P.2d at 212. Taxpayers have a right to ensure their tax dollars are lawfully spent. That right will be violated if Plaintiffs are granted the relief they expressly request. *See* (Pl. PLEA's Amended Complaint at 21-22); (Pl. Supervisors' Complaint at 37-38). Moreover, Plaintiff PLEA is asking this Court to order the City to immediately initiate pension payments that Taxpayers contend violate the plain language of state law. There is nothing theoretical about a presently existing controversy between PLEA's demand for relief and Taxpayers' contention that Plaintiff PLEA's demand, and any order granting it, is unlawful and unconstitutional.

Apparently, PLEA would like Taxpayers to wait and see whether this Court orders relief that would result in the immediate, unlawful expenditure of Taxpayer funds. (PLEA's Resp. at 6). Moreover, PLEA is asking the Court to resolve a constitutional question without the benefit of all relevant legal arguments from all interested parties. That is not what Rule 24(a) and (b) requires, and, in fact, is anathema to the very purpose of intervention, which is for a party to protect their interest by entering into an action *before* an adjudication may impair it.

### **III. Taxpayers Have Met the Requirements for Permissive Intervention.**

Taxpayers have easily met the requirements for intervention of right; in the alternative, the Court should exercise its discretion and grant permissive intervention because Taxpayers' defense and the main action share both questions of fact and law and their entry in this litigation will not delay the proceedings or prejudice the adjudication of the rights of the original parties. Ariz. R. Civ. P. 24(b)(2). The Rule governing permissive intervention "is remedial and should be liberally construed with the view of assisting parties in obtaining justice and protecting their rights." *Mitchell v. City of Nogales*, 83 Ariz. 328, 333, 320 P.2d 955, 958 (1958); *see also Bechtel v. Rose*, 150 Ariz. 68, 72, 722 P.2d 236, 240 (1986).

Plaintiff PLEA claims that this Court should not exercise its discretion to permit intervention by Taxpayers, arguing that “[a]pplicants do not take a common stance because the issue of legality has not been framed by existing parties.” (PLEA’s Resp. at 7). *See also* (Supervisors’ Resp. at 9). This is plainly untrue. The City of Phoenix has expressly raised the legality of the pension payments at issue as a question of law that must be resolved in this litigation. (Def.’s Obj. to App. Prelim. Inj. at 18). This case puts that common question of law squarely before the Court, and Taxpayers – whose interests regarding that issue are most directly at stake – are the party best equipped to brief and argue that legal question.

Additionally, the facts relevant to that question of law are similar to those raised by existing parties. Therefore, as indicated in Taxpayers’ Motion to Intervene, Taxpayers anticipate that the factual development of the record by the existing parties and Taxpayers will be substantially the same. Moreover, despite Plaintiff PLEA’s assertions that Taxpayers’ intervention raises “collateral issue[s]” involving “past payments under expired MOUs” (PLEA’s Resp. at 8), Taxpayers’ interest in this litigation involves the very same Memoranda of Understanding provisions that Plaintiffs seek to resurrect before this Court.

The interest of Taxpayers is clear, their claims involve both questions of law and fact in common with the existing parties, and their entry in this action will not delay or prejudice the rights of existing parties. In addition to satisfying the criteria for intervention of right, Taxpayers should alternatively be permitted to intervene as an exercise of this Court’s discretion.

#### **IV. This Court Has Clear Jurisdiction to Hear Taxpayers’ Claims.**

Plaintiff PLEA contends that this Court does not have jurisdiction to determine whether the relief PLEA requests violates state law. (PLEA’s Resp. at 9). It is, of course, axiomatic that a determination of the lawfulness and adequacy of relief demanded is a quintessential judicial function. However, PLEA contends that the Local Police Pension Board “has the sole power and responsibility to decide Applicants’ legality issue...,” purportedly because original jurisdiction vests in the Local Board (*id.* at 9-10).

“In determining whether an administrative agency has been granted original jurisdiction, the courts ask whether the agency ‘is *specifically empowered* to act by the Legislature.’ ” *Hamilton v. State*, 186 Ariz. 590, 593, 925 P.2d 731, 734 (App. 1996) (*quoting Minor v. Cochise Cnty.*, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980) (emphasis added)). In other words, in order for an administrative agency or board to have original jurisdiction, the Legislature must specifically grant that agency original jurisdiction. *See, e.g.,* A.R.S. § 41-1481, *et seq.* (the Arizona Civil Rights Division has original jurisdiction over certain employment discrimination claims).

Plaintiff PLEA asserts that the Local Board has original jurisdiction in this case. (PLEA’s Resp. at 10). To establish that proposition, PLEA relies on A.R.S. § 38-847(D)(1), the statutory provision that outlines the *specific, enumerated* powers and duties of local boards in PSPRS. Nowhere in the statutory provision cited, or in any other statutory provision, does state law grant the Local Board original jurisdiction to determine whether contractual provisions between municipalities and public labor unions violate state law. State law certainly does not afford the Local Board exclusive authority to determine whether the relief demanded by a civil litigant is lawful. Moreover, Taxpayers seek to intervene in this case not to challenge the actions of the Local Board,<sup>1</sup> but to prevent the unlawful expenditure of Taxpayer funds that would result if PLEA receives the relief it is specifically demanding.

Plaintiff PLEA also appears to further assert that the exhaustion of administrative remedies doctrine applies in this case (PLEA’s Resp. at 9-10). Exhaustion of remedies is inapplicable, even nonsensical, here because neither the Local Board nor PRPRS have original jurisdiction in this action and because Taxpayers are not “claimants” under PSPRS.

Arizona courts have repeatedly held that when an agency lacks original jurisdiction, the exhaustion of remedies doctrine does not apply. *See City of Bisbee v. Arizona Water Co.*, 214 Ariz. 368, 373, 153 P.3d 389, 394 (App. 2007); *Campbell v. Mountain State Tel. & Tel. Co.*, 120 Ariz. 426, 429, 586 P.2d 987, 990 (App. 1978) (“The doctrine [of exhaustion] applies only when an administrative

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<sup>1</sup> As a result of the TCE 2014-2016 document, the Local Board will no longer prospectively approve pension payments that include the unlawful pension spiking components of compensation.



agency has original jurisdiction.”). As indicated *supra*, PLEA lacks original jurisdiction because state statute does not and cannot confer original jurisdiction on the Local Board to perform purely judicial functions.

Additionally, the statutory provision cited by PLEA in support of its claim that exhaustion applies, A.R.S. § 38-847(D)(3), pertains to the process of determining the rights of “*claimants*” under PSPRS. “ ‘Claimant’ means any member or beneficiary who files an application for benefits pursuant to this article.” A.R.S. § 38-842(11). Taxpayers are obviously not “claimants” before the Local Board or under PSPRS. Therefore, the process of review set forth for Local Board determinations is entirely inapplicable to this case. Exhaustion of remedies simply does not apply to this intervention request based on taxpayer standing.

#### **V. Conclusion**

Taxpayers seek to intervene to prevent the imminent and unlawful expenditure of Taxpayer funds should Plaintiffs’ request for relief be granted. In an attempt to keep Taxpayers out of this case, Plaintiffs raise arguments that are either inapplicable to a Motion to Intervene or unavailing. Taxpayers have filed a timely motion establishing a clear interest in this litigation that is not adequately represented by the existing parties and would be immediately impaired should Plaintiffs receive the relief they have demanded. Accordingly, Taxpayers Motion to Intervene should be GRANTED.

**RESPECTFULLY SUBMITTED** this 22<sup>nd</sup> day of August, 2014 by:

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**CERTIFICATE OF SERVICE**

ORIGINAL E-FILED this 22<sup>nd</sup> day of August, 2014, with a copy delivered via the ECF system to:

The Honorable Robert Oberbillig  
Maricopa County Superior Court

Clerk of Court  
Maricopa County Superior Court

COPY of the foregoing E-MAILED and MAILED this 22<sup>nd</sup> day of August, 2014 to:

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