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

JAYNE FRIEDMAN, et al., Plaintiffs, vs. CAVE CREEK UNIFIED SCHOOL DISTRICT #93, et al., Defendants.	Case No.: CV2011-007925 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Oral argument requested *Hon. Eileen S. Willett*

Plaintiffs Jayne Friedman and Richard Bail move for summary judgment pursuant to Ariz. R. Civ. P. 56. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). This Motion is supported by the following Memorandum of Points and Authorities, and by Plaintiffs" Statement of Facts ("SOF").

MEMORANDUM OF POINTS AND AUTHORITIES

On November 7, 2000, the Cave Creek Unified School District No. 93 ("the District") held a Special Election where voters considered a $41.6 million class B bond measure for the

construction of several new schools and the acquisition of new buses. (SOF 1.) Ariz. Const. art. 7, § 13 requires voter approval of all bond issues, and Arizona law requires school districts wishing to issue class B bonds to mail a publicity pamphlet to each voting household, containing a "complete list of each proposed capital improvement that will be funded with the proceeds of the bonds." A.R.S. § 15-491(H)(6). Pursuant to this provision, the District sent out a Publicity Pamphlet, which included the purposes of the bond measure:

- Acquiring by purchase or lease school lots;
- Constructing new school buildings including but not limited to two new elementary schools, one new middle school and one new high school;
- Acquiring pupil transportation vehicles;
- Improving school grounds, including adjacent ways thereto;
- Liquidating indebtedness incurred for the purposes set forth above;
- Providing all utilities and other capital items necessary for the construction of school buildings and for improving school grounds;
- Paying all architectural, design, engineering, project and construction management and other costs incurred in connection with the purposes set forth above; and
- Paying all legal, financial and other costs in connection with issuance of the bonds

(SOF 1.) Voters approved the measure and bonds were issued.

According to the District"s 2010 Annual Report, the District still owes $17.9 million on the bonds, which will take taxpayers about 13 more years to pay back. (SOF 3.) Arizona law requires a school district to repay its bonds by levying a tax on the taxable property within the district to pay both the interest and the portion of the principal due. A.R.S. § 15-1022.

Approximately $13 million in proceeds from the 2000 bond measure remain unspent. (SOF 6.) Prior to enactment of 2010 Ariz. Sess. Laws. 332 § 34, the statute that is the subject of this lawsuit, under Arizona law and the terms of the publicity pamphlet, unspent money should have gone toward paying down the bond debt. *See* A.R.S. § 15-1024(B)(1).

At the time of the 2000 bond election, Arizona law specifically prohibited government from using bond proceeds for purposes other than those approved by voters.[1] A.R.S. § 15-491(J) states:

> If the voters approve the issuance of school district class B bonds . . . , the school district shall not use the bond proceeds for any purposes other than the proposed capital improvements listed in the publicity pamphlet, except that up to ten per cent of the bond proceeds may be used for general capital expenses, including cost overruns of proposed capital improvements.

Thus, voters could reasonably expect that the proceeds from the bonds would be spent on the constructing new schools and the related projects identified in the publicity pamphlet. Had they known that the District could otherwise spend the money, they might have voted differently.

On May 11, 2010, Governor Brewer signed into law 2010 Ariz. Sess. Laws. 332. (SOF 15.) Section 34 allows school board members to divert bond funds from voter-approved projects to capital improvements that have not been sanctioned by voters:

> Notwithstanding section 15-491, subsection J, Arizona Revised Statutes, when nine years or more have passed since an election that authorized a school district to issue bonds, the school district may choose to use the proceeds of any bonds authorized at that election for any necessary capital improvement, provided that the school district‟s governing board votes to authorize the proposed use of the bond proceeds prior to June 30, 2013.

Defendant Board Members voted to authorize the remaining 2000 bond money for the improvement of existing school facilities pursuant to § 34. (SOF 19.) Defendants are now planning and designing a variety of renovation projects. (SOF 24-25.)

[1] Besides the special exception carved out by 2010 Ariz. Sess. Laws. 332 § 34, the provision challenged here, A.R.S. § 15-491(J) still prohibits government from using bond proceeds for unapproved purposes.

Because it violates the state and federal contract clauses and the state Special Law Clause, Plaintiffs, who are District taxpayers whose property taxes finance the repayment of the bonds, ask this Court to declare § 34 unconstitutional and to permanently enjoin Defendants from entering into contracts or otherwise spending funds remaining from the 2000 bond program for purposes not listed in the District‟s November 2000 Publicity Pamphlet.

I. Defendants' actions and § 34 violate the federal and state Contracts Clauses

Both the federal and state constitutions prevent government from impairing contracts. U.S. Const. Art. 1, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); Ariz. Const. Art. II, § 25 ("No . . . law impairing the obligation of a contract, shall ever be enacted"). To bring a successful claim against a government for violating the contracts clauses, a plaintiff must show: (1) the existence of a contract, and (2) an unconstitutional impairment of that contract. *Baker v. Arizona Dept. of Revenue*, 209 Ariz. 561, 564, 105 P.3d 1180, 1183 (App. 2005). If a contractual impairment exists, courts inquire whether the state has "a significant and legitimate public purpose behind the regulation, such as the remedying of a *broad and general* social or economic problem." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004) (quoting *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-12 (1983)) (emphasis added). If so, courts determine whether the government action is reasonable and appropriately related to the underlying public purpose. *Id.* (citations omitted). But, as is the case here, "[c]ourts defer to a lesser degree when the [government] is a party to the contract because „the [government‟s] self-interest is at stake.‟" *Id.* (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)).

a. The 2000 election formed a contractual relationship

Voter approval of a bond measure for specific, enumerated purposes establishes a contractual relationship between the government and the voters, obligating the government to abide by the terms of the contract.[2] While Arizona courts have not yet had the opportunity to opine on the contractual relationship between a school district and its voters, courts in other jurisdictions have recognized that the relationship between the government and the electorate arising out of a bond election is contractual and thus protected by federal and state contracts clauses. Arizona"s regime of putting voters in charge of bond authorizations strongly supports this doctrine.

California courts have held that bond elections create relationships that are protected by the Contracts Clause. A California appellate court held with regard to a bond election, "Without question the election created a contractual relation between the electors and the supervisors. The terms of the contract are contained in the ballot proposal approved by the electors." *County of San Diego v. Perrigo*, 318 P.2d 542, 545 (Cal. App. 1957). *See also County of San Bernardino v. Way*, 18 Cal. 2d 647, 665, 117 P.2d 354, 365 (1941) ("It is the settled doctrine in California that upon the voting of bonds . . . there arises between the state or its agency and the taxpayers certain contractual obligations which must be respected by any subsequent legislation or by any action on the part of public officials."). Likewise, Texas courts have long recognized

[2] Note that Arizona courts have found that the purchase of bonds creates a contractual relationship between *bondholders* and the governmental entity selling the bonds. *See, e.g., Arizona State Highway Commission v. Nelson*, 105 Ariz. 76, 81, 459 P.2d 509, 514 (1969) ("It is a well established principle of Constitutional Law that bondholders are protected against subsequent legislation that will impair the contractual obligation evidenced by the bond").

that any law that attempts to "impair and destroy [the voters'] rights existing at the time of the vote" violates the state's contracts clause. *San Saba County v. McCraw*, 108 S.W. 2d 200, 202-203 (Tex. 1937). *See also Fletcher v. Ely*, 53 S.W. 2d 817, 818 (Tex. App. 1932) (the result of a bond election "has been referred to as having the binding effect and force of a contract"). Courts in other jurisdictions have likewise protected this relationship. *Roane County Court v. O'Brien*, 122 S.E. 352, 355 (W. Va. 1923) (recognizing that a "referendum by the people of the district constituted a contract or quasi-contract between the voters of the district and the county court").

The 2000 Cave Creek bond election created, as do all Arizona school district bond elections, a contract between the school district and the voters because bonds cannot issue without voter approval. This requirement of voter consent is key, as there is a "difference in the character of the rights of taxpayers in connection with . . . funds raised by levies which can be created *only by their consent* and of their rights with respect to . . . levies imposed by a political subdivision." *See Jarrell v. Bd. of Ed. of Raleigh County*, 50 S.E.2d 442, 445 (W. Va. 1948) (emphasis added).[3] The Arizona Constitution requires school districts to obtain voter approval before issuing bonds, Ariz. Const. Art. 7, § 13 ("Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers"). Other jurisdictions that have recognized a contract with the voters have done so largely because of these extra

[3] Indeed, Florida courts have found contractual relationships between voters and a municipality when taxpayers were required to approve special levies, *Fort Lauderdale v. Kraft*, 21 So.2d 461 (Fla. 1945), but in other cases have not found a contractual relationship when the law did *not* require public approval to levy a tax. *Carson v. City of Fort Lauderdale*, 244 So.2d 485 (Fla. Dist. Ct. App. 1971).

requirements imposed by state law. *Cf. Associated Students of N. Peralta Cmty. Coll. v. Bd. of Trustees,* 92 Cal. App. 3d 672, 676 (Cal. Ct. App. 1979) (a state constitutional provision that required voter approval before public entities could incur debt "led to a number of early decisions which found in bond elections and comparable situations a contractual relationship between the public entity and individual electors"); *Skinner v. City of Santa Rosa*, 40 P. 742 (Cal. 1895); *Fort Lauderdale*, 21 So. 2d 461 (finding a contractual relationship between a municipality and the taxpayers when taxpayers were required by law to approve a special assessment levy, and holding that the contract was impaired when the city subsequently tried to alter the plan). Additionally, Arizona law requires districts wishing to issue class B bonds to mail to each voting household a publicity pamphlet with a "complete list of each proposed capital improvement that will be funded with the process of the bonds." A.R.S. § 15-491(H)(6). Thus, the 2000 special election created a contractual obligation, and its terms were outlined in the Publicity Pamphlet. Failure to recognize this relationship would largely nullify the aforementioned constitutional and statutory requirements and curtail voter control over the bond approval process.

b. Section 34 and the District's actions pursuant to it impaired the contract

A law impairs a contract when it enlarges or reduces an obligation in favor of one party against another. *Phelps Dodge Corp. v. Arizona Elec. Power Co-op, Inc.*, 207 Ariz. 95, 122, 83 P.3d 573, 600 (App. 2004). Courts are particularly suspicious when government uses legislation to extricate itself from its own contracts. *See, e.g., United States Trust Co.*, 431 U.S. 1 (1977) (striking down efforts of the Port Authority of New York and New Jersey to nullify bond

covenants that prohibited it from using bond proceeds to support mass transit). Section 34 greatly alters and reduces the obligations of school districts to the voters by allowing districts like Cave Creek to deviate from voter-approved expenditures of bond proceeds.

Texas courts require bond funds to be spent for their approved purposes, and bond-funded projects must continue to be used for that purpose. *Gallagher Headquarters Ranch Development, Ltd. v. City of San Antonio*, 269 S.W. 3d 628, 633-35 (Tex. App. 2008) (*remanded by* 303 S.W. 3d 700 (Tex. 2010) due to a settlement agreement). "[W]hen the voters thus speak, the proceeds of the bond issue are „earmarked" with the character of a trust fund which may not be diverted to another purpose or project." *Fletcher*, 53 S.W. 2d at 818. The District clearly violated its contractual obligations to the voters when Board Members voted to divert the bond proceeds to various renovations and other capital improvements. Because the voters authorized the issuance of bonds specifically for the construction of a new school, the proceeds cannot be spent on these improvements to old schools.[4]

The contracts clauses do not prohibit the legislature from applying a law like § 34 prospectively, to bond proceeds that were allocated by elections after the law. In that case, voters would be on notice that, when they authorize their school district to issue bonds for certain purposes, district officials would be permitted to use the money for other purposes. This knowledge would reasonably factor into the voters" decision making processes.

[4] To be sure, the Contracts Clause does not prohibit states from repealing or amending statutes *generally*. *Cf. United States Trust Co.*, 431 U.S. 1 at 17. But if the Clause is to have any real meaning, the state must be able to bind successive governments by entering into contracts whose durations outlive the current legislature. A legislative body may not undo a contract entered into by a previous legislative body.

The reasonable expectations of a party to a contract play an important role in determining the extent of a retroactive statute"s impairment. *Matter of Estate of Dobert*, 192 Ariz. 248, 253, 963 P.2d 327, 332 (App. 1998). Section 34 applies to bonds that were already approved for specific purposes, and Cave Creek voters had no warning that approving bonds for new schools would allow District Board Members subsequently to reallocate the money to other projects. Indeed, the law in force at the time of the November 7, 2000, Special Election stated that the District could *not* use the bond proceeds for any purpose other than those specifically enumerated in the publicity pamphlet. A.R.S. § 15-491(J). The statutes in effect at the time that bonds were approved "became a part of the contract for the issuance and sale of the bonds, and was a part of the consideration for the authorization of their issue." *David v. Timon*, 183 S.W. 88, 91 (Tex. Civ. App. 1916). In other words, "bonds must be issued in conformity with the statute in force at the time of issuance," and a court will not assume that voters were aware of an imminent or probable change in legislation. *Morgan v. Falls City*, 174 N.W. 421 (Neb. 1919); *Verma v. Stuhr*, 223 Ariz. 144, 152, 221 P.3d 23, 31 (App. 2009) ("[T]he parties are presumed to know the law and the law is made part of the contract").

Preserving voters" reasonable expectations in a contractual sense comports with the greater public purpose of protecting voters" "right to full disclosure as to how the tax revenues would be spent." *See Daniel v. Jones*, 966 S.W.2d 226, 233 (Ark. 1998) ("The voters were not specifically informed, nor could they be presumed to have known, that the . . . county . . . would be allowed to spend the money for purposes other than those designated on the ballot"). Allowing Defendants to spend the bond money on unauthorized projects "work[s], in effect, a

fraud upon the electors through securing their votes for the approval of these bond issues upon terms and conditions which will not be kept." *Peery v. City of Los Angeles*, 203 P. 992, 998 (Cal. 1922). Furthermore, a statute cannot excuse the District from constitutional compliance. *See Turken v. Gordon*, 223 Ariz. 342, 351, 224 P.3d 158, 167 (2010) (citations omitted) ("[S]tatutory compliance does not automatically establish constitutional compliance").

Because the District violated its 2000 contract with the voters in voting pursuant to § 34 to spend bond proceeds on projects that were not listed in the publicity pamphlet, on contracts clause grounds alone, § 34 should be struck down and Defendants should be enjoined from spending the 2000 bond money on projects outside the publicity pamphlet.

II. Defendants' actions pursuant to § 34 violate the state Special Law Clause

Additionally, in voting to use the proceeds from the 2000 bond measure for capital improvements that were not authorized by the voters, Defendants Board Members acted pursuant to an unconstitutional special law. Article IV, part 2, § 19 of the Arizona Constitution provides, "No local or special laws shall be enacted in any of the following cases," including "(20) When a general law can be made applicable." A law is general and not special only if it satisfies all three prongs of the test: (1) the classification is rationally related to a legitimate governmental objective; (2) the classification is legitimate, encompassing all members of the relevant class; and (3) the class is elastic, allowing members to move in and out of it. *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006). Section 34 fails all three prongs, although failing any one is sufficient.

a. Section 34 creates an illegitimate classification

Challenges under the Special Law clause succeed if a law lacks a rational basis to further a legitimate government purpose. *Smith v. City of Tucson*, 153 Ariz. 372, 373, 736 P.2d 1184, 1185 (App. 1987). The aim of § 34 is not legitimate, for it permits school districts to breach their contractual obligations to the voters. It is an impermissible purpose to pass a law specifically designed to abrogate contract rights. Since the Contracts Clause *itself* limits otherwise legitimate exercises of state legislative authority, it would be illogical to argue that a law with no other end but impairing contracts is a legitimate exercise of state authority. *See U.S. Trust Co.*, 431 U.S. at 21, 30-1 ("[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives"). A state has no legitimate interest in defying constitutionally-protected rights. *Cf. Stewart v. Blackwell*, 444 F.3d 843, 873 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (2007) ("[W]e find it difficult to conjure up what the State's legitimate interest is by the use of technology that dilutes the right to vote").

Furthermore, it is arbitrary to relieve some school districts of their obligation to spend bond proceeds on voter-approved projects and not others merely based on the date of the bond election. *See Tucson Elec. Power Co. v. Apache Cnty.*, 185 Ariz. 5, 13, 912 P.2d 9, 17 (App. 1995) (a class is unreasonable if it is "palpably arbitrary"). The requirement that nine years must have passed since a bond election in order for a district to be eligible, which effectively limits § 34's applicability to bonds already passed, is similar to the situation in *City of Tucson v. Woods*, 191 Ariz. 523, 959 P.2d 394 (App. 1997). The court confirmed that *no* circumstances,

no matter how "exigent," justified a law that provided emergency assistance to some county islands while excluding other similarly-situated islands. *Id.* at 530, 959 P.2d at 401. Similarly, a vote to approve such expenditures by June 30, 2013, is arbitrary as well.

b. Section 34 creates a class that does not encompass all members

"The fundamental intent of [Arizona's] prohibitions on local or special laws is to prevent the enactment of statutes bestowing special favors on preferred groups or localities." *Woods*, 191 Ariz. at 529, 959 P.2d at 400. The legislative history surrounding § 34 "strongly suggests that the provision was the product of the very evil that the constitution was intended to guard against." *See id.* at 529, 959 P.2d at 400. In June 2009, the legislature passed SB 1187. (SOF 7.) Section 72 of that bill, a precursor to § 34, the subject of this lawsuit, did not reference the District by name, but was drafted narrowly to allow districts with bond money remaining from 2000 elections to spend the money on building modifications not approved by voters. (*See id.*) But legislative summaries of the bill expose that section's actual intentions, noting that the provision "[a]llows the *Cave Creek Unified School District* to expend remaining proceeds from a bond election conducted in November of 2000 to make modifications to an existing school rather than build a new school facility." (*See* SOF 8) (emphasis added). Indeed, on Saturday, June 27, 2009, the Cave Creek Board even convened a Special Meeting to support the Senate bill, which the Governor later vetoed. (SOF 9-10.) During its Third Special Session in 2009, the legislature passed an identically-worded bill to allow districts with bond money remaining from 2000 elections to use the money on projects not approved by voters. (SOF 11.) Again, legislative summaries of the bill reveal that its purpose was to allow "the *Cave Creek Unified*

School District to expend remaining proceeds from a bond election conducted in November of 2000 to make modifications to an existing school rather than build a new school facility." (*See* SOF 13.) This bill became law, but the District did not act pursuant to it because it was special legislation in violation of law. (SOF 13-14.) Attempting to mask its constitutional deficiencies, the legislature altered the language and passed § 34. Nevertheless, the legislative summary still reflects that the law was intended to "[a]llow[] *Cave Creek Unified*, with governing board approval, to use bond proceeds authorized in November 2000 for any capital purpose until June 30, 2013." (SOF 16) (emphasis added).

The more narrowly a statute applies, the more skeptical courts will be in determining whether it is a special law. *See, e.g., El Paso Natural Gas Co. v. Arizona Dep't of Revenue*, 174 Ariz. 470, 478, 851 P.2d 95, 103 (App. 1992) ("Although the number in the class is not determinative, as that number decreases in size, courts are more likely to find the classification invalid."). Just as legislative history indicates that § 34 was designed not for an entire affected class, but rather specifically for the Cave Creek District, in reality, § 34 creates a very narrow class, excluding all but a few other districts. In a survey of 218 of the 224 school districts besides Cave Creek in the State of Arizona, not even 3% have funds remaining from bond elections held prior to June 30, 2004, and thus are included in the class created by 2010 Ariz. Sess. Laws 332 § 34. (SOF 35.) This does not comport with a law supposedly designed to address a statewide economic predicament.

c. Section 34 creates an inelastic class

Section 34 creates an inelastic class and is thus is an unconstitutional special law. A law is special or local if it is plainly intended for a particular case and looks to no broader application in the future. *Arizona Downs v. Arizona Horseman's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981). For example, a tax law that applied only to hospital districts that existing in a certain fiscal year violated the Special Law Clause. *El Paso Natural Gas Co.*, 174 Ariz. at 478, 851 P.2d at 103 (App. 1992). In *Republic Inv. Fund I v. Town of Surprise*, the challenged property deannexation statute only applied to cities or towns of certain populations as calculated under a particular census, which prevented other municipalities whose populations might change in the future from coming within the statute"s operation. 166 Ariz. 143, 151, 800 P.2d 1251, 1259 (1990). Thus, the Arizona Supreme Court held that the statute was an unconstitutional special law. *Id.* (citations omitted) ("A classification limited to a population as of a particular census or date is a typical form of defective closed class; such an act is a form of identification, not of classification"). In contrast, a law expanding term limits for city mayors was not an unconstitutional special law because future mayors could enter and the current mayor could exit the class. *Sherman v. City of Tempe*, 202 Ariz. 339, 45 P.3d 336 (2002).[5]

By its own terms, § 34 only applies "when nine years or more have passed since an election that authorized a school district to issue bonds," and the school board must "authorize the proposed use of the bond proceeds prior to June 30, 2013." In other words, § 34 can only be

[5] The law extending the mayoral term passed simultaneously with the commencement of the new mayor"s term, so unlike § 34, voters had notice of the possible term extension and the law did not operate retroactively. *See id.* at 340-41, 45 P.3d at 337-38.

used by a district sitting on unspent bond money that was approved by voters on or before June 30, 2004. Thus, the defined class is not elastic, because as of the law"s enactment, no future bond measures may enter the class. Since bond measures must have been approved on or before June 30, 2004, to be covered by § 34, new bonds (bonds passed after § 34 was enacted) are ineligible to enter the class. Thus, § 34 "has no other application to the future. As such it is a special or local law." *See Barbee v. Holbrook*, 91 Ariz. 263, 265, 371 P.2d 886, 888 (1962).

CONCLUSION

Section 34 contemplates a discrete, particular class, circumvents the constitutionally-protected will of the voters and has permitted the Cave Creek District to elude its contractual obligations. For the aforementioned reasons, Plaintiffs respectfully request that this Court grant their Motion for Summary Judgment and award Plaintiffs their costs and fees.

RESPECTFULLY SUBMITTED this 17th day of June, 2011 by:

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