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Dorotha Stephens
Filing ID 954429
8/1/2011 1:53:00 PM

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

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| JAYNE FRIEDMAN, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>CAVE CREEK UNIFIED SCHOOL DISTRICT #93, et al.,<br><br>Defendants. | Case No.: CV2011-007925<br><br>**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**<br><br>*Hon. Eileen S. Willett* |

Plaintiffs submit the following Memorandum in support of their June 17, 2011, Motion for Summary Judgment. For the reasons set forth below, Plaintiffs' Motion for Summary Judgment should be granted.

## MEMORANDUM

### I. Both § 34 and Defendants' actions violate the state and federal contract clauses

The 2000 special election created a binding agreement between the Cave Creek Unified School District and the body politic. This contract was unconstitutionally impaired when the District, acting pursuant to 2010 Ariz. Sess. Laws. 332 § 34, voted to spend the bond proceeds on purposes not listed in the November 2000 Publicity Pamphlet.

**a. The bond election created a contract between the District and body politic**

Defendants seek to avoid that the voters, in approving the 2000 bond measure, contracted with the District for specific, enumerated purposes. But Defendants' arguments rest on a misunderstanding of Plaintiffs' claims and the relevant case law.

To begin, Defendants cite several cases for the proposition that "the word 'contract' is used in its usual sense in the impairment-of-contracts clauses." (Defs.' Combined Reply and Resp. 2) ("Resp."). But none of these cases supports Defendants' contention that the 2000 bond agreement is not contractual in the "usual sense"; rather, these cases strengthen *Plaintiffs'* position. In *Louisiana v. City of New Orleans*, 109 U.S. 285 (1883), for example, the Court held that the word "contract" does not extend to court judgments. Indeed, judgments are not the product of agreement, but rather "are usually the result of violent contests." *Id.* at 288. Thus, a contract "in its ordinary sense" is an agreement formed by "[m]utual assent to its terms," such as the 2000 bond agreement, and not an obligation "imposed upon the losing party by a higher authority against his will and protest," such as a court judgment.[1] *See id.* Here, the relationship was created when the District extended an offer, the terms of which were precise and specific, which the citizenry accepted – forming a classic contract.

The other cases cited by Defendants (Resp. 2) likewise distinguish between responsibilities imposed by law (via general legislation or judicial decision), which lack the element of consent and are not protected by the Contracts Clause, and agreements formed by

[1] Thus, the Court upheld a law that *incidentally* delayed enforcement of *non-contractual* court judgments, while observing that "state legislation . . . shall not operate *directly* upon *contracts* of the [municipal] corporation, so as to impair their obligation." *Id.* at 290 (emphasis added).

mutual assent, which *are* protected. *See Crane v. Hahlo*, 258 U.S. 142 (1922) (statutory compensation awarded by a state agency for property damage is not protected by the Contracts Clause); *Freeland v. Williams*, 131 U.S. 405 (1889) (court judgment founded on a tort committed as an act of public war is not protected by the Contracts Clause); *Medina v. Bd. of Ret.*, 112 Cal. App. 4th 864 (App. 2003) (protection of the contracts clauses does not extend to invalid contracts).[2] Indeed, the cases cited by Defendant illustrate the distinction between assent to the specific terms of the 2000 bond measure, which formed a contract between the District and the body politic, and non-contractual duties arising out of general law.[3]

Defendants also misunderstand the parties to be bound by the 2000 agreement. They continue to assert that the contract is unenforceable because it "binds people who never assented to be bound," namely, people who voted against the bond measure or who refrained from voting. But the contract is not between the District and any individual voter; rather, it is between the District and the *body politic*, much like corporations, themselves single entities composed of individuals, may enter into contracts. *See, e.g., Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 541 (1839). When the requisite number of individual voters approved the terms of the bond

[2] It is curious that Defendants would cite to *Medina*, a California case, to support their contention that constitutional protection does not extend to contracts with the voters, when the contracts with the voter doctrine is alive and well in that jurisdiction.

[3] Indeed, the Contracts Clause does not prohibit legislatures from repealing or amending statutes *generally*. *Cf. United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977). But if the Clause is to have any real meaning, it must enforce contractual decisions that bind governments. *See, e.g., U.S. v. Winstar Corp.*, 518 U.S. 839, 874 (1996) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135-36)) ("[L]egislative sovereignty [is] limited by the federal Constitution"s bar against laws impairing the obligation of contracts").

measure, *all* taxpayers were bound by the results, regardless of whether or not they assented *individually*. *Accord Cass County v. Johnston*, 95 U.S. 360, 369 (1877) ("All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting"). This is the nature of representative government. If it were otherwise, absent or "no" voters would not be bound to repay the bond. But this is not so – every property taxpayer of the District is liable to repay the bond‟s principal and interest, because every property taxpayer is bound by the decision of the body politic.

Contrary to Defendants‟ claim, Plaintiffs do not set forth a separate claim based on vitiation of voter consent (*see* Resp. 4-5), nor do they claim that statutes created contract rights or became terms of the contract (*see id.* at 6-7). Plaintiffs simply contend that the 2000 special election created a contract between the District and voters, and the terms were contained in the publicity pamphlet. Furthermore, Plaintiffs do not seek to "constitutionalize a question that the drafters of Arizona‟s Constitution chose *not* to constitutionalize." (*See id.* at 5) (noting that Arizona‟s Constitution lacks provisions limiting expenditure of bond proceeds to purposes specified at the election). Indeed, the drafters of the Arizona Constitution specifically protected the voters‟ sole authority to authorize bonds. *See* Ariz. Const. art. VII, § 13. Acting pursuant to that authority, the voters agreed to a bond measure for specific purposes. This would have formed a binding contract even absent the statutes in place at the time of the election, *see* A.R.S. § 15-491(H)(6) (requiring the enumeration of capital improvements in bond elections) and § 15-491(J) (prohibiting expenditure of bond proceeds on purposes outside the publicity pamphlet), but those laws strengthen Plaintiffs‟ claim because they shaped the parties‟ expectations at the

time the contract was formed. *See, e.g., Matter of Estate of Dobert*, 192 Ariz. 248, 253, 963 P.2d 327, 332 (App. 1998) (the reasonable expectations of a party to a contract play an important role in determining the extent of a retroactive statute"s impairment). Plaintiffs seek enforcement of the contracts clauses, which the framers of both the federal and Arizona constitutions *did* choose to constitutionalize.[4] Plaintiffs may enforce this contract as members of the body politic and, more importantly, as taxpayers whose property tax dollars will replenish the illegally spent funds. (*See* Pls." Resp. 3.)

**b. Section 34 and the District's actions unlawfully impaired the contract**

Defendants disagree that this Court should apply the heightened scrutiny that applies when a government impairs its own contract because "[t]he State played no part in the issuance of the bonds." (*See* Resp. 7.) But Plaintiffs challenge the constitutionality of *both* §34 *and* Defendants" vote to spend bond proceeds on unauthorized projects. (*See* Compl. ¶¶ 36-37.) Since the District"s self interest clearly is at stake, heightened scrutiny applies.

The impairment of the contract with District voters was not justifiable under the state or federal constitutions, because the impairment was not made pursuant to a "significant and legitimate public purpose." *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983). Defendants attempt to liken this lawsuit to *Baker v. Ariz. Dept. of*

[4] Defendants" attempt to distinguish Arizona"s statutory framework from California"s constitutional framework is inapposite. (*See* Resp. 5) (*citing Comm. for Responsible Sch. Expansion v. Hermosa Beach City Sch. Dist.*, 142 Cal. App. 4th 1178 (App. 2006)). That was not a contracts clause case, but was brought under a state constitutional provision requiring that districts name specific bond expenditures and conduct audits. That provision is only triggered in certain situations and does *not* form the basis of the contract with the voters doctrine.

*Revenue* (*see* Resp. 8), which upheld an amendment to a vehicle tax credit statute when the original law was a mistake "riddled with loopholes" with a "potential cost [that] mushroomed to hundreds of millions of dollars." 209 Ariz. 561, 566, 105 P.2d 1180, 1185 (App. 2005). But the plaintiffs in *Baker* failed in part because their alleged "rights" were mere statutory benefits for persons who converted their vehicles to alternative fuel, *id.* at 563, 105 P.3d 1182, and because they had no reasonable expectation to the tax credits "when the statute offered $30,000 in cash to buy a $6000 used motor home," which even the plaintiffs admitted was "a little too good to be true." *Id.* at 566, 105 P.2d at 1185. In contrast, the 2000 bond measure was a specific agreement formed by the mutual assent of the District and the voters, who reasonably expected that the bond proceeds would be spent only on the purposes they agreed to. Defendants defied their agreement with the voters pursuant to a statute designed to foster that very impairment.

Furthermore, Defendants' claim that *Earthworks Contracting, Ltd. v. Mendel-Allison Construction of Cal., Inc.*, 167 Ariz. 102, 804 P.2d 831 (App. 1990), supports their position that severe economic conditions are "not required for the State to have a legitimate basis for impairing contract rights" is deceiving. (*See* Resp. 8.) That case, employing a *lesser* standard of scrutiny because the government's own contract was not involved, nevertheless states that "at least, the condition that would allow legislation to impair contracts constitutionally must be of such magnitude as to bring to the general consciousness of the public a feeling of urgency and need. Anything less would unduly undermine the constitutional limitation against impairment of contracts." *Id.* at 107, 804 P.2d at 836. Of course, the constitutional proscription has greatest salience when, as here, the government abrogates its own contract.

Defendants at once claim that a decline in state funding justifies breaching the 2000 contract, *and* that Plaintiffs' evidence showing that the District's financial circumstances do not justify impairment is "immaterial." (*See* Resp. 9.) But Defendants cannot have it both ways. Plaintiffs have shown that the District's funding shortage does not rise to the level of an emergency that justifies a government's abrogating its own contractual obligations. (*See* Pls.' Resp. 9-11.) This is especially so when it is Defendants' own contract at issue (*see id.*), and when the District did not attempt to ask voters' permission to use the money for other purposes.

## II. Section 34 violates the Special Law Clause

In addition to violating the federal and state contracts clauses, § 34 is a special law in violation of the Arizona Constitution. Ariz. Const. art. IV, pt. 2, § 19. A law is general and not special only if it satisfies *all* three prongs of the test. *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006).

### a. Section 34 does not accomplish a legitimate objective

Defendants claim that the courts may not "second-guess the wisdom of legislative enactments." (Resp. 10.) But the first prong does not give the legislature a blank check to pass arbitrary laws, insulated from judicial scrutiny so long as the legislature labels them "rational" and "legitimate." Defendants mistake impermissible judicial policymaking with obligatory judicial duty. While the first prong leaves room for legislative discretion, "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." The Federalist No. 78 at 466 (Alexander Hamilton) (C. Kessler, ed. 1999). A law whose specific

purpose is to permit school districts to break their promises with the electorate does not have a legitimate aim, and a law that arbitrarily relieves some school districts of their obligation to spend bond proceeds on voter-approved projects and not others based on the date of the bond election is not a rational means of obtaining this objective.

**b. Section 34 does not encompass all members of the relevant class**

Defendants mischaracterize the second prong as applying the rational basis test. (*See* Resp. 10-11.) But that would render it merely a reiteration of the first prong. Indeed, the very case Defendants cite for their proposition, *Town of Gilbert v. Maricopa County*, instead inquires whether "the classification is legitimate, encompassing all members of the relevant class," and applying "uniformly to all cases and to all members within the circumstances." 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006). The focus of the second prong is whether the law uniformly encompasses all members of the relevant class. An inquiry into rationality does not arise unless the class is first found to be limited. Defendants correctly note that a law may create a narrow class and still pass constitutional muster. (*See* Resp. 11.) But *Republic Inv. Fund I v. Town of Surprise* observes that smaller classes are more suspect. 166 Ariz. 143, 151, 800 P.2d 1251, 1259 (1990). Thus, if a class is arbitrarily defined and exceptionally small, as it is here, courts inquire *further* as to whether there is "a rational reason *why the scope of its application is limited*." *Town of Gilbert*, 213 Ariz. at 246, 141 P.3d at 421 (emphasis added). In this case, there is not. Defendants contend that § 34 was passed "to help school districts cope with the effects of the recession." (Resp. 11.) This explanation is not persuasive. If § 34 were passed to help districts deal with the recession, then the class should apply to all affected

districts. *See Town of Gilbert*, 213 Ariz. at 246, 141 P.3d at 421 ("Although Appellants argue that exigent circumstances exist in Gilbert, they did not articulate why it is rational that the legislation does not include other similarly situated county islands").

The District defends § 34's arbitrary dates because "the Legislature must draw lines." (Resp. 11.) But just because a line must be drawn does not give the legislature license to draw it wherever it likes, especially when it excludes similarly-situated members from a class. The Special Law provision is designed to prevent precisely the type of favoritism employed here. Indeed, Defendants imply that passing a bond measure "for one specified purpose and promptly divert[ing] the funds to some other purpose" would be improper (Resp. 11-12), yet somehow waiting nine years makes that very practice acceptable. Defendants also claim that so limiting the class "tends to ensure that Section 34 will apply only when a school district's needs have legitimately changed." (*Id.* at 12.) But the arbitrary dates that define the class do not ensure a legitimate change; indeed, the evidence shows that Defendants' needs have *not* significantly changed. Legislators specifically could have targeted districts that have special financial needs. Instead, they created a tortured classification obviously designed to benefit a specific school district, which is exactly what the Special Law Clause is designed to ferret out and prevent. As it stands, the class containing fewer than three percent of all districts bears no relationship to the economic need of the districts within the state and thus does not justify such a limited class.

**c. Section 34 creates an inelastic class**

Finally, Plaintiffs have shown that § 34 creates an inelastic class. Defendants, like those in *Town of Gilbert*, have not shown how other districts may enter the class. Defendants

correctly note that Plaintiffs‟ Statement of Facts identifies "six other school districts [that] are *already* in the class." (Resp. 13.) But this is precisely what Plaintiffs object to – these districts are *already* in the class, and they were in the class since the day § 34 became law. That is the very opposite of elasticity. Defendants conflate the legitimacy of the class, prong two, with the elasticity of the class, prong three. Showing that fewer than three percent of all districts are *already* in the affected class and noting that the class is larger than a class of one (*see* Resp. 13) lends nothing to the inquiry of whether a class is elastic.[5] Thus, it is inaccurate to state that any other districts can or will enter the class in 2012 or 2013. There is nothing that the districts outside the class can do to make themselves eligible. That is a blatant, *per se* violation of the Special Law prohibition.[6]

## CONCLUSION

For the above reasons, Plaintiffs‟ Motion for Summary Judgment should be granted and Plaintiffs should recover their costs and fees.

**RESPECTFULLY SUBMITTED** this 1st day of August, 2011 by:

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[5] Nor does a class of six (of 218 districts surveyed) merit the description of "significantly larger" (*see* Resp. 13) than a class of one.

[6] Furthermore, Defendants recognize that the case law supports judicial review of laws contrary to Ariz. Const. art. 4, pt. 2, § 19(20), (*see* Resp. 13-14), and Plaintiffs reject Defendants‟ view that on appeal such case law should be overturned.

ORIGINAL E-FILED this 1st day of August, 2011, with:

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