No. 23933

IN THE SUPREME COURT OF THE STATE OF COLORADO

GEORGE H. BROOKS, R. C. HUSMAN, MARY L. WILKINSON, RICHARD A. PERCHLIK, and CARLOS LEAL, JR., aka CHARLIE LEAL, JR., Plaintiffs, vs. DOROTHY M. ZABKA, GEORGE W. HALL, THOMAS A. RAPP, JR., JAMES P. RUCKER, JR., L. WAYNE WELLS, CHARLES A. GREGORY, and HAROLD L. HYDE, individually and as Members of the City Council of Greeley, Colorado, BARTON BUSS, individually and as City Clerk of the City of Greeley, Colorado, and THE CITY OF GREELEY, a Municipal corporation, Defendants.	Error to the District Court of the County of Weld State of Colorado HONORABLE DONALD A. CARPENTER Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

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INTRODUCTION

The undersigned attorney, representing the Colorado Municipal League as Amicus Curiae, appears in support of Defendants in Error, the City of Greeley, et al., in their position that the Plaintiffs in Error are not entitled to a referendum on the Greeley sales tax ordinance, Ordinance No. 34, Series of 1968 (Fol. 37). The Colorado Municipal League represents some two hundred fourteen (214) member cities and towns throughout the State of Colorado, including all thirty-four (34) home rule cities.

Many home rule cities have charter provisions similar to that of the City of Greeley Charter (Fol. 11) excepting from the referendum, ordinances "making the tax levy" or "levying a tax." Consequently, the Colorado Municipal League is concerned with obtaining a judicial interpretation that, where charters so provide, all tax levy ordinances are excepted from the referendum powers.

Similarly, since many home rule charters have provisions excepting from the referendum certain types of ordinances for which there may not be a comparable exception in Article V, Section 1, of the Colorado Consitition, the Colorado Municipal League is interested in upholding the right of home rule cities pursuant to Article XX, Section 6, to provide reasonable exceptions to the referendum power, provided the citizens so elect by charter enactment or amendment. In essence, the Colorado Municipal League and the officials of the home rule cities which it represents are concerned with confirmation of the right of the citizens of each home rule community to provide self-imposed restrictions or exceptions to the power of referendum.

STATEMENT OF THE CASE

The undersigned adopts the statement of the case appearing in the Brief of the Defendants in Error, the City of Greeley.

SUMMARY OF ARGUMENT

I. THE GREELEY CHARTER PROVISION "MAKING THE TAX LEVY" APPLIES TO ALL TAXES LEVIED - NOT JUST TO PROPERTY TAXES.

II. THE GREELEY CHARTER PROVISION EXCEPTING ORDINANCES LEVYING THE SALES TAX FROM THE RIGHT OF REFERENDUM DOES NOT EXCEED THE EXCEPTIONS SET FORTH IN ARTICLE V, SECTION 1, OF THE COLORADO CONSTITUTION.

III. ARTICLE V, SECTION 1, AND ARTICLE XX, SECTION 5, WHEN CONSTRUED WITH ARTICLE XX, SECTION 6, AND ARTICLE XX, SECTION 8, DO NOT PRECLUDE THE CITIZENS OF HOME RULE CITIES BY CHARTER ENACTMENT FROM IMPOSING UPON THEMSELVES REASONABLE EXCEPTIONS OR LIMITATIONS TO THE POWER OF REFERENDUM.

tends to render the budgetary process ineffective and leave the entire

ARGUMENT

I. THE GREELEY CHARTER PROVISION "MAKING THE TAX LEVY" APPLIES TO ALL TAXES LEVIED - NOT JUST TO PROPERTY TAXES.

Section 9-3 of the Greeley charter provides:

> The referendum shall apply to all ordinances passed by the Council, except ordinances making the tax levy, making the annual appropriation, calling a special election, or ordering improvements initiated by petition and to be paid for by special assessments. . .

If the framers of the charter had intended to limit the tax exception to property taxes, words of limitation could easily have been supplied. However, there is no language such as "property tax," "mill levy," or "ad valorem tax" justifying a narrow construction of "making the tax levy."

The charter language "except ordinances making the tax levy, making the annual appropriation" suggests that the framers of the Greeley charter desired and intended to except from the referendum all finance ordinances, whether they be in the form of a tax levy or appropriation. The apparent policies underlying excepting tax levy ordinances and appropriations from the referendum support the proposition that "making the tax levy" applies to all municipal tax ordinances. The first policy, it is submitted, is to avoid the disruptive and delaying effects on the budgetary process and the continuity and functioning of government resulting from referral of revenue measures. The other policy is recognition by the framers of the charter that only the elected governing body is in a position to intelligently make informed and dispassionate decisions on questions involving municipal finances. These policies indicate a wise recognition by the framers of the charter and the people of the City of Greeley that tax and appropriation measures do not lend themselves to the referendum process. A narrow interpretation of "making the tax levy" to include only the property tax levy would be inconsistent with these policies. Because of multiple tax sources used by municipalities, referendums on any type of tax tend to make the other tax levies, property or otherwise, uncertain, with resultant disruptive effects on local government. Section 9-3 of the Greeley charter is simply a recognition that the referendum does not lend itself to tax levying or appropriating ordinances, but rather tends to render the budgetary process ineffective and leave the entire governmental process impotent. It is respectfully submitted that this Court should avoid a narrow construction of "making the tax levy" and give meaning to the underlying policies for excepting from the referendum tax and appropriation ordinances.

II. THE GREELEY CHARTER PROVISION EXCEPTING ORDINANCES LEVYING THE SALES TAX FROM THE RIGHT OF REFERENDUM DOES NOT EXCEED THE EXCEPTIONS SET FORTH IN ARTICLE V, SECTION 1, OF THE COLORADO CONSTITUTION.

Courts should and do avoid consideration of serious constitutional questions where possible. Counsel for the City of Greeley on page 9 of his Brief, citing applicable portions of the record, indicates that the question of the constitutionality of the charter exceptions to the referendum was not raised by Plaintiffs in Error in the pleadings. The City of Greeley raised this point before the trial and made timely objection thereto. However, the Plaintiffs in Error never requested or obtained leave to amend their pleadings to plead unconstitutionality of the Greeley charter. This Court has held that where a plaintiff fails to plead a material matter and the matter is not tried by express or implied consent of the parties, the Supreme Court will not consider the issue not pleaded. Grant Co. v. Casady, 117 Colo. 405, 188 P.2d 881 (1948) and First National Bank of Denver v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951). Furthermore, the issue of invalidity on constitutional grounds should be affirmatively pleaded. Colorado Southern Co. v. Davis, 21 Colo. App. 1, 120 Pac. 1048, and People v. Barksdale, 104 Colo. 1, 87 P.2d 755 (1939). It is respectfully submitted that this Court should refuse on the above grounds to consider the constitutional question.

Should this Court elect to consider the constitutional question, it is submitted that the Greeley charter exception is consistent with the requirements set forth in Article V, Section 1, of the Colorado Constitution. (The undersigned is assuming, arguendo, that Article V, Section 1, applies to home rule cities.)

Article V, Section 1, reserves from the referendum all laws enacted by the General Assembly:

> . . . for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the department of state and state insitutions, . . .

This Court in Shields v. City of Loveland, 74 Colo. 27, 218 Pac. 913 (1923), indicated that exceptions to the referendum power contained in Article V, Section 1, apply not only to laws enacted by the general assembly, but also to municipal ordinances. Consequently, the Greeley charter does not violate Article V, Section 1, of the Colorado Constitution so long as the ordinance enacting the sales tax falls within the general scope of Article V, Section 1, exceptions. The policy underlying the exceptions of "appropriations for the suport and maintenance of the department of state and state institutions" from

the referendum power is the same policy for excepting all revenue measures - whether they constitute tax levies, budgets, or appropriations - for support of government. Referrals of tax levies are as disruptive and ill-advised as referrals of ordinances appropriating public funds. The Greeley charter tax ordinance exception is, in essence, a measure for the support of local government within the support and appropriation exception of Article V, Section 1.

The other broad exception to the referendum right in Article V, Section 1, is the emergency law or ordinance. In Shields, supra, this Court held that emergency or safety ordinances, necessary for the public peace, health, or safety, are exempt from the referendum power and that the legislative body's determination of the emergency is conclusive. In adopting section 9-3 of the charter, the people of Greeley wished to avoid the potential abuse of all ordinances being declared emergency ordinances. However, the enactment of tax ordinances and appropriation ordinances were of such importance and urgency by their very nature that these ordinances were specifically excluded from the power of referendum. It is submitted that in light of the disruptive effects of referring tax ordinances, and in light of the otherwise apparent desire of the people to limit the emergency ordinance exception, tax ordinances can reasonably be construed to fall within the exception of valid emergency ordinances. Such a construction is consistent with the obvious intent in Article V, Section 1, to exclude the power to refer laws for which the consequences of referral might be severly inimical to effective government.

Such interpretation preserves a reasonable degree of referendum power, affords some protection to the continuity and stability of government, and avoids a constitutional confrontation between the rights of home rule cities and the requirements of Article V, Section 1.

III. ARTICLE V, SECTION 1, AND ARTICLE XX, SECTION 5, WHEN CONSTRUED WITH ARTICLE XX, SECTION 6, AND ARTICLE XX, SECTION 8, DO NOT PRECLUDE THE CITIZENS OF HOME RULE CITIES BY CHARTER ENACTMENT FROM IMPOSING UPON THEMSELVES REASONABLE EXCEPTIONS OR LIMITATIONS TO THE POWER OF REFERENDUM.

Article V, Section 1, provides that:

> . . . referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town, and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities.

Although the wording is broad, there is no specific reference to home rule cities. Since Article XX was initially adopted in 1902 (Session Laws of 1901, page 97) and the referendum provision of Article V, Section 1, was

not adopted until 1910, (Session Laws of 1910, page 11), the framers of the referendum amendment had every opportunity to specifically include home rule cities had they so intended. Perhaps the constitutional guarantee to the people of home rule cities by virtue of Article XX, Section 5, adopted in 1902 (Session Laws of 1901, page 97), in the judgment of the drafters, rendered inclusion of home rule cities under Article V, Section 1, unnecessary or undesirable. Article XX, Section 5, provides:

> Each charter shall also provide for a reference upon proper petition therefore, of measures passed by the council to a vote of the qualified electors, . . . (Session Laws of 1901, page 104)

In interpreting similar language apparently applicable to every city and town, this Court has repeatedly held that the bonded indebtedness limitation in Article XI, Section 8, does not apply to home rule cities. Berman v. Denver, 156 Colo. 538, 400 P.2d 434 (1965) and Fladung v. City of Boulder, Case No. 22997, Vol. 20, No. 13, Colorado Bar Association Advance Sheets, Page 282. Consequently, a strong argument can be made that Article V, Section 1, never applied to home rule cities.

Assuming, arguendo, that Article V, Section 1, adopted in 1910 to provide for the referendum originally applied to home rule cities, the 1912 amendment enlarging home rule powers under Article XX limited or modified Article V, Section 1. Counsel for Greeley in his Brief beginning at page 11 noted referendum restrictions in charters of cities as of 1912 presumably conflicting with Article V, Section 1. Yet the 1912 amendment of Article XX, Section 6, provided:

> All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs, and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as to their date. (Session Laws of 1913, Page 671)

This suggests that there was no intention in adopting the Article XX amendment in 1912 to impose the same Article V, Section 1, provisions on home rule cities.

The most recent relevant constitutional amendment is the 1912 amendment to Article XX, Section 6, tremendously enhancing home rule powers. This amendment granted home rule cities all powers necessary or proper pertaining to municipal elections of all types. Session Laws of 1913, Page 670. More importantly, the 1912 amendment unequivocally confirmed:

> To the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny to such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right. (Session Laws of 1913, Page 671)

What could be more clearly classified as a subject of local and municipal concern than referendum elections on municipal ordinances?

The constitutional grant of plenary powers to municipalities on matters of local and municipal concern, being broad in language and the latest in the relevant constitutional provisions, suggests that home rule cities are not subject to the referendum provisions of Article V, Section 1.

It is, however, sound practice to reconcile and apply, to the extent reasonably possible, all relevant constitutional provisions. Proper construction requires that each part of a constitutional provision or statute must be read in connection with all other pertinent sections, irrespective of the dates of adoption. People Ex rel. Carlson, Governor v. Denver, 60 Colo. 370, 153 Pac. 690 (1915) and Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). Applying this rule of construction, Article V, Section 1, and Article XX, Section 5, could be given meaning by interpreting those provisions to grant to the people of home rule cities the power of referendum. Article XX, Section 5, providing that the referendum power be granted by charter; Article XX, Section 6, providing plenary local and municipal home rule powers; and Article XX, Section 8, making conflicting constitutional provisions inapplicable, could all be given meaning by extending to the citizens of home rule cities the right and power by charter enactment or amendment to adopt self-imposed limitations or exceptions to the power of referendum. In this manner, the reservation of the referendum power can best be reconciled with the plenary powers of home rule cities under Article XX, Section 6, and the provision in Article XX, Section 8, rendering conflicting constitutional provisions inapplicable.

Plaintiffs in Error cite Burks v. City of Lafayette, 142 Colo. 61, 349 P.2d 692 (1960) for the proposition that home rule cities may not have exceptions to the referendum power in excess of or conflicting with Article V, Section 1, of the Colorado Constitution. On the contrary, Burks merely holds that a home rule city may provide a greater extent of referendum power than that guaranteed in Article V, Section 1. While there is perhaps dictum that the powers reserved in Article V, Section 1, are the minimum powers reserved to the citizens of home rule cities, the Court did not have occasion to rule on that point. In contrast, the opinion at page 65 stated:

> The effect of the applicable provision of Article XX is to require that referendum and initiative provision be included in home rule charters. It does not specify as to the scope and extent of the power but presence of this provision indicates the importance of this reservation. (Emphasis supplied)

Burks, supra, suggests that if people of home rule cities have the right by charter enactment to reserve broader referendum powers than those reserved by Article V, Section 1, the people of such cities have the corresponding right by charter to self-impose additional exceptions to that power of referendum.

In closing, should this Court elect to decide the constitutional question, all the relevant constitutional provisions may be reconciled and given significance if the Constitution is construed to grant the people of home rule cities full referendum powers, subject to such self-imposed limitations and exceptions as the people pursuant to their plenary powers as a home rule city may except by charter enactment. This construction honors the local desires and needs of the people of each home rule city.

CONCLUSION

It is respectfully submitted that the decision of the trial court is correct and should be affirmed.

Respectfully submitted,

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