Attorney Id. No. 22516

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

HERBERT SOROCK and TAXPAYERS UNITED OF AMERICA Petitioners, vs. WILMETTE SCHOOL DISTRICT 39 and the School Board members in their official and individual capacities as follows: KAREN L. DONNAN, JOHN FLANAGIN CINDY LEVINE, KIMBERLY W. ALCANTARA, ALICE D. SCHAFF, PAMELA A. DAVIDSON and KEITH DRONEN, Respondents.	)	No. 11 CH 17820 Cal. 9 Judge Rita M. Novak

Brief in Support of Emergency Motion for a Temporary Restraining Order and Preliminary Injunction and in Opposition to Motion to Dismiss

The Petitioners, HERBERT SOROCK and TAXPAYERS UNITED OF AMERICA by their attorney Andrew B. Spiegel, submit this brief in support of their emergency motion for a temporary restraining order and preliminary injunction against the Respondents WILMETTE SCHOOL DISTRICT 39, and in opposition to the School Board's Motion to Dismiss.

Introduction

There were 39 referenda introduced by 48 Illinois school districts during the April 5, 2011 consolidated election (hereinafter simply April 5, 2001 election). Of these 39 referenda, 14 were tax referenda and of those 14, the electors defeated 10 of them. See *Illinois School Referenda Results-2011 Consolidated Election, Illinois State Board of Education.*

This case challenges the validity of the ballot used in one of the four districts where the referenda passed, Wilmette School District 39. This suit alleges the ballot failed to comply with both Constitutional and statutory mandates as a result of the Respondent School Board deliberately misstating the effect of the tax increase, which enabled it to win voter approval of the property tax increase in the April 5, 2011 election. Petitioners claim that the Respondent knew it had understated the proposed property tax increase by a factor of over 3 and that the Respondent did so deliberately and in direct violation of the Property Tax Code and the Illinois Constitution.

There is no dispute that the language of the referendum, as it appeared on the ballot, failed to accurately estimate the amount of property tax increase that would result if there were an affirmative vote in favor of it. There is also no dispute that the problematic language was in paragraph 2 of the Respondent's explanation of the referendum, which stated:

> **For the 2010 levy year the approximate amount of the additional tax extendable against property containing a single family residence and having a fair market value at the time of the referendum of $100,000.00 is estimated to be $58.80.**

The Respondent knew before the election that this explanation was grossly misleading and failed to include the State equalizer factor applicable in all Cook County property tax bills. The Respondent knowingly and deliberately failed to accurately reflect the amount of the actual anticipated increase, which should have been stated as at least three times the amount stated on the ballot, to wit: $198.16 ($58.80 x 3.3701: the equalization factor).

The Respondent claims in essence that it complied with the ballot requirements and in any event, the so-called "savings clause" in the Property Tax Extension Limitation Law insulates it from its deliberate omission.

In this Brief, the Petitioners will show that the Respondent failed to comply with the Property Tax Act, that it is not protected by any savings clause and that as a result the ballot is invalid. The Petitioners will also show that a temporary restraining order should be entered against the Respondent.

Argument

I. The Motion to Dismiss Must Be Denied.

A. The Ballot Language Fails To Comply With State Law.

Clearly the best evidence of legislative intent is the language of the statute itself, which must be given its plain and ordinary meaning. *National City Mortgage v. Bergman,* 405 Ill. App. 3rd 102, 939 N.E.2nd 1 (2nd Dist., 2010). The legislature could not have been more clear when it provided, in the Property Tax Code, that:

> **The equalized assessed value of all property, as determined under this Code, after equalization by the Department, SHALL BE THE ASSESSED VALUATION FOR *ALL* PURPOSES OF TAXATION, and limitation of indebtedness prescribed IN *ANY* STATUTE.**

(emphasis supplied), **35 ILCS 200/18-115.** Yet the Respondent would have this Court find that for purposes of informing the electors in its April 5th referendum, the ballot language could deliberately ignore this statutory mandate, exclude the equalization factor and understate the effect of the rate increase to those electors.

The Respondent had an obligation to comply with each and every aspect of the Property Tax Code and not just certain paragraphs. While many sections of that Code are inapplicable to the circumstances of this case, the explicit language of Section 18-115:

"for all purposes of taxation" "in any statute" does not leave any doubt as to the legislative intent on this question.

Yet the Board deliberately decided to exclude the equalization factor and it is that deliberate decision that takes this circumstance out of the protections of the "savings clause'" which was not inserted in the statute to protect against a deliberate omission of a statutory mandate. The savings clause protects officials from any error, miscalculation, or inaccuracy in *computing* any amount set forth on the ballot so long as any such error, miscalculation, or inaccuracy is not deliberate. It does not protect those officials from a deliberate decision to omit a vital element in the equation mandated by both the State Constitution and the Code itself to be included for all purposes of taxation in every statute in the Property Tax Code.

Here there was an admitted deliberate failure to use the equalized assessment and the excuse offered is that the Board did so on advice of counsel. Perhaps the Respondent has recourse against such counsel; but that is no excuse for the Board's deliberate omission of a vital factor in calculating a reasonable estimate of the effect of the rate increase on a single-family home having a fair market value of $100,000 at the time of the referendum.

This is not a case where the inclusion of language in one provision and its exclusion in another provision means the legislature intended the omission in that latter provision. The Respondent's reliance on this rule of statutory construction is misplaced at best. Section 18-115 leaves no room for doubt: the equalized assessed value is to be used ***for all purposes of taxation*** and ***in any statute***.

Taxes in Illinois can only be levied, assessed and collected in the way mandated by statute and subject to the restraints imposed by the State and Federal Constitutions. *People ex rel Schuler v. Chapman,* 370 Ill. 430, 19 N.E.2nd 351 (1939). The equalizing factor must be used as to all property of the same class and the failure to use such factor destroys uniformity in taxation. *People ex rel Ross, v. Chicago, B & Q R.R. Co.,* 381 Ill. 374, 45 N.E.2nd 633 (1942). Uniformity of taxation is a requirement of constitutional dimension. Illinois Constitution (1970), Art. IX, Section 4(a) and (b). The Respondent violated that requirement here by its deliberate failure to use the equalization factor.

The Respondent did not even comply with the statutory mandate contained in Section 190(a) of the Property Tax Extension Limitation Act. The mandated explanations for inclusion on the ballot includes four sub-paragraphs that, in the words of the statute:

> *…must include only the following supplemental information:*
>
> *The ballot for any proposition submitted pursuant to this Section* ***shall have printed thereon****, but not as a part of the proposition submitted, only the following supplemental information (which shall be supplied to the election authority by the taxing district) in substantially the following form:*
>
> *(1) The approximate amount of taxes extendable at the most recently extended limiting rate is $..., and the approximate amount of taxes extendable if the proposition is approved is $....*
>
> *(2) For the ... (insert the first levy year for which the new rate or increased limiting rate will be applicable) levy year the approximate amount of the additional tax extendable against property containing a single family residence and having a fair market value at the time of the referendum of $100,000 is estimated to be $....*
>
> *(3) Based upon an average annual percentage increase (or decrease) in the market value of such property of %... (insert percentage equal to the average annual percentage increase or decrease for the prior 3 levy years, at the time the submission of the proposition is initiated by the taxing district, in the amount of (A) the equalized assessed value of the taxable property in the taxing district less (B) the new property included in the equalized assessed value), the approximate amount of the additional tax extendable against such property for the ... levy year is estimated to be $... and for the ... levy year is estimated to be $ ....*
>
> *(4) If the proposition is approved, the aggregate extension for ... (insert each levy year for which the increase will apply) will be determined by the limiting rate set forth in the proposition, rather than the otherwise applicable limiting rate calculated under the*

provisions of the Property Tax Extension Limitation Law (commonly known as the Property Tax Cap Law). ***(emphasis supplied).*** **35 ILCS 200/18-190.**

The Respondent's ballot deleted sub-paragraph 3 above even though the statute explicitly mandates inclusion of each of the four paragraphs.

In addition, Respondent attaches to its Motion to Dismiss a "Memorandum" to "Illinois Taxing Districts" from Chapman and Cutler, LLP regarding the very form of ballot at issue in this case. See "Exhibit A" attached to Respondent's Motion to Dismiss. This Memorandum establishes the deliberate nature of Respondent's omissions. The precise omission was repeated in at least two additional districts: Arbor Park School District 145 and Oak Park District 97. Upon information and belief, there were at least three additional referenda on the ballot for the April 5, 2011 election that suffered from the same flawed language on their ballots: Prospect Heights School District 23, Riverside-Brookfield School District 208 and West Northfield School District 31.

The Memorandum contains a glaring error right on its first page. Section 190 (a) contains the only explanations allowed under the statute to appear on the ballot. There are supplemental instructions for paragraphs 1, 3 and 4; there is no supplemental instruction for paragraph 2. The instructions on how to calculate the estimated tax increase relied upon by Respondent and cited as applying to paragraph 2, in fact apply to sub-paragraph 3 and not to sub-paragraph 2. In other words, the explanation used by Respondent as instructions under sub-paragraph 2 is actually the explanation for the precise paragraph Respondent omitted from its ballot language, namely sub-paragraph 3. As such, it also violates the statutes prohibition against the use of non-conforming language on the ballot.

The language of that portion of Section 190(a) is as follows:

> *The approximate amount of taxes extendable shown in paragraph* ***(1)*** *shall be computed upon the last known equalized assessed value of taxable property in the taxing district (at the time the submission of the proposition is initiated by the taxing district). Paragraph* ***(3)*** *shall be included only if the increased limiting rate will be applicable for more than one levy year and shall list each levy year for which the increased limiting rate will be applicable. The additional tax shown for each levy year shall be the approximate dollar amount of the increase over the amount of the most recently completed extension at the time the submission of the proposition is initiated by the taxing district. The approximate amount of the additional taxes extendable shall be calculated (i) without regard to any property tax exemptions and (ii) based upon the percentage level of assessment prescribed for such property by statute or by ordinance of the county board in counties which classify property for purposes of taxation in accordance with Section 4 of Article IX of the Constitution.* **35 ILCS 200/18-190.**

There is no supplemental explanation for the increase in paragraph 2 as referenced in the Memorandum and as relied upon by the Respondent here and by as many as five additional school districts.

Clearly there has been no compliance by this Respondent with the requirements of the Property Tax Code for the question it had placed on the ballot for the April 5, 2011 election.

B. Neither Petitioner Sorock's Statements Nor Laches Bar This Action.

In its motion, the Respondent also disingenuously claims that the lead Petitioner, Herbert Sorock, admitted prior to the election, that the ballot language was correct. At the time and even continuing to this point in the litigation, the Board was (and is) telling the public the ballot language was correct and complied with the law. Mr. Sorock thought the language was misleading, but based on the representations of the Board itself, he did not realize there was a legal problem with it until he read about the Oak Park lawsuit (*Kuriakos, et. al. v .Oak Park District 97, et. al.,* No, 11 CH 11543) after its

filing on April 26, 2011. See the Affidavit of Herbert Sorock attached hereto and made a part hereof as Petitioners' Exhibit A.

Apparently the Respondent is now claiming that Sorock or any other aggrieved property taxpayer and voter in Wilmette School District 39 should have disbelieved their repeated statements that the ballot language complied with state law and filed a lawsuit challenging the language. The Petitioners filed this action before the Board voted to approve the levy. In fact, the Petitioners notified the Board it would be filing and by facsimile transmission prior to the Board meeting, asked them to take no further action to approve the referendum pending a court hearing. See Petitioners' Exhibit B attached hereto and made a part hereof. That same evening, the Board, ignoring Petitioners' request, voted to approve the rate increase and certify the election results to the County Clerk. Their action now necessitates adding the County Clerk to this lawsuit.

Laches does not apply in this case. It applies where a plaintiff has delayed in asserting a right, and the defendant has relied upon the circumstances complained of to a degree that to allow the requested relief would be inequitable and unjust. *Ole, Ole, Inc. v. Kozubowski,* 187 Ill. App. 3rd 277, 286, 543 N.E. 2nd 178, 183 (1989). The doctrine of unclean hands bars the Respondent from asserting laches here. This Respondent cannot be heard to assert laches where that same Respondent's actions were the main factor that caused the delay in the first instance.

Here the Respondent continues to assert that the ballot language fully complies with state law notwithstanding the fact that it not only stands in direct violation of the Code itself but also that it grossly misstates by at least three times, the effect of the rate increase. The Respondent cannot now claim that because it successfully persuaded the

electors in District 39 not to pursue any action before the election that those electors should now be barred from pursuing their legal remedies after they discovered the Board misled them.

C. Taxpayers United of America Has Standing to Challenge the Ballot.

As stated in the Verified Petition For Expedited Declaratory, Injunctive and Other Relief, *Taxpayers United of America* ("TUA") is a national taxpayer organization with a number of adherents in Wilmette School District 39 who are registered voters, property owners and some who are parents and have children in School Ddistrict 39. There has been no verified pleading or other verified submission filed to refute that verified allegation. Therefore it remains unrefuted at this point.

In Illinois, standing is established by simply demonstrating some injury to a legally cognizable interest. *Village of Chatham v. County of Sangamon,* 216 Ill. 2nd 402, 419, 837 N.E.2nd 29 (2005). A plaintiff is not required to allege facts establishing standing. *Winnebago County Citizens for Controlled Growth v. County of Winnebago,* 383 Ill. App. 3rd 735, 739, 891 N.E. 2nd 448 (2008). Instead, the defendant must plead and prove a lack of standing, Id., at 739.

In this case, the Respondent attempts to defeat the standing of TUA, as alleged in the verified petition, with mere assertion in an unverified motion to dismiss. While a 2-619(a)(9) motion is an acceptable way to challenge standing, lack of standing must still be proven. Further, the Respondent's motion admits the legal sufficiency of the complaint and a court must accept as true all well pled facts in the verified petition and all inferences that can reasonably be drawn in Petitioners' favor. *Chicago Teachers*

Union, Local 1, v. Board of Education of the City of Chicago, 189 Ill. 2nd 200, 206, 724 N.E.2nd 914, 918 (2000).

Further, in a declaratory judgment action such as the case at bar, there must be an actual controversy between adverse parties and the party seeking the declaratory judgment must be interested in the controversy. *Flynn v. Ryan,* 199 Ill.2nd 430, 436, 771 N.E. 2nd 414, 418 (2002). The "actual controversy" component requires a showing that the underlying facts and issues of the case are not moot or premature. The case must present a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof. The "interested in the controversy" component requires the party seeking relief to possess a personal claim, status or right which is capable of being affected. *Flynn, Id.,* 199 Ill. 2nd at 436-37; 771 N.E.2nd at 418.

TUA meets both these criteria. There is an actual controversy between the parties that is neither moot nor premature. Whether the Respondent can ignore one section of the Property Tax Code, which by its plain language is mandatory to all other sections of the Code, is an actual controversy between the parties. TUA has a direct interest through its adherents in District 39 because its ability to raise funds from them may be directly affected if the property tax increase is allowed to stand.

TUA has shown that it has an injury in fact to a legally cognizable interest. This is all it must do to establish its standing. *Greer v. Illinois Housing Development Authority,* 122 Ill.2nd 462 (1988). A legally cognizable interest exists when the injury, whether actual or threatened, is distinct and palpable, when it is fairly traceable to the defendant's actions and when it is substantially likely to be prevented by the granting of the requested relief.

Greer, Id., 122 Ill.2nd 462, 492-93 (1988). Each of these elements is satisfied by TUA in this case.

II. The Temporary Restraining Order Must Be Entered.

A temporary restraining order must be entered in order to preserve the status quo until the trial court can consider this case on its merits. This is the purpose of such relief. *Board of Education of Springfield Public School District No. 186 v. Springfield Education Association,* 47 Ill. App. 3rd 193, 361 N.E.2nd 697 (4th Dist., 1977). The status quo means the last actual, peaceable, uncontested status, which preceded the controversy, which in this case requires a return to the tax rate prior to the referendum.

The Petitioners satisfy each of the requirements for injunctive relief. They have an unalienable right to be free from the taking of their property without due process of law under both the due process clauses of the U.S. Constitution and the Illinois Constitution. It is a denial of due process to tax a person's property unlawfully. They also have he right to uniformity of taxation under the Illinois Constitution (1970) Art. IX, Sections 4(a) and (b). The use of an unlawful ballot by the Respondent in order to convince the electors into approving that increase is a violation of the 5th and 14th Amendments of the U.S. Constitution and a violation of Article 1, Section 2 of the Illinois Constitution (1970) as well as a violation of Art. IX, Section 4(a) and (b) of that Constitution.

The Petitioners will also suffer irreparable harm without the protection of an injunction. The Court can take judicial notice of the fact that housing prices in Illinois are now at 2002 levels. Increasing property taxes effects every property owner trying to sell their property in this difficult market. Being unable to sell their home results in the

inability of many people in those circumstances to purchase a new home, to re-locate their family and a whole variety of other living conditions too numerous to mention. Senior citizens on fixed incomes may be placed in a situation where they can no longer afford to stay in their homes with an increase in the property taxes.

To claim property owners who find themselves in such circumstances have an adequate remedy at law because there is a procedure for filing objections, does not answer the question of their irreparable harm if they loose their home in the process. In fact, it shows the exact opposite; it shows the lack of any adequate remedy at law. The Petitioners have a Constitutional and statutory right to challenge the validity of the ballot. The tax objection process does not supersede this action.

Finally, a Petitioner seeking a temporary restraining order, must show a likelihood of success on the merits; however the Petitioner only has to show that they have raised a fair question regarding the existence of their right and that the court should preserve the status quo until the case can be decided on the merits. *Stanton v. City of Chicago,* 177 Ill. App.3rd 519, 532 N.E.2nd 464 (1st Dist., 1988). Respondent deliberately failed to include the equalized assessed valuation in its calculations despite the constitutional and statutory requirements it do so. Petitioners are more than likely to prevail on this issue.

The Petitioners here have shown that they have satisfied each of the requirements for a temporary restraining order. They have shown they have a protectable right and will suffer irreparable harm without the protection of a temporary restraining order. Petitioners have also shown they have no adequate remedy at law and that they are

likely to succeed on the merits. With this showing it is incumbent upon this Court to grant the temporary restraining order to these Petitioners.

Conclusion

For these reasons, the Motion to Dismiss must be denied and the temporary restraining order must be entered, enjoining the Respondent from spending any of the increase in property taxes they may obtain as a result of the invalid ballot question the Respondent used on the April 5, 2011 ballot.

Respectfully submitted,

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