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4/26/2012 5:01:24 PM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RICHARD E. GORDON
JUDGE

CASE NO. C-20122175

DATE: April 26, 2012

DAVID DEVINE, et al.,
Plaintiffs,

VS.

ROGER W. RANDOLPH,
Defendant.

CAMPUS ACQUISITIONS INVESTMENT
MANAGEMENT, LLC, et al.,
Intervenors.

RULING

IN CHAMBERS UNDER ADVISEMENT RULING

Pending before the Court is Plaintiffs' David Devine and David Boston's Statutory Special Action (Mandamus). The Complaint challenges the refusal of Roger W. Randolph, the Clerk of the City of Tucson, to process Referendum Petition No. 2012-RF01. The Referendum Petition seeks to refer Tucson Ordinance No. 10968 for a public vote. The Court granted Campus Acquisitions Holdings, a developer directly affected by the challenge, the right to intervene. Ariz. R. Civ. P. 24(b). Following briefing and an evidentiary hearing on April 20, 2012, the Court took the matter under advisement.

A. Findings of Fact

The Court has considered the testimony, adjudging credibility where needed, and reviewed the exhibits giving them the weight deemed appropriate in light of all of the evidence. The Court has disregarded any inadmissible parts of the admitted exhibits and testimony. *See State v. Garcia*, 97 Ariz. 102, 104, 397 P.2d 214, 216 (1964). The Court finds as follows:

1. On February 28, 2012, the City of Tucson's Mayor and City Council approved Tucson Ordinance 10968 which created an urban overlay district and established special zoning for an area known as the "Main

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- Gate District.” The Main Gate District encompasses an area south of Speedway Boulevard, west of Park Avenue, north of Sixth Street, and East of Euclid Avenue.
2. The ordinance calls for a mixed-use residential and commercial district designed to focus on public transportation and take advantage of other completed or funded infrastructure, including a modern street car, several parking garages, and the Olive Underpass. The ordinance itself is over 25 pages in length and includes an overview, a detailed description of the Main Gate District, standards and guidelines, and multiple maps of the affected areas.
 3. Around February 21, 2012, before Ordinance No. 10968 was passed, Val L. Little, an opponent of the plan, began investigating as to how she might have the ordinance referred for a public vote. Ms. Little was part of a group known as the “Repeal the Main Gate Overlay” committee.
 4. Ms. Little went to the Tucson City Clerk’s Office and was given updated information regarding how many signatures were needed and, about the same time, she looked online for pertinent rules and regulations.
 5. At some point early on in the process, Ms. Little was given a paper and an electronic copy of a Sample Petition for Referendum. The electronic copy was intended to supply a version that could be used for formatting.
 6. On March 1, 2012, Ms. Little presented a draft of her Referendum Petition to the Tucson City Clerk’s Office for review. This draft of the Referendum Petition was generated from the electronic copy sent by the Tucson City Clerk’s Office and, according to Ms. Little, was a “first pass.” The Tucson City Clerk’s Office filed the Referendum Petition after Ms. Little corrected some deficiencies, most notably a warning provision was added.
 7. Also around March 1, 2012, Ms. Little was given a “Referendum Packet.” The Referendum Packet included, among other things, a copy of the Tucson City Clerk’s Office “Initiative and Referendum Rules and Regulations,” a sample “Title and Text” page, excerpts from the Tucson City Code addressing elections, and an “Initiative, Referendum & Recall Handbook” prepared by the Arizona Secretary of State.
 8. By letter dated March 5, 2012, Roger Randolph informed Ms. Little of a variety of other deficiencies with the Referendum Petition she had filed.
 9. On March 16, 2012, Ms. Little filed a revised Referendum Petition apparently intended to address the problems found earlier, including the absence of ordinance and/or referendum numbers.

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10. Ms. Little's Referendum Petition described the ordinance at issue as allowing "seventeen high-rises up to 14 stories" and also had a paragraph designed to be advocacy. The ordinance, however, calls for only four buildings which could be as high as 14 stories.
11. On March 19, 2012, the Tucson City Clerk's Office staff noticed another deficiency with Ms. Little's Referendum Petition. Specifically, the Referendum Petition lacked what the parties call the "Notice" and "Voter Statement" provisions which are set forth under A.R.S. § 19-101(A):

Notice: This is only a description of the measure sought to be referred prepared by the sponsor of the measure. It may not include every provision contained in the measure. Before signing, make sure the title and text of the measure are attached. You have the right to read or examine the title and text before signing.

and

I have personally signed this petition with my first and last names. I have not signed any other petition for the same measure. I am a qualified elector of the City of Tucson.

12. By letter dated March 20, 2012, Mr. Randolph informed Ms. Little of the missing Notice and Voter Statement provisions.
13. On March 21, 2012, upon learning of the absence of the Notice and Voter Statement provisions, Ms. Little informed the Tucson City Clerk's Office by email that her group was circulating a revised Referendum Petition containing the statutory language. A copy of the revised Referendum Petition was included with the email.
14. According to the record, 460 signature pages containing an estimated 6,900 signatures did not have Notice and Voter Statement provisions.
15. Some 90 to 95 percent of the signatures were gathered by approximately 100 volunteers.
16. Ms. Little and her group made considerable efforts to ensure that the signatures would legally comply with the referendum process.
17. Ms. Little and her group provided training for the volunteers. Among other matters, the volunteers were instructed: to tell the signers that they had the right to read the entire ordinance, to tell the signers that they could not have signed another petition for the same referendum and ensure that they were a qualified elector/voter; and to keep the title page and the ordinance stapled to the front with the signature page on the back.

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18. Ms. Little did not see all of the signatures as they were gathered and, when asked if she could be sure that the volunteers followed her instructions, she said that "they had good intent."
19. On March 30, 2012, the Tucson City Clerk's Office rejected the 460 signature pages potentially containing 6,900 signatures because these pages did not have the Notice and Voter Statement provisions.
20. Ms. Little was provided a Sample Referendum Petition and a copy of Title 19 of Arizona Revised Statutes, including A.R.S. § 19-101, within the Referendum Packet given to her. Additionally, most of the language of the Notice and Voter Statement provisions was contained in the hard copy initially provided by the Tucson City Clerk's Office early on in the process.
21. The Sample Referendum Petition provided within the Referendum Packet contained the Notice and Voter Statement provisions which varied in insignificant ways from the statutory language of A.R.S. § 19-101(A).
22. Had Ms. Little and her group used the Sample Referendum Petition or A.R.S. § 19-101 as a guide in preparing their Referendum Petition, the Tucson City Clerk's Office would have had no basis to complain about the missing language described in its March 20, 2012, letter.

B. Conclusions of Law

Plaintiffs challenge the Tucson City Clerk's Office rejection of the 460 signature pages essentially on two grounds. First, Plaintiffs argue that the City of Tucson's Charter supersedes any requirement imposed by A.R.S. § 19-101(A) because it is a "home rule city." Second, Plaintiffs argue that the Tucson City Charter requires only substantial compliance with the referendum process and, therefore, the 460 signature pages should not have been rejected. After reviewing the evidence and the controlling case law, the Court rejects both arguments.

1. The City of Tucson has adopted A.R.S. § 19-101(A) and was authorized to do so.

Plaintiffs argue that A.R.S. § 19-101(A) does not apply to the City of Tucson and, therefore, the Tucson City Clerk's Office should not have rejected the 460 signature pages. It is true that municipalities like the City of Tucson are entitled to enact their own laws within their charters concerning referenda. *See* Ariz. Const. Art. 4 Pt. 1 § 1(8). And, to the extent that state law conflicts with city charters on this particular topic, the city charter will prevail so long as the matter is of local concern. *See, e.g., City of Tucson v. State*, ___ P.3d ___, 2012 WL 1138217 *2-8 ¶¶ 7-35 (Ariz. 2012); *Strode v. Sullivan*, 72 Ariz. 360, 365-69, 236 P.2d 48, 51-54 (1951).

Here, however, the Court perceives no conflict. *See City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 197 Ariz. 600, 603-04 ¶ 9-10, 5 P.3d 934, 937-38 (App. 2000). This is because the

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Tucson City Clerk has promulgated Rules and Regulations which are wholly consistent – that is, not in conflict – with the statutory language at issue. Under its charter and code, the City of Tucson and the Tucson City Clerk were fully authorized to do this. Tucson City Charter, Ch. XX § 3; Tucson City Code § 12-1.3. The Court sees nothing improper about the City of Tucson's choice to have its referendum regulations track the state's regulations on the same topic.

The City of Tucson, through the Tucson City Clerk's Office Rules and Regulations, has adopted the language requirements of A.R.S. § 19-101(A), going as far as providing a Sample Referendum Petition within its attached Appendix. Clerk's Office Initiative and Referendum Rules and Regulations § 1.2 & Appendix 3(B)(2). The Sample Referendum Petition, which was given to Ms. Little, in all significant respects tracks A.R.S. § 19-101(A). In addition, the City of Tucson provides to the public a Referendum Packet containing a copy of the Arizona Secretary of State's Initiative and Referendum Handbook. The Handbook, which also was given to Ms. Little, similarly includes a copy of Title 19. Because the language requirements sought to be enforced is consistent with the self-executing nature of Ariz. Const. Art. 4 Pt.1 § 1(9), it may legally be imposed on those who seek to use the referendum process. *See Direct Sellers Ass'n. v. McBrayer*, 109 Ariz. 3, 5, 503 P.2d 951, 953 (1973); *Ghera v. State*, 16 Ariz. 344, 351-52, 146 P. 494, 497-98 (1915) (per curiam).

2. The 460 signature pages did not strictly or substantially comply with A.R.S. § 19-101(A).

The parties dispute whether Plaintiffs were required to strictly comply with the applicable code and regulations or whether substantial compliance would suffice. Under either standard, the requirements themselves must be broadly construed. *See Sherrill v. City of Peoria*, 189 Ariz. 537, 540, 943 P.2d 1215, 1218 (1997); *Lawrence v. Jones*, 199 Ariz. 446, 45 ¶ 9, 18 P.3d 1245, 1250 (App. 2001).

Plaintiffs argue that strict compliance with the City of Tucson's referendum requirements is unnecessary. This is so, according to Plaintiffs, notwithstanding the significant body of case law requiring stringency because the referendum process allows a minority to hold up valid legislation which may represent the wishes of the majority. *See, e.g., Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428-29, 814 P.2d 767, 769-70 (1991). Plaintiffs contend, however, that the City of Tucson rejected a strict compliance rule by its application of the the recall provisions of its Charter to the referendum provisions of its Charter, which explicitly states that "[a]ny defect in said form or record shall not invalidate the petition." Tucson City Charter, Ch. XX § 1; Tucson City Charter, Ch. XXI § 2.

Although Plaintiffs' argument is sensible, it makes no difference in this case because Plaintiffs' Referendum Petition did not substantially or strictly comply with the Notice and Voter Statement provisions at

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issue. In deciding whether there is substantial compliance, a court should consider the nature and purpose of the constitutional or statutory requirements, as well as the extent to which the petition differs from the requirements. *See Feldmeier v. Watson*, 211 Ariz. 444, 447 ¶ 14, 123 P.3d 180, 183 (2005).

Here, the nature and the purpose of the requirements at issue here are self-evident. The Notice and Voter Statement provisions are prophylactic in nature; they are designed to avoid voter confusion which might arise from advocacy and, importantly, to place the onus on each signer to declare “for himself” that he or she is a qualified elector of the City of Tucson. *See Sklar v. Town of Fountain Hills*, 220 Ariz. 449, 454 ¶¶ 17-18, 207 P.3d 702, 707 (2008); Ariz. Const. Art. 4 Pt. 1 § 1(9).

Plaintiffs’ Referendum Petition differs significantly from the requirements at issue. Both the Notice and Voter Statements provisions are entirely absent from the 460 signature pages. Although the ordinance was attached, its presence did not convey the message regarding who drafted the brief description of the ordinance nor did its presence necessarily suggest that each signer had the right to read through the entire ordinance upon request. The deficiency is augmented by the group’s description of the ordinance which was ambiguous, quite likely misleading, and admittedly contained advocacy.

Additionally, contrary to Plaintiffs’ contention, the prefatory language in their Referendum Petition, “we, the undersigned, residents of the City of Tucson, Arizona, and duly qualified electors,” is not equivalent to the constitutionally required *declaration* which each signer *for himself* must make that he or she is a qualified elector. Ariz. Const. Art. 4 Pt. 1 § 1(9). A declaration differs from an ordinary statement insofar as it is meant to be a formal proclamation on a particular subject and, in this case, it must also be individual to the declarant. *Cf. Alaska v. Jeffery*, 170 P.3d 226, 232 (Alaska 2007). Even if the prefatory language within Plaintiffs’ Referendum Petition might be considered a formal proclamation on the topic of electorate status, it did not address the signing of multiple petitions and, importantly, it was not personal in nature which is a quality explicitly mandated by the Arizona Constitution itself; even under a broad reading of the provision.

The Court has considered the training provided to the circulators. The Court, however, is not convinced that the approximately 100 volunteers who collected the vast majority of the signatures would have – or even could have – verbally ensured alternate compliance with the nearly 7,000 signatures they gathered. Under these circumstances, the Court finds no substantial compliance and certainly no strict compliance as to the challenged petitions. For these same reasons, to the extent that the case law might allow the presumption of validity to be restored to the challenged petitions by independent evidence, *see Feldmeier*, 211 Ariz. at 184 n.4, 123 P.3d at

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448 n.4; *Western Devcor, Inc.*, 168 Ariz. at 431-32, 814 P.2d at 772-73, the Court finds that the proof presented was insufficient to do so in this case.

There has been much discussion regarding Plaintiffs' efforts and their reliance on the Tucson City Clerk's Office. To be sure, Ms. Little and her group made significant efforts to avoid the very type of challenge she faces here. The Court does not believe, however, that the Tucson City Clerk's Office purposefully undermined the group's attempt to refer the matter in compliance with city ordinances and regulations. In any event, to the extent that mistakes were made by the Clerk's Office, the law is clear that such errors do not excuse noncompliance. See *Western Devcor, Inc.*, 168 Ariz. at 431, 814 P.2d at 772, see also *Fidelity Nat'l Title Co., Inc. v. Town of Marana*, 220 Ariz. 247, 250 ¶ 14, 204 P.3d 1096, 1099 (App. 2009).

C. Conclusion

The Court agrees that the "seemingly straightforward statutory requirements for pursuing a referendum are at times mystifying to all but the most sophisticated legal specialists." *Fidelity Nat'l Title Co., Inc.*, 220 Ariz. at 251 ¶ 15, 204 P.3d at 100. Frustration with the process is understandable. The Court nonetheless is bound by the regulations and the controlling case law construing them, both of which require more than what was done in this case. The Court also fully understands how important the referendum process is to Arizona's constitutional form of government. Any streamlining or simplification, however, is for the legislative branch, not for the Court.

Accordingly,

IT IS ORDERED finding **IN FAVOR** of Defendant and Interveners and against Plaintiffs on Plaintiffs' Statutory Special Action (Mandamus).

IT IS FURTHER ORDERED that, because the Court has considered the merits following an evidentiary hearing/trial, the Tucson City Clerk's Motion to Dismiss pursuant Ariz. R. Civ. P. 12(b)(6) is **DENIED**.

IT IS FURTHER ORDERED DENYING all other motions and pending matters not expressly addressed herein.

IT IS FURTHER ORDERED entering Final Judgment **IN FAVOR** of Defendant and the Interveners and against Plaintiffs on Plaintiffs' Statutory Special Action (Mandamus).

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/s/
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