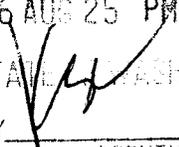


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COURT OF APPEALS
DIVISION II

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NO. 34170-1-II

STATE OF WASHINGTON

BY  _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF TACOMA, Petitioner

v.

MICHAEL PURDY, an individual resident and employee in the City of Tacoma; CHARLY LANIER, an individual resident and employee in the City of Tacoma; DERRICK LEGGIN, an individual resident and employee in the City of Tacoma; ELIZABETH JOHNSON, an individual resident and employee in the City of Tacoma, and ASSOCIATED CASINO EMPLOYEES FOR SURVIVAL (ACES), a Washington association, Respondents.

RESPONDENTS' BRIEF

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I. Statement of the Issues

A. Whether this appeal is moot because Appellant City placed the initiative on the September 2006 ballot.

B. Whether Superior Court can enjoin Appellant City from violating the due process rights of its citizens.

C. Whether Appellant City can challenge the legal merits of an initiative prior to its adoption by the voters.

II. Statement of the Case

A. Procedural History

On November 23, 2005, Respondent Associated Casino Employees for Survival (ACES) and four individual employees filed in Pierce County Superior Court a complaint for a writ of mandate and preliminary injunction. (CP 1-20). On December 9, 2005, Pierce County Superior Court granted the injunction and ordered that the initiative be placed on the February ballot. On December 20, 2005, the parties stipulated to a March election date. (CP 171). Appellant City then petitioned the Court of Appeals Division II for an emergency order to stay enforcement of the Superior Court's order. (CP 173-174). The Court stayed the trial court's order in part. A March election was not required, the injunction was not stayed.

B. Statement of Facts

On October 5, 1999, the City Council, under the authority of RCW 9.46.295, adopted Ordinance 26515, a city-wide ban on new casinos. Ord. 26515 allowed existing licensed social card rooms to operate in accord with RCW 9.46 until January 1, 2006. The same ordinance mandated that the City Council review the provisions of the ordinance by December 31, 2002. Section 4 of Ord. 26515 provided as follows:

Following any amendments to the State Gambling Act, chapter 9.46 RCW, by the State legislature, which increase authority of municipalities to regulate social card games, or by December 31, 2002, whichever is sooner, the City Council shall review the provisions of this ordinance.

The City Council performed a review of Ord. 26515. The “review” that the City claims the Council conducted was mentioning the forming, in the future, a joint task force with another city. **(CP 134-136)**.

In July of 2005, the City of Tacoma sent notice to each of the restaurants operating social card games advising the operators that, as of January 1, 2006 at 2:00 a.m., pursuant to Ordinance 26515 the social card games must terminate. (Letter from City, attached as Exhibit E to Complaint for Writ of Mandate and Injunction, **CP 1-20**). The employees formed a grassroots organization called the Associated Casino Employees for Survival (ACES) to change the ordinance pursuant to the Tacoma City Charter initiative process. **(CP 1-20)**.

On August 12, 2005, ACES forwarded to the City Clerk a petition for validation and certification to be voted on by the people in the February 2006 election or to be adopted by the City Council. **(CP 150)**. This petition provided that the four existing card rooms be permitted to continue to operate, but new card rooms would be prohibited. **(CP 10-11)**. The City Clerk informed ACES representatives that if they produced enough valid signatures by November 1, 2005, the initiative could be placed on the February 2006 special election ballot. (Declaration of Elizabeth Johnson, November 23, 2005, **CP 47-50**). The City Attorney approved the ballot title and petition, thereby permitting ACES to pursue the requisite signatures for placement on the ballot. **(CP 155)**.

The employees were advised at the City Clerk's office that ACES needed a little more than four thousand signatures verified by November 1, 2005, to meet the prerequisites of the charter in order for the petition to be placed on the February 2006 ballot. (Findings of Fact 11, **CP 167**). On October 24, 2005, ACES delivered approximately sixteen thousand signatures to the City Clerk's office. (FOF 12, **CP 167**). Then, on November 1, 2005, ACES submitted to the City Council more signatures, for a total of approximately 20,000 signatures. (FOF 13, **CP 167**). On October 27, 2005, and November 2, 2005, the City Clerk's Office

transmitted signed petitions to the Pierce County Auditor for verification of the signatures. **(CP 159, 161)**.

The City Clerk did not verify these signatures by November 9th, which would have been 90 days before the February 7th election. (FOF 17, **CP 168**). In the October 27, 2005 letter from the City Clerk to Pierce County Auditor, the City Clerk noted: “in the event that the City Council, as anticipated, calls for a special election...then the next municipal election within the meaning of the Charter of the City of Tacoma will be the February 7, 2006, election. (Letter attached as Exhibit D to Complaint, **CP 1-20**). The signatures were not verified until December 5, 2005, too late to be placed on the February 7th ballot. **(CP 163-164)**.

On November 23, 2005, ACES and four individually named employees filed a complaint for Writ of Mandate and Injunction in Pierce County Superior Court, seeking an order from the court to place the initiative on the February 7, 2006, ballot, and to enjoin the City from enforcing Ord. 26515’s prohibition of commercial card room gambling until this vote on the initiative. **(CP 1-20)**.

The matter was heard on December 9, 2005, by Pierce County Superior Court Judge D. Gary Steiner. Judge Steiner ruled that Respondent ACES was entitled to a writ of mandamus, ordering the City to place the initiative on the February 7, 2006, ballot. On December 20,

2005, Judge Steiner entered an order, with the agreement of both parties, that the City Council adopt a resolution calling for a March 2006 special election and enjoining the City from enforcing the ordinance until a vote on ACES' initiative measure. (CP 171).

On December 22, 2005, the City of Tacoma filed a motion in the Court of Appeals Division II for an emergency order staying enforcement of the order on December 20, 2005, entered by the Pierce County Superior Court. On January 12, 2006, the Court of Appeals entered an order affirming the injunction granted by the Superior Court. The court ordered the injunction to stay in place pending this review.

III. Argument

A. This Appeal is MOOT.

A case is moot if a court can no longer provide effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793, 796 (1984). In this matter, Appellant City placed the initiative on the September 2006 ballot. The voters will have the opportunity to vote on the measure prior to this appeal being heard. Thus, there is no reason to proceed with this appeal. In the event Appellant City contends the case is not moot, or that a mootness exception should apply, Respondent respectfully requests this court permit additional briefing on the issue and a hearing to address the question of whether this action should proceed if moot. *Hart v.*

Department of Social and Health Services, 111 Wn.2d 445, 759 P.2d 1206 (1988).

B. Standard of Review of a Trial Court Injunction.

The standard of review for grant or denial of a preliminary injunction is abuse of discretion. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). Discretion is abused if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary. *Id.* A party seeking relief through a temporary injunction must show a clear legal or equitable right, that there is a well-grounded fear of immediate invasion of that right, and that the acts complained of have or will result in actual and substantial injury. *Tyler Pipe Indus., Inc. v. Department of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). Also, since injunctions are within the equitable powers of the court, these criteria must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate. *Id. Rabon*, 135 Wn.2d at 284.

C. The Trial Court Properly Enjoined Appellant City from Enforcing the Prohibition of Commercial Card Room Gambling Because the City Violated the Due Process Rights of its Citizens.

Both the Washington and United States Constitutions provide that no person shall be deprived of “life, liberty, or property without due process of law.” U.S. Const. Amend. XIV, § 1; Wash. Const. Art. I, § 3.

“Due process centrally concerns the fundamental fairness of governmental activity.” *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). See also *Standlee v. Smith*, 83 Wn.2d 405, 411, 518 P.2d 721 (1974) (“The court emphasized the fundamental fairness was the touchstone of due process”).

The trial court specifically found that the City had violated the civil rights of its citizens. Conclusion of Law No. 4 stated:

Also included, are the civil rights violations suffered by the employees who have never been afforded an opportunity to be heard, or to participate in self governance in a meaningful manner. **CP 170.**

One of the foremost rights of Washington State citizens is the power to propose and enact laws through the initiative process. Const. art. II, § 1(a). Furthermore, the Tacoma City Charter reserves in the people the right to self governance via the initiative process. Tacoma City Charter 2.19, Complaint **CP 1-20** Ex. C. Through provision 2.19 of the Tacoma City Charter, the City put a process in place for its citizens to change the law. However, when it came to ACES, the City chose arbitrarily not to review, nor to verify the signatures in time, and thus to deny ACES their due process rights. The City has an affirmative obligation to fulfill its duty under the law despite the personal sentiment of its officers. The trial court did not abuse its discretion.

(1) The Plaintiffs' Due Process Rights Were Violated When the City Clerk Failed to Verify the Signatures for the Initiative in a Timely Manner.

The City's failure to timely certify the signatures to meet a February election deadline provides the requisite legal basis to support the trial court's order. The affirmative duty of the City is set forth clearly in the City Charter. Section 2.19 of the Tacoma City Charter states:

Citizens of Tacoma may by initiative petition ask the voters to approve or reject ordinances or amendments to existing ordinances... (a) the petitioners shall file an Initiative Petition with the City Clerk... (j) The City Clerk **shall verify** the sufficiency of the signatures on the petition. (Emphasis added).

The duty placed on the City Clerk is a mandatory duty to verify the signatures presented. Further, the City informed ACES that if they submitted the requisite number of signatures by November 1, 2005, the initiative would be placed on the February 2006 ballot. Relying on this statement, ACES diligently collected more than enough signatures, and submitted them to the City Clerk a full eight (8) days before the deadline. The City Clerk did not forward those signatures to the County Auditor until October 27, 2005. Although it was the City Clerk's office that told the employees that the signatures would need to be submitted by November 1, 2005 for placement on the February 7, 2006 ballot, the City Clerk took five (5) days to transmit the signatures to the County Auditor.

ACES fully complied with the initiative process, as represented to it by the City. ACES did not hide the fact that it was going to submit the signatures, nor did ACES surprise the City Clerk. The City Clerk failed to verify the signatures in a timely manner. Therefore, ACES was denied its due process right to fundamental fairness in the initiative process. The court correctly granted the appropriate equitable relief.

Due to the failure of the City Clerk to verify the signatures in time, the trial court's primary concern was the preservation of the employees' jobs until such time as the Initiative could be placed on the ballot.

Transcript of December 20, 2005, Hearing, p. 6. The legal basis for the order was to protect the employees and citizens' rights to self governance and due process.

THE COURT: There is a clear legal right because they followed what the City said and got the petitions in. It was the City having problems getting it all done, and so there is a clear legal right because they have a duty to follow the mandate and they did so.

Transcript of December 9, 2005, p. 13. The City's failure to timely certify the votes to meet a February election deadline provides the requisite legal basis to support the court's order.

(2) The City Failed to Conduct a Meaningful Review of the Ordinance as Required in Ord. 26515.

The City Council, in Ord. 26515, directed itself to review the prohibition on gambling not later than December 2002. Instead of

conducting a review and inviting the ACES employees, as the stakeholders in the Ordinance, the City merely mentioned the appointing of a task force to review the zoning ordinances and suggested looking into the increase of the tax on gaming to increase city revenues.

Contrary to the City's assertions, the trial court did not find that the City conducted a review. In fact, the trial court specifically found that the employees were not invited to participate in any review process and did not participate in any review process. (CP 165-172). The failure of the City to conduct a meaningful review, as it had committed itself by ordinance to do, was at the heart of the trial court's ultimate ruling. The trial court specifically ruled as a matter of law that the civil rights of the employees were violated in that the employees were never afforded an opportunity to be heard. (Conclusions of Law 4, CP 170).

(3) The Trial Court Properly Granted the Injunction in Order to Prevent the Actual and Substantial Injury Caused by the City's Violation of the Citizens' Due Process Rights.

The trial court's issuance of injunctive relief is a discretionary ruling. RCW 7.40. A reviewing court will only reverse a discretionary ruling if the trial court's decision is manifestly unfair, unreasonable, or untenable. *General Telephone Co. v. WUTC*, 104 Wn.2d 460, 474, 706 P.2d 625 (1985). A trial court is accorded broad discretion, and its

decision is entitled to great deference on review. *In re Dependency of Roberts*, 46 Wn. App. 748, 752, 732 P.2d 528, 531 (1987).

A party seeking relief by an injunction must demonstrate that (1) it has a clear legal or equitable right, (2) the party has a well-grounded fear of immediate invasion of that right, (3) and that such invasion of that right will result in actual and substantial injury. *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265 (1986).

The trial court's primary concern was the preservation of the employees' jobs until such time as the Initiative could be placed on the ballot. Transcript of December 20, 2005, Hearing, p. 6. There was a clear legal and equitable right at stake: the employees and citizens' rights to self governance and due process.

THE COURT: There is a clear legal right because they followed what the City said and got the petitions in. It was the City having problems getting it all done, and so there is a clear legal right because they have a duty to follow the mandate and they did so.

Transcript of December 9, 2005, p. 13. Additionally, the ACES employees had a well grounded fear of immediate invasion of that right. As a result of the City's failure to comply with its own processes, ACES employees would be out of jobs immediately until the City decided when or if it would place the initiative on a ballot.

The actual and substantial injury that would have occurred if the trial court had not granted the injunction would be the loss of nearly five hundred employee jobs. The livelihoods of the employees and their families were at stake, as well as their meaningful right to be heard. Significantly, the City benefits from the continued operation of these social card games from the tax revenues earned. The City faced no greater harm than it had encountered for the seven years these businesses had been allowed to operate.

The decision by the trial court to grant an injunction until the initiative could be placed on the ballot cannot be considered manifestly unfair, unreasonable, or untenable. ACES collected the signatures in advance of the date given to it to be placed on the February 2006 ballot. The City did not comply with its own process, and therefore ACES members were denied their fundamental right to the initiative process. In order to prevent further harm, the trial court correctly granted an injunction.

D. The City Cannot Challenge the Unlawfulness of the Petition Until After the Petition Has Been Adopted by the People.

It has been a longstanding rule that courts refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted. *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119

P.3d 318 (2005). The City contends that ACES has no equitable right to an injunction because the substance of the initiative petition is unlawful. However, a challenge to the substantive invalidity of a petition before it becomes law is not allowed in this state because of the constitutional preeminence of the right of initiative. *Maleng v. King County Corr. Guild*, 150 Wn.2d 325, 76 P.3d 727 (2003).

The reluctance to rule on the validity of an initiative before its adoption stems from the desire not to interfere in the electoral process or give advisory opinions. *Coppernoll*, 155 Wn.2d at 330. An exception to this general rule allows judicial review of a proposed initiative to determine if it is beyond the scope of the initiative power. *Id.* For example, in *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971), the court was asked to determine whether the King County electorate had the power to repeal the King County Constitution by initiative. The court invalidated the petition on the grounds that directly amending the state constitution was not a legislative act and, consequently, not within the initiative power reserved to the voters. *Id.* at 156.

In this case, the initiative proposed is not beyond the scope of the initiative power, and the City cannot substantively challenge the petition until after it is enacted. ACES is not attempting by direct action to change

the structure of the government. Rather, it is asking that the citizens decide whether to keep in place the existing operating card rooms.

IV. Conclusion

This action is moot and should be dismissed. If not dismissed, ACES and the individually named employees respectfully request that this Court affirm the trial court's order granting an injunction and mandamus. The trial court properly entered an injunctive order to protect constitutional violations and followed the mandates of the City Charter in directing referral of the Initiative to the voters in March of 2006.

Dated this 25th day of August, 2006.

Respectfully submitted,



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STATE OF WASHINGTON

BY [Signature]
DEPUTY

CERTIFICATE OF SERVICE

I, Rebecca Dexter, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On August 25, 2006, I caused to be served a true and correct copy of the below listed documents, filed in the Court of Appeals, Division II on all parties or their counsel of record, as follows:

- U.S. Mail Postage Prepaid
- ABC/Legal Messenger Service

TO: Mr. Steve Victor
City Attorney's Office
747 Market Street, Room 1120
Tacoma, WA 98402
Fax: (253) 591-5755

The documents served are:

1. Respondents Brief; and
2. This Declaration of Service.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and dated at Fircrest, Washington this 25th day of August, 2006.

Rebecca Dexter

Rebecca Dexter