FILED
January 9, 2018
OFFICE OF APPELLATE COURTS

State of Minnesota
In Supreme Court
A17-0221

Joel Jennissen, Russel Burnison, Mark Vanick, William Reichert, and Sunil Lachhiramani,

Petitioners,

vs.

City of Bloomington, Minnesota,

Respondent.

RESPONDENT'S RESPONSE TO PETITIONERS' PETITION FOR REVIEW AND REQUEST FOR CROSS-REVIEW

The City of Bloomington ("Respondent") submits the following under Minn. R. App. P. 117, subd. 4 in opposition to Petitioners' Petition for Review ("Petition") and in support of cross-review of additional issues in the event the Court grants the Petition.

(a) Statement of the Issues

1. Is the proposed charter amendment preempted by the Minnesota Waste Management Act, Minnesota Statutes, chapter 115A ("MWMA")?

   The lower courts held that the MWMA preempts Petitioners' proposed charter amendment.

If the Petition is granted, Respondent requests review of the following two issues:

2. Is the proposed charter amendment manifestly unconstitutional when it would impair Respondent's contract with licensed haulers for organized collection?

The District Court held that because the proposed charter amendment does not impair the haulers' contract, it is not manifestly unconstitutional. The Court of Appeals did not address this issue.

3. Is the proposed charter amendment an improper referendum on Respondent's Ordinance No. 2015-45?

The lower courts declined to address this issue.

(b) Criteria Relied upon by Petitioners

Petitioners rely on Minn. R. App. P. 117, subd. 2(a) and (d)(1-3) to support the Petition. The statute at issue, however, is unambiguous and needs no clarification. Further, Petitioners have not shown that the lower courts erred in applying the long-standing test for field preemption. Finally, this case does not involve issues of statewide importance, but is limited to issues arising out the specific language of the proposed charter amendment in this case. The Petition should be denied.

Respondent's request for cross-review of additional issues is supported by Minn. R. App. P. 117, subd. 2(a) and (d)(2). The issue of whether the proposed charter amendment is manifestly unconstitutional presents important constitutional questions. Moreover, a decision by this Court will help develop, clarify, and harmonize the law on matters of statewide importance including the authority of charter cities to decline to submit to voters proposed charter amendments that violate the United States and Minnesota Constitutions or are an improper use of a referendum.

(c) Statement of the Case

In October 2014, the Bloomington City Council directed City staff to proceed with the process to organize solid waste collection under Minn. Stat. § 115A.94. Doc. 26 at 1.

On December 21, 2015, Respondent adopted Ordinance No. 2015-45 effectuating organized collection and approved a five year, renewable contract with Bloomington Haulers, LLC (the "Consortium") for solid waste collection ("Contract"). Doc. 17. It is undisputed that Respondent complied with all statutory requirements to organize collection.

In June 2016, Petitioners petitioned to amend the Bloomington City Charter to add the following:

> Unless first approved by a majority of voters in a state general election, the City shall not replace the competitive market in solid waste collection with a system in which solid waste services are provided by government-chosen collectors or in government designed districts. The adoption of this Charter amendment shall supersede any ordinances, ordinance amendment, or charter amendments related to solid waste adopted by the City Council in 2015-2016.

Doc. 27 at 27. On June 27, 2016, the City Council adopted a resolution rejecting the proposed charter amendment. Doc. 27 at 29. The Council found, in relevant part, that the proposed charter amendment was manifestly unconstitutional because it impaired the Contract, was preempted by the MWMA, and was an improper referendum of Ordinance 2015-45. Id.

On July 29, 2016, Petitioners initiated this action. On January 11, 2017, the Honorable Daniel C. Moreno, Hennepin County District Court, granted Respondent's summary judgment motion. Doc. 31. Judge Moreno held that Petitioners' proposed charter amendment was preempted by the MWMA, but not manifestly unconstitutional. Id. at 3. Judge Moreno did not address Respondent's argument that the proposed charter amendment is an improper referendum. See id. On November 20, 2017, the Court of

Appeals affirmed based on preemption, but did not address Respondent's arguments that the proposed charter amendment was manifestly unconstitutional and an improper referendum. Jennissen v. City of Bloomington, 904 N.W.2d 234 (Minn. Ct. App. 2017).

(d) Brief Argument

This Court recently affirmed the long-standing principal that "charter provisions (and therefore charter amendments) must be consistent with state law and state public policy." Bicking v. City of Minneapolis, 891 N.W.2d 304, 312 (Minn. 2017). See also State ex rel. Town of Lowell v. City of Crookston, 91 N.W.2d 81, 83 (Minn. 1958) (recognizing that "[t]he adoption of any charter provision contrary to the public policy of the state, as disclosed by general laws or its penal code, is also forbidden"). Further, "placing an unconstitutional or unlawful proposed amendment on the ballot is a futile gesture that [the courts] do not require." Bicking, 891 N.W.2d at 313.

I. The Court of Appeals' decision should be affirmed.

As both lower courts held, the MWMA preempts the proposed charter amendment and Respondent, therefore, properly declined to put it on the ballot. Petitioners have not shown that this Court's review is warranted. First, Petitioners mischaracterize the Court of Appeals' decision. Petitioners construe the decision to mean that "the exercise of *any* local authority in the *area of organized collection* is void."[1] Pet. p. 5 (emphasis added). All parties and both lower courts agreed that the issue is much narrower and limited to

[1] Petitioners argue for the first time in the Petition that conflict preemption should be used to evaluate the issue, rather than field preemption. Pet. p. 5. At the Court of Appeals, Petitioners conceded that "the question of conflict preemption is not before this court." Pet.'s App. Br. p. 12.

whether the *process to organize collection* is so fully covered by the MWMA as to occupy the field and preempt local regulation of that process. As recognized by the Court of Appeals, cities maintain the authority to decide whether to organize collection at all and, if they do choose to organize, retain the right to regulate collection of solid waste under Minn. Stat. § 115A.94, subd. 6. Jennissen, 904 N.W.2d at 241. The Court of Appeals' decision has no impact on the exercise of local authority other than the detailed statutory process to organize collection.

Second, Petitioners have not shown the Court of Appeals erred in applying the field preemption test in Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 815 (Minn. 1966). That test requires consideration of "(1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population." Id.

Petitioners do not dispute that the subject matter to be regulated is the process a city must follow to implement organized collection, or that the third factor is inapplicable. While Petitioners disagree with the court's analysis of the fourth factor, they have not shown that the court's findings are erroneous. See Pet. p. 7. The Court of Appeals properly found that the MWMA addresses state-wide public policy concerns. Jennissen, 904 N.W.2d at 242-43. Further, "[i]f city voters could override the process

under Minn. Stat. § 115A.94 by charter amendment, voters might not promote the broad public policy concerns that the legislature found important in enacting the MWMA." Id.

Petitioners argue that the "legislature intended for cities to be able to exercise municipal authority in the field" under section 115A.94, subdivision 6. Pet. p. 6. As the Court of Appeals found, the plain terms of section 115A.94 distinguish the process for organizing collection in subdivisions 4a to 4d, from a city's authority to decide whether to organize and its authority to govern organized collection once authorized as provided in subdivision 6. The legislature, not the courts, through the plain terms of the statute clearly defined the limits of a city's authority over process and governance. Thus, there is no need for further review or clarification by this Court. The Petition should be denied.

II. The District Court erred in holding the proposed charter amendment is not manifestly unconstitutional.

In the event this Court grants the Petition and ultimately finds the proposed charter amendment is not preempted, Respondent was still within its discretion to not put it on the ballot because it is manifestly unconstitutional. Minneapolis Term Limits Coalition v. Keefe, 535 N.W.2d 306, 307 (Minn. 1995). The United States and Minnesota Constitutions prohibit the passage of laws that impair contracts. U.S. Const. art. I, § 10, cl. 1; Minn. Const. art. 1, § 11. Legislation that substantially impairs a contract and is not supported by a "significant and legitimate public purpose" and "reasonable and necessary" to serve such policy is unconstitutional. See Christensen v. Minneapolis Mun. Emp. Ret. Bd., 331 N.W.2d 740, 750-51 (Minn. 1983).

Petitioners' proposed charter amendment, if passed, would retroactively strip Respondent of its authority to organize collection and effectively terminate the Contract. The District Court wrongly held there was no impairment because the Contract would have terminated by its own terms. In so holding, the District Court misconstrued the plain terms of section 12.2.3 of the Contract, which unambiguously provides for termination upon the occurrence of certain events. None of those events occurred in this case. Respondent therefore established impairment, shifting the burden onto Petitioners to prove the impairment was reasonable and necessary to serve a significant and legitimate public purpose. Petitioners failed to show any justification for impairing the ongoing contractual rights between Respondent and the Consortium. Thus, the District Court's decision on this issue should be reversed.

III. Respondent properly rejected the proposed charter amendment as an improper referendum.

The lower courts erred in declining to address and grant Respondent summary judgment on this issue. Respondent has maintained throughout this action that Petitioners are attempting to repeal Ordinance No. 2015-45 through an improper referendum cloaked as a "charter amendment." In section 3.04 of City Charter, "all legislative" power is given to the City Council through the adoption of ordinances. Bloomington's citizens reserved to themselves only limited powers, including the power of referendum to repeal an ordinance under a very specific, time limited process. Id. at § 5.10 – 5.12. A citizen seeking a referendum of a duly adopted ordinance must submit a

proper petition within 15 days of the effective date of the ordinance.[2] Id. at § 5.10. This Court recognizes the:

> right to suspend, and possibly revoke, as given by the referendum, . . . is an *extraordinary* power which ought not unreasonably be restricted or enlarged by construction. It "*must be confined within the reasonable limits fixed by the charter*. * * * Where a power so great as the suspension of an ordinance or of a law is vested in a minority, the safeguards provided by law against its irregular or fraudulent exercise should be carefully maintained.

Aad Temple Bldg. Ass'n v. City of Duluth, 160 N.W. 682, 684-85 (Minn. 1916) (emphasis added).

The express intent and effect of Petitioners' proposed charter amendment is to repeal Ordinance No. 2015-45 previously adopted by the City Council. That is a referendum. See St. Paul Citizens for Human Rights v. City Council of City of St. Paul, 289 N.W.2d 402, 404 n.2 (Minn. 1979) (defining a "referendum" as "the process by which a small percentage of voters may delay the effective date of legislation and *compel officials to submit it to the voters for approval or rejection*") (emphasis added). Because the proposal is in fact a referendum, but Petitioners failed to comply with the City Charter requirements, it was properly rejected by the City Council and cannot be resurrected as a charter amendment.

[2] Petitioners previously tried to repeal Ordinance No. 2015-45 by referendum. Respondent rejected that effort because Petitioners failed to comply with the City Charter. Petitioners did not challenge Respondent's decision.

January 9, 2018

/s/ Shelley M. Ryan
George C. Hoff (#45846)
Shelley M. Ryan (#348193)
HOFF BARRY, P.A.
775 Prairie Center Drive, Suite 160
Eden Prairie, Minnesota 55344
(952) 941-9220
ghoff@hoffbarry.com
sryan@hoffbarry.com

Attorneys for Respondent City of Bloomington

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CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that Respondent's Response to Petitioners' Petition for Review and Request for Cross-Review conforms to the requirements of the applicable rules, is produced with Times New Roman, a proportional font, and the length of this document is 1,967 words. This document was prepared using Microsoft Word 2010.

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/s/ Shelley M. Ryan
George C. Hoff (#45846)
Shelley M. Ryan (#348193)
HOFF BARRY, P.A.
775 Prairie Center Drive, Suite 160
Eden Prairie, Minnesota 55344
(952) 941-9220
ghoff@hoffbarry.com
sryan@hoffbarry.com

Attorneys for Respondent City of Bloomington