

**State of Minnesota
In Supreme Court**

A17-0221

FILED

December 18, 2018

**OFFICE OF
APPELLATE COURTS**

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

Petitioners,

v.

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 an additional issue in the event the Court grants the Petition.

(a) Statement of the Issues

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

The District Court did not address this issue. The Court of Appeals held that Petitioners’ proposed charter amendment is an improper referendum.

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

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 affirmed the decision.

(b) Criteria Relied upon by Petitioners

Petitioners appear to rely on R. App. P. 117, subd. 2(a) and (d)(1-3) to support the Petition. The Court of Appeals did not create a new legal principle, but simply followed long-standing law recognizing that the right to a referendum is an "extraordinary power" that may only be used in accordance with the procedural safeguards set forth in the charter. Aad Temple Bldg. Ass'n v. City of Duluth, 160 N.W.2d 682, 684-85 (Minn. 1916). Moreover, this unpublished decision does not involve issues of statewide importance, but is limited to issues arising from the specific language of the proposed charter amendment in this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.

(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 provision:

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 and finding, in relevant part, that it unconstitutionally impairs the Contract and is an improper referendum of Ordinance 2015-45. Id.

On July 29, 2016, Petitioners initiated this action.¹ 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

¹ This action, known as Jennissen II, follows Petitioners’ previous challenges to organized collection through an untimely referendum and a failed initiative.

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). On June 20, 2018, this Court held that the MWMA does not preempt Petitioners' proposed charter amendment and remanded the matter back to the Court of Appeals. On October 29, 2018, the Court of Appeals affirmed Judge Moreno's decision that Petitioners' proposed charter amendment is not manifestly unconstitutional, but held that it is an improper referendum.

(d) Brief Argument

- I. The Court of Appeals properly held that Petitioners' proposed charter amendment is an improper referendum on Ordinance No. 2015-45.

As the Court of Appeals held, Petitioners' proposed charter amendment is an improper referendum and Respondent, therefore, properly declined to put it on the ballot. This Court's review is not warranted.

Petitioners wrongly argue that the Court of Appeals created a new legal principle. The express intent and effect of Petitioners' proposed charter amendment is to repeal Ordinance No. 2015-45 previously adopted by the City Council. As found by the Court of Appeals, that is a referendum and Petitioners do not claim otherwise in their Petition. 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).

This Court has long-recognized that 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). As the Court of Appeals recognized, Petitioners’ referendum cloaked as a charter amendment is “irregular” and would “unreasonably enlarge the right to referendum” by allowing voters to circumvent the referendum requirements in the Charter.² Jennissen v. City of Bloomington, No. A17-0221, 2018 WL 5316187, at *6 (Minn. Ct. App. Oct. 29, 2018). Further, allowing Petitioners’ “disguised referendum” renders the referendum requirements in the Charter meaningless, both as to the time limitation and petition process. Id. The Court of Appeals properly found that Petitioners’ proposed charter amendment is an improper referendum and no further review is warranted.

Despite Petitioners’ myriad arguments, the Court of Appeals’ decision is easily reconcilable with Minn. Stat. § 410.12. Minn. Stat. § 410.04 provides, in relevant part, that a city “may frame a city charter for its own government in the manner” prescribed by chapter 410. Under § 410.20, cities may adopt charter provisions for the repeal of ordinances, which the City did by providing for a referendum in Section 5.10 of its Charter. Allowing voters to bring a referendum on an ordinance under the guise of a

² Petitioners’ argument that a charter amendment is statistically more difficult to bring than a referendum misses the point. The Charter not only prescribes the number of signatures for a petition, but imposes a 15 day time limit. Thus, allowing Petitioners’ proposed charter amendment on the ballot, which was filed well after the 15 day limit, unreasonably enlarges the right to a referendum.

charter amendment renders § 410.20 meaningless, especially in cities that chose not to adopt referendum rights in their charters. Instead, these sections make clear that the authority granted to cities to allow a referendum under § 410.20 is separate and distinct from the authority granted to voters to petition for charter amendments under § 410.12. The Court of Appeals did not redefine or destroy voters' rights under § 410.12, but simply recognized that a charter amendment seeking to repeal an ordinance is an improper use of a referendum.³

Finally, Petitioners' arguments are based on the faulty premise that voters in charter cities have an unlimited right to change or repeal duly enacted legislation under Minn. Stat. § 410.12. Petitioners' suggestion that a charter amendment could be used as a referendum would result in no time limit within which to repeal an ordinance. If there is no time limit on a referendum, residents and businesses would be wary to rely on an adopted ordinance to govern their affairs. The resulting uncertainty would hinder and delay development, investment, and contracting with municipalities.

Moreover, as this Court recognized in Vasseur v. City of Minneapolis, a charter "may provide for any scheme of municipal government" and its provisions may "vest some powers in its government and *not* in its residents, or . . . some powers in its government and in its residents." 887 N.W.2d 467, 472 (Minn. 2016). Further, "the form

³ Petitioners' argument that the court's holding creates uncertainty over the allowable extent of future charter amendments lacks merit. Petition p. 8. The repealing language in Petitioners' proposed charter amendment is a referendum on Ordinance No. 2015-45, which is what makes it improper. Petitioners' example of amending the charter to change the signature threshold for a referendum is not a referendum and is therefore inapplicable. The court's decision is clear and requires no clarification.

of municipal government adopted in a charter defines the powers held by that government and its residents.” Id. The form of government adopted in the Bloomington City Charter vests legislative authority in the City Council, subject to the specific, defined powers of initiative, referendum, and recall that are reserved to the people. City Charter §§ 2.01, 5.01. Accordingly, when the Bloomington City Council passed Ordinance 2015-45, it could only be repealed by voters through the referendum process in the Charter. Petitioners have not cited any case recognizing the authority of voters to circumvent the mandatory referendum process and directly repeal an ordinance through a charter amendment. The Court of Appeals’ decision that Petitioners’ proposed charter amendment is an improper referendum requires no further review.

II. The Court of Appeals 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 an improper referendum, 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 Court of Appeals wrongly held there was no impairment because the Contract terminated by its own terms. The Court of Appeals 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. The burden is then on Petitioners to prove the impairment was reasonable and necessary to serve a significant and legitimate public purpose. Petitioners failed to make that showing or any justification for impairing the ongoing contractual rights between Respondent and the Consortium. If this Court accepts review of the Petition for Review, review of this issue should be accepted as well.

Dated: December 18, 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
Tel.: (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 1,928 words. This document was prepared using Microsoft Word 2010.

Dated: December 18, 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
Tel.: (952) 941-9220
ghoff@hoffbarry.com
sryan@hoffbarry.com

*Attorneys for Respondent
City of Bloomington*