



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869

MARY MERTENS JAMES
Circuit Court Judge
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September 25, 2007

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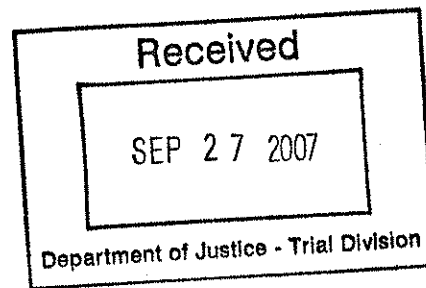
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Re: Hazell, et al v Bradbury, et al
Case No. 06C22473

Dear Counsel,

This matter was scheduled for hearing on Plaintiffs', Defendants' and Intervenor's Cross Motions for Summary Judgment. Plaintiffs Hazell, Nelson, Civiletti, Delk and Duell ("Hazell plaintiffs") are represented by



Dan Meek
Linda Williams
David Leith
Gregory Chaimov
September 25, 2007
Page 2

Daniel Meek. Plaintiffs Horton and Lewis (“Horton plaintiffs”) are represented by Linda Williams. Defendants are represented by Assistant Attorney General David Leith. Intervenor-defendants and cross-claimants are represented by Gregory Chaimov. On July 13, 2007, the court heard oral argument from all counsel. The court then took the motions under advisement.

I have carefully reviewed the pleadings submitted by counsel, and taken into account the arguments you each presented. I want to thank the parties and their counsel for your extensive briefing as well as your patience with the court. A serious illness, followed by the death of my mother-in-law caused me to take time for my family in the interim. Now, being fully advised, this letter sets forth my decision.

Summary of Issues for Summary Judgment

The issue raised by Plaintiffs’ Complaint is whether defendants Bradbury and Myers (“State” or “defendants”) incorrectly placed Measure 47 in abeyance. Measure 47 was a 2006 ballot measure that was validly approved by the people in 2006 but which—by its terms, specifically section 9(f)¹—will take effect in the future only if the Oregon Constitution is amended or reinterpreted in a pertinent manner.

Proponents of two 2006 ballot measures sought to amend the Constitution to authorize and simultaneously to enact CC&E limits. Measure 46 proposed a constitutional amendment; Measure 47 proposed a statute. Measure 46, if passed, would have removed the existing state constitutional impediment to Campaign Contribution and Expenditure (“CC&E”) limits. In turn, Measure 47 proposed to enact statutory CC&E limits, as well as other related requirements, applicable to candidate-election campaigns. Measure 47 provided for the contingency that the

¹ If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

Measure 47, section (9)(f).

Dan Meek
Linda Williams
David Leith
Gregory Chaimov
September 25, 2007
Page 3

Oregon Constitution still might not permit CC&E limits on its effective date. In that event, section (9)(f) directed that the Act nevertheless should be codified and “become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.”

At the election, voters rejected the proposed constitutional amendment but approved Measure 47, the statutory initiative. The central issue in this case concerns the validity and effect of the provision placing Measure 47 in abeyance in the event that CC&E limits are not permitted on its effective date.

The Hazell plaintiffs and the State argue that section 9(f) is constitutionally valid. The State argues that the entire Act is dormant until either the Supreme Court revisits the constitutionality of limits on CC&E’s and finds them to be permitted or the voters amend the constitution to allow such limitations. All plaintiffs argue that whether or not the Court finds section 9(f) to be an unconstitutional contingency provision as the Horton plaintiffs and the intervenors argue, it must sever the provision and implement the rest of Measure 47, considering the validity of each of the remaining provisions of the Act. Intervenors argue that the entire Measure is invalid because section 9(f) purports to hinge the effectiveness of the Act on a contingency that violates Article I, Section 21 of the Oregon Constitution which provides, in pertinent part, “nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution;”.

Conclusions and Analysis

First, as a matter of law, I find that at the time of Measure 47’s passage in 2006, the Oregon Constitution precluded any limitations on CC&Es. In *Meyer v. Bradbury*, 341 Or. 288, (2006), the Oregon Supreme Court explained that an earlier decision, *Vannatta* “held that *Article I, section 8*, prohibits laws restricting campaign expenditures and contributions.” *Meyer*, 341 Or. at 293 n. 4. The *Meyer* court later expanded upon that proposition: “Under Oregon law, both campaign contributions and expenditures are forms of expression protected by [Article I, section 8], thus making legislatively imposed limitations on individual political campaign contributions and expenditures impermissible. See *Vannatta v.*

Dan Meek
Linda Williams
David Leith
Gregory Chaimov
September 25, 2007
Page 4

Keisling, 324 Or. 514, 537 (1997). * * * (so holding).” *Meyer*, at 299. At the 2006 general election, Measure 46 was rejected, leaving the holdings in *Vannatta* and *Meyer* intact. Thus, Article I, section 8, of the Oregon Constitution still prohibits CC&E limits. This court is bound by the Oregon Supreme Court’s holdings in *Vannatta* and *Meyer*.

This premise then requires that the court address the question whether Measure 47’s plain terms place its operative effect in abeyance, pending authorization. I conclude that it does. The meaning and proper application of section (9)(f) in this case is a matter of statutory construction. As set forth in defendants’ memorandum of law in support of summary judgment, a court interpreting an initiated statute should look first to the text and context of the provision at issue. Insofar as the text and context may be ambiguous, the court should then turn to the history of the measure, including voters’ pamphlet information and contemporaneous newspaper items.

I find the text and context unambiguous as to meaning and effect. The text of section (9)(f) describes a condition, then mandates the consequences if that condition obtains. The condition triggering section (9)(f) is that “on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions and expenditures.” The mandated consequence if that condition obtains is that the “Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.” As held above, the triggering circumstances unambiguously existed and were not changed by Measure 46, which did not pass. The unambiguous consequence is that Measure 47, in its entirety, presently is not operative.

The Horton plaintiffs and intervenors argue that section (9)(f) must be construed as an attempt to alter the *effective date*, not just the *operative effect*, of Measure 47, making it constitutionally impermissible. That contention is answered completely by *State v. Hecker*, 109 Or. 520 (1923). *Hecker* makes clear that section (9)(f)’s use of the term “shall become effective” must be construed to mean “shall become *operationally* effective.” So construed, as in *Hecker*, section (9)(f) conflicts with no

Dan Meek
Linda Williams
David Leith
Gregory Chaimov
September 25, 2007
Page 5

constitutional requirements as to the effective date of legislation passed by initiative.

Nor is the indeterminate nature of the contingency fatal to the provision's effect. In *Hecker*, the challenged statute was to become operative whenever constitutionally authorized, without any specification of an election at which such a proposal might be considered. The section relating to that statute's contingent operation provided:

This act shall take effect as soon as and whenever the constitutional provision of section 36 of Article I of the constitution of the state of Oregon relating to the death penalty, and any amendment or amendments thereto, will permit.

1920 Oregon Laws, ch. 20, section 4 (as quoted in *Hecker*, 109 Or. at 539). That statute, like the one at issue here, did not specify any election at which an amendment to the constitutional death-penalty prohibition might be considered. Nevertheless, the Oregon Supreme Court upheld the contingency. Section (9)(f) similarly may be sustained under that directly controlling authority, at least with respect to the operative effect being contingent on amendment of the Oregon Constitution.

Intervenors also contend that Measure 47 is void under Article I, section 21, of the Oregon Constitution, which provides, in pertinent part, that no law shall be passed "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Intervenors contend that the contingency contained in section (9)(f) that permits court interpretation to breathe life into the Act also renders Measure 47 invalid under Article I, section 21.

To address this question, the court must determine whether intervenors have standing to raise the challenge, as they are the only parties to raise this argument.

Dan Meek
Linda Williams
David Leith
Gregory Chaimov
September 25, 2007
Page 6

I conclude that intervenor-defendants have standing under the Declaratory Judgment Act, ORS 28.010 *et seq.* ORS 28.020 requires that a petitioner be "affected":

Any person * * * whose rights, status or other legal relations *are affected* by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

ORS 28.020 (emphasis added).

Intervenors' alleged standing is predicated solely on interests that might be affected if Measure 47's substantive provisions ever were to become operative. As such, intervenors' potential injury is contingent on either a change in the Constitution, which is speculative, or the Court's determination that Measure 47 in whole or part can become effective as the Hazell plaintiffs urge here, which, at least theoretically, could happen in this litigation. Accordingly, I find that the intervenor-defendants assert more than an abstract interest in the application of a law.

Addressing intervenors' cross-claim on the merits, the challenged provision is not unconstitutional. As *Hecker* demonstrates, a term directing that legislation shall take effect contingently is most reasonably construed as a reference to operative effect, not as an unconstitutional attempt to adjust the legislation's effective date. Accordingly, in the absence of any indication otherwise, section (9)(f) of Measure 47 is construed as a direction that the measure's operative effect shall be deferred in specified circumstances, though its effective date remains as provided in Article IV, section 1(4)(d).

Intervenors also challenge the specific contingencies on which Measure 47 would be animated. Section (9)(f) directs that Measure 47 shall become operative when either the constitution is amended to permit CC&E limits, or when it is construed to allow CC&E limits. As noted above, the contingency rendering Measure 47 operative if it is authorized by

Dan Meek
Linda Williams
David Leith
Gregory Chaimov
September 25, 2007
Page 7

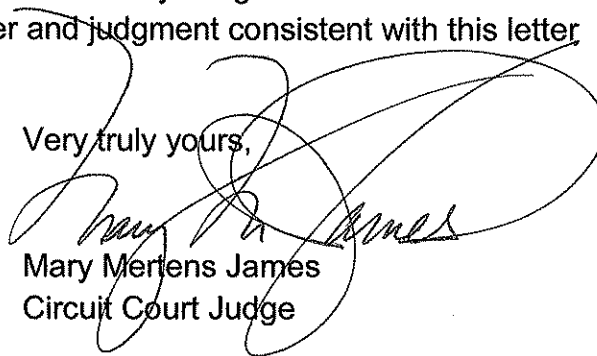
constitutional amendment is exactly the same contingency upheld in *Hecker*. Section (9)(f)'s direction that Measure 47 shall become operative upon amendment of the constitution to allow CC&E limits is permissible.

The alternative contingency—that the constitution is found to allow CC&E limits—presents a somewhat more difficult question. The Supreme Court in *Portland v. Coffey*, 67 Or. 507, 135 P. 358 (1913), did strike down a provision that made part of the statute operative only if another part of the statute was ruled unconstitutional. That holding is inapposite here, however, because the contingency in this case is not that a provision of the current measure is held invalid. Rather, the contingency is that an existing Supreme Court precedent may be overruled rendering the present measure valid or that the Supreme Court may determine that portions of Measure 47 are valid limits on CC&Es. While these contingencies are effectively identical to the first contingency: all merely provide that the measure is in abeyance until its CC&E requirements become constitutionally permissible, it relies on the activity of a third party, rather than the legislative process to give effect to the legislation.

Hecker does not assist defendants as to this challenge. I need not decide whether the measure's operative effect can be made to depend on a judicial finding, for even if this contingency is indefensible constitutionally. There is no justification, however to find the entire Act unconstitutional. ORS 174.040 permits the court in such instances to merely strike and sever that specific clause of section (9)(f). The balance of the section is valid and should be given effect. ORS 174.040.

Accordingly, the State's Motion for Summary Judgment is allowed. Will Mr. Leith please prepare an order and judgment consistent with this letter opinion?

Very truly yours,



Mary Mertens James
Circuit Court Judge

MMJ/sg
cc: File