

BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 96-07

INITIAL DECISION GRANTING SUMMARY JUDGMENT

IN THE MATTER OF THE COMPLAINTS FILED BY DAVID DEARBORN, GILBERT
J. JUNGERT, AND K. MAYO FIEGEL REGARDING ALLEGED CAMPAIGN REFORM
ACT VIOLATIONS BY THE CITY OF GRAND JUNCTION

The City of Grand Junction ("City") filed a Motion to Dismiss/Motion for Summary Judgment in this matter asserting that the Campaign Reform Act ("Act") does not apply to annexation elections. Complainants filed a response opposing this motion.¹ The City then filed a reply, which the Administrative Law Judge hereby accepts pursuant to Rule 10, Rules of Procedure of the Division of Administrative Hearings.

On October 23, 1996, the Division of Administrative Hearings notified the parties that the hearing scheduled in this matter for October 28, 1996, was vacated due to the fact that the City's motion was being granted and that a written decision would follow. Because the granting of the City's motion to dismiss disposes of the complaints in their entirety, the Administrative Law Judge hereby issues an Initial Decision Granting Summary Judgment.

NATURE OF COMPLAINTS

The complaints filed in this matter collectively assert that the City has improperly used public funds to influence an annexation ballot issue involving property known as the Eastern Wedge by mailing two brochures and a worksheet which allegedly urge voters to vote for the annexation, are one-sided, and contain no arguments against the annexation.

In their response to the City's motion, Complainants also criticize certain aspects of the annexation election process, e.g., that the petition for election is deficient, the election commissioners were improperly selected, the City's actions in placing the annexation question on the ballot were unauthorized, and hearings complying with the Annexation Act were not held. The Complainants did not raise the propriety of the annexation procedure used by the City in their complaints, and these alleged deficiencies are thus not at issue in this proceeding. In addition, the Secretary of State has no jurisdiction to address these issues. See Section 31-12-116, C.R.S. (1996).

FINDINGS OF FACT

The Administrative Law Judge finds that there is no genuine issue regarding the following material facts:

1. In July, 1996, the City council received a petition for an annexation election regarding the area variously described as "Fruitvale to Peachtree Center" or the "Eastern Wedge."

2. The City Council determined that the petition satisfied the requirements of the Annexation Act of 1965, Sections 31-12-101 to 123, C.R.S. (1986 and 1996).

3. The City then took steps to insure that the annexation question would be placed on the general election ballot on November 5, 1996. On August 26, 1996, the City Attorney filed with the Mesa County District Court a petition for an annexation election, pursuant to Section 31-12-112, C.R.S. On August 28, 1996, the Mesa County District Court appointed three election commissioners, who "called for an election on or after September 12, 1996, pursuant to Section 31-12-112, C.R.S. On September 10, 1996, the City Clerk certified the ballot question to the County Clerk.

DISCUSSION

I. Standard for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is thus entitled to judgment as a matter of law. C.R.C.P. 56(c); *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). The burden is on the moving party to demonstrate the nonexistence of a genuine issue of material fact. *Mehaffy, Rider v. Central Bank of Denver*, 892 P.2d 230 (Colo. 1995). The responding party must then counter the movant's statements of fact by affidavit or other evidence which sets forth specific facts showing the existence of a triable issue of fact. When the movant's affirmative showing of specific facts is uncontradicted, the court must conclude that there is no genuine issue of material fact. *Morphew v. Ridge Crane Service*, 902 P.2d 848 (Colo. App. 1995).

The City supports its motion with the affidavits of Kristin Winn and Stephanie Nye and various Mesa County District Court pleadings and orders in Case No. 96CV342, involving the annexation election. While Complainants disagree with the legality of certain actions taken by the City in relation to the annexation election, as discussed above, they have not filed any opposing affidavits or contested the facts asserted by the City in the attachments to its motion. The Administrative Law Judge thus finds that there is no genuine issue of material fact and concludes that the entry of summary judgement is appropriate pursuant to C.R.C.P. 56.

II. Applicability of the Campaign Reform Act

The Act, as cited by Complainants, prohibits a political subdivision of the state from expending public moneys to urge electors to vote for or against certain issues appearing on their ballots:²⁷

No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution or contribution in kind in campaigns involving the nomination, retention, or election of any person to any public office, nor shall any such entity expend any public moneys from any source, or make any contributions in kind, to urge electors to vote in favor of or against any:

(A) Statewide ballot issue that has been submitted for the purpose of having a title designated and fixed pursuant to section 1-40-106 (1) or that has had a title designated and fixed pursuant to that section;

(B) Local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section;

(C) Referred measure, as defined in section 1-1-104 (34.5);

(D) Measure for the recall of any officer that has been certified by the appropriate election official for submission to the electors for their approval or rejection.

Section 1-45-116(1)(a)(I), C.R.S. (1996).

The Act does not prohibit public expenditures in relation to every proposition which may appear on a ballot. In order to fall within the proscriptions of Section 1-45-116(1)(a), the annexation election at issue here must fall within one of the types of ballot propositions enumerated in subsections (A), (B), (C), or (D). Each of these possible characterizations of the annexation issue must thus be considered.

Statewide Ballot Issues [Section 1-45-116(1)(a)(I)(A)]. It is undisputed in this matter that the City's annexation of the Eastern Wedge is not a statewide ballot issue. Pursuant to Section 31-12-112, C.R.S. (1996) and the Colorado Constitution, Art. 2, Sec. 30, only registered voters and landowners in the area proposed to be annexed are permitted to vote on the annexation, not electors throughout the state. The annexation issue is local, not statewide.

Local Ballot Issues [Section 1-45-116(1)(a)(I)(B)]. While in common parlance, the annexation issue may be a local ballot issue, it must meet the statutory definition of this term under the Act in order to qualify as such. The Act applies only to a certain type of local ballot issue, *i.e.*, one "that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section." The statutory provision referenced, *i.e.*, Section 31-11-111, applies only to municipal initiatives, referenda, and referred measures. As expressed in the legislative declaration, Title 31, Article 11 sets forth the procedures for exercising the initiative and referendum powers reserved to the municipal electors in the Colorado Constitution, Article V, Section 1(9).

The procedure for municipal initiatives, referenda and referred measures begins with submitting a proposed ordinance to a legislative body of any municipality by filing notice and then a petition signed by five percent of the registered electors of the municipality. If the legislative body then does not adopt the proposed ordinance, the legislative body it must refer the proposed ordinance to the registered electors of the municipality, who then vote for or against the ordinance. Sections 31-11-104 to 110, C.R.S. (1996). As a part of this procedure and after an election has been ordered, the legislative body fixes a ballot title pursuant to Section 31-11-111, as referenced in Section 1-45-116(1)(a)(I)(B).

The provisions of Title 31, Article 11 regarding municipal initiatives, referenda, and referred measures are inapplicable to the present annexation issue because they involve proposed municipal ordinances and municipal electors. The annexation of land is not an ordinance, and the eligible electors are not from the City, as required pursuant to Title 31, Article 11, but rather from the proposed annexation area. The statutory procedure for annexations is prescribed in the Municipal Annexation Act of 1965, Sections 31-12-101 to 123, C.R.S. (1986 and 1996), not in Title 31, Article 11. See *Board of County Commissioners, County of Adams, v. City and County of Denver*, 37 Colo. App. 395 548 P.2d 922 (1976).

In relation to an annexation election, the annexation process begins with the filing with a municipality of a petition signed by a certain number of qualified electors; continues with determination by the governing body of whether the petition is in substantial compliance with the applicable law [Section 31-12-107], the holding of hearings [Section 31-12-109], a request to the district court to hold an annexation election [Section 31-12-112], the District Court's appointment of election commissioners [Section 31-12-112(4)], and the election commissioners' calling of an election [Section 31-12-112(5)]; and ends with the annexation election, at which voters vote for or against the annexation [Section 31-12-112(8)]. Only those persons living or owning land in the area proposed to be annexed may vote. Section 31-12-112.

The annexation procedure does not include a title setting pursuant to Section 31-11-111. Thus an annexation election is not a "[l]ocal ballot issue that has been

submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section" and consequently is not covered by Section 1-45-116(1)(a)(I)(B).

Referred Measure [Section 1-45-116(1)(a)(I)(C)]. The Act also applies to referred measures, as defined in Section 1-1-104 (34.5), C.R.S.:

"Referred measure" includes any ballot question or ballot issue submitted by the general assembly or the governing body of any political subdivision to the eligible electors of the state or political subdivision pursuant to article 40 or 41 of this title.

Based on this definition, in order for the annexation election to be considered a referred measure, the City Council must have submitted it to the *eligible electors of the City* pursuant to Title 1, Article 40 or 41. In the instant case, however, the City did not submit any ballot question or ballot issue to City electors. Rather, only eligible electors and landowners in the area proposed to be annexed can vote on the annexation. Electors from the City as such are not eligible to vote, except if they also are landowners in the proposed annexation area. The City Council thus did not refer the annexation question to municipal electors as required by the definition of a "referred measure."

In addition, the City Council's actions in this matter were not pursuant to either Article 40 or 41 of Title 1, as required by the definition of a "referred measure." Article 40 applies to all statewide ballot issues that are authorized by the state constitution pursuant to initiative and referendum.³⁷ Sections 1-40-101 and 103(1), C.R.S. Because the annexation question is not a state ballot issue, Article 40 thus does not apply. In addition, Article 41 addresses only odd-year elections. Specifically, Section 1-41-103 regarding local ballot issues in odd-numbered years clarifies the type of issues which can be submitted. Section 1-41-101. Since the election at issue is not an odd-year election, the annexation issue could not have been submitted pursuant to Article 41.

Therefore, while Complainants apparently contend that the annexation question at issue here is a referred measure, the annexation question does not meet the statutory definition for such a measure. The annexation election thus does not trigger the applicability of the Act pursuant to Section 1-45-116(1)(a)(I)(C).

Recall Measures [Section 1-45-116(1)(a)(I)(D)]. The Act also prohibits the expenditure of public funds to urge electors to vote for or against the recall of an officer. This is clearly not the subject matter of the annexation election, and this provision thus does not apply.

Since the annexation question is not a statewide ballot issue, a local ballot issue governed by Section 31-11-111, a referred measure, or a recall measure, the

Act does not prohibit expenditures by the City of public moneys to urge electors to vote for or against it.

Additional Assertions by the Parties. Complainants contend that the Uniform Election Code of 1992 applies to this annexation election pursuant to Section 1-1-102(1), C.R.S., and that the Uniform Election Code is designed in part to prevent fraud and corruption in elections [Section 1-1-103(1), C.R.S. (1996)]. It is unclear how Complainants believe that the Election Code supports their position in relation to the asserted violations of the Act. Section 1-1-103(1) of the Election Code, relied on by Complainants for the contention that the Election Code is designed to prevent fraud and corruption, for example, addresses the issue of who is permitted to vote, an issue not raised by the complaints.

The legislative purpose of the Act, as opposed to the Election Code, is reflected in Section 1-45-102, C.R.S. (1980), and is also cited by Complainants:

The general assembly hereby finds and declares that the interests of the people of this state can be better served through a more informed public; that the trust of the people is essential to representative government; and that public disclosure and regulation of certain campaign practices will serve to increase the people's confidence in their elected officials. Therefore, it is the purpose of this article to promote public confidence in government through a more informed electorate.

In construing the Act, the primary task is to ascertain and give effect to the underlying legislative intent. *Colorado Common Cause v. Meyer*, 758 P.2d 153 (Colo. 1988); *Englebrecht v. Hartford Accident and Indemnity Co.*, 680 P.2d 231 (Colo. 1984). Nonetheless, the legislative declaration of the Act can only be used as a guide to interpretation of the specific provisions found elsewhere in the Act and does not itself proscribe all conduct which would, for instance, counter the goals of an informed public, public trust, and public disclosure and regulation of certain campaign practices. When, as in the instant case, the specific provisions of the Act do not apply to an annexation election, the legislative declaration provides no independent basis for establishing its applicability. Had the legislature wished to include annexation elections in the listing of ballot issues to which the Act applies, it could certainly have done so.

The City asserts in its motion that it is not subject to the Act because it is a home rule city. Based on the conclusion reached above that the language of the Act does not cover annexation elections, the Administrative Law Judge does not address this contention. Further, the Administrative Law Judge does not reach the issue of whether any worksheet or brochures distributed by the City urge electors to vote in favor of or against the annexation or were factual summaries including arguments both for and against the annexation.

CONCLUSIONS OF LAW

1. There is no genuine issue as to any material fact in this matter, and the City of Grand Junction is entitled to a judgment as a matter of law pursuant to C.R.C.P. 56(c).

2. The Secretary of State lacks jurisdiction over the City of Grand Junction and the subject matter of the three complaints filed in this matter, which assert violations of Sections 1-45-116(1)(a)(I) and (b)(I), C.R.S. (1996) of the Campaign Reform Act, because the annexation election at issue is not subject to the Campaign Reform Act.

INITIAL DECISION

It is therefore the Initial Decision of the Administrative Law Judge that summary judgment is granted to the City of Grand Junction and all charges in the three complaints filed in this matter are dismissed.

DONE AND SIGNED

October 30, 1996

Nancy Connick

NANCY CONNICK
Administrative Law Judge

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FOOTNOTES

^{1/}
- It is not entirely clear on whose behalf the response to the City's motion was filed (*i.e.*, all three Complainants or simply Mr. Jungert). The response itself indicates that it is filed on behalf of all Complainants, but it is not signed. The certificate of service, however, is signed by Gilbert J. Jungert. In any case, the Administrative Law Judge has fully considered all arguments raised in the response.

^{2/}
- The Act further clarifies in Section 1-45-116(b)(l), C.R.S. (1996), that certain public expenditures are permitted, despite the prohibitions cited above:

Nothing in this subsection (1) shall be construed as prohibiting an agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof from expending public moneys or making contributions in kind to dispense a factual summary, which shall include arguments both for and against the proposal, on any issue of official concern before the electorate in the jurisdiction. Such summary shall not contain a conclusion or opinion in favor of or against any particular issue. As used herein, an issue of official concern shall be limited to issues that will appear on an election ballot in the jurisdiction.

Complainants rely on both the language of Section 1-45-116(1)(a)(l) prohibiting public expenditures to urge electors to vote in favor of certain ballot propositions and the language of Section 1-45-116(1)(b)(l) permitting the dispensing of factual summaries which include arguments both for and against issues of official concern.

^{3/}
- Title 1, Article 40 specifically does not apply to municipal initiatives, referenda and referred measures, governed by Sections 31-11-101 to 117. Section 1-40-103(2), C.R.S.