

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

In the Matter of:)	
Validation Proceeding to Determine)	Case No. 1404-05077
The Regularity and Legality of)	
Metro's Contracts and Decision in)	Order on Motions for Summary
Connection with the Oregon)	Judgment
Convention Center Hotel Project)	

I. Introduction

Pursuant to ORS 33.710(2), Petitioners Metro and its governing body, the Metro Council, have commenced this proceeding for the purpose of "having a judicial examination and judgment of the court as to the regularity and legality" of the various actions and processes taken to authorize the issuance and sale of revenue bonds, the proceeds from which will be used to pay for a portion of costs related to the development and construction of a Hyatt Hotel.

ORS 33.720(2) requires Petitioners to publish notice of this action in order to obtain "jurisdiction of the electors of the municipal corporation." The notice must appear in "a newspaper of general circulation published in the county where the proceeding is pending," at a

frequency of "at least once a week for three successive weeks." Jurisdiction of the court over this matter and the parties is complete "within 10 days after the date of completing publication."

Respondents Paige Richardson and Michelle Rossolo appeared, pursuant to the notice, to "contest the validity of such proceedings, or of any of the acts or things therein enumerated."
ORS 33.720(3)

Petitioners now move for summary judgment on all matters as to which validation is sought in this proceeding.

Respondents also seek partial summary judgment regarding the adequacy of Petitioner's published notice to establish the court's jurisdiction over each of the matters contained in this proceeding.

II. Standard of Review

A court may grant summary judgment only when there are no genuine issues of material facts in dispute, and the moving party is entitled to judgment as a matter of law. ORCP 47 C; *Van Osdol v. Knappton Corp.*, 91 Or App 499, 502 (1988). "No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter." ORCP 47 C. In determining whether summary judgment is appropriate, the court should (1) assess the pleadings, depositions, affidavits, declarations, and admissions in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists and (2), if not, assess whether the moving party is entitled to judgment as a matter of law. *Metropolitan Prop. & Cas. V. Harper*, 168 Or App 358, 363 (2000); ORCP 47 C.

III. Analysis

A. Respondents' Motion for Partial Summary Judgment

Respondents move for partial summary judgment on the basis that the notice Metro wrote and published to initiate this action was legally defective to grant this court jurisdiction over the electors, as is contemplated in ORS 33.720(2). Respondents' particular asserted defect is that the Metro Council had not adopted resolutions to authorize issuance of the revenue bonds for a convention center hotel, nor to execute the Development and Finance Agreement (DFA), prior to the time the notice of this proceeding was published.

The parties are not in dispute about the material facts which underlie Respondents' motion, specifically the timing of the notice's publication and the Metro Council's authorizations. Applying relevant law to these undisputed facts, I deny Respondents' motion for the reasons that follow.

The language of ORS 33.720(2) casts the purpose of the published notice as jurisdictional, and Respondents' arguments are that the defective notice has deprived this court of the jurisdiction over all the "electors" needed to render a legally effective and binding judgment in this case. ORCP 21G(1) requires that "[a] defense of lack of jurisdiction over the person...is waived if the defense is neither made by motion under this rule nor included in a responsive pleading." Respondents have already filed and had adjudicated various motions brought pursuant to ORCP 21, but did not raise "lack of jurisdiction" in that motion. I find, therefore, that Respondents have waived this argument, for failing to raise it as required under ORCP 21G(1). *See In Re Adams*, 173 Or App 242 (2001).¹

¹ Respondent's argument against waiver – that the alleged defect in the notice “did not exist at the time their [Rule 21] motions were filed,” is simply inaccurate. The alleged deficiency – that “at the time of the notice was published, the terms of the Development and Finance Agreement and Authorization of the Issuance of Revenue Bonds had not yet been decided upon” – was the fact on April 25, 2014 when Respondents filed their Rule 21 Motions. (Quoted portions from Respondents' Reply Brief in Support of Partial Summary Judgment pages 1-2.)

Even considered on the merits, Respondents' motion is not well-taken.

ORS 33.720(2) requires that the notice be published, but the statute specifies not at all what the content of the notice should include. As I find the notice is the functional equivalent of the summons in a civil lawsuit, I look for guidance as to the notice's content by reference to ORCP 7.

Comparing the requirements of ORCP 7 to the notice published in this case (Exhibit 1 to Respondents' Motion for Partial Summary Judgment), the content of the notice is clearly patterned after a summons and, as such, appears to satisfy the notification purposes of a document intended to provide jurisdiction in an adjudicatory context. I find the Respondents' motion asserting to the contrary to be unsupported by law.

Indeed, Respondents Rossolo and Richardson appear to have had no difficulty making their choice to enter this proceeding, despite the pendency of Metro's final authorization for some of the steps involved in the overall effort regarding the convention center hotel at the time the notice was published. Moreover, the fact Rossolo and Richardson have appeared, despite the alleged defect in the notice, supports the conclusion that Respondents lack standing to assert the aggrieved rights of other, non-appearing individuals.

Most important is that Metro's final authorizations for issuance of the bonds, and execution of the DFA, are complete now, and fully capable to being reviewed by this court for their regularity and legality, as urged by both Petitioners and Respondents.

B. Petitioners' Motion for Summary Judgment

1. Petitioners' Motion 1

Metro's first Motion for Summary Judgment seeks a court order as follows:

Validating the regularity and legality of Metro resolutions approving a Term Sheet, authorizing the execution of a Development and Financing Agreement and authorizing the issuance and sale of revenue bonds in a principal amount

sufficient to generate net proceeds of \$60,000,000, secured by TLT net revenues, the proceeds of which will be granted to the developer of the Convention Center Hotel.

The parties agree that determination of whether Metro acted within its scope of authority regarding these matters requires the analysis of two questions: 1) whether the act is authorized by the government's home rule charter or by statute; and 2) whether the act "contravenes state or federal law." *Rogue Valley Sewer Servs. v. City of Phoenix*, 262 Or App 183 (2014) (quoting *La Grande v. Public Employees Ret. Bd.*, 281 Or 137 (1978)).

Pertinent to resolution of both these questions is the history of Metro's creation, described here as it was in *City of Sandy v. Metro*, 200 Or App 481, 481-486 (2005). Metro is a metropolitan service district encompassing land in Multnomah, Washington, and Clackamas counties. In 1969, the Legislature Assembly enacted "The Metropolitan Service District Act," codified at ORS 268 to permit the creation of "metropolitan service districts." In 1990, state voters passed a constitutional amendment (Article XI, section 14), which allowed any metropolitan service district to adopt a charter to enable it to enact district legislation on matters of metropolitan concern. In 1992, Metro electors adopted a charter and constituted Metro as a home rule district. In 1997, the Legislative Assembly enacted a statute for the purpose of conforming ORS 268 and other state laws to the Metro Charter.

Turning to the first of the two questions set out above, that question is not seriously in dispute.² Under the Oregon Constitution, Article XI, §14, "(3) A district charter may provide for the exercise by ordinance of powers granted to the district by the Constitution or laws of this state." According to the Oregon Supreme Court, the central object of the state's constitutional

² At oral argument, counsel for Respondents stated: "Motion 4, I think, talks about seeking a validation that Metro could enter into the development and financing agreement by Resolution. *In theory we don't have an argument to that. In theory Metro could enter into its contracts that way. We don't really think that is an issue here.* The question is whether there has been a failure of condition preceding which we believe is a vote of the public on the financing package. And that enters into each of the motions other than the last two which are different animals." (emphasis added) Oral Argument at 2:14:00 on October 17, 2014, In the Matter of Validation Proceeding, 1404-05077.

provisions for the creation of metropolitan service district charters is “to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature.” *La Grande*, 281 Or at 142. The “validity of local action depends, first, on whether it is authorized by the local charter or by a statute.” *Id* (emphasis added). Accord: *Rogue Valley Sewer Servs.*, 262 Or App at 190-91. (“home rule” is to “permit the people of cities or towns to determine for themselves the organization and powers of their local governments without the need to obtain authority from the state legislature.”)

Here, Chapter II, section 9 of the Metro Charter states that:

When carrying out the functions authorized or assumed under this charter: (1) Metro has all the powers that the laws of the United States and this state now or in the future could allow Metro just as if this charter specifically set out each of those powers; (2) the powers specified in this charter are not exclusive; (3) any specification of power in this charter is not intended to limit authority; and (4) the powers specified in this charter shall be construed liberally.

This is the broadest grant of authority, and permits Metro to act under the full scope of power conferred by Oregon and the United States. As past Oregon courts have noted, the constitutional amendment allowing for home rule charters was intended to allow the districts to act under the authority of a district charter without the need for legislative action. According to the Metro Charter, Metro may “impose, levy and collect taxes and may issue revenue bonds, general and special obligation bonds, certificates of participation and other obligations.” Metro Charter, Ch. III, §10. In accordance with that section:

Metro may issue from time to time revenue bonds for such purposes as are determined by Council to be necessary or appropriate to carry out the functions, duties and operations of Metro. Metro may issue revenue bonds for the purpose of financing such property as Council shall determine is necessary or desirable in order to carry out or assist or advance the carrying out of Metro’s function, duties and operations regardless of whether such property is to be owned by Metro or any other public or private agency or person and regardless of whether such property is to be located within or without the jurisdictional boundaries of Metro.

Metro Code 7.02.040. Under Chapter 2, §6 of the Metro Charter, “Metro is authorized to exercise the following functions: (1) acquisition, development, maintenance and operation of... (b) public cultural, trade, convention, exhibition, sports, entertainment, and spectator facilities.”

Thus, the first question of the analysis is answered: Metro has the authority to issue the revenue bonds under the Metro Charter alone, with any need to rely upon statutory authority.³

The second step of the analysis asks whether the act contravenes state or federal laws. The state law which Respondents contend Metro’s actions have contravened is ORS 268.310(4). This law provides:

Subject to the provisions of a district charter, a district may, to carry out the purposes of this chapter (4) acquire, construct alter, maintain, administer and operate major cultural, convention, exhibition, sports and entertainment facilities. However, unless the electors of the district first approve the financing of the facilities, the district shall not: (a) construct new facilities.

ORS 268.310(4).

ORS 268.310 is, in its own words, “subject to the provisions of a district charter.” The term “subject to” means “conditional or dependent on.” *Subject to Definition, The Law Dictionary Featuring Black’s Law Dictionary*, <http://thelawdictionary.org/subject-to/> (last visited Nov. 18, 2014). The American Heritage Dictionary defines the word “contravene” as meaning “to act or be counter to; violate.” American Heritage Dictionary 318 (2d ed. 1982). The definition and plain meaning of these terms compels the conclusion that a statute made “subject to” a charter simply cannot be “contravened” by that charter. This reality is made even clearer by ORS 268.710(2), which provides:

³ Respondents' reliance on *City of Sandy* to support a contrary proposition is misplaced. While that court found "that the question whether the Metro council was authorized to enact *the ordinances at issue* does not differ from the question of whether Metro had that authority by statute" *Id* at 489 (emphasis added), it does not follow, as Respondents argue, that the Metro Charter is limited to authority conferred by statute. Rather, *City of Sandy* advances the unremarkable proposition that, when charter language and the language of a statute are “almost verbatim,” the construction of each necessarily becomes one of statutory interpretation.

After January 1, 1997, no person may commence or maintain an action to challenge the validity of a district charter existing and effective on January 1, 1997, on the basis of inconsistency or conflict between the district charter and ORS 268.030, 268.300, 268.310...In addition to any authority expressly granted to a metropolitan service district by the Legislative Assembly, a district charter is an independent grant of authority by the affected electorate pursuant to section 1 (5), Article IV and section 2, Article XI of the Oregon Constitution.

Therefore, as it is undisputed by Respondents, as well as by the facts and law, that Metro has acted fully within the scope of its authority under the Metro Charter and Code to authorize the issuance and sale of the revenue bonds, and further that, as a matter of law, these actions by Metro are in not contravention of ORS 268.310, the court grants summary judgment on Metro's Motion 1.

2. Petitioners' Motions 2, 3 & 4

Metro's second, third, and fourth Motions for Summary Judgment seek an order granting summary judgment validating the regularity and legality of, respectively, "Metro's award of the Development and Financing Agreement " (DFA), "Metro's authorization of the execution of the [DFA] by resolution," and the DFA, including each related agreement for which a form is attached as an exhibit to the DFA (hereinafter referred to collectively as "the DFA matters").

Under Chapter II, §8 of the Metro Charter, "all Metro officers shall preserve, to the greatest extent possible, the ability of Metro to contract for all services with persons or entities who are not Metro employees." The approval of contracts occurs by resolution. Metro Code 2.01.080.

All parties agree that the DFA matters, procedurally and substantively, were authorized by, and consistent with, the Metro Charter. Respondents' argument against summary judgment regarding the DFA matters is that Metro failed to comply with what Respondents term a "condition precedent": submission of the financing package to the voters for their approval.

Respondents fail to point to any statute or requirement in the Metro Charter or Metro Code requiring that the financing package be submitted to the voters for approval, relying exclusively again on ORS 268.310. As the court has ruled above that ORS 268.310 has no application to Metro's actions in this case, Metro did not need to submit the financing package to the voters.

Thus, as the parties agree that there are no issues of fact on these matters and that Metro followed all procedural processes in accordance with its charter and code, and ORS 268.310 has no application to Metro's actions in this case, Petitioners' Motions 2, 3 & 4 are granted.

3. Petitioners' Motions 5 & 6

Metro's Motions 5 and 6 ask the court to declare that opponents to the project cannot use the referendum or initiative processes to overturn Metro's actions in entering into the DFA or issuing revenue bonds and attendant obligations.

As noted above, ORS 33.710(2) provides for "a judicial examination and judgment...as to the regularity and legality" of "the proceedings of the governing body and of the municipal corporation providing for and authorizing the issue and sale of bonds of the municipal corporation, *whether the bonds or any of them have or have not been sold or disposed of*", and "the authorization of any contract as to the validity of the contract, *whether or not is has been executed.*" (emphasis added)

While this statute expressly permits the petitioning government to obtain review and approval of future actions, the statute also reminds of the limitations of the review: "nothing in this section allows a governing body to have a judicial examination and judgment of the court without a justiciable controversy." ORS 31.720(4).

Justiciability is a vague standard but entails several definite considerations. A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests. The

controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue. A justiciable controversy results in specific relief through a binding decree as opposed to an advisory opinion which is binding on no one.

Brown v. Oregon State Bar, 293 Or 446, 449 (1982).

Petitioners' Motions 5 and 6 request the court to go beyond simply determining the "regularity and legality" of Metro's actions entering into the DFA and issuing revenue bonds, as ORS 33.710(2) permits. What Petitioners' seek is a court order expressly foreclosing particular legal processes which, depending upon precise factors not known or knowable at this time, might or might not be available.

Presently, no opponents are undertaking such processes. The motions, thus, do not involve an actual controversy, and involve future, hypothetical facts. There are no parties who have adverse legal interests with respect to the matters which are the subject of Metro's motions 5 and 6. If the jurisdictional concept of justiciability is to be preserved as ORS 33.710(4) mandates, these motions must be denied as non-justiciable.

IV. Conclusion

For the reasons stated above, the court hereby rules and orders as follows:

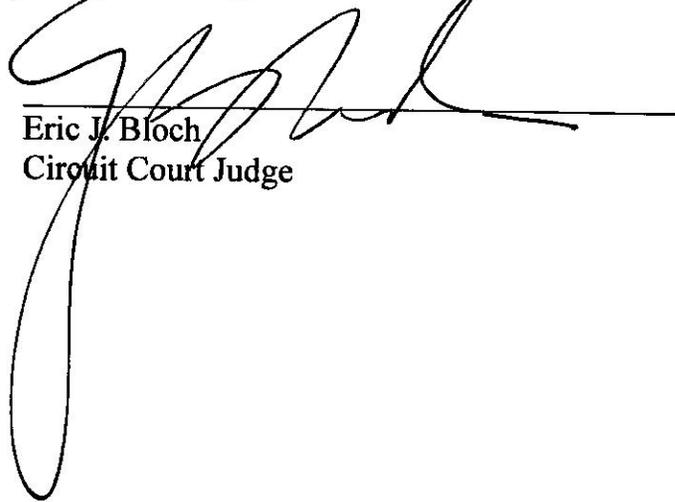
Respondents' Motion for Partial Summary Judgment is denied, on the grounds Respondents have waived any challenge to jurisdiction, and Respondents lack standing;

Petitioners' first Motion for Summary Judgment is granted, as there are no issues of material fact in dispute and Petitioners' are entitled to judgment in their favor as a matter of law;

Petitioners' second, third and fourth Motions for Summary Judgment are granted, as there are no issues of material fact in dispute and Petitioners' are entitled to judgment in their favor as a matter of law;

Petitioners' fifth and sixth Motions for Summary Judgment are denied, as non-justiciable.

DATED This 19 day of November, 2014.



Eric J. Bloch
Circuit Court Judge