

FILED

2009 APR 16 P 4:11

E. Barker

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS TAXPAYER ACCOUNTABILITY
COMMITTEE; LAS VEGAS
REDEVELOPMENT REFORM COMMITTEE;
D. TAYLOR; CHRISTOPHER BOHNER; KEN
LIU,

Petitioners,

vs.

CASE NO. A587389
DEPT NO. XVIII

CITY COUNCIL OF LAS VEGAS, NEVADA;
BEVERLY K. BRIDGES, in her official
Capacity as City Clerk of the City of Las Vegas,

Respondents.

Hearing: April 15, 2009
April 16, 2009

LIVEWORK, LLC, a Delaware limited liability
Company; FC VEGAS 20, LLC, a Nevada limited
Liability company; FC VEGAS 39, a New York
Limited liability company; and DOWNTOWN LAS
VEGAS ALLIANCE, a Nevada non-profit corporation,

Respondents-in-Intervention.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter having come before the Court on April 15, 2009 and again on April 16,
2009 on Petitioners' Petition for Writ of Mandamus and Complaint for Declaratory and

1 Injunctive Relief Pursuant to NRS 295.210(4) and NRS 30.030. Petitioners appearing
2 through counsel Richard G. McCracken, Esq.; Respondents appearing through counsel Daniel
3 F. Polsenberg, Esq. and Brad Jerbic, Esq; and Respondents-in-Intervention appearing through
4 counsel Mark E. Ferrario, Esq. The Court, having reviewed the pleadings and papers on file
5 herein, reviewed testimony before the Supreme Court on this matter, heard testimony of
6 witness and arguments of counsel, finds as follows:
7

8
9 **I**
OVERVIEW

10 This is an action pursuant to NRS 295.210(4) for declaratory and injunctive relief and
11 pursuant to NRS 34.150 through 34.350 for a writ of mandate ordering the Las Vegas City
12 Clerk and City Council to submit initiative and referendum measures, more specifically
13 identified as the "Taxpayer Initiative" and the "Redevelopment Referendum" in the City of
14 Las Vegas. The individual petitioners are registered voters and taxpayers of the City.
15

16 Petitioners presented the form of their petitions to the City on December 8, 2008, and
17 then presented signed petitions on January 22, 2009. No later than January 29, 2009, the
18 Clark County Clerk determined that a sufficient number of signatures had been submitted to
19 qualify each measure for the June 2, 2009 general election ballot. On February 10, 2009, the
20 Las Vegas City Clerk certified that the petitions had received more than the required number
21 of signatures. On March 4, 2009, Respondent City Council voted to refuse to put the
22 measures on the ballot, contending that the measures proposed were "legally insufficient."
23

24 The Taxpayer Initiative provides, in pertinent part:

25 Section 1: Voter Approval for Certain City Development Projects.

26 A new Section 2.340 is added to the City of Las Vegas Charter:
27 Section 2.340. Voter Approval for Certain City Development Projects.
28

1
2 (1) Notwithstanding any other provision of the Charter or Municipal Code, the
3 following provisions shall apply to any lease-purchase agreement for the construction
4 or remodeling of a building or facility entered into pursuant to Section 2.145 of the
5 City of Las Vegas Charter:

6 (a) Annual appropriations of \$2 million or more to satisfy an obligation under
7 any lease-purchase agreement for the construction or remodeling of a city
8 building or facility shall be subject to voter approval.

9 (b) The question of whether to make such an appropriation shall be presented
10 to voters at the general municipal election proximately prior to the beginning
11 of the fiscal year in which the obligation under the lease purchase agreement is
12 due. At such general municipal election, registered voters shall be presented
13 with all proposed appropriations for the ensuing two fiscal years.

14 (c) If a majority of the registered voters voting on the question is in favor of
15 the proposed appropriation, the proposal is carried and otherwise the proposal
16 is defeated and the proposed appropriation shall not be made.

17 (d) The ballot question for proposed appropriations submitted to the registered
18 voters must contain the amount and due date of the obligation for which each
19 appropriation is proposed and the purpose of the lease purchase agreement
20 under which the payment is due.

21 (2) Notwithstanding any other provision of the Charter or Municipal Code, the
22 registered voters of the City of Las Vegas, Nevada are deemed to be the "legislative
23 body" within the meaning of Nevada Revised Statutes Sections 279.586, 279.604, and
24 279.608 to the exclusion of the City Council of Las Vegas and all other legislative
25 bodies. Any and all redevelopment plans, and material deviations therefrom and
26 amendments thereto, and contracts for redevelopment projects within the meaning of
27 NRS 279.412, must be approved by the registered voters of the City of Las Vegas,
28 Nevada. A vote of the registered voters on any matter subject to this subsection may
take place at any general municipal election, general statewide election or special
election called for such purpose.

The Redevelopment Referendum would repeal Las Vegas Ordinance No. 5830. That
Ordinance adopted the current Amended and Restated Redevelopment Plan for the downtown
in 2006.

On March 10, 2009, Petitioners filed an original Petition for Writ of Mandate with the
Nevada Supreme Court, which ruled on April 8, 2009 that the matters contained therein

1 should be raised first before this District Court under the procedures set forth in NRS
2 295.210(4).

3 Petitioners filed the instant Complaint for Declaratory and Injunctive Relief and
4
5 Petition for Writ of Mandamus on April 10, 2009. Pursuant to NRS 295.210(4) and in light of
6 the April 22, 2009 deadline for printing ballots for the June general election, the Court set this
7 matter for hearing on April 15 and 16, 2009. The parties appeared and had an opportunity to
8 present evidence and argument.

9 The petitioner argues that the responsibility of the City to place this matter on the
10 ballot is absolute. Petitioner further argues that the responsibilities of the City are ministerial
11 and leave no discretion to consider the issues in this case in a pre-election context. Petitioners
12 assert that the use of the word "shall" indicates the requirement is mandatory.
13

14 The City counters that it recognizes its responsibilities, but there are pre-election
15 issues that can and must be addressed. The City further argues that before this Court issues a
16 Writ of Mandamus ordering the measure be placed on the ballot, this Court has the authority
17 and discretion to address the City's position that the measures are legally sufficient as to
18 subject matter, violate the single subject rule, and improperly describe the results of the
19 measure and whether it is unconstitutional.
20

21 The Court agrees that the analysis is not as simple as petitioners suggest. An Initiative
22 or Referendum must meet certain threshold standards before it can be placed on a ballot. If
23 those standards are not met, the ballot measure is void. *Glover v. Concerned Citizens for Fuji*
24 *Park*, 118 Nev. 488, 498-499 (2002). A void ballot measure cannot trigger the otherwise
25 mandatory action required by NRS 295.215.

26 ///

1 Even the pre-existing common law, against which the statute must be construed,
2 plainly rejected the notion that a City has a non-discretionary duty to place invalid measures
3 on the ballot, moreover.

4 The proposition that a writ of mandate will not issue to compel respondents to submit
5 to the electors of the city a proposed ordinance that would be void even if approved by
6 a majority of the electors is too clear for discussion or the citation of authorities. *State*
7 *ex rel. Davies v. White*, 36 Nev. 334, 336 (1913).

8 Just before this Petition was filed, the Nevada Supreme Court rejected a similar
9 Petition involving the same parties, in which petitioners also asserted that the City had a non-
10 discretionary duty.

11 If Petitioners' contentions in regard to this being ministerial were an accurate
12 statement of the Supreme Court's position then there would be no need for the District Court
13 to hold a hearing. The Nevada Supreme Court, which denied this same Petition, cited to *State*
14 *v. County of Douglas*, 90 Nev. 272, 276-77 (1974) when finding that "Ordinarily, application
15 should be made in the first instance to the district court so that factual and legal issues are
16 fully developed, giving this court an adequate record on which to make a reasoned decision."
17 *Las Vegas Taxpayer Accountability Committee v. City Council of Las Vegas, Nevada*
18 Supreme Court, Case No. 53388 (order dated 04/08/09).

19 This Court also looks to the *Herbst Gaming, Inc. v. Heller*, 141 P.3d 1224 (Nev. 2006)
20 for direction. As cited by *Herbst*,

21 "This article argues that it is generally improper for courts to adjudicate pre-election
22 challenges to a measure's substantive validity. Such pre-election review involves
23 issuing an advisory opinion, violates ripeness requirements, undermines the policy of
24 avoiding unnecessary constitutional questions, and constitutes unwarranted judicial
25 interference with the legislative process. By contrast, this Article argues that pre-
26 election review of challenges based on noncompliance with procedural requirements
27 or subject matter limitations is proper. Such claims do not implicate the same level of
28 justifiability concerns; rather, they address the justifiable issue whether the measure's
proponents are legally entitled to invoke the direct legislation process in the instance."

1 James D. Gordon III & David B. Magleby, *Pre-election Judicial Review of Initiatives*
2 *and Referendums*, 64 Notre Dame L. Rev. 298 (1989). The Nevada Supreme court has
3 cited this article with approval in prior decisions. See *Herbst Gaming, Inc. v. Heller*,
4 141 P.3d 1224, 1228 n. 7 (Nev. 2006); *Garvin v. Ninth Judicial Dist. Court*, 118 Nev.
5 749, 766 n. 75 (2002); *Citizens for Train Trench Vote v. Reno*, 118 Nev. 574, 585 n.16
6 (2002), *overruled in part by Garvin*, 118 Nev. at 765 n.72; *Glover v. Concerned*
7 *Citizens for Fuji Park*, 118 Nev. 488, 498 n.37 (2002), *overruled in part by Garvin*,
8 118 Nev. at 765 n.71.

9 Therefore, this Court finds that factual and legal issues important for a reasoned
10 decision must be developed.

11 II 12 INITIATIVE

13 The first issue as to the Initiative is the application of NRS 295.009(1)(a) which
14 states, in pertinent part:

15 **NRS 295.009 Requirements for petition: Must embrace one subject; must**
16 **include description.**

17 1. Each petition for initiative or referendum must:

18 (a) Embrace but one subject and matters necessarily connected therewith and
19 pertaining thereto.

20 The Petitioner argues that the single subject rule does not apply in this action.
21 Petitioner argues that this statute should only be applied to a statewide initiative and has no
22 applicability to this municipal initiative. The City counters that NRS 295.009(1)(a) is an
23 important consideration in analyzing any Initiative or Referendum at any level within the
24 state. This court agrees. The Initiative must clearly state to the voter the purpose or intent,
25 by a single subject, along with an accurate statement of the potential result. The Court
26 believes this is fundamental to the process.

27 The Initiative involved in this petition presents two unrelated provisions. The first,
28 §1(1) requires voter approval for appropriations to make payments for lease-purchase

1 agreements for public buildings. The provision applies to *all* construction or remodeling
2 projects. It does not specifically limit itself to redevelopment but attempts to limit the
3 Council's powers to use lease-purchase agreements to conduct business.

4
5 The second provision in §1(2) does relate to redevelopment, as it attempts to substitute
6 all registered voters as the "legislative body" for the purposes of NRS Chapter 279 and
7 requires that the voters approve all redevelopment plans and agreements. It attempts to limit
8 the powers of the Redevelopment Agency—a legal entity separate from the City itself.

9 The Initiative petition includes two distinct subjects, one relating to voter approval for
10 *all* lease purchase agreements (whether for redevelopment projects or otherwise), and the
11 other seeking to govern the redevelopment agency by popular vote. They are not functionally
12 related or germane to one another such that voters are given notice of the measure's general
13 subject.
14

15 The Court also rejects the Petitioners' argument that the Initiative is limited to a single
16 subject of requiring voter approval for expenditure of taxes for development projects. While
17 such a description might be considered generally true as to § 1(1), through which voter
18 approval of a specific type of appropriations would be required, § 1(2) is not so limited. That
19 section would require voter approval of issues beyond particular proposals to spend taxpayer
20 money on specific development projects; it would also require voter approval of the multitude
21 of other decisions relating to the contents of a redevelopment plan.
22

23 Finally, severance was never discussed as an option to salvage the Initiative. The
24 Court also notes that petitioners did not request severance in the event the Court found a
25 violation of the single subject rule.
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1 For these reasons, the Court concludes that the Initiative has not met the threshold
2 requirement for placement on the ballot.
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4

5 **III**
6 **REFERENDUM**

7 Petitioners' argument in support of the Referendum mirrors the Initiative in that
8 petitioners have complied with all requirements of NRS 295.215 and therefore the City has a
9 nondiscretionary, ministerial duty to place the measure on the ballot.

10 The City counters that the Referendum incorrectly describes its effect in violation of
11 NRS 295.009(1)(b). The City further argues that the Referendum petition is legally
12 inadequate because it inaccurately describes the effect of the potential passage of the
13 Referendum.
14

15 Pursuant to NRS 295.009(1)(b), a petition must accurately describe the effect of a
16 ballot measure:

17 1. Each petition for initiative or referendum must:

18 * * *

19 (b) Set forth, in not more than 200 words, a description of the effect of
20 the initiative or referendum if the initiative or referendum is approved
21 by the voters. The description must appear on each signature page of
22 the petition.

23 As stated above, each petition for Initiative or Referendum must set forth "a
24 description of the effect of the initiative or referendum if the initiative or referendum is
25 approved by the voters. The description must appear on each signature page of the petition."
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1 Respondents assert that the petition to propose the Referendum had an improper
2 description of its effect, because it advised the signers only that the proposal would eliminate
3 further redevelopment “projects,” when it would actually abolish the entire existing “plan”
4 and the redevelopment “area.” See *City of Las Vegas Downtown Redevelopment Agency v.*
5 *Crockett*, 117 Nev. 816 (2001), which explains the meaning of these terms under NRS
6 Chapter 279.

8 A review of the procedural validity of a ballot measure requires a determination
9 regarding compliance with the statutory requirement that voters be adequately advised of the
10 effect of the measures NRS 295.009(1)(b). *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877
11 (2006).

12
13 Petitioners’ primary argument is that challenges to the “constitutional” validity of
14 proposed direct legislation cannot be accomplished in pre-election litigation, relying on
15 *Herbst*.

16 In *Herbst*, the Supreme Court reasoned that pre-election review of constitutional
17 challenges to a ballot initiative is generally not appropriate because the case would not be
18 ripe. *Herbst*, 141 P.3d at 1231. The Supreme Court recognized, however, that when harm is
19 probable, and not just speculative, the matter is ripe for judicial review, even if the harm does
20 not yet exist. *Id.*

21
22 The Nevada Supreme Court has also recognized an exception for pre-election review
23 where the constitutional violation is “patently, or plainly and palpably, unconstitutional.” See
24 *Citizens for a Public Train Trench Vote v. City of Reno*, 118 Nev. 574, 585 (2002) (holding
25 that a measure need not be included on the ballot merely because threshold procedural
26 requirements have been met).

1 The Court finds the petition misleads the voters by explaining that the repeal of
2 ordinance 5830 would have only a prospective effect by preventing "further development
3 projects or incurring further indebtedness" for those projects. The petition fails to describe
4 the impact of the Referendum on existing projects and existing indebtedness. The petition
5 states:
6

7 The referendum asks registered voters in the City of Las Vegas to
8 repeal Ordinance No. 5830, entitled "An Ordinance to Adopt an
9 Amended and Restated Redevelopment Plan. Which Includes
10 Additional Property Within the Plan, and to Provide for other Related
11 Matters." Ordinance No. 5830 amended and restated the
12 Redevelopment Plan for the Downtown Las Vegas Redevelopment
13 Area by expanding the area covered by the Plan, restating the purpose
14 of the Redevelopment Plan, and making certain other findings. *Repeal
of Ordinance No. 5830 would prevent the Redevelopment Agency from
undertaking further redevelopment projects in the Redevelopment Area
or incurring further indebtedness to support such additional projects.*
(Emphasis added).

14 The petition fails to inform the voters of the true effect of passage of the Referendum:
15 termination of the Redevelopment Plan and the impairment of the outstanding securities of the
16 Redevelopment Agency.
17

18 Failure to inform the signers of the true effect on outstanding obligations was material
19 and invalidates the petition under 295.009(1)(b). The City properly determined that the
20 Referendum failed to meet threshold requirements for placement on the ballot.

21 The Referendum is not the proper subject matter for direct legislation because it would
22 allow the electorate to violate NRS 279.608, which authority even the City Council does not
23 possess. The petition also did not adequately advise the voters of the effect of the measure as
24 required by NRS 295.009(1)(b). Furthermore, the Referendum is clearly unconstitutional and
25 cannot possibly be implemented in a constitutional manner. The City properly exercised its
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1 authority in refusing to place the Referendum on the ballot. *Garvin v. Dist. Ct.*, 118 Nev. 749,
2 766 (2002)


3 For these reasons, the Court concludes that the Referendum has not met the threshold
4 requirement for placement on the ballot.
5

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7 **ORDER**
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9 Now, therefore, it is hereby

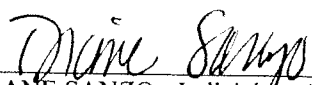
10 **ORDERED** that Petitioners' Petition for Writ of Mandamus and Complaint for
11 Declaratory and Injunctive Relief is hereby denied.

12 DATED this 17th day of April, 2009

13
14
15 
16 _____
DISTRICT JUDGE

17 I hereby certify that on the date filed, I faxed
18 and placed a copy of the foregoing Order in the
folder(s) in the Clerk's Office of the following:

19 Richard G. McCracken, Esq. 386-9848
20 Daniel F. Polsenberg, Esq. 949-8398
Bradford Jerbic, Esq. 386-1749
21 Mark E. Ferrario, Esq. 796-7181

22 
23 _____
DIANE SANZO, Judicial Assistant
24
25
26
27
28