CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
807 MAIN STREET
OREGON CITY, OR 97045

HENRY C. BREITHAUPT
Judge Pro Tem

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December 13, 2018

SENT VIA EMAIL

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Re: Clackamas County v. City of Happy Valley
Clackamas County Case No. 18CV30439

Counsel:

This case is before the court on the motion of the plaintiff for summary judgment. In its motion, plaintiff (the District) only moved on its claim. It did not move on the affirmative defenses pled by the defendant (the City), and this opinion therefore does not address those affirmative defenses.

The parties are separated as to how they read the provisions of ORS Chapters 198 and 222 dealing with withdrawal from a service district. The District maintains that ORS Chapter 198 governs the purported withdrawal by the City from the District. The City argues that the provisions of ORS 222.520 govern its purported withdrawal.

The City was incorporated in 1965. The District was formed in 1990.

The District is one governed by ORS 198. See ORS 198.180 (Districts include county service districts formed under ORS Chapter 451). Chapter 198 sets out comprehensive rules for the formation, operation and termination of districts. Under Chapter 198, a "change of organization" means the annexation or withdrawal of territory to or from a district. Those include the provisions of ORS 198.866 providing for procedures by which a city may annex of the city to a district. The City in this case followed these provisions, as did the District, when, in 2005, the City was annexed into the District.

Chapter 198 also provides procedures for withdrawal of property from a district. ORS 198.870 permits withdrawal either by an owner of land or by "the electors of an area within a district." It is undisputed that the neither the City nor electors within the City have complied with the requirements of ORS 198.870. The District and other plaintiffs conclude that the purported withdrawal from the District of property within the City is therefore invalid and *ultra vires.*

For its part, the City argues that ORS 222.520 applies in this situation, and it is therefore allowed to withdraw from the District pursuant to ORS 222.524. The City argues that if ORS 222.520 does not apply in this case, there would never be a way for a city to withdraw from a district once the property in the city became part of a district. The court notes that the provisions of ORS 222.520 could apply because of the cross reference found in ORS 451.585(4), which is parallel to the provisions of ORS 222.520.

The position of the City is not well taken. The text of Chapter 198 by its terms applies to the method by which the City became part of the District. That was through the property of the City being "annexed to" the District pursuant to ORS 198.866. Now, the property in the City is "an area within a district," within the meaning of ORS 198.970(1)(b). It appears the "electors" within this area (or a statutorily required number of them under ORS 198.800 to 198.820) wish to withdraw from the district. To do this, that group of electors must file a petition with the county board. This has not been done.

The provisions of ORS 222.520 apply to two circumstances in which land within a district may be withdrawn pursuant to ORS 222.524. The first of those circumstances is when a part of district land becomes incorporated as a city. That did not occur here as the City was incorporated before the District existed. The other circumstance is when part of the land of a district is "annexed to a city." That also did not occur here. The provisions for annexation by a city were not used to bring the land within the City into the District. That land was not annexed to the City. Rather, the City was annexed to the District under ORS 198.866. The court cannot change the explicit meaning of the statutes and the recognition in the statutes of different paths by which cities may form relationships with districts.

Accordingly, the purported withdrawal of the City from the District is not in accordance with law and is therefore *ultra vires*.

The objections of the City voiced at the hearing on this matter cannot withstand the explicit statutory language discussed above. The City argues that to conclude that Chapter 198 governs leaves the City and other cities in the position of the City with no way out of districts. The court is of the opinion that this consequence is what the legislature intended. While it is true that the provisions of Chapter 198 do not provide for initiation of proceedings by a city, they clearly contemplate that the electors within a city can undertake withdrawal. The court cannot read into Chapter 198 a provision for a city to act.

Next, the City argues that the mechanism set forth in Chapter 198, especially provisions on the standards to be applied to withdrawal petitions, will result in no withdrawal being possible. The District responds that this is speculation as no petition has been submitted. The court agrees that application of statutory standards to a petition is premature at this point. Further, if the statutory hurdle in Chapter 198 is a high one, the remedy, if any, is for the legislature and not this court.

The City finally argues that the conclusion the court reaches violates a basic principle that cities are the "preferred providers" of the types of services at issue here. The City argues from that premise that it should be allowed to use the Chapter 222 processes that it has initiated and under which less rigorous standards for withdrawal may be available. The problem with this argument of the City is that there is no legislative history that supports the policy the City urges exists. Nor does the text or context of the statutes involved in this case. Further, as discussed at the hearing on this matter, the legislature has amended provisions in this area to allow cities to choose continued service by districts rather than by the cities themselves. This period of continued district service is unlimited in the statutes. That fact is inconsistent with the argument that cities are to be "preferred providers." If cities were such, the court concludes the legislature would have placed some requirement on cities to assume the service or services involved.

At the hearing on this matter, the court expressed doubt as to whether the affirmative defenses raised by the City were supported by law. However, a determination of that question must await a motion either by the District or the City that brings the validity of those affirmative defenses, as well as summary judgment standards as to those defenses, before the court.

As questions regarding the affirmative defenses remain to be decided, any order or judgment on this matter cannot yet be entered. Counsel are directed to confer and advise the court as to how, in their opinion, the matter of affirmative defenses is to be handled. Cognizant of the time of year, the court suggests counsel first discuss when a response to the court on further proceedings should be due. That schedule item should be reported by December 21, 2018.

Sincerely,

Signed 12/13/2018 1 19 27 PM

Henry Breithaupt, Judge
Henry C. Breithaupt
Circuit Judge