DIVISION ONE
FILED: 11-12-2010
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SALVATORE SCARMARDO, Plaintiff/Appellant, v. CITY OF LAKE HAVASU, a body politic; LAKE HAVASU CITY IRRIGATION AND DRAINAGE DISTRICT, a body politic; LEE BARNES, Lake Havasu City Councilman; DON CALLAHAN, Lake Havasu Councilman; DAVID MCATLIN, Lake Havasu Councilman; BRIAN WEDEMEYER, Lake Havasu Councilman; DEAN BARLOW, Lake Havasu Councilman; GAIL WHITTLE, Lake Havasu City FINANCE DIRECTOR, Defendants/Appellees.	No. 1 CA-CV 10-0138 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV 2009-7116

The Honorable John P. Plante, Judge

AFFIRMED

Harvey R. Jackson, Attorney at Law By Harvey R. Jackson Attorneys for Plaintiff/Appellant	Lake Havasu City
Charles F. Yager, Lake Havasu City Prosecutor By Paul Lenkowsy	Lake Havasu City

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Gust Rosenfeld, P.L.C. Phoenix
By David A. Pennartz
Trish Stuhan
Co-Counsel for Defendants/Appellees

D O W N I E, Judge

¶1 Salvatore Scarmardo ("Appellant") appeals from the trial court's grant of summary judgment to Lake Havasu City, Lake Havasu City Irrigation and Drainage District, Lee Barnes, Don Callahan, David Mcatlin, Brian Wedemeyer, Dean Barlow, and Gail Whittle (collectively, "Appellees"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Lake Havasu Irrigation and Drainage District ("IDD") was created in 1963 by the Mohave County Board of Supervisors. Lake Havasu City was incorporated in 1978. Thereafter, the IDD Board was replaced by the Lake Havasu City Council acting as trustees of the IDD.

¶3 As trustee, the City Council is responsible for setting annual IDD property tax assessments. In 2009, the council approved a tax that would increase over three years to a level that existed in 1997. Appellant filed a complaint in Mohave County Superior Court challenging the City Council's action. Appellees filed an answer and a motion to dismiss. Appellant moved for summary judgment.

¶4 The superior court treated the motion to dismiss as a motion for summary judgment and considered both motions together. It ruled that the challenged levy was a tax increase and concluded that the IDD could provide and charge for domestic, municipal, and industrial water. The court determined that the IDD's right to levy taxes created a "semblance of authority" for the challenged tax. As such, it held that Appellant must first pay the tax before challenging it in court. The superior court dismissed the complaint, "except that the dismissal of Plaintiff's tax related claims is without prejudice, with respect to the Plaintiff's right to pursue the tax issues in the tax court, another court of competent jurisdiction."

¶5 Appellant filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶6 We review *de novo* the grant of summary judgment and view the evidence and all reasonable inferences in the light most favorable to the party opposing that motion. *Hohokam Irr. & Drainage Dist. v. Ariz. Public Service Co.*, 204 Ariz. 394, 396-97, ¶ 5, 64 P.3d 836, 838-39 (2003). We review the interpretation of statutes *de novo*. *Id.* at 397, ¶ 5, 64 P.3d at 839.

1. Special Action Jurisdiction

¶7 In count three of the complaint, Appellant sought a writ of mandamus, claiming Appellees had "failed to exercise or perform a duty required by law" and were "threatening to proceed . . . in excess of their jurisdiction." A.R.S. § 12-2021 (2003) provides:

> A writ of mandamus may be issued by the supreme or superior court to any person, inferior tribunal, corporation or board, though the governor or other state officer is a member thereof, on the verified complaint of the party beneficially interested, to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

¶8 The superior court did not expressly accept or decline special action jurisdiction. However, by finding that Appellant had a remedy "at least as adequate as it is in any of the modern cases that have gone before the court to challenge a tax," we infer that it declined special action jurisdiction due to the availability of an adequate remedy at law. We find no error in declining special action jurisdiction.

¶9 "Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law

specifically imposes as a duty." *Sears v. Hull,* 192 Ariz. 65, 68, ¶ 11, 961 P.2d 1013, 1016 (1998) (citation omitted). "The requested relief in a mandamus action must be the performance of an act, and such act must be non-discretionary." *Id.* Mandamus is not an appropriate manner of "obtain[ing] a definition of duties that are otherwise subject to dispute." *Yes on Prop 200 v. Napolitano,* 215 Ariz. 458, 467, ¶ 26, 160 P.3d 1216, 1225 (App. 2007).

¶10 The duties allegedly violated in this case are in dispute. And, as we discuss *infra,* the superior court correctly determined that there was a semblance of authority for Appellees' actions. Furthermore, a special action petition seeks extraordinary relief that is usually appropriate only if justice cannot be satisfactorily obtained by other means. *Nataros v. Superior Court,* 113 Ariz. 498, 499, 557 P.2d 1055, 1056 (1976); *see also* A.R.S. § 12-2021 (writ of mandamus may issue when there is not a plain, adequate, and speedy remedy at law). Appellant has an adequate remedy at law. For all of these reasons, special action jurisdiction was inappropriate.

2. Declaratory Judgment

¶11 The complaint alleged that the 2009 tax levy was an impermissible tax increase (count one), and that the tax "is for purposes not allowed under Arizona law" (count two). More specifically, count one alleged that the tax violated the Lake

Havasu City Tax Limitation Initiative ("Initiative"). The Initiative, passed in 1997, provides, in pertinent part:

> Property tax increases, Irrigation and Drainage District tax increases enacted by the Lake Havasu City Council sitting as trustees of said district, sales tax increases, transaction privilege tax increases, and any other increase in a city tax which can be enacted or adopted by Lake Havasu City, and any new taxes which do not exist as of the date of adoption of this ordinance . . . shall not be adopted unless first authorized by a special election called for the purpose of submitting to the voters of Lake Havasu City the question of whether or not to adopt such provision, and for any such provision to become effective said provision must obtain the approval of more than two thirds (2/3) of the votes cast at such special election.

¶12 The superior court ruled that the City Council had indeed adopted a tax increase.[1] It did not, however, determine the propriety of that increase. Instead, it ruled that the IDD's right to levy taxes created "a semblance of authority" for the challenged assessment and that Appellant must first pay the tax before challenging it in court.

¶13 We agree. When a tax is imposed with semblance of authority, no injunction shall issue, and a challenger must pay the tax and then maintain an action to recover any tax that was illegally collected. A.R.S. §§ 12-1802(7) (2003), 42-11004

[1] Although Appellees argued below that the 2009 action did not constitute a tax increase, they have not cross-appealed from the superior court's contrary determination.

(2006), 42-11006 (2006); *Lane v. Superior Court*, 72 Ariz. 388, 390-91, 236 P.2d 461, 462-63 (1951) (discussing the "well-established policy of this state to prevent the validity of a tax from being tested by injunctive means"). The purpose of this rule is to limit interference in the collection of tax revenues that are essential to the sustenance of governmental functions. *Drachman v. Jay*, 4 Ariz. App. 70, 73, 417 P.2d 704, 707 (1966).

¶14 Turning to the semblance of authority issue, we first note that irrigation districts may exercise the taxing power. *Taylor v. Roosevelt Irr. Dist.*, 72 Ariz. 160, 163, 232 P.2d 107, 109 (1951); *see also* A.R.S. § 9-101.02(A)(2) (2008) (IDD trustees "may, without limitation, except as provided by law and within this section, operate the facilities of the district, [and] may cause the levy of district taxes and assessments to pay debts and operating charges of the district"); *Mesa v. Salt River Project Agr. Imp. & P. Dist.*, 92 Ariz. 91, 103-04, 373 P.2d. 722, 731 (1962) (holding that one of the municipal attributes of an irrigation district is the ability to accomplish its business and economic purposes). Additionally, the IDD may "[e]stablish tolls or charges for service of irrigation, domestic water, electricity and other commodities" and may "engage in any and all activities, enterprises and

occupations within the powers and privileges of municipalities generally." A.R.S. § 48-2978(10), (15) (Supp. 2009).

¶15 Both sides advance colorable claims regarding the propriety of the tax levy in light of the Initiative. *See, e.g., Hancock v. McCarroll,* 188 Ariz. 492, 496-97, 937 P.2d 682, 686-87 (App. 1996) (discussing limitations on the power of initiative and referendum). We do not resolve the substantive merits of that issue, but hold that the Initiative does not clearly vitiate the semblance of authority under which Appellees acted.

¶16 The superior court approached count two somewhat differently. We will affirm the judgment if the court was correct for any reason. *Wertheim v. Pima County,* 211 Ariz. 422, 424, ¶ 10, 122 P.3d 1, 3 (App. 2005).

¶17 There is legal support for the superior court's conclusion that the IDD is authorized to provide domestic, municipal, and industrial water under A.R.S. §§ 9-101.02, 48-2901 (2005), and 48-2981 (2005). However, like count one, we conclude that count two should have been dismissed because there is a semblance of authority for the challenged conduct. Appellant repeatedly made clear that he is seeking injunctive relief as to count two. The following paragraphs of his complaint are illustrative:

> 26. That the specific increase objected to herein is specifically for the purpose of subsidizing the domestic water system and waste water system, and was enacted in lieu of increasing fees for domestic water and waste water.
>
> 27. That *unless restrained by the Court,* that the [Appellees] will impose and collect the aforementioned tax which is stated to be utilized for unauthorized purposes.

(Emphasis added.) In his prayer for relief on count two, Appellant requested an "Order of Mandamus prohibiting the LAKE HAVASU CITY FINANCE DIRECTOR from assessing or collecting any such tax increase . . . ." Similarly, in opposing Appellees' motion to dismiss, Appellant stated he was "simply seeking an order prohibiting the City officials to [sic] utilize a tax that was either increased illegally, or utilize a tax for illegal purposes."[2] Because Appellant was seeking injunctive relief, as

[2] Also, his motion for summary judgment requested the following relief:

> [T]he appropriate public officials *should be restrained from* utilizing not only the increase recently enacted for the Irrigation and Drainage District taxes, but further from *utilizing the taxes for anything other than irrigating arid agricultural lands or for paying off the bonds* . . . .
>
> Since the City has no arid lands to irrigate, and does not irrigate any such lands, and since park lands do not fulfill that requirement, the appropriate public officials should be restrained from collecting the taxes and ordered to refund any such taxes collected for illegal purposes.

with count one, he must first pay the tax before challenging it in court. *See, e.g., County of Maricopa v. Chatwin,* 17 Ariz. App. 576, 580, 499 P.2d 190, 194 (1972) ("[T]he choice of the remedial avenue to be followed by a dissatisfied taxpayer is, to a large extent, dictated by a consideration of the legal issues which he wishes to advance.").

¶18 The semblance of authority for using IDD tax revenues for non-irrigation pursuits stems from the Arizona Constitution, statutes, and appellate precedent. Article 13, Section 7 of the Arizona Constitution reads:

> Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, now or hereafter organized pursuant to law, shall be political subdivisions of the state, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this constitution or any law of the state or of the United States . . . .

¶19 "In addition to the broad powers granted irrigation districts by the state constitution, the legislature conferred specific statutory powers on these districts in the Irrigation District Act of 1921." *Hohokam Irr. & Drainage Dist.,* 204 Ariz. at 398, ¶ 11, 64 P.3d at 840. A.R.S. § 48-2981 allows

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(Emphasis added.)

irrigation districts to deliver water for non-irrigation purposes. It provides:

> A. If a district was providing not less than ninety per cent of its total deliveries of water for municipal and industrial uses on June 12, 1980, the district may deliver municipal[3] and industrial[4] service to all lands within the boundaries of the district as constituted on June 12, 1980, as a part of its charter as an irrigation district. The acquisition, operation and maintenance of systems related to such municipal and industrial service are within the district's authority . . . .
>
> . . . .
>
> D. This section does not affect the ability of a district to provide for the incidental delivery of water for municipal and industrial purposes as provided under § 48-2978, paragraph 15.

A.R.S. § 48-2981(A), (D).

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[3] "Municipal use" is defined as

> all *non-irrigation uses of water* supplied by a city, town, private water company or irrigation district, except for uses of water, other than Colorado river water, released for beneficial use from storage, diversion or distribution facilities to avoid spilling that would otherwise occur due to uncontrolled surface water inflows that exceed facility capacity.

A.R.S. § 45-561(11) (2003) (emphasis added).

[4] "'Industrial use' means a non-irrigation use of water not supplied by a city, town or private water company, including animal industry use and expanded animal industry use." A.R.S. § 45-561(5).

¶20 It is undisputed that the IDD met the requirements of A.R.S. § 48-2981(A) and was supplying at least ninety percent of its total deliveries for municipal or industrial uses as of June 12, 1980. Without deciding the ultimate legal question, we conclude that there is a semblance of authority for the conduct that Appellant sought to enjoin in count two. As such, the superior court properly dismissed that count as well.

CONCLUSION[5]

¶21 We affirm the superior court's grant of summary judgment.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge

[5] Count four, which merely requested order to show cause proceedings, does not require separate analysis and discussion.