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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DAVID DEVINE and DAVID BOSTON, Plaintiffs/Appellants, v. ROGER W. RANDOLPH, Clerk of the City of Tucson, Defendant/Appellee, CAMPUS ACQUISITIONS HOLDINGS, LLC, a Delaware limited liability company; DRI/CA TUCSON, LLC, a Delaware limited liability company; CAMPUS INVESTORS TUCSON, LLC, a Delaware limited liability company; CAMPUS ACQUISITIONS INVESTMENT MANAGEMENT, LLC, a Delaware limited liability company; and CA MANAGER, LLC, a Delaware limited liability company, Defendant-Intervenors/Appellees.	2 CA-CV 2012-0069 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20122175

Honorable Richard E. Gordon, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 In this expedited election appeal pursuant to Rule 8.1, Ariz. R. Civ. App. P., appellants David Devine and David Boston challenge the trial court's denial of their request for a writ of mandamus ordering the Tucson City Clerk, appellee Roger Randolph, to accept their referendum petition. In regard to the narrow issues of law presented to us, we find no error and therefore affirm.[1]

Background

¶2 On February 28, 2012, Tucson's mayor and city council approved an ordinance creating an urban overlay district and special zoning for the area known as

[1]Like the trial court, this court is mindful of the importance of the referendum process and understands that the petitioners attempted to comply with the complex requirements for a referendum petition.

"Main Gate District."[2] That ordinance allowed for mixed-use residential and commercial use and included public transportation infrastructure.

¶3 Before the ordinance passed, Val Little, a Tucson resident who opposed the ordinance, went to the Tucson City Clerk's office and was given information about the number of signatures that would be needed to put the ordinance to a public vote via referendum. She also did some online research about referendum rules and regulations. And the City Clerk's office later gave her both a paper and an electronic copy of a sample "Petition for Referendum." Randolph testified that the electronic version was "for formatting purposes" so that a person creating a petition would not have to "create boxes and columns and have the correct spacing" and was "not done for verbiage." And the assistant clerk testified she had informed Little that the electronic version was to "assist her with the spacing of the lines, . . . the margins, and the font size." The Clerk's office also provided Little with an "initiative and referendum packet," which included a copy of the Clerk's office's rules and regulations for referendums and initiatives, a sample "Title and Text" page, excerpts from the city code relating to elections, and an "Initiative, Referendum & Recall Handbook," created by the Arizona Secretary of State.

¶4 On March 1, Little took a draft of her petition, which she had created from the electronic copy, to the Clerk's office for review. The Clerk's office informed her of at least one problem with her petition; some changes were made to the petition, and it

[2]The district lies between Speedway Boulevard and Sixth Street, and Park and Euclid Avenues.

was filed later that day. On March 5, the Clerk's office sent Little a letter detailing deficiencies in the filed petition. She corrected some of the additional errors identified by the Clerk's office and filed a revised petition on March 16.

¶5 Three days later, the Clerk's office discovered that the petition lacked "Notice" and "Voter Statement" provisions, which A.R.S. § 19-101(A) requires to be included on a referendum petition. These provisions are as follows:

> Notice: This is only a description of the measure sought to be referred prepared by the sponsor of the measure. It may not include every provision contained in the measure. Before signing, make sure the title and text of the measure are attached. You have the right to read or examine the title and text before signing.
>
> . . . .
>
> I have personally signed this petition with my first and last names. I have not signed any other petition for the same measure. I am a qualified elector of the state of Arizona, county of (or city or town and county of, as the case may be) _____.

§ 19-101(A). On March 20, Randolph sent Little a letter notifying her of the missing provisions. The next day Little sent the Clerk's office an electronic mail message stating her political committee, "Repeal the Main Gate Overlay" ("the committee"), was circulating a revised petition that contained the provisions and included a copy of the revised petition. But, 460 signature pages, containing approximately 6,900 signatures,

did not have the provisions, and the Clerk's office rejected those pages and the referendum petition.[3]

¶6 On April 4, 2012, Devine and Boston, who had signed the rejected pages, filed a "statutory special action," asking the trial court to order Randolph to accept the petitions.[4] They argued the rejected pages had "complied with the constitutional requirements" set forth in article 4, pt. 1 § 1 of the Arizona Constitution and "[t]he stated reasons for rejection . . . are based on non-substantive statutory window dressing." They further alleged they had "sought the assistance" of the City Clerk and Attorney, "who each misle[]d" them; the sample forms they received from the Clerk's office "contained the very defects cited by the City Clerk in rejecting" the pages; and they had otherwise "relied to their detriment on the assistance of the City Clerk." After a bench trial, the court concluded that A.R.S. § 19-101(A), which required the provisions missing from the rejected pages, applied and that the rejected pages "did not strictly or substantially comply" with its requirements. The court therefore denied Devine and Boston's request for mandamus. This expedited election appeal followed.

Discussion

¶7 On appeal, Devine and Boston first contend Randolph should have accepted their petition because Tucson's "charter and ordinances control the form of city

[3]This rejection brought the number of signatures presented below the 8,487 minimum required to put the ordinance on the ballot.

[4]The trial court also granted a motion by the developers of a proposed residential housing project in the Main Gate District to intervene in the action.

referenda" and, therefore, § 19-101(A) does not apply. We review the applicability of § 19-101(A) de novo. *See City of Tucson v. Consumers For Retail Choice Sponsored by Wal-Mart*, 197 Ariz. 600, ¶ 4, 5 P.3d 934, 936 (App. 2000).

¶8 Tucson's city charter provides that its provisions for recall petitions apply to referendum petitions, "with such modification as the nature of the case may require." Tucson City Charter, ch. XX, § 1. The charter's provisions for recall petitions, in turn, require that an elector wishing to seek the recall of a public officer may

> make and file with the clerk an affidavit, containing the name of the officer to be removed, and a general statement, not to exceed two hundred (200) words, stating the grounds of removal. The clerk shall thereupon deliver, to the elector making such affidavit, a sufficient number of copies of petitions for such recall and removal, printed forms of which he shall keep on hand. Such petitions shall be issued by the clerk, with his signature and official seal thereto attached; they shall be dated and addressed to the mayor and council, shall contain the name of the person to whom issued, the number of forms so issued, the name of the person sought to be removed, the office from which such removal is sought, the grounds of such removal, as stated in said affidavit, a copy of which petition shall be entered in a record book, to be kept for that purpose, in the office of the clerk. Any defect in said form or record shall not invalidate the petition.

Tucson City Charter, ch. XXI, § 2.

¶9 Tucson's city code also addresses the form of referendum petitions, requiring that they comply with the rules set forth in the code for initiative petitions.[5] Tucson City Code, ch. 12, art. V, § 12-76. Those rules require

[5]Devine and Boston also cite the charter provisions relating to initiatives, but nothing in the charter or code makes those charter provisions relevant to referendum

> [a] person . . . [to] file with the city clerk an application on a form to be provided by the city clerk, setting forth the names and addresses of three (3) individuals to be contacted, stating an intent to circulate and file a petition. This application shall be accompanied by the complete text of the proposed ordinance to be initiated.

Tucson City Code, ch. 12, art. IV, § 12-52. And, as to the form of the petition, the code provides that it "shall be presented upon a petition which has been printed and numbered in the form prescribed by the city clerk." Tucson City Code, ch. 12, art. IV, § 12-53.

¶10 Devine and Boston maintain these provisions and those set forth in article 4, pt. 1, § 1(9) of our state constitution[6] control referenda in Tucson, because it is a

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petitions. Rather, as set forth above, the charter inexplicably provides that the recall petition rules in the charter apply, whereas the code provides that the initiative rules in the code apply.

[6]Article 4, pt. 1, § 1(9) of the Arizona Constitution provides:

> Every initiative or referendum petition shall be addressed to the secretary of state in the case of petitions for or on state measures, and to the clerk of the board of supervisors, city clerk, or corresponding officer in the case of petitions for or on county, city, or town measures; and shall contain the declaration of each petitioner, for himself, that he is a qualified elector of the state (and in the case of petitions for or on city, town, or county measures, of the city, town, or county affected), his post office address, the street and number, if any, of his residence, and the date on which he signed such petition. Each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people, and every sheet of every such petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed in the presence of the affiant and that in the belief of the affiant each signer was

charter city and is allowed under article 13, § 2 of the Arizona Constitution to "frame a charter for its own government." Quoting *Strode v. Sullivan*, 72 Ariz. 360, 364, 236 P.2d 48, 51 (1951), Devine and Boston argue the local rules "'supersede all laws of the state in conflict with such charter provisions insofar as such laws relate to purely municipal affairs.'" And, they therefore contend, the state rule embodied in § 19-101(A) does not apply to referendum petitions in Tucson and the pages they signed should have been accepted because they otherwise complied with the Tucson requirements.[7]

¶11 The provisions of § 19-101(A), however, do not conflict with the charter or code. Nothing in the charter or code provisions requires that a petition include only certain language or prescribes language that would preclude the language required by § 19-101(A). Rather, at most, the charter and code share some "'commonality'" "'of subject matter'" with § 19-101(A), which is insufficient to create a conflict. *Consumers for Retail Choice*, 197 Ariz. 600, ¶ 6, 5 P.3d at 937, *quoting City of Prescott v. Town of Chino Valley*, 163 Ariz. 608, 616, 790 P.2d 263, 271 (App. 1989), *vacated in part on other grounds*, 166 Ariz. 480, 803 P.2d 891 (1990). Thus, § 19-101(A) applies to

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> a qualified elector of the state, or in the case of a city, town, or county measure, of the city, town, or county affected by the measure so proposed to be initiated or referred to the people.

[7]In support of their assertion that the petitions otherwise complied with Tucson's charter and code, Devine and Boston cite Randolph's trial testimony that he had not relied on any provisions of the charter or code in rejecting the petitions. But, his testimony could not be dispositive of this legal issue, *see W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431, 814 P.2d 767, 772 (1991), nor did he state conclusively that the petitions did comply with the charter and code, only that any such errors had not been the basis for his rejection on March 20.

referendum petitions in Tucson, even absent the city's express adoption of the statute. *See* A.R.S. § 19-141(A) ("The provisions of this chapter shall apply to the legislation of cities . . . except as specifically provided to the contrary in this article.").

¶12 But even were we to find a conflict as Devine and Boston apparently urge, we would reject their argument that the city's rules control. Although our constitution does allow a city to frame its own charter, Ariz. Const. art. 13, § 2, it also includes specific provisions related to referenda and initiatives, Ariz. Const. art. 4, pt. 1. These more specific provisions control here. *See Clouse ex rel. Clouse v. State*, 199 Ariz. 196, ¶ 11, 16 P.3d 757, 760 (2001) ("'It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.'"), *quoting de'Sha v. Reed*, 572 P.2d 821, 823 (Colo. 1977). And, in contrast to the non-referendum cases on which Devine and Boston rely,[8] in the referendum context, this court has concluded state statutes control and cities may regulate only to the extent their rules do not conflict with the state constitution and laws. *Jones v. Paniagua*, 221 Ariz. 441, ¶¶ 9-11, 212 P.3d 133, 136-37 (App. 2009) ("While the Arizona Constitution gives localities broad initiative and referendum powers, when a local law conflicts with a state statute, the local law is invalid."); *see also* A.R.S.

[8]*City of Tucson v. State*, 229 Ariz. 172, 273 P.3d 624 (2012) (city council elections); *Triano v. Massion*, 109 Ariz. 506, 513 P.2d 935 (1973) (city council elections); *Strode*, 72 Ariz. 360, 236 P.2d 48 (creation of new political party; city council elections); *City of Tucson v. Tucson Sunshine Climate Club*, 64 Ariz. 1, 164 P.2d 598 (1945) (city advertising expenditures); *City of Tucson v. Walker*, 60 Ariz. 232, 135 P.2d 223 (1943) (constitutional challenge to ordinance providing pension benefits to police officers).

§ 9-284(B) ("The charter shall be consistent with and subject to the state constitution, and not in conflict with the constitution and laws relating to the exercise of the initiative and referendum and other general laws of the state not relating to cities."); *Fleischman v. Protect Our City*, 214 Ariz. 406, ¶¶ 15-16, 153 P.3d 1035, 1038 (2007); *Consumers for Retail Choice*, 197 Ariz. 600, ¶ 15, 5 P.3d at 939 ("[C]ities may enact ordinances regulating the procedure for their referendum petitions, so long as those ordinances do not directly conflict with the referendum statutes and do not unduly impair the constitutional right of referendum.").

¶13 Devine and Boston further maintain that under Tucson's charter and code only substantial compliance with any referendum requirements was required. To the extent they thereby contend Tucson's purported "substantial compliance" standard conflicts with, and should therefore control over, the strict compliance standard our supreme court has imposed on referendum petitions under the Arizona Constitution and statutes, *see Feldmeier v. Watson*, 211 Ariz. 444, ¶ 12, 123 P.3d 180, 183 (2005), we need not resolve the issue because the rejected petitions here do not meet either standard. Devine and Boston argue the trial court erred in ruling they had "failed to meet the standard of the charter and ordinances." But, they do not explain how complete failure to include the required statutory language could be considered substantial compliance with the requirements of § 19-101(A). *See, e.g.*, *Feldmeier*, 211 Ariz. 444, ¶ 14, 123 P.3d at 183 ("[I]n the context of the formal requirements for initiatives, substantial compliance means that the petition as circulated fulfills the purpose of the relevant statutory or

constitutional requirements, despite a lack of strict or technical compliance."). We therefore cannot say the trial court erred in concluding the rejected petitions did not meet either standard. *See Bee v. Day*, 218 Ariz. 505, ¶ 8, 189 P.3d 1078, 1080 (2008) (supreme court reviews whether nomination petition substantially complied with requirements de novo). And, in any event, as explained above, to the extent the city and state law standards conflict, the state law requiring strict compliance applies. *See Jones*, 221 Ariz. 441, ¶¶ 9-11, 212 P.3d at 136-37 ("While the Arizona Constitution gives localities broad initiative and referendum powers, when a local law conflicts with a state statute, the local law is invalid.").

¶14 Finally, Devine and Boston maintain that any noncompliance is excusable because the committee relied on the City Clerk's sample petitions and direction, and the sample forms the Clerk provided do not fully comply with § 19-101(A). "But, it is the challenger's responsibility to comply with the statutory requirements for filing a referendum petition, and the receipt of erroneous advice, even from governmental officials responsible for administering the referendum process, does not excuse that responsibility." *Fid. Nat'l Title Co., Inc. v. Town of Marana*, 220 Ariz. 247, ¶ 14, 204 P.3d 1096, 1099 (App. 2009). And, in any event, even if we were to accept that the city charter and code provisions giving the Clerk some authority in determining the form of the petition were a basis to depart from the general proposition stated in *Fidelity*, we would reject any claim of reliance here. The Clerk's office told Little the sample forms were only for formatting, not for substance. And, the record shows the office told her

that she was solely responsible for properly preparing the petition. *Cf. Freightways, Inc. v. Ariz. Corp. Comm'n*, 129 Ariz. 245, 247, 630 P.2d 541, 543 (1981) (reliance reasonable if one not "on notice to make further inquiries"); *John C. Lincoln Hosp. and Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, ¶¶ 11, 12, 96 P.3d 530, 535 (App. 2004) (estoppel requires reasonable reliance on affirmative act inconsistent with later position).

Disposition

¶15 For all these reasons, the judgment of the trial court is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge