

IN THE DISTICT COURT OF LINCOLN COUNTY, NEBRASKA

CITY OF NORTH PLATTE, NEBRASKA,)
 A Municipal Corporation,)
)
 Plaintiff,)
)
 v.)
)
 WILLIAM L. TILGNER, DALLAS C. DYE,)
 and EDWARD L. RIEKER,)
)
 Defendants.)

CASE NO. C110-119
ORDER

This matter comes before the Court on April 9, 2010, for trial. The Plaintiff is represented by Douglas L. Stack. The Defendants are present and represented by George E. Clough. Evidence is adduced. The parties are given time to submit briefs, and the matter is taken under advisement.

This matter comes before the Court on May 3, 2010, after having been taken under advisement. In this matter, the Court is summoned "once more unto the breach". However, unlike the stalwart English rallied by Henry V to charge into battle, the Court is, at best, a reluctant participant in this matter. It is this Court's opinion that courts generally are poor vessels to avoid the shoals of discontent and to navigate the stormy seas roiled by the winds from the political debate that has devolved into superficial arguments and petty name calling.

Sec. 18-2528 (1)(a) RRS (1943) specifically provides that measures necessary to carryout contractual obligations are not subject to referendum. The Defendants deny that the option agreement entered into between the Plaintiff and the Golden Spike Tower & Visitors Center is a contractual obligation and thus the statute is not implicated. They argue that agreement does not set an option price, does not define what is to be purchased and is illusory in that one party to the option, the City, may change the rate or the occupation tax at any

time. These three arguments do not negate the fact that this is a contractual obligation that is binding upon the City and the other party to the contract. The option price is the monies paid in over the course of the agreement, the contract sets out what is being purchased, and the fact that the City may alter the occupation tax does not deprive the contract of its validity as a contract.

However, as the attorney for the City properly points out, the obligation of the city to the Golden Spike is to pay monies in "an amount equal to the Occupation Tax Revenue collected during the previous month." It could be argued that, despite the Defendants' belief to the contrary notwithstanding, their petition has absolutely no effect on the obligation of the city and the amounts of monies to be paid to the Golden Spike under the contract. Even though, in this regard, the Petition may be a meaningless exercise and of no effect, the referendum is clearly an attempt to amend and impair the obligation of the contract and is, thus, violative of Sec. 18-2528 (1)(a) RRS 1943.

This determination by the Court does not render the initiative and referendum statutes and Constitutional guarantees "so hollow that they have no substance and are thus something less than 'meaningful'". The people, acting through their representatives, have determined that referendum may not be used if there is an obligation of contract that will be impaired by the referendum process. That is specifically the situation in this case. It is not for this Court to second guess the determination of the Nebraska Legislature in adopting such a statute just so some petition circulators may have a feel good vote on a proposal that they endorse. The Court is bound by the statutes adopted by the State of Nebraska and will not ignore them based on some dubious claim that democracy is somehow being trampled by the Court's determination.

The Defendants further claim that the contract is violative of the Constitution in that it involves a project for economic development that should have been subjected to a vote of the voters of the city prior to the entry into the option agreement. The Defendants further raise in their Counterclaim the issue of the use of these funds as violative of Section 13-2 of the Nebraska Constitution and seek an injunction prohibiting the use of the funds in that regard.

Despite the irony and the mental gymnastics that must be used to understand the Defendants' wish to amend what they believe to be a void ordinance, the Constitution does require that industrial and economic development issues be submitted to a vote of the majority of the registered voters of the city before they are adopted. Sec. 18-2705 RRS (1943) defines economic development programs and does so in regard to "qualifying businesses". Sec. 18-2709 RRS (1943) defines qualifying businesses as "Any corporation, partnership, limited liability company, or sole proprietorship which derives its principal source of income from any of the following: tourism related activities." Should the city have submitted the Golden Spike to the voters as an economic development? Maybe.

The Court is not convinced that the narrow scope of the Court's review under this statute permits a consideration of the equitable remedy sought by the Defendants. Further, the evidence before the Court is, to say the least, sparse. There is little to no evidence before the Court in regard to the Golden Spike itself, its income, its operation, and whether it qualifies as tourism related activity. Absent any evidence, the Court cannot conclude that the Golden Spike Tower & Visitors Center constitutes an economic development and that the Defendants would be entitled to an injunction in this case or for the Court to determine that the ordinance adopted by the City of North Platte is *ultra vires*.

Further, the Court finds that there has been no evidence adduced in regard to whether or not the City may raise the doctrine of laches to bar any action by the Defendants seeking an injunction and whether the statute of limitations has run on any claim against the City for the adoption of this ordinance. Further, the Court cannot reach any conclusion in regard to the standing of the Defendants to raise these issues since the denial of a right to vote on an economic development as guaranteed by the Constitution may be an issue of such weight that the Defendants would have standing to raise the issue in a separate action seeking an injunction. These are all issues not properly presented to the Court in this action, although they may be in a separate action brought by the Defendants if they wish.

The only issue presented to this Court is whether or not the ordinance as adopted creates a contractual obligation that may not be impaired by the action of a referendum. The Court has reached the conclusion that it is and finds that a referendum is not the proper method to attack the ordinance in question.

It amazes the Court that such a small, albeit, tall building could create such a tempest. The building has elicited much passion, and, frankly, much silliness. A supporter of the building recently alleged that some New York Machiavellian puppeteer, who apparently has some dispassion for railroad observation towers, has stuck his long fingers into the process by paying for the petitions and this very suit. The Court suspects that the attorney for the Defendants is surprised by such allegation given that his fees in this matter, the Court further suspects, are somewhat modest.

In opposition to the building are self-appointed tax and economics experts and self-anointed guardians of the public purse who allege a rather ephemeral and illusory promise of property tax relief. Recent comments by one opponent urged the citizens to "take back control of your city from the tax and spenders". The only word missing from the sentence is "liberal". Further there is a reference to the "taxpayers right to vote on this issue" which, is at best, misleading. Our government is based on a theory of representative democracy in which the voters elect those individuals to make decisions for all of us in the operation of government at all levels, from the city to the federal government. These lawfully elected representatives are certainly responsible to the citizens in the decisions they make, but the proper course of objection is through the election process. Not all issues are subject to a vote of the people, nor should they be. The founders of this country were appalled at the idea of a direct democracy and thought it would result in mob rule and that the passions of the moment would allow the majority to oppress the minority in many regards. While the actions of the representatives may be subject to a review through the initiative and referendum processes guaranteed in the Nebraska Constitution and Nebraska statutes, it guarantees neither a vote on all issues involving the taxation of individuals nor the spending of the municipality's funds.

We are once again faced with a debasement of discourse that plagues our politics and appears to be prevalent throughout our society. It is exemplified by those who picture our president as some modern day Hitler, or rail against federal taxes even though they are lower than they have been in decades. It is further exemplified by those who resort to ridicule of their opponents rather than relying on reason. It has a deleterious effect on discussion and debate and on the very basis of our democracy. It should not be tolerated and should face the condemnation of all right thinking citizens. If we allow our indifference to prevail, the first casualty will be the truth, but, ultimately we all will become the victims of that indifference.

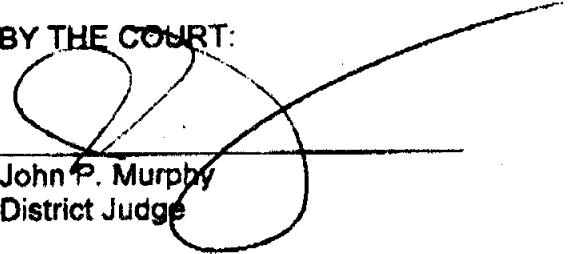
The Court proffers its fervent desire that cooler heads prevail in this regard in this issue, that divisive rhetoric be abandoned and that the parties set aside their own self-interests and beliefs, whether foolishly held or sincerely believed, to work out that which is best for the entire city of North Platte and not for their own ill defined narrow interests. This continued and continuous clash of personalities leads to bickering and invective and not to any insight into the pros and the cons of the establishment of the Golden Spike. Is the development good for the city? Does it bring in tourists who spend their money in the city, thus raising revenues? Does it enhance the general welfare of the community? Is this a proper enterprise for government to engage in? Is this the proper method to be applied to the use of funds raised by taxation? These are the questions that should be debated, not who is funding this suit, or whether the community leaders are interested only in self-aggrandizement.

Had the debate in Philadelphia gone thus, there would be no United States and no democratic principles for the Court or anyone else to be concerned about.

Therefore, the Court finds that the Petition of the Defendants violates Sec. 18-2528 RRS 1943 and the Lincoln County Clerk shall not consider the votes cast for or against the petition filed by the Defendants and shall report no results or certify such results from the voting.

SO ORDERED.

BY THE COURT:



John P. Murphy
District Judge