BOARD OF ASSESSMENT APPEALS
STATE OF COLORADO
Docket Number 35086

ORDER

CAROLYN A. WILBER, individually and as proposed Class Representative on behalf of all others similarly situated,

Petitioners,

v.

LA PLATA COUNTY BOARD OF COMMISSIONERS,

Respondent.

THIS MATTER was heard by the Board of Assessment Appeals upon the filing of the following documents:

A. Joint Stipulation Of Facts ("Stipulation"),
B. Petitioner's Motion In Support Of Appeal ("Petitioner's Motion"),
C. La Plata County's Response To Petitioner's Motion In Support Of Appeal ("County's Response"),
D. La Plata County's Motion To Dismiss With Citation To Authorities, ("County's Motion"),
E. Petitioner's Response to La Plata County's Motion to Dismiss ("Petitioner's Response"), and
F. La Plata County's Reply to Petitioner's Response ("County's Reply").

FINDINGS OF FACT:

1. None of the facts are in dispute. At best, only their relevancy and materiality are in dispute. Stipulation at p. 1.

2. The Board adopts the Stipulation as its findings of fact in this matter. Those facts are fully incorporated herein by reference.

3. There are no genuine issues of material fact for the Board to determine. This matter should be determined on the basis of the Board's opinion as to how the facts should be applied to the law with reference to the written argument submitted by the parties.

4. The Board's determination is based upon consideration of the above well-researched, written arguments and the Board's own reading and interpretation of the laws involved, recognizing that its determination is necessary before judicial review may be obtained.

CONCLUSIONS:

A. Issue to be determined.

1. The parties agree that the only issue is whether two ballot proposals, referred to by the parties as the "1994 Referred Measure" and the "1997 Referred Measure," constitute effective voter approvals for increasing the statutory mill levies imposed by operation of subsection 29-1-301(1), C.R.S. 1999. Petitioner's Motion at p. 12; County's Response at p. 2. Initially, the Board questions the wording of the issue. For the reasons that follow, the Board concludes that viewed against the parties' written arguments, that is not the real issue.

2. The Petitioner claims that the Respondent violated subsection 29-1-301(1) for the 1996-1998 property tax years because the Respondent increased the mill levy without appropriate authorization. See subsection 29-1-301(2) (increases over 29-1-301(1)(a) revenue limitation permitted with division of local government or elector approval); Petitioner's Motion at p. 12.

3. In its defense, the Respondent advances several arguments, including that the Respondent did not increase the mill levies in question but instead merely obtained authorization to retain additional revenues from existing mill-levy rates generated by increased property valuations. County's Motion at p. 5.

4. The issue identified by the parties, if accepted by the Board, effectively concedes one of the points the Respondent challenges, namely whether the Respondent increased the mill-levy rate. The face of the stated issue asks the Board to decide whether the voters approved mill-levy rate increases, which implies that mill-levies rates were increased for the years in question. However, the Respondent argues that it did not increase the mill-levies rates at all. According to the Respondent, the mill levies have always been 8.5 percent. Respondent's Motion at p. 12. The Respondent argues that it sought to obtain voter authorization under the 1994 Referred Measure and the 1997 Referred Measure to retain additional revenues – not increase the mill-levy rates.

5. The Board concludes that the Respondent does not mean to make the concession implied in the issue as stated by the parties. The Board views this matter as presenting the following issue for resolution: whether the Respondent violated the subsection 29-1-301(1) limitation for the 1996-1998 property tax years.

6. If the Respondent violated the subsection 29-1-301(1) limitation, the petition should be granted. If the Respondent did not violate the subsection 29-1-301(1) limitation, the petition should be denied.

B. Subsection 29-1-301(1) limitation and exceptions.

1. The dispute begins with reference to § 29-1-301. The statute provides as follows:

> All statutory tax levies for collection in 1989 and thereafter when applied to the total valuation for assessment . . . each of the counties, . . . shall be so reduced as to prohibit the levying of a greater amount of revenue than was levied in the preceding year plus five and one-half percent plus the amount of revenue abated or refunded by the taxing entity by August 1 of the current year less the amount of revenue received by the taxing entity by August 1 of the current year as taxes paid on any taxable property that had previously been omitted from the assessment roll of any year, except to provide for the payment of bonds and interest thereon, for the payment of any contractual obligation that has been approved by a majority of the qualified electors of the taxing entity, for the payment of expenses incurred in the reappraisal of classes or subclasses ordered by or conducted by the state board of equalization, for the payment to the state of excess state equalization payments to school districts which excess is due to the undervaluation of taxable property, or for the payment of capital expenditures as provided in subsection (1.2) of this section. For purposes of this subsection (1), the amount of revenues received as taxes paid on any taxable property that had been previously omitted from the assessment roll shall not include the amount of such revenues received as taxes paid on oil and gas leaseholds and lands that had been previously omitted from the assessment roll due to under reporting of the selling price or the quantity of oil or gas sold therefrom. In computing the limit, the following shall be excluded: The increased valuation for assessment attributable to annexation or inclusion of additional land, the improvements thereon, and personal property connected therewith within the taxing entity for the preceding year; the increased valuation for

> assessment attributable to new construction and personal property connected therewith, as defined by the property tax administrator in manuals prepared pursuant to section 39-2-109(1)(e), C.R.S., within the taxing entity for the preceding year; the increased valuation for assessment attributable to increased volume of production for the preceding year by a producing mine if said mine is wholly or partially within the taxing entity and if said increase in volume of production causes an increase in the level of services provided by the taxing entity; and the increased valuation for assessment attributable to previously legally exempt federal property which becomes taxable if such property causes an increase in the level of services provided by the taxing entity.

2. Presently, the Respondent's total mill-levy rate is 8.5 mills for each of the years in issue here. Stipulation at p. 6, para. No. 29.

3. The Petitioner seems to contend that where, as here, additional revenues are retained, the mill levy is effectively increased. Though that may be true in a practical sense, it is not true in a conceptual sense. In property tax law, there is a real difference between the mill-levy rate and the revenues the mill-levy rate generates. In other words, the mill-levy rate and mill-levy revenues are different tax law concepts.

4. In Colorado, the general rule provides that in the absence of special approval, mill-levy revenues must be held constant from year to year. Colo. Const. Art. X, § 20(4); § 29-1-301(2); § 29-1-302. In light of the fact that property values fluctuate and in light of the fact that mill-levy revenues are based upon property values, to keep revenues constant, the mill-levy rate must fluctuate. However, the difference between subsection 29-1-301(1) and TABOR is that the fluctuation under TABOR may only be downward.

5. An example illustrates the consequences of property value fluctuations on the mill-levy rate under TABOR. Generally, if the mill-levy rate is 10 percent and property values total $100.00, the county retains $10.00 in the first year. Without proper voter approval, the county may never retain more than $10.00 in any subsequent tax year. [1] If property values decrease to $90.00 in the second year, the county collects $9.00 ($90.00 x 10 percent). The entire amount the county collects may be retained because the mill-levy rate will be constant and the mill-levy revenues collected will not exceed the total amount collected the previous year ($9.00 may be retained because it is less than $10.00). The "kicker" under TABOR is that in the subsequent year, the county may not raise the mill levy to collect the same $10.00 without voter approval. This results in a ratcheting-down effect on government.

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[1] Technically, the county could legally retain more than $10 the second year because, for example, the statute authorizes the county to retain the previous year's amount plus 5.5 percent. The Board's example ignores subsequent-year additions here, such as the 5.5 percent, for simplicity.

6. If, however, property values increase 20 percent to $120.00 in the second year, the county will collect $12.00 in revenues, $2.00 more than the previous year, unless the mill levy is reduced. To avoid having to reduce the mill levy to maintain a constant amount of retained revenues, the county must obtain special permission under subsection 29-1-301(2). Also § 29-1-302, C.R.S. 1999 (submission of increased levy to people). If such permission is granted, the county may retain the $2.00. If such permission is denied, it must adjust its mill-levy rate such that no more than $10.00 is collected. Under this circumstance, the mill-levy rate fluctuates.

7. The Petitioner's theory that the retention of excess mill-levy revenues is illegal in the absence of a corresponding, express authorization to increase the mill-levy rate leads to an absurdity. Express authorization to increase the mill-levy rate in order to retain additional revenues generated by increased property values serves no policy objective under subsection 29-1-301(1). The statute's use of the words "increased levy" refers to authorization to collect and retain revenues. See Op.Atty.Gen. No. 99-2, July 30, 1999 at p. 3 n. 2.

8. Unlike TABOR, subsection 29-1-301(1) contains no voter requirement before a county may raise a mill rate when property values decrease as long as the total revenue raised by the higher mill levy does not exceed the other requirements of the statute. Imposing a voter-approval requirement under the statute on a county seeking only to retain higher revenues and not a higher mill-levy rate would be to legislate something that does not exist in § 29-1-301(1).

9. The formula for calculating the mill levy provides further support for the conclusion that the mill-levy rate is a fall-out number and that mill-levy revenues are the critical figures. The formula is stated in terms of revenues.[2] Subsection 29-1-301(1) expressly refers to "statutory tax levies" which are always expressed as mill-levy rates. The Board is persuaded that the subsection 29-1-301(1) limitation is a revenue limitation and the rate is a function of revenues.

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[2] An examination of the elements of the "mill levy" within the meaning of subsection 29-1-301(1) supports the conclusion that the term really refers to a rate or percentage. The subsection 29-1-301(1) formula for computing the mill levy may be calculated by combining the following amounts:

+ Amount of revenue levied preceding year
+ 5.5 percent x (amount of revenue levied preceding year)
+ Revenue abated or refunded by 8/1 of current year less revenue received by 8/1 of current year on previously omitted property, except to provide payment on bonds and interest, for voter approved contracts
+ Expenses incurred for reappraisals ordered by the state board of equalization
+ Payments to the state for excess state equalization payments to school district
+ Payments for certain capital expenditures
Total mill levy revenues

Total mill levy revenues are then divided by the county valuation. The result is the mill-levy, in other words, the property tax rate.

10. Exceptions to the subsection 29-1-301(1) limitations exist. They appear in subsection 29-1-301(2) as follows:

> If an increase over [the subsection 29-1-301(1) limitation] is allowed by the [1] division of local government in the department of local affairs or [2] voted by the electors of a taxing entity under the provisions of section 29-1-302, the increased revenue resulting therefrom shall be included in determining the limitation in the following year. However, any portion of such increased
> revenue which is allowed as a capital expenditure pursuant to section 29-1-302(1.5) shall not be included in determining the limitation in the following year. [Emphasis added.]

11. The Respondent does not assert that the first exception to the subsection 29-1-301(1), approval of the Division of Local Government in the Department of Local Affairs, is applicable here. The Respondent asserts, and the Petitioner denies, that the second exception applies here. That being the case, the Board turns its attention to the second exception.

12. If the Referred Measures complied with the subsection 29-1-301(2) voter-approval exception, the Board should conclude that the revenues collected by the Respondent during the years in question were within the subsection 29-1-301(1) revenue limit, Stipulation at p. 4, para. No. 18, and any other arguments and requested relief will be moot.

C. The voter-approval exception.

1. The Respondent referred two similarly worded measures to its electors. The measures differ only with respect to the years they reference. The measures provide as follows:

> Shall La Plata County, Colorado, without increasing its property tax mill levy or sales tax rates, be authorized to collect, retain and spend or reserve all revenues from its existing sales tax and property tax, non-federal grants, and any and all county fee and revenue sources, [effective January 1, 1994, and expiring December 31, 1997/for 1998 through December 31, 2002 (five years)], for the purpose of funding capital projects, road and bridge maintenance, public safety, human services, and other county services; provided that the county's property tax mill levy and sales tax rates shall not be increased without further voter approval; and shall the county be entitled to collect and spend or reserve the full revenues from such revenue increase without any

> other condition or limitation, and without limiting the collection or spending any other revenues by the county under Article X, Section 20, to the Colorado Constitution or any other law?

Stipulation Appendices 7 and 12.

2. The Petitioner argues that this language does not satisfy the requirements of subsection 29-1-301(2). According to the Petitioner, the Respondent exceeded the mill-levy limitation and the 1994 Referred Measure and 1997 Referred Measure failed to authorize an increased mill levy. Petitioner's Motion at p. 7. According to the Petitioner, the measures waive the Colo. Const. Art. X, § 20 limitation ("TABOR") but not the subsection 29-1-301(1) limitation. Petitioner's Motion at p. 8. The Board disagrees.

3. Both measures passed by a majority vote of the Respondent's electors. Stipulation at p. 3, para. Nos. 8 and 13. Both measures make reference to TABOR. In addition, however, both contain prophylactic language, namely "or any other law." In effect, the Respondent's constituents gave the Respondent a blank check for the years in question in terms of avoiding applicable Colorado revenue-limitation laws. Any applicable Colorado revenue-limitation law, whether or not expressly and specifically named, was avoided. Assuming § 29-1-301 contains a requirement that voters approve the retention of revenues resulting from increased property values, the question is whether a county must expressly and specifically cite the revenue-limitation law in referred measures.

4. Express or specific reference to the laws that are included in a referred measure and intended to be avoided with voter approval, as the Petitioner argues is necessary, Petitioner's Motion at p. 15, is not a requirement that the Board is aware of or has been made aware of here. The Board concludes that if a referred measure makes no specific reference to any law -- including TABOR and subsection 29-1-301(1) -- and instead it only provides that the county seeks permission to retain revenues in excess of all revenue limitations, the measure would be valid. Such measures would give the voters sufficient information to determine whether the measure should receive their support. The voters would know (1) where the revenues were coming from, (2) to what the revenues would be applied, and (3) for what period of time the revenues would be collected. The Board can not conceive of any other material information a voter would require to make a decision.

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5. Thus, the Board concludes that the Respondent obtained approval to retain revenues in excess of the subsection 29-1-301(1) revenue limitation in satisfaction of subsection 29-1-301(2). Prior to obtaining such approval, the Respondent's mill-levy rate was 8.5 mills and after obtaining such approval, the Respondent's mill-levy rate remained at 8.5 mills. The Respondent benefitted from the voter approval because it was authorized to retain the additional revenues generated under the existing rate by virtue of higher property values. Under such circumstances, no abatement or refund is appropriate.

6. An order should be entered denying the Petition for Abatement or Refund.

ORDER:

1. The Petition for Abatement or Refund is denied.

2. The other relief sought is likewise denied.

APPEAL:

Petitioner may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

If the Board recommends that this decision is a matter of statewide concern, or if it results in a significant decrease in the total valuation of the county, Respondent may petition the Court of Appeals for judicial review within 45 days from the date of this decision. However, if the Board does not make such a recommendation, Respondent may petition the court of appeals for judicial review of such questions within 30 days from the date of this decision.

If Respondent alleges procedural errors or errors of law by this Board, Respondent may petition the Court of Appeals for judicial review within 30 days from the date of this decision.

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DATED and MAILED this 15th day of April, 2000.

BOARD OF ASSESSMENT APPEALS

Harry J. Fuller

Cherice Kjosness

This decision was put on the record

MAY 15 2000.

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Diane Von Dollen

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