Required Ballot Notice for a Levy Initiative

Horton v. Multnomah County
(Ancer L. Haggerty, D. Or. 3:03-cv-1257)

The U.S. Court of Appeals for the Ninth Circuit determined that a required ballot notice for a levy initiative that might appear misleading in isolation was not misleading in the context of the state's property assessment regulations.

Supporters of a special levy ballot initiative in Multnomah County filed a federal complaint on September 12, 2003, claiming that a ballot statement certified on September 4 was inaccurate.[1] The complaint also challenged the constitutionality of the statute requiring the ballot statement.[2] Judge Ancer L. Haggerty set the case for hearing on September 18 and invited Oregon's attorney general to intervene because of the challenge to the constitutionality of a statute.[3] He also granted a party's intervention in support of the statute.[4]

The ballot statement was required by Oregon law:

> (a) Except as provided in paragraph (b) of this subsection, the ballot title for a measure authorizing the imposition of local option taxes shall contain the following additional statement:
>
> > This measure may cause property taxes to increase more than three percent.
>
> (b) The ballot title for a measure authorizing the renewal of current local option taxes shall contain the following additional statement:
>
> > This measure renews current local option taxes.[5]

On September 19, Judge Haggerty concluded, "Plaintiffs correctly contend that the three percent warning is grossly inaccurate."[6] A one-year special levy of $0.003 per $1,000 assessed value is much less than a three percent increase in taxes which averaged $21 per $1,000 assessed value.[7]

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1. Complaint, Horton v. Multnomah County, No. 3:03-cv-1257 (D. Or. Sept. 12, 2003), D.E. 1.

2. *Id.*

3. Order, *id.* (Sept. 18, 2003), D.E. 14 [hereinafter Sept. 18, 2003, *Horton* Order]; *see* Docket Sheet, *id.* (Sept. 12, 2003) [hereinafter *Horton* Docket Sheet] (D.E. 30, granting Oregon's motion to intervene); Intervention Motion, *id.* (Sept. 26, 2003), D.E. 23.

4. Sept. 18, 2003, *Horton* Order, *supra* note 3; *see Horton* Docket Sheet, *supra* note 3 (D.E. 11, motion to intervene).

5. O.R.S. § 280.070(4) (2015).

6. Opinion at 4, *Horton*, No. 3:03-cv-1257 (D. Or. Sept. 19, 2003), D.E. 17 [hereinafter Sept. 19, 2003, *Horton* Opinion].

7. *Id.* at 3–4.

"Conceivably, defendants argue, Multnomah County could raise the assessed valuation of homes by exactly three percent, as permitted by the Oregon Constitution, and the small tax increase authorized by Measure 26-52 would then 'raise property taxes more than three percent.' This interpretation of the three percent warning is rejected." Opinion at 7, *id.* (Oct. 17, 2003), D.E. 45 [hereinafter *Horton* Injunction Opinion].

Judge Haggerty determined, however, that the federal court was without jurisdiction to hear the challenge to the ballot language, because the ballot language was certified by a state judge; among federal courts, only the Supreme Court has jurisdiction to review state court decisions.[8] Judge Haggerty could, however, review the constitutionality of the statute relied on by the state court judge.[9]

Following the September 19 decision, the plaintiffs presented Judge Haggerty with a transcript of the state judge's proceeding, which contradicted defense counsel's representation that the state judge had considered the constitutionality of the statute.[10] Judge Haggerty concluded on October 3 that he had jurisdiction over the application of the statute to the ballot language after all.[11]

At an October 15 hearing, the defendants informed Judge Haggerty that the ballots need not be mailed out until October 21.[12] On the morning of an October 17 hearing, however, "defendants mailed 345,000 ballots to Multnomah County voters. This number constitutes over ninety-nine percent of the ballots for the election."[13] On October 17, Judge Haggerty issued an injunction against Oregon's mandatory three percent statement on all initiatives for a local option tax and ordered the defendants to publish widely corrections to the incorrect ballot statement.[14] The court of appeals, however, stayed the injunction pending appeal.[15] On December 15, 2003, the court of appeals dismissed the appeals as moot and vacated the injunction as it applied to the 2003 election, but left in effect the injunction as it applied to future elections.[16]

Judge Haggerty applied his reasoning in the Multnomah County case to a January 14, 2004, ruling in pending litigation over a Yamhill County initiative scheduled for a March 9 election.[17] On May 27, Judge Haggerty awarded the Yamhill County plaintiffs $14,000 in attorney fees and costs;[18] on De-

8. Sept. 19, 2003, *Horton* Opinion, *supra* note 6, at 6–8; *see* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983).

9. Sept. 19, 2003, *Horton* Opinion, *supra* note 6, at 8–10.

10. Opinion, *Horton*, No. 3:03-cv-1257 (D. Or. Oct. 3, 2003), D.E. 31.

11. *Id.*

12. *Horton* Injunction Opinion, *supra* note 7, at 13.

13. *Id.*

14. *Id.* at 14–15; *see* Dave Hogan & Harry Esteve, *Ballot Tax Warning Is Ruled Misleading*, Oregonian, Oct. 18, 2003, at A1.

15. Docket Sheet, Horton v. Multnomah County, No. 03-35841 (9th Cir. Oct. 21, 2003), D.E. 7 (state's appeal); Docket Sheet, Horton v. Multnomah County, No. 03-35837 (9th Cir. Oct. 20, 2003), D.E. 4 (intervenor's appeal); Docket Sheet, Horton v. Multnomah County, No. 03-35836 (9th Cir. Oct. 20, 2003), D.E. 10 (county's appeal); *see* Dave Hogan, *Appeals Court Blocks PUD Ads*, Oregonian, Oct. 22, 3003, at B1.

16. Order, *Horton*, Nos. 03-35836, 05-35837, and 03-35841 (9th Cir. Dec. 15, 2003), D.E. 34, 32, and 33, respectively, *filed as* Order, *Horton*, No. 3:03-cv-1257 (D. Or. Jan. 13, 2004), D.E. 72.

17. Opinion, Caruso v. Yamhill County, No. 3:03-cv-1731 (D. Or. Jan. 14, 2004), D.E. 15, 2004 WL 2005626; *see* Docket Sheet, *id.* (Dec. 12, 2003).

18. Order, *id.* (May 27, 2004), D.E. 33.

cember 6, he awarded the Multnomah County plaintiffs $30,475 in attorney fees and costs.[19]

Reviewing the Yamhill County case, the court of appeals determined on September 6, 2005, that the Oregon statute was constitutional.[20] The court of appeals evaluated the statute in the context of an underlying three percent limit on annual assessments so that voter-approved levies, no matter how small, could increase taxes by more than three percent if assessments were increased at the maximum allowed rate.[21] The court of appeals determined that the First Amendment burden imposed by the statute was justified by the state's interest in informing voters, observing that strict scrutiny is not generally applied to election laws' First Amendment intrusions.[22]

Judge Haggerty vacated his injunction and awards of attorney fees.[23]

19. Opinion, *Horton*, No. 3:03-cv-1257 (D. Or. Dec. 6, 2004), D.E. 102; Judgment, *id.* (Dec. 17, 2004), D.E. 103 (dismissing the case).

20. Caruso v. Yamhill County, 422 F.3d 848 (9th Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006); *see* Horton v. Multnomah County, 197 F. App'x 635 (9th Cir. 2006) (applying the Yamhill County decision to the Multnomah County case).

21. *See Caruso*, 422 F.3d at 854.

22. *Id.* at 855–62.

23. Order, *Caruso*, No. 3:03-cv-1731 (D. Or. Oct. 16, 2006), D.E. 43; Order, *Horton*, No. 3:03-cv-1257 (D. Or. Oct. 13, 2006), D.E. 113.