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CITY OF SPENCER v. RAYBURN: OKLAHOMA
PROPERTY VOTER RESTRICTION IN ELECTION TO
APPROVE MUNICIPAL BONDS DECLARED
UNCONSTITUTIONAL

In *City of Spencer v. Rayburn*,¹ the Oklahoma Supreme Court considered the validity of Art. 10, § 27, of the Oklahoma Constitution which permits only qualified property-taxpaying citizens to vote in elections to approve the issuance of municipal obligation bonds.²

In an original action before the Oklahoma Supreme Court, the City of Spencer sought a Writ of Mandamus to compel its Mayor, Rayburn, to hold a special election in order to approve the issuance of general obligation bonds as authorized by Art. 10, § 27, of the Oklahoma Constitution. The City Council had previously adopted a resolution directing its Mayor to submit to the *qualified voters* for their approval municipal

¹ 483 P.2d 735 (Okla. 1971).

² OKLA. CONST. art. 10, § 27 provides in part:

Any incorporated city or town . . . may, by a majority of the *qualified property taxpaying voters of such city or town*, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than . . . [the regular 5% constitutional debt limitation], for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city: Provided, that any such city or town incurring any such indebtedness . . . shall provide for the collection of an *annual tax in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it fall due, and also to constitute a sinking fund, for the payment of the principal thereof within twenty-five years from the time of contracting the same.* (emphasis added)

bonds in the sum of \$132,000.00 for the purpose of improving and expanding the city water system. The Mayor refused on the basis that the resolution called for submission of the proposition to *qualified voters*; whereas, Art. 10, § 27 specifies submission to *qualified property taxpaying voters* of the City. Consequently, the City of Spencer sought a Writ of Mandamus, challenging the validity of Art. 10, § 27, by asserting this provision violated the "equal protection clause" of the fourteenth amendment by disenfranchising otherwise qualified voters who are not property taxpayers.

Although the Oklahoma Supreme Court had previously upheld the State's right to restrict to property taxpayers the vote in elections to approve the issuance of general obligation bonds,³ the plaintiff contended that the recent U. S. Supreme Court decision in *City of Phoenix v. Kolodziejcki*⁴ required the State Supreme Court to reverse its position and declare the voter restriction in Art. 10, § 27 unconstitutional. Therefore, a thorough examination of *Phoenix* is essential in order to properly evaluate the decision rendered by the Oklahoma Supreme Court.

The *Phoenix* case also involved the constitutionality of state laws designed to deny otherwise qualified voters who own no real property the right to vote in elections to approve the issuance of general obligation bonds to be used in financing municipal improvements.⁵ The City of Phoenix, Arizona held an election on June 10, 1969, to authorize the issue of \$60,450,000 in general obligation bonds. According to Arizona law, ad valorem taxes were to be levied to service

³ *Settle v. City of Muskogee*, 462 P.2d 642 (Okla. 1969).

⁴ 399 U.S. 204 (1970).

⁵ ARIZ. CONST. art. 7, § 13, art. 9, § 8; ARIZ. REV. STAT. ANN. §§ 35-452 (1956), 35-455 (Supp. 1971); Law of March 9, 1943, ch. 31, § 4, [1943] Ariz. Laws 73 (amended in 1970 to reflect the *Phoenix* decision, now ARIZ. REV. STAT. ANN. § 9-523 (Supp. 1971)).

the indebtedness, although the City was legally entitled to use other revenues for this purpose.⁶ The bonds were subsequently approved in an election wherein only real property taxpayers were permitted to vote. On August 1, 1969, Kolodziejski, a qualified voter who owned no real property, filed suit in the United States Court for the District of Arizona challenging the constitutionality of the restricted franchise in Arizona bond elections and attacking the validity of the election approving the Phoenix bonds. A three-judge district court held this exclusion of nonproperty-owning voters a violation of the Federal Constitution.⁷ The City of Phoenix appealed this decision to the United States Supreme Court which affirmed the judgment of the lower court.

The Supreme Court ruled that the Arizona Constitution and statutes as applied to exclude nonproperty owners from voting in elections to approve general obligation bonds violated the "equal protection clause" of the fourteenth amendment. In reaching this decision, the Supreme Court relied on two earlier cases, *Kramer v. Union Free School District*⁸ and *Cipriano v. City of Houma*.⁹ Discussing *Kramer*, the *Phoenix* Court maintained *Kramer* held:

[A] State could not restrict the vote in school district elections to owners and lessees of real property and parents of school children because the exclusion of otherwise qualified voters was not shown to be necessary to promote a compelling state interest.¹⁰

This announced principle, by its terms applicable to elections of public officials, was extended to elections for the approval of revenue bonds to finance local improvements in *Cipriano v. City of Houma*.¹¹

⁶ 399 U.S. at 205 n. 1.

⁷ 313 F. Supp. 209 (D. Ariz. 1969).

⁸ 395 U.S. 621 (1969).

⁹ 395 U.S. 701 (1969).

¹⁰ *City of Phoenix v Kolodziejski*, 399 U.S. 204, 205 (1970).

¹¹ 395 U.S. 701 (1969).

The *Cipriano* case involved a successful challenge to the constitutionality of Louisiana voter restrictions which allowed only property taxpayers to vote in elections called to approve *municipal utility revenue bonds*.¹² The United States Supreme Court in *Cipriano* stated that the Louisiana restriction did not meet the “. . . exacting standard of precision we require of statutes which selectively distribute the franchise.”¹³ The *Cipriano* Court referred to its decision in *Kramer* and declared that the constitutionality of the Louisiana voter restriction depended on “whether all those excluded [were] in fact substantially less interested or affected than those the statute include[d].”¹⁴ Since all customers of the utility system pay utility bills and their rates could be “substantially affected” by the amount of revenue bond indebtedness, the Court stated:

[P]roperty owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates.

The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenues. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers.¹⁵

The Court determined in *Cipriano* that those excluded by the classification were clearly as interested and affected

¹² LA. REV. STAT. §§ 39:501, 39:508 (1950); § 33:4258 (Supp. 1971). These statutes authorize Louisiana municipalities to issue revenue bonds, but only if they are approved by a “majority in number and amount of the property taxpayers qualified to vote . . . [who voted in the bond election].” LA. REV. STAT. § 39:501 (1950).

¹³ 395 U.S. at 706, *quoting*, *Kramer v. Union Free School District*, 395 U.S. 621, 632 (1969).

¹⁴ 395 U.S. at 704, *quoting*, 395 U.S. at 632.

¹⁵ 395 U.S. at 705.

as those included. And since the voting classification was wholly irrelevant to the achievement of the State's declared objective—limiting the franchise to those voters who had a special interest in the election—the restrictions were unconstitutional because there was no compelling state interest to be served by enforcing the restrictions. For this reason, the Court concluded that the denial of the franchise to non-property owners in an election regarding *revenue bonds* was an abridgement of their fourteenth amendment rights.

The issue in *City of Phoenix v. Kolodziejski* then became: Whether the Federal Constitution requires the extension of the "Cipriano Doctrine" regarding revenue bonds to elections involving the approval of general obligation bonds? The City of Phoenix argued that the *Cipriano* rationale did not apply and therefore did not render unconstitutional the exclusion of nonproperty owners—that the restricted voting franchise was valid because of the compelling state interests involved.¹⁶ The City based this argument on two basic premises: First, the Arizona law placed a special burden on property owners since it required the levying of property taxes in an amount sufficient to pay the interest and principal on general obligation bonds.¹⁷ Second, the City emphasized the servicing distinction between revenue bonds such as were involved in the *Cipriano* case and general obligation bonds as approved by the property taxpayers in *Phoenix*. Revenue bonds are serviced entirely from funds derived from *both* property and nonproperty owners alike because revenue bonds are secured by income from the operation of the particular facility financed by the bonds. In contrast, *ad valorem* taxes are principally used to service general obligation bonds, which are secured by the taxing power of the municipality. Therefore, the City of Phoenix contended that general obligation bonds act as a lien on all real property subject to taxation by the municipality, and consequently

¹⁶ 399 U.S. at 207-8.

¹⁷ See note 6 *Supra*.

the “. . . State is justified in recognizing the unique interests of real property owners by allowing only property taxpayers to participate in elections to approve the issuance of general obligation bonds.”¹⁸

The United States Supreme Court rejected this argument and in so doing stressed the following reasons for the conclusion that the “differences between the interests of property owners and the interests of nonproperty owners are not sufficiently substantial to justify excluding the latter from the franchise.”¹⁹ First, all citizens of Phoenix have a substantial interest in the services which the City has to provide and thus are substantially affected by the bond election. In addition, the Court emphasized that giving the right to vote solely to property owners can be justified only by some “overriding interest of those owners that the State is entitled to recognize.”²⁰ The Court felt this test had not been met. Secondly, although the laws of Arizona call for an ad valorem tax to service the general obligation bonds, revenues from other sources can be utilized for this purpose. “[I]t is anticipated with respect to the instant bonds, as has been true in the past, that more than half of the debt service requirements will be satisfied not from real property taxes but from revenues from other local taxes paid by nonproperty owners as well as those who own real property.”²¹ Therefore, all citizens will contribute directly to the servicing of the bonds by the payment of taxes for this purpose. Thirdly, even if the general obligation bonds were serviced *entirely* by property owners paying ad valorem taxes, the disenfranchisement of nonproperty owners would not be justified. The Court stated:

Property taxes may be paid initially by property owners, but a significant part of the ultimate burden

¹⁸ 399 U.S. at 208.

¹⁹ *Id.* at 209.

²⁰ *Id.* at 209.

²¹ *Id.* at 209-10.

of each year's tax on rental property will very likely be borne by the tenant rather than the landlord . . . [T]he landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent. . . . Moreover, property taxes on commercial property . . . will be treated as a cost of doing business and will normally be reflected in the prices of goods and services purchased by non-property owners and property owners alike.²²

For these reasons, the Court determined that the challenged provisions of the Arizona Constitution and statutes violated the "equal protection clause" of the Federal Constitution. In reaching this conclusion, the Court stated:

[A]lthough owners of real property have interests somewhat different from the interests of nonproperty owners in the issuance of general obligation bonds, there is no basis for concluding that nonproperty owners are substantially less interested in the issuance of these securities than are property owners.²³

Justice Stewart, dissenting, agreed with the holding in *Cipriano* because there "the State had created a wholly irrelevant voting classification."²⁴ However, he strongly dissented with the majority opinion because the Majority was not concerned in *Phoenix* with "income producing utilities that can pay for themselves, but with municipal improvements that must be paid for by the taxpayers."²⁵ Because

²² *Id.* at 210-11. It should be noted that how successful the landlord will be in "passing on" the additional property tax to the tenant depends upon how responsive the demand for rental property is to changes in rent levels. Many other economic factors beyond the scope of this article should be considered in determining the validity of this argument. See, R. Netzer, *ECONOMICS OF THE PROPERTY TAX* 32-40 (1966).

²³ 399 U.S. at 212.

²⁴ *Id.* at 216 (dissenting opinion).

²⁵ *Id.* at 217.

the indebtedness created by the general obligation bonds operates during the lifetime of the bonds as a lien on all taxable property, Justice Stewart argued, the exclusion of nonproperty owners is an entirely rational public policy and not the "invidious discrimination that the equal protection clause condemns."²⁶

This writer believes the reasoning employed by Justice Stewart is sound and strongly disagrees with the Court's extension of the "Cipriano Doctrine" to elections involving general obligation bonds. Although Arizona restricted voting on municipal utility bond indebtedness, this exclusion of nonproperty owners was made on the basis of who was "primarily interested in or affected by" the election. The historical idea that property ownership is directly related to voter competence is no longer accepted by the Supreme Court.²⁷ However, the City's argument in *Phoenix* was not that property owners were better qualified to vote, but that they, as a class, had a substantially larger interest in the election than did those not owning real property. Although their general interest in public improvements may not be any greater, their pecuniary interest in the bond issue is substantially greater than that of the property taxpayers in *Cipriano*. The property taxpayers in Arizona are directly responsible for the cost of the bonds through additional ad valorem taxes; whereas, the property taxpayers in *Cipriano* pay for revenue bonds only as users of the public improvement at the same rate as do nonproperty owners. The Court argued in *Phoenix* that this distinction is invalid because property owners pass on the affect of higher ad valorem taxes to lessees and consumers, and in this manner nonproperty owners share the expense of the general obligation bonds. The question arises as to the extent the additional ad valorem tax is "passed on"?

²⁶ *Id.* at 218.

²⁷ *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966).

In absense of positive proof that a significant portion of the higher property tax is passed on to the tenant and consumer, the Court failed, in this writer's opinion, to demonstrate a need for extending the principles established by *Cipriano*.

Nevertheless, *Phoenix* indicates that all states having provisions requiring property ownership as a basis for voter qualification in elections to approve the issuance of general obligation bonds are in violation of the fourteenth amendment.²⁹ Therefore, the central issue in the Oklahoma case, *City of Spencer v. Rayburn*, was whether *Phoenix* rendered inoperable Article 10, Section 27 of the Oklahoma Constitution insofar as it permits only property taxpayers to vote in general obligation bond elections? Although the Oklahoma Supreme Court on several previous occasions had declared Section 27 to be within the spirit of the equal protection clause of the fourteenth amendment,³⁰ the court applied *Phoenix* and in a unanimous decision held the voter limitation unconstitutional.

The *Spencer* case represents not only a significant and complete reversal of the court's attitude,³¹ but brings the

²⁹ It should be noted that the Court in *Phoenix* specifically named 12 states besides Arizona which restrict the franchise to property taxpayers in varying degrees in general obligation bond elections. Oklahoma was one of the states. By inference, was the Court suggesting that these state statutes were unconstitutional? 399 U.S. 213 n.11.

³⁰ *Settle v. City of Muskogee*, 462 P.2d 642 (Okla. 1969), *Settle v. Board of Co. Comr's of Co. of Muskogee*, 462 P.2d 646 (Okla. 1969).

³¹ This change in the Oklahoma Supreme Court's attitude is reflected by the withdrawn opinion in *Beauchamp v. Oklahoma City*, 41 OKLA. B.A.J. 2215 (Oct. 10, 1970), wherein the court refused to apply *Phoenix* by factually distinguishing Section 27 from the analogous provisions of the Arizona Constitution and statutes. Realizing either their tremendous error in judgment, or else due to mounting pressure from bond buyers and city officials, the court withdrew this opinion and in another decision upheld an

state constitution into harmony with the *Phoenix* mandate. The constitutional question of the restricted voting franchise in Oklahoma has finally been resolved, removing the doubt and uncertainty of bond buyers, public officials, and concerned citizens.

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Oklahoma City bond election on the basis that Oklahoma has no well-defined period for challenging general obligation bond elections within the meaning of the *Phoenix* case. 41 OKLA. B.A.J. 2317 (1970). The question, therefore, of the validity of the restricted franchise was left unresolved.