Opinion issued April 10, 2018.

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00946-CV

ROBERT J. BERTRAND, II, LINDA RICHARD, DEIRDRE BROWN, MICHAEL STACEY, DEBRA PONCHETTI-ADAMS, MARK ADAMS, JILL HORN, AND PAUL HORN, Appellants

V.

KEVIN HOLLAND, MAYOR OF THE CITY OF FRIENDSWOOD, THE CITY OF FRIENDSWOOD, TEXAS, CARL W. GUSTAFSON, AND MICHAEL FOREMAN, Appellees

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On Appeal from the 334th Judicial District
Harris County, Texas
Trial Court Case No. 2016-40883

MEMORANDUM OPINION

Appellants/contestants ask us to declare a May 7, 2016 special election void because they allege: (1) the ballot proposition authorizing a sales and use tax did not

notify voters that a Type B corporation would be formed to monitor and direct use of the funds raised from the tax; and (2) Friendswood failed to include Harris County Precinct 742 in relevant pre-election ordinances. We are not persuaded by appellants' arguments and affirm.

Background

The City of Friendswood held a special election on May 7, 2016 to authorize a new sales and use tax to fund local economic development. The ballot requested approval or disapproval of the following:

> The adoption of a Type B local sales and use tax in the City of Friendswood, Texas at the rate of one-eighth (1/8) of one percent (1%) to undertake projects authorized under Chapter 505 of the Local Government Code, to promote new or expanded business enterprises in the downtown area as defined by the City of Friendswood Downtown District Map, including but not limited to streets, targeted infrastructure, paved sidewalks, pedestrian amenities including lighting, benches, signage, and other related public improvements, and the maintenance and operations expenses for any of the above-described projects.

City of Friendswood, Tex., Ordinance 2016-09 (Feb. 1, 2016). The City's website explained that "the tax is administered by a board of seven residents who are appointed by City Council." The proposition passed with 1,274 votes for it and 1,135 votes against it.[1]

[1] The only polling place for in-person voting was the Friendswood City Hall.

Appellants/contestants filed suit, challenging the validity of the election. Appellants argued that the election should be deemed "void" because the ballot language was misleading in that it did not expressly notify voters that approving the ballot item would approve "the formation of a[n] [economic development] corporation which would have separate administrative costs and could have separate staff than the City and the collected taxes would pay for such corporation and overhead versus taxes being directly used for improvements." Appellants also argued that the election should be deemed void because "[t]he Friendswood part of Harris County precinct 742 was omitted from all three ordinances while all other precincts were listed."

The parties filed cross-motions for summary judgment. The trial court granted appellees/contestees full summary judgment, dismissing the election contest. Appellants/contestants appealed.

Sufficiency of Ballot Description

In their first issue, appellants challenge the special election on the basis that the ballot language did not comply with the Texas Local Government Code and did not capture the "measure's essence" because it failed to state that the sales and use tax would be used "for the benefit of a Type B corporation." We disagree.

A. Applicable Statutes

The Texas Local Government Code, section 505.251 (concerning Type B corporations) prescribes how to establish a sales and use tax for the benefit of a Type B corporation: "The governing body of the authorizing municipality by ordinance may adopt a sales and use tax for the benefit of a Type B corporation *if the tax is approved* by a majority of the voters of the municipality voting at an election held for that purpose in accordance with Chapter 321, Tax Code." *Id.* at § 505.251 (emphasis added).

In a parallel structure, Chapter 321 of the Tax Code permits sales and use taxes for the benefit of a municipality: "A municipality that is not disqualified may, by a majority vote of the qualified voters of the municipality voting at an election held for that purpose, adopt an additional sales and use tax for the benefit of the municipality in accordance with this chapter." TEX. TAX CODE § 321.101(b). Section 321.506 further clarifies that this provision applies only to taxes created for the benefit of the municipality: "[e]xcept as provided by Section 321.507, the money received by a municipality under this chapter is for the use and benefit of the municipality." *Id.* § 321.506. Furthermore, Chapter 321 provides explicit ballot language to use when proposing a sales and use tax for the benefit of the municipality: "'A sales and use tax is adopted within the city at the rate of _____ percent' (insert appropriate rate)" or "'The adoption of an additional sales and use

tax within the city at the rate of _____ percent to be used to reduce the property tax rate' (insert appropriate rate)." *Id.* § 321.404.

B. Analysis

Appellants argue that section 505.251 of the Local Government Code requires voters to approve a sales and use tax "to be used for the benefit of a corporation." Appellants contend that the City's failure to specify on the ballot that the tax would be used for the benefit of a corporation "did not capture the 'measure's essence' because it omitted the crucial details about how their votes would provide the necessary statutory authorization to levy a sales and use tax to benefit an economic development corporation."

We note from the outset that the plain language of section 505 requires approval of "the tax." TEX. LOC. GOV'T CODE § 505.251 ("The governing body . . . may adopt a sales and use tax for the benefit of a Type B corporation if the tax is approved by a majority of the voters . . . .").

But even assuming that the statutory language mandates voter approval of a sales and use tax for the benefit of a Type B corporation, the May 7, 2016 ballot language sufficiently identified the measure and "substantially submitted" the question with enough "definiteness and certainty" that the voters were not misled. *See Dacus v Parker*, 466 S.W.3d 820, 826 (Tex. 2015).

In *Dacus v Parker*, the Texas Supreme Court set forth the standard in a case challenging the sufficiency of ballot language: "the issue is whether the ballot 'substantially submits the question . . . with such definiteness and certainty that the voters are not misled.'" *Id.* at 826 (quoting *Reynolds Land & Cattle Co. v. McCabe*, 12 S.W. 165, 165 (Tex. 1888)). As the Court explained, "not every detail need be on the ballot, and short, general descriptions are often acceptable." *Id*. But "the ballot must identify the measure *by* its chief features, showing its character and purpose." *Id.* at 825–26 (citations omitted) ("disapprov[ing] of language suggesting that the ballot need *only* 'direct[ ] [the voter] to the amendment so that he can discern its identity and distinguish it from other propositions on the ballot'"). A description may be inadequate because it (1) affirmatively misrepresents the measure's character and purpose or its chief features; or (2) misleads the voters by omitting certain chief features that reflect its character and purpose.[2] *Id*. at 826.

The *Dacus* court found the ballot language at issue inadequate when it did not specify that drainage charges would be imposed on properties benefiting from the drainage system: "when the citizens must fund the measure out of their own pockets, this is a chief feature that should be on the ballot, and its omission was misleading."

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[2] The "proposition" is "the wording appearing on a ballot to identify a measure," and the "measure" is "a question or proposal submitted in an election for an expression of the voters' will." *Dacus v. Parker*, 466 S.W.3d 820, 823 (Tex. 2015) (citing TEX. ELEC. CODE § 1.005 (12), (15)).

Id. The Court distinguished cases in which ballot language was adequate, despite technical errors, where the proposition disclosed the "purpose of the measure and the costs the citizens would directly bear" or "acknowledged the direct fiscal impact to citizens." *Id*. at 826–28 (citing *Wright v. Bd. of Trs. Of Tatum Indep. Sch. Dist.*, 520 S.W.2d 787, 792 (Tex. Civ. App.—Tyler 1975, writ dism'd) (holding use of two words, "maintenance tax," on ballot sufficiently described school-tax measure); *Texsan Serv. Co. v. City of Nixon*, 158 S.W.2d 88, 90–91 (Tex. Civ. App.—San Antonio 1941, writ ref'd) (declining to invalidate propositions in bond election that stated that propositions concerned "funds to aid in the construction, purchase, extension and improvement of waterworks and sewer systems," without expressly mentioning that city could choose between constructing or purchasing the systems); *Moerschell v. City of Eagle Lake*, 236 S.W. 998, 1000 (Tex. Civ. App.—Galveston 1921, writ ref'd) (upholding proposition about "contin[uing] or discontin[uing]" tax even though election arguably concerned new tax); *Beeman v. Mays*, 163 S.W. 358, 359 (Tex. Civ. App.—Dallas 1914, writ ref'd) (holding election valid where ballot allowed voting "For School Tax" and "Against School Tax," where should have said, "For *increase* of school tax" and "Against *increase* of school tax") (emphasis added); *Reynolds*, 12 S.W. at 165–66 (proposition that queried whether taxes "shall be levied for school purposes" was sufficient even though it did not mention purposes of building schools and supplementing state fund); *City of Austin v. Austin*

Gas-Light & Coal Co., 7 S.W. 200, 204–05 (Tex. 1887) (upholding passage of "a special additional annual tax" to help fund Austin public schools despite alleged confusion about tax details and relationship to preexisting taxes)).

Under this framework, we find the ballot language in this case adequate. As an initial matter, although section 321.404 of the Texas Tax Code provides specific ballot language for the imposition of a sales and use tax implemented for the benefit of the municipality, section 505.251 of the Local Government Code does not definitely prescribe ballot language for a sales and use tax for the benefit of a Type B corporation. Because the applicable statute here does not "definitely prescribe" the form in which a question must be submitted to voters, the question is whether the issue was substantially submitted to the voters, under the *Dacus* framework. *See Beeman*, 163 S.W. at 359; *Reynolds*, 12 S.W. at 166 ("if the form is not prescribed . . . the language of the proposition submitted is not material, provided it substantially submits the question which the law authorizes with such definiteness and certainty that the voters are not misled.").

Here, the ballot specifically asked for a vote for or against the "adoption of a *Type B* local sales and use tax." It further stated that the tax was: "authorized under *Chapter 505* of the Local Government Code"—the provision specifically concerning Type B corporations. It also explained that the tax was to "promote new or expanded

business enterprises in the downtown area . . . including but not limited to . . . maintenance and operations expenses."

Unlike the ballot language in *Dacus*, the description here notified voters that this was a tax—that citizens would "fund the measure out of their own pockets." *See Dacus*, 466 S.W.3d at 826. It is undisputed that the ballot language also informed voters of (1) the rate of the tax, (2) its general purpose to promote business enterprises downtown, and (3) the type of potential projects it would fund.

The use of the phrases "Type B" tax and "authorized under Chapter 505 of the Local Government Code" (the chapter entitled "Type B Corporations") is also significant. Yes, the ballot did not include the term "corporation." It also did not say "for the benefit of"—a phrase that is also notably absent from the required ballot language set forth in Chapter 321. But these omissions are insufficient, in light of the other language used, to deem the description misleading. The language was sufficient to apprise voters that the tax was proposed for the benefit of a Type B corporation. *Cf. id.*; *see Reynolds*, 12 S.W. at 166.

The proposition "identified the general purpose of the measure," and it substantially submitted the measure to the voters with sufficient definiteness and certainty, without misrepresenting or omitting "chief features that reflect its character and purpose." *See Dacus*, 466 S.W.3d at 826.

We overrule appellants' first issue.

Failure to Identify Precinct 742 in Election Ordinances

In their second issue, appellants argue that the special election is void because the City "failed to identify one of its precincts in the ordinances calling the elections" in violation of section 42.061(a) of the Texas Election Code.[3] We disagree with appellants' reading of 42.061.

Section 42.061(a) of the Texas Election Code provides that "[t]he governing body of a political subdivision other than a county shall establish the election precincts for elections ordered by an authority of the political subdivision." TEX. ELEC. CODE § 42.061(a). "The precincts may be established before each election or, once established, remain established until changed, at the governing body's discretion." TEX. ELEC. CODE § 42.061(b).

We interpret statutes in light of their plain language and do not read terms into a statute that do not exist in the text. *See, e.g.*, *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 563 (Tex. 2016). Further, we presume that the Legislature "deliberately and purposefully selects the words and phrases it enacts, as well as deliberately and purposefully omits the words and phrases it does not enact." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012).

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[3] Specifically, appellants contend that Friendswood's City Council passed three ordinances pertaining to the May 7, 2016 elections, and those ordinances identified other precincts, but not Precinct 742.

The Election Code requires "[t]he governing body of a political subdivision . . . [to] establish the election precincts for elections." The statute does not require any particular ordinance relating to an election to list the precincts eligible to vote. *See* TEX. ELEC. CODE § 42.061(a). Nor does it mandate that the way to "establish precincts" is to list them in all ordinances related to an election. Put differently, so long as the governing body has established "election precincts for elections" before each election or in the past, the terms of section 42.061 are satisfied, and an ordinance's failure to list (or properly list) what county precincts may vote in a city election does not violate the terms of section 42.061. TEX. ELEC. CODE § 42.061(b) ("[P]recincts may be established before each election or, once established, remain established until changed, at the governing body's discretion."). We do "not judicially amend a statute by adding words that are not contained in the language of the statute." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015).

We overrule appellants' second issue.

Conclusion

We affirm the judgment of the trial court.

Jennifer Caughey
Justice

Panel consists of Justices Jennings, Massengale, and Caughey.