MEMORANDUM

Date: July 5, 2022

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: Jan Lesher
County Administrator

Re: **City of Tucson Differential Water Rate Lawsuit Update**

On June 13, 2022, I provided you with the County response to the City of Tucson Motion to Dismiss the equal protection claims in the County complaint alleging that the County lacks standing and capacity to assert claims of denial of equal protection under the United States and Arizona Constitutions. The City additionally filed the attached reply in support of their Motion to Dismiss the County's equal protection claims.

This is the last filing related to the City's Motion to Dismiss and the Court may now rule on the Motion at any time. The County did request an opportunity for oral arguments on this matter but it is the Court's prerogative as to whether to grant this request.

Please let me know if you have any questions.

JKL/anc

Attachment

c: Carmine DeBonis, Jr., Deputy County Administrator
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PIMA COUNTY, a body politic in the State of Arizona,

Plaintiff,

v.

CITY OF TUCSON, *et al*.,

Defendants.

Case No.: CV2022-001141

REPLY TO RESPONSE TO MOTION TO DISMISS PLAINTIFF'S EQUAL PROTECTION CLAIMS (COUNTS III AND IV)

The County's often repetitive response to the City's motion to dismiss the equal protection claims of Counts III and IV attempts to distract from the dispositive issue of standing. Given the nature of the motion and its basis, it is not "incredible" that the City does not defend on the merits. Accordingly, no reply need be made to the County's irrelevant argument of the merits in the guise of "background."

To the point, the County it is not a person and therefore cannot equal protection claims on its own behalf. Neither can it pursue the claim on behalf of its citizens because they, according to *Jung v. City of Phoenix*, have no such claim.

Memorandum of Points and Authorities

I. The City's motion to dismiss is not subject to summary denial.

A. A Rule 12(b)(6) motion filed after an answer is treated as motion for judgment on the pleadings.

A Rule 12(b)(6) motion to dismiss for failure to state a claim and a Rule 12(c) motion for judgment on the pleadings are procedurally functional equivalents. Just like a Rule 12(b)(6) motion, a Rule 12(c) motion tests the sufficiency of the complaint:

> A motion for judgment on the pleadings tests the sufficiency of the complaint and if the complaint fails to state a claim for relief, judgment should be entered for the defendant.

Shannon v. Butler Homes, Inc., 102 Ariz. 312, 315 (1967); *accord e.g*., *Mobile Cmty. Council for Progress, Inc. v. Brock*, 211 Ariz. 196, 198, ¶ 5 (App. 2005).

The rules explicitly provide that the defense of "[f]ailure to state a claim upon which relief can be granted … may be raised … by a motion under Rule 12(c)." Rule 12(h)(2). Consequently, styling a motion as one under Rule 12(b)(6) after filing an answer is inconsequential. The court may simply treat the motion as one for judgment on the pleadings. *Best v. Driggs Title Agency, Inc*., No. 1 CA-CV 19-0037, 2019 WL 7188582, at *3, ¶ 11 (Dec. 24, 2019). Contrary to the County's argument, "[w]aiver under Rule 12(h)(1) does not apply to the Rule 12(b)(6) defense." *Id*. The defense of failure to state a claim can even be raised at trial. Rule 12(h)((2)(C).

B. The lack of a good faith consultation certificate is inconsequential.

The oversight of the City is no reason to deny the City's motion. *Brock Fam. P'ship, LLP v. Tellurian Dev. Co*., No. 1 CA-CV 21-0419, 2022 WL 678040 (March 8, 2022), supports that conclusion.

In *Brock*, the plaintiff argued that the court should have summarily denied the defendant's Rule 12(b)(6) motion for failure to submit a separate good faith consultation certificate. Brock contended that "the filing of a good faith consultation certificate is

mandatory based on the use of 'must' in Rule 12(j)." *Id*. at *2, ¶ 9. The trial court nevertheless considered the motion and granted dismissal. The court of appeals affirmed, noting that "[t]he rule does not, however, set forth any specific consequences of noncompliance [with Rule 12(j)]" and observing the lack of authority for the proposition that "denial of a motion is mandatory if a party fails to file a good faith consultation certificate.…" *Id*. The trial court had stated that Brock "identif[ied] no prejudice based on the lack of compliance." *Id*. at 2, ¶ 11. Accordingly, "any error was harmless, and the court was not obligated to summarily deny [defendant's] motion." *Id*.

Likewise here, the County does not argue any prejudice. Furthermore, it is apparent from the County's response that any consultation in an effort to achieve dismissal of Counts III and IV without filing a motion would have been futile. Because the City's oversight is harmless, the court in its discretion should reject the County's technical argument.

II. The County concedes it has no standing to sue on its own behalf.

The County's admission that it is not a "person" (Response at 6, n.1)[1] therefore concedes that it may not assert a claim of denial of equal protection on its own behalf. Accordingly, the County only argues that it can assert an equal protection claim on behalf of County citizens, but it does not argue for standing as *parens patriae*. (Response at 1, 6.) It instead only argues for *jus tertii* standing. (Response at 6-9.)

III. *Jung* precludes an equal protection claim by the County or any citizen.

In *Jung v City of Phoenix*, 160 Ariz. 38 (1989), customers of the Phoenix Water Department who lived outside the city limits alleged that a city ordinance that charged them at a rate double the rate charged to city residents was discriminatory and denied them equal protection of the law pursuant to the 14th Amendment. The Arizona

[1] References to the Response are to its pages as numbered, not the pdf pages.

Supreme Court rejected that claim, holding there is no applicable constitutional claim and the customers' only claim is for the violation of state law requiring reasonable rates for water service:

> Although we agree with most of the analysis in the opinion of the Court of Appeals, we believe that the opinion suggests, at least by implication, that the plaintiffs' allegations support a civil rights action under 42 U.S.C. § 1983.[2] We believe that any suggestion that the allegations of the complaint support a civil rights action must be corrected. Not every denial of a right conferred by state law involves a denial of equal protection. The plaintiffs have no constitutional right to receive water at a particular rate. The city, in providing water service to nonresidents, is acting in its proprietary capacity and, *absent a statute,* has no duty to provide water to the nonresidents. If the city has violated a state statute in its charges for water provided to nonresidents, the plaintiffs' remedy is under state law, not under § 1983 of the Civil Rights Act.

160 Ariz. at 39 (citations omitted). Accordingly, the case was remanded to the trial court where the plaintiffs "should be allowed to amend the complaint to assert a right to reasonable rates under A.R.S. § 9-516." 160 Ariz. at 41.

Jung remains the law in Arizona and precludes any and all equal protection claims in this case, whether made by the County on its own behalf or on behalf of its citizens, or made by a citizen joined as a plaintiff herein by amendment. The County's argument that Jung is "no longer good law" (Response at 12-14) is an argument for another day in another court – the Arizona Supreme Court. Meanwhile, there is no need to engage in any "tiers of scrutiny" analysis to determine whether the County has stated a claim under the Equal Protection Clause.

As the County acknowledges (Response at 5), standing requires that "a plaintiff must allege a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). Here, as to Counts III and IV, the required injury is a denial of equal protection.

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[2] *Jung v. City of Phoenix*, 160 Ariz. 35 (App. 1987).

Although the County alleges such an injury, it cannot, as a matter of law, state a claim for that injury because the claim is precluded by *Jung*.

That "the City admitted in its Answer that the Equal Protection Clauses prohibit [it] from enacting ordinances that discriminate" (Response at 10) does not and cannot avoid the holding of *Jung*. Here, as in *Jung*, there exists a governing statute. It requires "just and reasonable" water rates, deems "unjust or unreasonable" rates unlawful, and provides the basis to remedy any violation. A.R.S. § 9-511.01(C) and (D). That statute is the basis of the County's Count I.

IV. *Jung* is not distinguishable.

Each of the County's imagined distinctions will be discussed in turn.

1. That the *Jung* plaintiffs did not allege race-based discrimination as the County does in Count IV is a distinction without a difference. The nature of the alleged discrimination forming the basis of the denial of equal protection claim is immaterial. Whatever the type of discrimination, the equal protection claim is barred by *Jung*.

Furthermore, the County's allegation of race discrimination misrepresents the subject Ordinance. The rate differential of the Ordinance is based on location, not race. "Charges for water utility service for customers within unincorporated Pima County, but not within lands placed into trust for a Native American tribal nation, will be set in proportion to costs, plus a reasonable differential." (Complaint, Ex. 1 at 1.) Native Americans and Native American-operated businesses are not necessarily the only water customers located within the trust lands.

2. There is no distinction between the City of Phoenix in *Jung* and the City of Tucson herein. The City of Tucson, "in providing water service to nonresidents" is "acting in is proprietary capacity," just as the City of Phoenix was said to do in *Jung*. 160 Ariz. at 39. The distinction the County attempts to make concerns the cities' respective reasons for the differential rates. However, *Jung* is silent as to the objectives

of the City of Phoenix. Therefore, the County cannot assume that Phoenix was "simply increasing prices" for reasons different than those motivating Tucson. (Response at 15.) Even if the reasons are wholly different, that does not distinguish *Jung*. Whatever the reasons for the differential rates, they are not "material to the equal protection analysis." (Response at 15.) Whatever the reasons for the differential rates, given *Jung*, there is no equal protection claim to analyze.

The County reaches too far in trying to distinguish *Jung*. It simply cannot be read to hold that "there was no evidence of 'intentional' discrimination." *Jung* holds that there is no cause of action for denial of equal protection, not that there was no evidence of a denial. Likewise, the County's attempt portray the Phoenix rate increase as unintentional in contrast to the Tucson rate increase defies reality. The enactment of each city's rate increase ordinance was nothing but intentional.

Finally, that the *Jung* plaintiffs sued pursuant to 42 U.S.C. § 1983 and the County does not is insignificant. That statute is often used as a vehicle for making an equal protection claim. "Redress for denial of equal protection is available under § 1983." *French v. Heyne*, 547 F.2d 994, 997 (7th Cir. 1976), citing *e.g.*, *Lindsey v. Normet*, 405 U.S. 56 (1972).

3. That "*Jung* concerned the U.S. Constitution only, whereas here the County brings claims under the 14th Amendment and Article II, Section 13" does not evade the effect of *Jung* on this case. The methodology of construing those equal protection clauses is not determinative because the construction of the 14th Amendment clause was not the basis of the holding in *Jung*. Instead, Jung holds that the equal protection clause did not apply because the statute governed.

4. The enactment of A.R.S. § 9-511.01 after *Jung* does not change its holding and its effect on this case. The *Jung* court "believe[d] that the implication of reasonable rates for utility service must be read into A.R.S. § 9-516(C)," the "relevant statue" in

Jung. Thus, the later enactment of § 9-511.01(E) to expressly require "just and reasonable rates" does not distinguish *Jung*.

5. *Jung* did not "implicitly determine that in-Phoenix customers were not 'similarly situated' with out-or-Phoenix customers," as the County asserts. (Response at 16-17.) *Jung* did not decide the merits of the equal protection claim on that basis or any other. Instead, it held there was no equal protection claim available.

V. The County cannot have *jus tertii* standing.

The requisites to *jus tertii* standing for a denial of equal protection under the 14th Amendment's equal protection clause are stated in *Powers v. Ohio*, 499 U.S. 400 (1991), and quoted in the County's Response (at 6).[3] The County's claim to *jus tertii* standing fails on the first of those requirements: "The [County] must have suffered an 'injury in fact,' thus giving [it] a 'sufficiently concrete interest' in the outcome of the issue in dispute." 499 U.S. at 411.

The County's argues it has suffered an injury because it "is a Tucson Water Customer and purchases water in unincorporated areas." (Response at 7.) However, merely paying a higher water service rate is not the relevant injury. The injury relevant to the equal protection claims of Counts III and IV is the alleged denial of equal protection. Thus, to make a claim of denial of equal protection on behalf of County citizens, the County must have also suffered a denial of equal protection. Moreover, to make such a claim it must first be a legally possible claim. However, as discussed above, *Jung* precludes an equal protection claim. Therefore, there can be no such "injury in fact" and, consequently, the County cannot have *jus tertii* standing.

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[3] A somewhat different formulation of the *jus tertii* elements was drawn in *State v. B Bar Enter., Inc*., 133 Ariz. 99, 101, n.2 (1982), from a law review article, and yet another formulation was taken from pre-*Powers* U.S. Supreme Court cases and stated in *Rasmussen v. Fleming*, 154 Ariz. 200, 205 (1986).

The County's argument to the effect that the City has conceded the required "injury in fact" because "the City has not argued that the County lacks standing to raise Counts 1, II, or V" is a red herring. (Response at 8.) Each of the County's claims stands alone. The subject of the City's motion to dismiss is only the equal protection claims – Counts III and IV. Counts I, II and V do not allege a denial of equal protection. The injuries alleged in those claims are not conceded and will be defended on grounds other than lack of standing.

VI. The standing requirement should not be waived.

Although standing is not a jurisdictional requirement in Arizona courts, "[a]s a matter of judicial restraint, however, this Court has traditionally required a party to establish standing." *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405, ¶ 22 (2020). The doctrine of standing is applied "as a matter of sound judicial policy." *Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶ 16 (2003). Arizona courts "are … reluctant to waive the standing requirement and have done so only on rare occasions. *Bennett v. Brownlow*, 211 Ariz. 193, 195, ¶ 15 (2005). "Waiver of the standing requirement is the exception, not the rule. Our reluctance to waive the requirement stems in large part from the narrowness of the exception.… Moreover, the standing doctrine is consistent with notions of judicial restraint and ensures that courts refrain from issuing advisory opinions, [and] that cases be ripe for decision and not moot.…" *Id*. at 463, ¶ 16.

The conditions for waiving the standing requirement are not present herein. Specifically, Counts III and IV are not of "critical public importance." Indeed, they are of *no* importance because no equal protection claim exists, as discussed above. Consequently, the County's equal protection claims are moot and to decide them would be akin to rendering an advisory opinion. Furthermore, any public importance of Counts III and IV is not "critical" because the validity of the City's differential rate

ordinance can be addressed through the County's other claims, particularly Count I.

Therefore, as a matter of judicial restraint, this court should not waive the standing requirement.

VII. Granting leave to amend to add an individual plaintiff would be futile.

As discussed above, an individual plaintiff, like those in *Jung*, will likewise not have an equal protection claim. Given *Jung*, their remedy is only statutory.

Respectfully submitted on July 1, 2022.

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