



1

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OFFICE OF THE CITY ATTORNEY

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OPINION NO. 95-03

TO: Janice L. Graziano, City Clerk
FROM: Stephen M. Kemp, City Attorney
DATE: February 11, 1995
SUBJECT: Opinion Request-Referendum

QUESTION:

1. Is a referendum petition valid that does not follow the exact statutory wording regarding the "warning"
2. Is a referendum petition that does not contain the county of registration, but does contain the city and state valid.

OPINION:

On January 18, 1995, the Office of the City Clerk received signed referendum petitions.¹ The warning contained on the received petitions does not match the warning contained in the statute.² The warning language used in the petitions submitted replaced the words "he" or "his" with "he/she" and "his/her".

Additionally, four of the petitions circulated do not appear to

¹Previously, the petitioners had requested and were issued a referendum number "REF 95-01" in the manner provided by law.

²The required language for the warning is found in A.R.S. _19-101.A.

comply with the requirements for the affidavit of circulator.³ One of the petitions does not list the county of registration in the address box. Further, three of the petitions do not have the county of residence of the Notary Public written out, but are stamped with a Notary Stamp indicating the county of residence.

The need for strict compliance with the statutory requirements for referendum petitions has been addressed by the Arizona Courts on three separate occasions. In Direct Sellers Association v. McBrayer, 109 Ariz. 3, 503 P.2d 951 (1972), the Arizona Supreme Court noted:

"The right to suspend, and possibly to revoke as given by the referendum ... is an extraordinary power which ought not to be restricted or enlarged by construction."

citing, AAD Temple Bldg. Ass'n v. Duluth, 135 Minn, 221, 160 N.W. 682 (1916)

Subsequently, in Cottonwood Development, v. Foothills Area Coalition, 134 Ariz. 46, 653 P.2d 694 (1982), the Arizona Supreme Court rejected arguments that substantial compliance with the statute governing the requirements for referendum petitions is sufficient.

Recently, in Western Devcor, Inc. v. City of Scottsdale, 168 Ariz. 426, 814 P.2d 767 (1991), the Arizona Supreme Court held that it was not enough that the missing information on the petition could be verified elsewhere. If the statute required the information, it must be on the petition.⁴

In this case, there are three distinct issues to be analyzed. First, does the modification to the statutorily mandated warning by changing "his" to "his/her" and "he" to "he/she" make the petitions defective. It is the opinion of this office that such a change does not make the petitions defective. Under A.R.S. §1-214.C., words of the masculine gender include the feminine and the neuter. The change made by the proponents simply states, what state law already provides.

Second, does the failure to indicate by written signature, the

³The requirements for the affidavit of circulator are found in A.R.S. §19-112.D.

⁴In Western Devcor, the missing information was a reference in the affidavit of circulator that the circulator was a resident of the City of Scottsdale. The proponents argued that this could be determined from the records of the Maricopa County Recorder. Nevertheless, the Arizona Supreme Court held that the missing reference made the affidavits void as it did not strictly comply with the provisions of A.R.S. §19-112.D.

Opinion No. 94-*

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Page 3

county of residence of the Notary Public subscribing the petitions, even though the seal contains the county of residence result in the those petitions containing such a defect being invalid.

Arizona has adopted the Uniform Recognition of Acknowledgements Act.⁵ Under this act, sufficient proof of the authority of the notary exists if: "The official seal of the person performing the notarial act is affixed to the document,...". See, A.R.S. §33-502.B.2. As the petitions in this case do contain the official notarial seal, it is the opinion of this office that the Affidavits of circulators in those three petitions meet the minimum standards and the signatures are valid.

Third, does the failure to indicate county of registration on the affidavit of circulation result in the signatures on such a petition being invalid. While there is no direct Arizona case law on this issue, the decision of the Supreme Court in Western DevCor Inc. v. City of Scottsdale, provides clear guidance. As in Western DevCor, it would be relatively simple for the city clerk to find this missing information. However, as the Arizona Supreme Court indicated all information must be present. Therefore, it is our opinion that the Petition on which the affidavit of the circulator does not contain the county of registration are invalid.

I trust that this answers your request. If you should have any questions, please do not hesitate to contact me.

cc: Honorable Mayor and Council

SMK\OPINION\95-03

⁵See, A.R.S. §33-501, et.seq