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OFFICE OF THE CITY ATTORNEY

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OPINION NO. 96-08

Office of the City Attorney

TO: Janice L. Graziano, City Clerk
FROM: Stephen M. Kemp, City Attorney
DATE: October 25, 1996
SUBJECT: Initiative Petitions

QUESTION:

You have inquired as to whether an initiative petition submitted by the Peoria Police Officer's Association Political Action Committee constitutes a valid exercise of the reserved legislative authority granted to the qualified electors of the City under the Arizona Constitution and therefore should be certified for placement on the ballot in the event the form of the petition is satisfactory and sufficient numbers of qualified signatures obtained.

OPINION:

Prior to addressing this issue in greater detail the issues may be summarized as follows. This proposed initiative raises the question of whether it constitutes a valid exercise of the legislative power reserved to the people under the constitution of Arizona. If the initiative is not a valid exercise of the legislative power it is defective in form and not subject to placement on the ballot for submission to the qualified electors of the city. For all the reasons addressed in greater detail below, it is the opinion of this office that the proposed

initiative does not constitute a valid exercise of the legislative power granted to the qualified electors of the city and is not subject to placement on the ballot.

For purposes of this opinion, the following background is provided. On October 11, 1996, the City Clerk was requested to issue an initiative number for an initiative petition, a copy of which is attached as Appendix A-PPOA Initiative Petition (hereinafter "the Initiative"). In accordance with A.R.S. §19-111 and §19-143, the City Clerk issued an initiative number ("96-03") for the Initiative, which is now being circulated.

Your opinion request assumes that the circulators will obtain the necessary amount of signatures and that you will be required to make a decision on whether the Initiative constitutes a valid exercise of the legislative power reserved to the qualified electors of the City.

This opinion does not address whether the proposed Initiative is constitutional or legal. The Arizona Supreme Court has determined that such issues should be addressed only after action by the qualified electors. Tilson v. Mofford, 153 Ariz. 468, 737 P.2d 1367 (1987). The question that you raise is preliminary to the constitutional or legal issues, that is whether the initiative constitutes a valid exercise of the reserved legislative power placed in the qualified electors under the Arizona Constitution.

The concept of the initiative and referendum developed during the "progressive era" in American politics from 1890 - 1912. An initiative is legislation proposed and enacted by the qualified electors of the City in a regular or special election, while a referendum is a vote by the qualified electors to determine if previously enacted legislation shall be upheld. Both concepts fall under the rubric of reserved powers held by the people and not their government.

Starting with Wisconsin in 1903, a number of states adopted initiative and referendum provisions, including California, Oklahoma, Oregon and Washington. The Arizona Constitution in 1912 reserved the power of the initiative and referendum to the people. Ariz. Const. Art.IV, Pt.1, Sec. 1. The legislature subsequently enacted Title 19, Chapter 1, Arizona Revised Statutes to provide the framework for the exercise of the initiative and referendum power by the qualified electors.

The starting point for this analysis is an understanding that the initiative power is a reserved legislative power. This means that an initiative must be within the power to legislate. Acts within the authority of the judicial or executive branch are not subject to the initiative. Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867 (1928).

The determination of whether an act is legislative or administrative with respect to the initiative or referendum requires an analysis of the proposition as to whether action proposed in the initiative is making a new law or executing a law already in existence. As the Arizona Supreme Court noted in Wennerstrom v. City of Mesa, 169 Ariz. 485, 489, 821 P.2d 146 (1991):

"The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas it is administrative in nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. Similarly, an act or resolution constituting a declaration of public purpose and making provision for means of its accomplishment is generally legislative as distinguished from an act or resolution that merely carries out the policy of purpose already declared by the legislative body." citing, 5E McQuillin, The Law of Municipal Corporations §16.55 (3d.rev.ed. 1989)

Other jurisdictions have adopted a similar rationale. See, Wheelright v. County of Marin, 2 Cal.3d 448, 467 P.2d 537, 85 Cal. Rptr. 809 (1970), citing, Housing Authority v. Superior Court, 35 Cal.2d 550, 219 P.2d 457 (1950); Citizens for Financially Responsible Government v. City of Spokane, 99 Wash.2d 339, 662 P.2d 845 (1983) (Washington Supreme Court held that an action is legislative rather than administrative if it relates to a subject of a permanent and general, as contrasted to temporary and special character or if it makes new law rather than executes pre-existing law); Heider v. City of Seattle, 100 Wash.2d 874, 675 P.2d 597 (1984); Fite v. Lacey, 691 P.2d 901, 905 (Okla. 1984); Amalgamated Transit Union v. Yerkovitch, 24 Ore.App. 221, 545 P.2d 1401 (1975).

The question then becomes whether the proposed initiative:

1. Makes a law or is executing one already in existence and
2. Establishes a new policy or plan or executes an existing policy or plan?

The starting point for answering this question is a review of the existing City Charter and Code provisions.

The Peoria City Charter provides for the organization of various offices and departments of the City. Article IV, Sec. 1.A. (Appendix B) Further the charter provides that the Council shall provide for the number, title, qualifications, powers, duties and compensations of all officers and employees of the City. Article IV, Sec.1.C. (Appendix B). The Council has exercised this power through the enactment of Sections 21-16 through 21-20 of the Peoria City Code (1992) (Appendix C).

All remaining authority is granted under the Charter and Code to the City Manager. Secs. 21-16 - 21-18, Peoria City Code (1992) Appendix C). In fact, the City Council is precluded from further involvement in the Police Department under Article II, Section 20 Appendix D) of the City Charter and Section 2-67 of the Peoria City Code (1992) (Appendix E) both of which prohibit the City Council from interfering with the City Manager in the performance of his powers and duties.

The duties of the City Manager include the appointment of all employees, with the exception of charter officers and the preparation and administration of an annual budget. Article III, Section 3, Peoria City Charter (Appendix F). The City Manager has further been delegated authority to direct and supervise employees, investigate complaints and reorganize offices, positions and units of the City under Section 2-66 of the Peoria City Code (1992) (Appendix G).

The proposed Initiative would:

1. Establish a minimum staffing level for the police department and direct hiring and training.
2. Direct determination of City's population.
3. Prohibit reducing hiring standards or qualifications for police officers.
4. Prohibit reduction of wages or benefits for police officers.
5. Prohibit police officer staffing from falling below the mandated levels.

Reviewing the charter and code provisions outlined above, the City has established a comprehensive plan for the staffing of its departments, including the police department. The plan provides for the City Manager to submit for Council approval, the numbers, classifications, duties, salaries and qualifications for employees.

The assignment and staffing of employees is granted to the department heads and other supervisors through the City Manager. A review of Chapter 2 of the Peoria City Code (1992) indicates a comprehensive process for the City Manager to address all of the items contained in the Initiative.

The Initiative does not purport to replace the existing process, but to direct it in its entirety. Instead of the City Manager submitting qualifications to the Council for approval, the qualifications would be established by initiative. Instead of the

City Manager establishing hiring standards for police officers, the initiative would establish the hiring and training standards.

Instead of the City Manager determining the number of employees and their classifications for Council to review and act on through the budget process, the initiative would direct the classifications and numbers of employees.

Essentially, the initiative seeks to direct the City Manager how to exercise those duties that he was previously granted discretion to perform. Based on the court decisions discussed above, the Initiative would appear to be administrative not legislative. Instead of legislating a process or plan for the City to use in establishing numbers, classifications, duties, salaries and qualifications of employees, the Initiative attempts to eliminate the administrative discretion currently granted the City Manager to make these decisions.

The proposed Initiative seeks to direct the type of Administrative action that the Arizona Supreme Court held in the Wennerstron case is not an exercise of the legislative power. See, Hughes v. Bryan, 425 P.2d 952 (Okla. 1967). Therefore it is our opinion that the Initiative describe as INI96-03 is not a valid exercise of the qualified electors of the City reserved legislative power and therefore does not constitute a valid initiative.

The second restriction on the qualified electors of the City in exercising their reserved legislative power through the initiative is a limitation on their ability to delegate the legislative power. The qualified electors have no greater ability to delegate the legislative power granted to the City Council, than the City Council has the power to do. Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867 (1928).

There are two tests in evaluating the delegation of legislative power. First, is the act complete in all its terms and provisions, leaving no legislative judgments to those given power to administrate the legislation, Tillotson v. Frohmiller,. See, Transamerica Title Insurance Co. v. City of Tucson, 157 Ariz. 346, 757 P.2d 1055 (1988); Rossi v. Brown, 9 Cal.4th 688, 889 P.2d 557, 38 Cal.Rptr.2d. 363 (1995).

The Arizona Supreme Court in Tillotson noted that the delegation of projects to a Board of Directors of Public Institutions impermissibly delegated legislative powers to appropriate funds and determine the objects of expenditures. Such powers were granted exclusively in the legislative body under the Arizona Constitution.

The second test is whether the legislative power is granted specifically to the legislative body and not subject to being

delegated to others. The fact that the legislative body has such authority does not mean it can be delegated to the qualified electors. City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968).

This issue arose in the Transamerica Title Insurance Co. v. City of Tucson case. In Transamerica Title, a citizens group sought to file initiatives changing the City's general plan adopted pursuant to A.R.S. §9-461.05. The Arizona Supreme Court held that power to modify the general plan resided solely in the City Council and could not be delegated to the qualified electors of the City.

Other jurisdictions have adopted similar positions to that of the Arizona Supreme Court in Transamerica Title. See, Bagley v. City of Manhattan Beach, 18 Cal.3d 22, 553 P.2d 1140, 132 Cal.Rptr. 668 (1976). (California Supreme Court held initiative providing for binding arbitration of labor disputes constituted improper delegation of City Council legislative power.) The reasoning for this position is that the initiative cannot be used to interfere in a local legislative body's responsibilities, including the responsibility for fiscal management. Rossi v. Brown, 9 Cal.4th 688, 889 P.2d 557, 38 Cal.Rptr.2d. 363 (1995); Crane v. Frohmiller, 45 Ariz. 490, 45 P.2d 955 (1935).

The proposed Initiative constitutes such an improper delegation of the City Council's responsibility for fiscal management. Currently, the City Council each year determines the numbers, classifications, duties, salaries and qualifications of employees including those in the police department through the budget process. The proposed Initiative would remove this responsibility from the City Council.

Clearly, the City Council could not delegate its responsibility for fiscal management to the City Manager. To do so would violate Article VI, Section 3 of the Peoria City Charter (Appendix H) and Sections 2-180 - 2-182 of the Peoria City Code (Appendix I) that place the ultimate decision on appropriating funds as part of the budget in the City Council. Consequently, if the City Council were to enact legislation providing for mandated staffing of the police department not subject to appropriation and budget it would exceed the power granted to the City Council under the City Charter.

The same restraints on the City Council apply to the citizens in exercising the legislative power of the Initiative. The citizens have no more ability to delegate legislative power than the City Council does. Myers v. City Council of Pismo Beach, 241 Cal App. 2d 237, 50 Cal Rptr.402 (1966). Therefore, an initiative could not mandate staffing of the police department not subject to the power to appropriate and budget under the City Charter.

Accordingly, this office must find that the proposed Initiative improperly delegates legislative power reserved to the City Council under the City Charter. Therefore, the Initiative is not a proper exercise of the legislative power and is not entitled to certification and placement on the ballot.

The final restriction on the exercise of the initiative by the qualified electors is whether the legislature has preempted the local government's ability to legislate. Preemption is determined by the existence of two factors. First, whether the matter is a subject of statewide concern and second, whether the state legislation has appropriated the field. Jett v. City of Tucson 180 Ariz. 115, 882 P.2d 426 (1994). See, State v. Mercurio, 153 Ariz. 336, 736 P.2d 819 (App. 1987).

The question to be addressed is whether the proposed Initiative is inconsistent with the Arizona Constitution and Statute provisions governing municipal budgeting, appropriation and taxation. The Arizona Constitutional provisions may be found in Article 9, §§17-21, which were enacted by the voters in 1980, following other property tax and expenditure limitation initiatives such as Proposition 13 in California.

Subsequently, the legislature amended A.R.S. §§42-301 - 42-303 to implement the constitutional provisions. The provisions operate to establish a maximum amount of property tax that may be imposed by any city, except for bonded indebtedness approved by the qualified electors. Also, the provisions establish a maximum expenditure limit for each city, which may not be exceeded, except by a super majority of the governing body and approval of the qualified electors in advance.

Even if the City raises more than the expenditure limitation amount using the current level of taxes, the City may only spend the limitation amount. The provisions apply to all political subdivisions of the state, including counties, school districts, community college districts, cities, towns and charter cities. Ariz. Const. Art.9, Sec. 20.(11).

The constitution and statutes create two state agencies, the Economic Estimates Commission and the Property Tax Oversight Commission to regulate political subdivisions. The state auditor general is authorized to develop a uniform reporting system for all political subdivisions.

Under these provisions, Peoria is limited to taxing the maximum amount of its primary property tax levy. Also, the City cannot exceed its expenditure limitation established by the voters, even if revenues were available.

As part of the statutory process, the City Council is mandated to meet and establish the maximum limitations and to adopt a Tentative Budget setting the maximum expenditures that must be less than the expenditure limitation. The tentative budget must indicate each item of expenditure necessary for City purposes. The tentative budget also must indicate the amounts estimated as required for each department, public office or official. A.R.S. §42-302.A.

Subsequently, the City Council must hold a public hearing permitting any taxpayer to appear and be heard on any proposed expenditure or tax levy. The final budget must contain the amounts for expenditure for each purpose that may not exceed the total amount contained in the published estimates. A.R.S. §42-303.A-E.

Clearly, in mandating uniform reporting and budgeting procedures across the state and applying the procedures to all cities, including charter cities, the legislature indicated that the budget and appropriation of monies, even by local governments, is a matter of statewide concern. Also, the legislature has indicated a clear intent to appropriate the field. Both the constitutional provisions and A.R.S. §42-301 indicate an intent to establish a single process applicable to all governmental entities.

Unlike the judicial removal procedures at issue in Jett v. City of Tucson, the constitutional and statutory provisions in this matter are so comprehensive that a preemption intent by the legislature must be found.

The issue then becomes whether the proposed Initiative is conflicting with the legislative preemption, compared to addressing a common subject matter. In resolving this issue, the Initiative must be read as a whole, giving meaningful operation to all of its provisions. Wyatt v. Wehmuehler, 167 Ariz. 281, 806 P.2d 870 (1991).

The proposed Initiative mandates:

1. A mandated minimum staffing level for the police department and directing the hiring and training process.
2. Determination of City's population annually.
3. Prohibit reducing hiring standards or qualifications for police officers.
4. Prohibit reduction of wages or benefits for police officers.

5. Prohibit police officer staffing from falling below the mandated levels.

The proposed Initiative contains no reference to the City's mandated responsibility to appropriate, budget and expend its monies. In fact, it purports to eliminate this power to appropriate, budget and expend by prohibiting reduction of wages or benefits for police offices, reduction of hiring standards or qualifications and reduction of staffing.

Under the proposed Initiative, even if a majority of taxpayers requested at the annual budget hearing a reduction in the amount of City expenditures on the police department, the City Council would be unable to do so. Conversely, even if the amount of expenditures required by the proposed Initiative were to exceed the City's expenditure limitation, the proposed Initiative would require the City to expend such amounts. The result is that the legislative intent to have a common tax and budget process for all cities is defeated.

Courts in Arizona and other jurisdictions with similar initiative provisions have held that the initiative cannot be used to defeat legislative preemption. Cota-Robles v. Mayor and Council of Tucson, 163 Ariz. 143, 786 P.2d 994 (1989); See, Leshar Communications Inc. v. City of Walnut Creek, 52 Cal 3d 531, 802 P2d 317, 277 Cal. Rptr. 1 (1990); COST v. Superior Court, 45 Cal 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988). The same result occurs in this case.

The proposed Initiative seeks to defeat the legislative plan of expenditure limitation and tax limitation by removing the power from the City Council to establish a budget for the police department and vesting the power in the qualified electors. The qualified electors have no more power to defeat the legislative plan than that of the City Council.

A second preemption issue raised by the Proposed Initiative is whether the Initiative creates a debt without approval of the qualified electors. Article IX, Section 8 of the Arizona Constitution requires the approval of the qualified electors of the city for the creation of a debt. Municipal obligations payable from special improvement assessments or that do not involve a pledge of the general credit of the city are not subject to this limitation. City of Phoenix v. Phoenix Civic Center Auditorium and Convention Center Ass'n, 100 Ariz. 101, 412 P2d 43 (1966).

The obligation created by the proposed Initiative does not fall under this exception. Instead it will be paid as a general obligation of the city. The proposed Initiative by its own terms does not provide any discretion to the City Council for payment of

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the costs due under the Initiative, instead such payment is mandated. Under the Initiative the city is bound to expend money to pay for an expense. Rochlin v. State, 112 Ariz. 171, 540 P.2d 643 (1975)

The impact is identical to any other general obligation of the city that has a right to repayment from municipal tax revenues, except that the creation of this general obligation under the proposed Initiative is not voter approved. By its terms, the proposed Initiative does not provide for voter approval of obligation it would create. Such general obligations of the City are prohibited under the Arizona Constitution without the approval of the qualified electors.

Therefore, it is the opinion of this office that Initiative 96-03 is an attempt to enact legislation preempted by the Constitution and statutes of this state. Therefore the proposed Initiative is not a valid exercise of the legislative power and is not subject to certification and placement upon the ballot for submission to the qualified electors of the City of Peoria. If you should have any questions, please do not hesitate to contact me.

cc: Honorable Mayor and Council
Peter C. Harvey, City Manager