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**OFFICE OF THE CITY ATTORNEY**

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**OPINION NO. 99-05**

**TO:** Janice L. Graziano, City Clerk  
**FROM:** Stephen M. Kemp, City Attorney  
**DATE:** February 8, 1999  
**SUBJECT:** Recall Petitions, Eligibility of Circulator and Elector

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**QUESTION:**

Your opinion request raises four distinct inquiries:

1. Are the signatures of individuals who sign a recall petition to recall a Peoria City Council member valid if their address on the petition indicates they are residents and qualified electors of the district, even if their voter registration indicates that they are registered in another district in the City of Peoria?
2. Are the signatures of individuals who sign a recall petition to recall a Peoria City Council member valid, if their address on the petition indicates a Peoria residential address, but their voter registration on the date of signature indicates that they were registered in a precinct outside the City of Peoria?
3. Are the signatures of individuals who sign a recall petition to recall a Peoria City Council member valid, if the individual circulating the petition indicates a Peoria residential address, but their voter registration on the date of circulation and on the date of execution of the affidavit indicates that they were registered in a precinct outside the City of Peoria?
4. Are the signatures of individuals who sign a recall petition to recall a Peoria City Council member valid, if the individual circulating the petition executes the affidavit under one name, but their voter registration on the date of circulation and on the date of execution of the affidavit indicates that they were registered under a different name in a precinct outside the City of Peoria?

**OPINION:**

For purposes of this Opinion, the following factual background is provided. Peoria City Council members are elected by district. There are six Council districts. On December 23, 1998, the Peoria City Clerk issued a recall number for a recall

petition for the Council member representing the Ironwood District. Under the Arizona Constitution, the minimum number of valid required signatures for a recall of the council member is 191 signatures.<sup>1</sup>

On January 20, 1999, recall petitions containing 246 signatures were temporarily received by the Peoria City Clerk.<sup>2</sup> Pursuant to A.R.S. § 19-208.01, the Peoria City Clerk commenced the statutory verification process. After the Peoria City Clerk completed the first stage of the verification process, 243 signatures on 19 petition pages were transmitted to the Maricopa County Recorder for the second stage of verification in accordance with A.R.S. § 19-208.02

On February 1, 1999, the Maricopa County Recorder returned the petitions to the Peoria City Clerk. The County Recorder determined that 27 additional signatures should be struck as not registered voters at the time of signing or for other reasons. The County Recorder referred the following issues to the City Clerk.

15 signatures had voter registrations that indicated residence at a different address. Of these 15 signatures, 7 voter registrations indicated residence outside of the City of Peoria.

40 signatures were on petitions circulated by an individual whose voter registration indicated residence at an address outside of the City of Peoria and was registered under a different name. Some of which were already determined to be invalid for other reasons.

The City Clerk reinstated three signatures removed by the County Recorder.

With the initial striking of signatures of non-registered voters, 216 signatures were left. If the signatures of individuals who are registered in other jurisdictions in Maricopa County, but not in the City of Peoria and those signatures on petitions circulated by an individual registered under a different name in another jurisdiction in Maricopa County, but not in the City of Peoria, are removed and the reinstated signatures added to the total, then the total remaining number of signatures is 171, which is less than the minimum 191 required by the Arizona Constitution.

As indicated, If signatures of individuals registered in Maricopa County, but not in Peoria when they signed the petitions are not valid and the signatures contained on Petitions circulated by a circulator registered under another name and residence in Maricopa County, but not in Peoria are not valid, then the numbers of signatures on

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<sup>1</sup> Article VIII, Part 1, §1 of the Arizona Constitution requires a recall petition to be signed by a number of qualified electors equal to twenty-five percent of the number of votes cast at the last preceding general election for all of the candidates for the office.

<sup>2</sup> Once the city clerk receives recall petitions, a temporary receipt is issued until the petitions are verified and filed or returned to the party submitting the petitions. A.R.S. §§19-203, 19-208.01.

the recall petitions are insufficient and the Petitions shall be returned to the circulator pursuant to A.R.S. § 19-208.01.B. Conversely, if these signatures were valid, then the number of signatures would be sufficient and the Clerk would formally file the Petition in the manner provided by A.R.S. § 19-208.03.A.1, resulting in a recall election for the office of City Council member.

At the outset, it is acknowledged that the law in this area is confused at best, with a recent United States Supreme Court decision raising more questions. The starting place for this analysis is the Arizona Constitution and Statutes pertaining to recall.

The Arizona Constitution provides:

1. Officers subject to recall; petitioners

Section 1. Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a recall petition, demand his recall.

The constitutional provision has been implemented by the provisions of A.R.S. §19-205 and § 19-205.02 that provide:

§19-205. Signatures and verification

A. Every qualified elector signing a petition for a recall election shall do so in the presence of the person circulating the petition and who is to execute the affidavit of verification on the reverse side of the signature sheet. At the time of signing, the qualified elector shall sign and print his first and last name and the elector so signing shall write, in the appropriate spaces following the signature, his residence address, giving street and number or, if the elector has no street address, a description of his residence location, and the date on which he signed the petition.

B. The person before whom the signatures were written on the signature sheet shall in an affidavit subscribed and sworn to by him before a notary public verify that each of the names on the sheet was signed in his presence on the date indicated, and that in his belief each signer was a qualified Elector of the election district on the date indicated in which such recall election will be conducted. All signatures of petitioners on a signature sheet shall be those of qualified electors who are registered to vote in the same

county. However, if signatures from more than one county appear on the same signature sheet, only the valid signatures from the same county which are most numerous on the signature sheet shall be counted. In the absence of a legible signature, the name as it is printed shall be the name used to determine the validity of the signature.

C. The affidavit shall be in the form prescribed for initiative and referendum. In addition it shall also require a statement by the circulator that the circulator believes that the circulator and all signers thereof are qualified to vote in the recall election.

§ 19-205.02. Prohibition on circulating of petitions by certain persons

No county recorder or justice of the peace, and no person other than a qualified elector shall circulate a recall petition and all signatures verified by any such unqualified person shall be void and shall not be counted in determining the legal sufficiency of the petition.

The provisions of A.R.S. § 19-205 and § 19-205.02 are clear. In order for a signature to be counted as a valid signature, one must be a qualified elector of the election district in which the recall is being held. At first blush, the definition of qualified elector would appear to be that contained in A.R.S. § 16-121, which provides:

16-121. Qualified elector; definition

A. A person who is qualified to register to vote pursuant to section 16-101 and who is properly registered to vote shall, if he is at least eighteen years of age on or before the date of the election, be deemed a qualified elector for any purpose for which such qualification is required by law, except as provided in section 16-126. A person continues to be a qualified elector until that person's registration is canceled pursuant to section 16-165 or until that person does not qualify as a resident as prescribed by section 16-101, subsection B.

B. For purposes of subsection A of this section, a person who does not reside at a fixed, permanent or private structure shall be properly registered to vote if that person is qualified pursuant to section 16-101 and if that person's registration address is any of the following places located in this state:

1. A homeless shelter to which the registrant regularly returns.
2. The place at which the registrant is a resident.
3. The county courthouse in the county in which the registrant resides.

4. A general delivery address for a post office covering the location where the registrant is a resident.

C. A person who is otherwise qualified to register to vote shall not be refused registration or declared not qualified to vote because the person does not live in a permanent, private or fixed structure.

D. As used in this section, "homeless shelter" means a supervised publicly or privately operated shelter designed to provide temporary living accommodations to individuals who lack a fixed, regular and adequate nighttime residence.

Unfortunately, the definition of qualified elector has been complicated by a number of attorney general opinions, court decisions and legislative actions that appear to establish different standards depending on whether the matter is a nomination petition, initiative, referendum or recall. Division Two of the Court of Appeals in State v. Macias, 162 Ariz. 316, 783 P.2d 255 (App.1989), *rev. denied* defined qualified elector of a city as one who is registered and resident within the city for fifty days preceding the election.<sup>3</sup> The Court of Appeals cited to Article 7, Section 15 of the Arizona Constitution<sup>4</sup> and noted that the state had an interest in preventing "political carpetbagging" by individuals becoming residents and qualified electors after the fact.

In 1994, the Arizona Legislature amended A.R.S. § 16-135 to comply with the National Voter Registration Act of 1993.<sup>5</sup> The revised statute now provides:

16-135. Change of residence from one address to another

A. An elector who moves from the address at which he is registered to another address within the same county and who fails to notify the county recorder of the change of address before the date of an election shall be permitted to correct the voter registration records at the appropriate polling place for the voter's new address. The voter shall present a form of identification that includes the voter's given name and surname and the voter's complete residence address that is located within the precinct for the voter's new residence address. The voter shall affirm in writing the new residence address and shall be permitted to vote a "new residence ballot".

B. When an elector completes voting a new residence ballot, the election official shall remove the stub from the ballot, shall place the ballot in

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<sup>3</sup> It should be noted in 1990, the provisions of A.R.S. §9-822 were amended to reduce the residency period from 50 to 29 days.

<sup>4</sup> Article 7, Section 15 provides: Every person elected or appointed to any elective office of trust or profit under the authority of the state, or any political division or any municipality thereof, shall be a qualified elector of the political division or municipality in which such person shall be elected.

<sup>5</sup> See. 42 U.S.C. §1973gg.

an envelope for new residence ballots to be verified and shall deposit the envelope in the ballot box.

C. Within five business days after the election, a new residence ballot shall be compared to the signature roster for the precinct in which the voter was listed and if the voter's signature does not appear on the signature roster for that election and if there is no record of that voter having voted early for that election, the new residence ballot shall be counted. If the signature roster or early ballot information indicates that the person did vote in that election, the new residence ballot for that person shall remain unopened and shall not be counted.

The application of the amendments to A.R.S. § 16-135 were addressed by the Arizona Supreme Court in Pacuilla v. Cochise County Board of Supervisors, 186 Ariz. 367, 923 P.2d 833 (1996). The Court noted that "Courts must exercise restraint when interpreting constitutional and statutory provisions relating to election matters before imposing unreasonable restrictions on the right to participate in legislative processes." Citing, Kromko v. Superior Court, 168 Ariz. 51, 811 P.2d 12 (1991). The Court then found that the liberal construction of election requirements for initiatives should be applied to nominating petitions as well.

One year later in McDowell Mountain Ranch Land Coalition v. Vizcaino, 190 Ariz. 1, 945 P.2d 312 (1997), the Supreme Court rejected a liberal construction of election requirements for referendum elections noting: "Where a power so great as the suspension of an ordinance or of a law is vested in a minority, the safeguards provided by law against its irregular or fraudulent exercise should be carefully maintained." Citing, Direct Sellers Ass'n v. McBrayer, 109 Ariz. 3, 503 P.2d 951 (1972). The Court rejected vesting roving political circulators with the extraordinary power to delay the effective date of properly enacted legislation as violative of both the letter and the spirit of the law.

Three months later in Alliance Marana v. Groseclose, 191 Ariz. 287, 955 P.2d 43 (App. 1997), *rev.denied* 1998. Division Two of the Arizona Court of Appeals found that an individual must be a Marana resident in order to be a qualified elector of the City.

The meaning of qualified elector is even more confusing with recall elections due to the lack of recent case law and two conflicting Arizona Attorney General Opinions. The Attorney General stated in 1973 that recall petition circulators did not have to be registered voters. ARIZ.ATTY.GEN.OP.73-15 (1973). However, the statute has subsequently been amended.

Subsequently in 1987, the Arizona Attorney General in reviewing the current statute concluded that signatures on a recall petition circulated by anyone other than a qualified elector are void and may not be counted in determining the sufficiency of the petition. The Attorney General further concluded that a person who has moved

and neither re-registered or transferred his registration as required is not a qualified elector. ARIZ.ATTY.GEN.OP. 187-145 (1987) However, A.R.S. § 16-135 and § 16-584 have been amended since that opinion to modify the process of transferring registration.

Finally, on January 12, 1999, the United States Supreme Court rendered a decision in Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 119 S. Ct. 636, (1999). Buckley involved the constitutionality of a Colorado law pertaining to initiatives that required among others that circulators be registered voters. The U.S. Supreme Court finding that initiatives were an exercise of free speech upheld a residency requirement but struck down a requirement that initiative petition circulators be qualified electors of the state.

The question becomes how does this apparently contradictory and confusing legal background apply to recall and providing the answers to your inquiries? The answer begins with the Arizona Constitution. At the time of statehood, admission to the Union was conditioned on removal of a provision in the constitution permitting recall of judges. Once admitted, Arizona qualified electors promptly returned the provision to the constitution in the election of 1912. Clearly, the constitution and statutes of this state recognize the public right to recall their elected officials for any reason. Vinson v. O'Malley, 25 Ariz. 552, 220 P. 393 (1923).

In establishing the right of recall, the Legislature exercised its authority pursuant to Article 8, Part 2, Section 6 of the Arizona Constitution to require the right to be exercised by qualified electors of the election district from which a public official is elected through petitions circulated by qualified electors from the election district from which a public official is elected. Such a requirement recognizes the first amendment speech issues in any election, while at the same time applying the same rules to recall, as would apply to an election for that public officer. While striking down the Colorado Initiative provisions, the United States Supreme Court recognized that Colorado does have a substantial interest in its election process. In order to avoid an unconstitutional infringement of first amendment rights, the state can require no greater restrictions on recall of a public officer, than it imposes to vote in the election for that public officer. Buckley.

Municipal elections require that a resident meet the requirements of A.R.S. § 9-822, which provides:

§9-822 . Qualifications of voters

A. Except as provided in subsection B of this section, no person is entitled to vote at an election in a city or town who has not been a qualified elector as defined in section 16-121 in the city or town for twenty-nine days preceding the election.

B. Any person who has resided for at least twenty-nine days preceding an election in an area annexed at least twenty-nine days prior to such election by a city or town shall be entitled to vote at any such city or town election, provided he is a qualified elector as defined in section 16-121.

Accordingly, at a minimum to vote in a City of Peoria election, one must be a qualified elector of the City of Peoria for at least 29 days prior to the election.

The provisions of A.R.S. § 16-135 do not change this statute and to the extent that it is in conflict with A.R.S. § 9-822, it is our duty to give effect to both. Chaparral Development v. REMD Intern., Inc., 170 Ariz. 309, 823 P.2d 1317 (App.1991) *rev.denied* In that light, it is the opinion of this office that if an individual signing a recall petition indicated residency within the council district and was a qualified elector of the City of Peoria, regardless of the council district they were registered in at the time they signed the recall petition or if they indicated residency within the council district and were a qualified elector of the City of Peoria, regardless of the council district they were registered in and circulated a petition for recall, such signatures should be counted.

However, in order to be a qualified elector of the City of Peoria on the date one signed the petition or circulated the petition, one must be a resident of the City. However, if one changes their residency within the twenty-nine days prior to a primary, general or runoff election, they are deemed a resident of their prior precinct. A.R.S. § 16-125.<sup>6</sup> This statute is consistent with A.R.S. §16-135, allowing such individuals to vote a new resident ballot at their new precinct, and with proper verification at that time, they may execute a change of registration to the new voting precinct. The result is that the individual's ability to vote is protected regardless of the precinct they are deemed to be a resident of.

For purposes of signing a recall petition, A.R.S. § 16-125 requires that a registered elector who was registered at an address outside a City of Peoria precinct on the date that they signed the petition or within 29 days prior, is a resident of the precinct shown on their voter registration. As they are not a City of Peoria resident, they may not sign a recall petition to recall a City of Peoria Council member and their signatures are void and shall not be counted in determining the number of signatures for purposes of calculating sufficiency of signatures for recall. See, A.R.S. § 9-822; § 16-125; McDowell Mountain Ranch Land Coalition v. Vizcaino, 190 Ariz. 1, 945 P.2d 312 (1997); Alliance Marana v. Groseclose, 191 Ariz. 287, 955 P.2d 43 (App. 1997); Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 119 S. Ct. 636 (1999).

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<sup>6</sup> A.R.S. §16-125 provides: A registered elector who removes from one precinct to another during the twenty-nine day period preceding either a primary, general or runoff election is deemed to be a resident and registered elector of the precinct from which they removed until the day after the primary, general or runoff election, whichever applies.

Clearly, only qualified electors of the City may circulate recall petitions. A.R.S. § 19-205.02. This standard is no different than nominating petitions that may only be circulated by qualified electors. A.R.S. § 16-315. As the Arizona Supreme Court noted in State v. Macias, the state has a substantial interest in preventing “political carpetbagging” by individuals seeking political office who are not qualified electors of the jurisdiction they seek to represent. This same interest is no less with a recall where one seeks to remove an elected official. Therefore it is our opinion that a person circulating a recall petition is a resident at the address at which they are registered with the County Recorder as a voter at the time of their execution of the affidavit of circulation. A.R.S. § 16-125. If that address is outside of the City of Peoria, they are not a resident and qualified elector of the City entitled to circulate petitions for recall. A.R.S. § 19-205.02. As they are not a qualified circulator, signatures on petitions they circulated are void and should not be counted in determining the sufficiency of the number of signatures. McDowell Mountain Ranch Land Coalition v. Vizcaino, 190 Ariz. 1, 945 P.2d 312 (1997).

In the case where an individual has changed their name a new affidavit of registration is required. A.R.S. § 16-137<sup>7</sup>. The individual does not cease being registered at the time of marriage or a new registration, but in accordance with A.R.S. § 16-125, they are a resident of their prior precinct for twenty-nine days. If such precinct is outside of the City of Peoria, they are not a City of Peoria resident and qualified elector and may not circulate or sign referendum petitions. § 19-205; § 19-205.02.

Therefore, it is the opinion of this office that:

1. Signatures of individuals who were residents and qualified electors of the City of Peoria at the time they signed the recall petition should be counted if their address indicated they were residents of the particular council district regardless of their registration and absent any evidence to the contrary. A.R.S. § 9-822, § 16-121, § 16-125 and § 16-137.
2. Signatures of individuals whose voter registration on file with the Maricopa County Recorder indicated that they were registered in a precinct outside of the City of Peoria, Arizona on the date that they signed the recall petitions were not residents of the City of Peoria and therefore not qualified electors. Therefore their signatures are invalid and should not be counted in determining the sufficiency of the signatures. A.R.S. § 9-822, § 16-121, § 16-125 and § 19-205.

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<sup>7</sup> A.R.S. §16-137 provides: An elector desiring to register under a new name, resulting either from a court order or marriage, shall reregister and shall state on the new affidavit of registration his former legal name.

3. Signatures of individuals whose voter registration on file with the Maricopa County Recorder indicated that they were registered in a precinct outside of the City of Peoria, Arizona on the date that they circulated the recall petitions were not residents of the City of Peoria and not qualified electors. Therefore they are not valid circulators and any signatures they obtained are invalid and should not be counted in determining the sufficiency of the signatures. A.R.S. § 9-822, § 16-121, § 16-125 and § 19-205.02.

4. Signatures of individuals whose voter registration on file with the Maricopa County Recorder indicated that their name is different and that their name as circulator was changed by marriage or court order were required to reregister and until they have done so are registered at their prior precinct and if that precinct is outside of the City of Peoria, Arizona on the date that they circulated the recall petitions, they were not residents of the City of Peoria and not qualified electors. Therefore they are not valid circulators and any signatures they obtained are invalid and should not be counted in determining the sufficiency of the signatures. A.R.S. § 9-822, § 6-121, § 16-125, § 16-137 and § 19-205.02.

If you should have any further questions, please contact this office.

cc: Honorable Mayor and Council  
Terry Ellis, City Manager