



City of Peoria

OFFICE OF THE CITY ATTORNEY
8401 W. MONROE STREET, ROOM 280
POST OFFICE BOX 4038
PEORIA, AZ 85380-4043
T 623.773.7330
F 623.773.7043

OPINION NO. 2016-01

TO: John Sefton, Community Services Director
FROM: Stephen M. Kemp, City Attorney
DATE: March 18, 2016
SUBJECT: Opinion on Use of Municipal Arts Fund

QUESTION:

What are the applicable standards contained in City Code concerning the use and planning for the City of Peoria Municipal Arts Fund. In particular, how do these standards apply to the following types of expenditures?

- Grant Programs
- Maintenance of Art & Facilities
- Art Planning & Professional Services
- Artist Design & Related Expenses

OPINION:

There are two sections of the Peoria City Code that provide guidance on the expenditures from the municipal arts fund.

Sec. 2-127. Arts commission; establishment; powers and duties.

....

(d) The Peoria Arts Commission shall:

- (1) Consultation and discussion with Mayor and Council on Arts capital improvement projects, budgets and schedules.
- (2) Recommend the selection and commissioning of artists with respect to the design, execution, and placement of works of art for which appropriations have been made
- (3) Advise the appropriate City departments through the City Manager concerning maintenance requirements of works of art, and recommend to the responsible department the type, frequency and extent of maintenance required to preserve the quality and value of such works. Any proposed work of art which is demonstrated by an appropriate City department head or the Peoria Arts Commission to require extraordinary operations or maintenance expense, shall be reviewed with the City Manager and approved by the City Council.
- (4) Recommend to the City Council payment for the design, execution and

placement of works of art, within the appropriations in connection with specific projects or from designated appropriations to the Municipal Art Fund.

(5) Establish guidelines for accepting, selecting, purchasing, commissioning, placing, and maintaining City art acquisitions, gifts or temporary use and placement of loaned art.

(6) To recommend to the City Council the use of Public Arts Funds for the design, engineering, construction and operation of facilities owned by the City in whole or in part for the performing arts.

(7) In addition, the Peoria Arts Commission shall have such other powers and duties as directed by the City Council.

(e) Percent for arts funding.

(1) All capital improvement projects as defined in Section 2-126 shall include an amount equal to one percent (1%) of the projected cost at the time the project is included within the City's capital improvements program. For the budget year that the Council appropriates funding for the Capital Improvement Project and that the Capital Improvements Project is instituted, the one percent shall be deposited in the Municipal Arts Fund.

(2) Money collected in the Municipal Arts Fund shall be budgeted and expended in the same manner as other City revenues and used for projects pursuant to sections 2-126 through 2-130 of this code. Such expenditures may include the payment of debt service or lease obligations to construct permanent facilities for the display of and performing of arts. Funds unexpended may be re-budgeted in subsequent years in accordance with the City's budget processes. Such funds shall be treated as capital funds for the purpose of section 1-181 of this code.

....

Under Section 2-128 of the Peoria City Code (1992), the City has established a municipal arts fund. The section provides general standards governing the use of the fund as set forth below:

Sec. 2-128. Arts; municipal arts fund.

There is established in the city a special fund designated the municipal arts fund into which funds appropriated as contemplated by sections 2-126 through 2-130 of this code shall be deposited. Each disbursement from such fund or from other appropriations for works of art or for design, engineering and construction costs or facilities for the display and exhibition of art shall be recommended by the arts commission and authorized in accordance with this code and the City's budget.

The starting place for the interpretation of any statute or code is whether its language is clear and unequivocal. In such cases, the language is determinative of the statute's construction.¹ Section 2-127(d) (4) of the Peoria City Code (1992) authorizes the Arts Commission to Recommend to the City Council payment for the design, execution and placement of works of art, within the appropriations in connection with specific projects or from designated appropriations to the Municipal Art Fund. Therefore it is our opinion that payment of documented artist design and related expenses are a permissible use of the Municipal Arts Fund.

¹ *Deer Valley Unified School District v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007).

When a statute is subject to only one reasonable interpretation, it should be applied in such a manner as to effectuate the legislative body's intent.² The Peoria City Code (1992) provides in Section 2-127(d) (2) that the Arts Commission shall recommend the selection and commissioning of artists with respect to the design, execution, and placement of works of art for which appropriations have been made.

While the provision does not use the terms "Art Planning" or "Professional Services", implicit in the design of art is planning for such art and the commissioning of artists is directly related to professional services. It would lead to an absurd result if only the costs of selection could be paid, but other professional services such as "mock up" pieces; reference checking; concept development and other similar expenses could not be paid due to a strict interpretation of the code. Such an interpretation would violate the rules of statutory construction that a statute should not be interpreted to create an absurd result.³

Therefore it would be our conclusion that the expenses for art planning and related professional services for the design and commissioning of artists may be paid from the municipal arts fund.

Similarly, the Peoria City Code (1992) provides in Section 2-127(d)(6) that the Arts Commission may recommend to the City Council the use of Public Arts Funds for the design, engineering, construction and operation of facilities owned by the City in whole or in part for the performing arts. While no reference is made to maintenance of facilities containing art is contained in the code, Webster's New College Dictionary defines operation as the condition of being operative or functioning in full operation.⁴ Functioning in full operation certainly implies keeping the item in suitable condition to operate. Applying the same rules of statutory construction as outlined above, it is our conclusion that the expenses for maintenance of art and the expenses for maintenance of facilities where art is contained may be paid from the Municipal Arts Fund.

Unlike the other three items contained in your request, the provisions of the Peoria City Code (1992) pertaining to the Municipal Arts Fund contain no reference to authorizing grants to third parties. As a result a more detailed statutory analysis is required. First, the Arizona Court of Appeals recognized that the provisions of A.R.S. §9-240(B) (28) authorizing city councils to enact laws and regulations necessary to promote the general welfare of its people included authorization for a cultural facilities impact fee.⁵

Peoria's city charter contains similar language, Article I, Section 3 (16) provides: In this charter mention of a particular power shall not be construed to be exclusive or to restrict the

² *Glazer v. State*, 237 Ariz. 160, 347 P.3d 1141(2015)

³ *State v. Valenzuela*, 116 Ariz. 61, 567 P.2d 1190 (1977)

⁴ *Webster's New Collegiate Dictionary, Houghton Mifflin, 2001*

⁵ *Homebuilder's Association of Central Arizona v. City of Mesa*, 226 Ariz. 7, 243 P.3d 610 (App.2010)

scope of the powers which the city would have if the particular power were not mentioned. The charter shall be liberally construed to the end that the city shall have all powers necessary or convenient for the conduct of its municipal affairs, and for the health, safety, and general welfare of its inhabitants, including all powers that cities may assume pursuant to state law and the state constitution.

A.R.S. §9-461.05.E.5; 7 and 11 all provide for elements of the city's general plan to provide for civic and community centers, community redevelopment, and neighborhood preservation and revitalization. Clearly implied from these statutes is the power of the City to plan for programs that are related to arts and culture. As the Court of Appeals held in the *City of Mesa* decision, the general welfare clause in the Peoria City Charter, which is nearly identical to that contained in A.R.S. §9-240(B)(28) constitutes a legal basis for the City to expend funds on Arts and Culture.

The City having such authority, the question is then whether the City can delegate its authority to third parties through the payment of grants to such parties for their performance of these services, which the City itself could perform. Generally, a principal, such as the City may delegate its authority to its agents, unless it is a non-delegable duty. A non-delegable duty exists where the principal has a special responsibility to individuals above the normal obligations.⁶ The non-delegable duty rule has been applied to cities as well.⁷

The question is whether the common law, statute, city charter or code places upon the City any special duty to provide arts and culture. If it does not, then the duty may be delegated to third parties.⁸ As the Arizona Supreme Court held in *Myers v. City of Tempe*, 212 Ariz. at 132, 128 P.3d at 755, if neither the common law nor any other source imposes the duty upon the City, then the City voluntarily assumed the duty and may delegate the duty.

The City has voluntarily assumed the responsibility of supporting arts and culture. It may delegate this duty to third parties through the provision of grants and monies, subject to the existence of commercially reasonable consideration resulting in compliance with Article IX, Section 7 of the Arizona Constitution, commonly referred to as the "Gift Clause". Therefore we conclude that the City may expend monies from the Municipal Arts Fund for grants to third parties for Arts and Cultural services that the could perform, but has elected to delegate to such third parties.

Should you have any further questions, please do not hesitate to contact this office.

SMK:SK

⁶ *Fort Lowell-NSS Ltd. Partnership v. Kelly*, 166 Ariz. 96, 800 P.2d 962 (1990)

⁷ *Wiggs v. City of Phoenix*, 198 Ariz. 367, 10 P.3d 625 (2000)

⁸ *Myers v. City of Tempe*, 212 Ariz. 128, 128 P.3d 751 (2006)