



PRESCOTT CITY COUNCIL SPECIAL MEETING AGENDA

**PRESCOTT CITY COUNCIL
SPECIAL MEETING
Monday, August 31, 2009
3:00 PM**

**City Council Chambers
Prescott City Hall
201 South Cortez
Prescott, Arizona**

The following Agenda will be considered by the Prescott City Council at a Special Meeting pursuant to the Prescott City Charter, Article II, Section 13. Notice of this meeting is given pursuant to Arizona Revised Statutes, Section 38-431.02.

I. Call to Order.

II. Roll Call.

MAYOR AND CITY COUNCIL:

Mayor Wilson

Councilman Bell*

Councilman Lamerson

Councilwoman Lopas

Councilman Luzius

Councilman Roecker

Councilwoman Suttles

*May be participating via telephone

III. Discussion and possible action(s) and/or staff direction pertaining to proposed Taxpayer Protection Initiative Charter Amendment.

IV. Adjournment

CERTIFICATION OF POSTING OF NOTICE

The undersigned hereby certifies that a copy of the foregoing notice was duly posted at Prescott City Hall on _____ at _____ .m. in accordance with the statement filed by the Prescott City Council with the City Clerk.

Elizabeth A. Burke, MMC, City Clerk

COUNCIL AGENDA MEMO – (August 31, 2009)

DEPARTMENT: Legal Department

AGENDA ITEM:

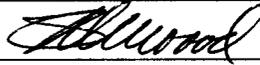
Approved By:

Date:

Department Head: Gary D. Kidd

Finance Director: Mark Woodfill

City Manager: Steve Norwood



08/27/09

Item Summary

Discussion and possible action(s) and/or staff direction pertaining to proposed Taxpayer Protection Initiative Charter Amendment

Background

Councilmember Lamerson, following up on discussions relating to this matter, contacted Representative Mason in order to obtain a formal legislative opinion discussing signature requirements for City Charter amendments. He has obtained that opinion, which is attached to this memo for Council discussion and any possible action including possible direction to City staff. The opinion is self-explanatory, and states in pertinent part the opinion of legislative counsel that the signature requirement for Charter amendments is 25%. Council has previously debated a number of issues pertaining to this issue and the proposed Charter amendment ballot measure, and determined at that time, after discussion of numerous factors which are summarized in the minutes of that meeting, which are attached for reference to this memo, to allow the measure to proceed with 15 percent signatures. Due to the legislative opinion, this matter has been requested to be brought back for further discussion, and if decided to be necessary, action by the Council.

Possible actions include proceeding as decided by Council on its meeting of June 23, 2009, rescinding that action and directing staff to not place the matter on the ballot or to take other possible actions; conducting further discussion on this item at a later time to allow Council time to consider the issues presented during the discussions of this item; and could even include, in view of the conflicting opinions and issues presented to council, even consideration of seeking a judicial determination of the various legal issues.

Attachments-

- 1) Formal Legislative Opinion
- 2) Minutes of June 23, 2009 meeting

Recommended Action: MOVE to _____.

1700 WEST WASHINGTON, SUITE H
PHOENIX, ARIZONA 85007-2844
CAPITOL PHONE: (602) 926-5874
CAPITOL FAX: (602) 417-3001
TOLL FREE: 1-800-352-8404
lmason@azleg.gov



COMMITTEES:
WATER AND ENERGY,
CHAIRMAN
ENVIRONMENT

Arizona House of Representatives
Phoenix, Arizona 85007



LUCY MASON
DISTRICT 1

August 21, 2009

The Honorable Jim Lamerson
Prescott City Council
201 S. Cortez St.
Prescott, AZ 86303-3938

Dear Jim:

Further to our recent conversation, I wanted to follow up with additional thoughts regarding the process of amending city charters and the conflicting Arizona Constitutional provisions related to the process. Specifically at issue is the requisite percentage of votes required by the qualified electors necessary for a measure to be on the ballot. Apparently, there has been some confusion about this issue. Recently, I have received inquiries regarding the Prescott city council taking action on an initiative petition to bring a proposed change to its municipal charter to the voters of Prescott. From the description of events I have received, the city council has acted to move the matter to an election, but has taken this action based on petition signatures of only 15% of the qualified electors. I believe this is a serious problem.

In reviewing the pertinent provisions of the Constitution with attorneys from our staff at the House of Representatives, it is my understanding that 25% of qualified electors can cause a measure of this sort to be decided by the voters. Under Article 13, Section 2 of the Constitution it provides that charters may be amended by petition "as hereinafter provided". Section 3 then provides that "twenty-five per centum of the total number of votes cast at the next preceding general municipal election" is required.

Confusion may stem from the language of Article 4, Part 1, Section 1 (8). In the Article 4 provision, it provides that 15% of qualified electors are required for petition signatures related to other initiatives. Clearly, any initiative not related to amending the charter requires 15% of qualified electors, but since the initiative described to me relates to amending the charter, I believe the more specific constitutional provision requiring 25% is applicable under the circumstances.

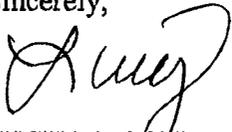
To reconcile these two provisions, I am advised that general principles of constitutional interpretation will apply. That is, where a specific and a general provision of the Constitution

Jim Lamerson
Prescott City Council
August 21, 2009

conflict, the more specific provision controls. Here, signatures of 25% of the qualified electors is required for a charter initiative to make its way to the voters under Article 13, Sections 2 and 3. If the city council has voted to submit an initiative charter question to the voters without the requisite number of petition signatures, I have great concern that the council's action is subject to challenge and may be overturned. Moreover, a defect of this nature could even threaten the validity of the charter amendment if ultimately adopted by the city voters. For these reasons, an election of this sort could very well be an exercise in futility, which raises the most important question of all - whether such an election would be an appropriate use of public resources by the council. (For your convenience I have enclosed an opinion from Legislative Council.)

If the facts are as they appear, it would be my hope the council promptly reconsider or rescind its action. If you have any further questions or I can assist in any other way, please do not hesitate to contact my office.

Sincerely,



LUCY MASON
State Representative
District 1

LM/sr

cc: The Honorable Jack Wilson, Mayor of Prescott
Gary Kidd, Prescott City Attorney

enclosure

LEGISLATIVE COUNCIL

MEMO

August 21, 2009

TO: Representative Lucy Mason
FROM: Ken Behringer
General Counsel
RE: City Charters; Amendment (R-49-88)

QUESTION

What is the signature requirement for a petition to request an election for the amendment of a city charter?

ANSWER

The petitions must be signed by qualified electors of the city numbering at least twenty-five percent of the total number of votes cast at the immediately preceding general municipal election. A proposed charter amendment accompanied by petitions with fewer signatures may not be placed on the ballot.

The Constitution of Arizona discusses city charters in article XIII, sections 2 and 3. Section 2 provides that charter amendments may be proposed by the legislative authority of the city or "by petition as hereinafter provided."

Section 3 prescribes the requirements for calling for an election of the board of freeholders to draft the initial charter. By the reference in section 2 quoted above, the petition requirements of section 3 also apply to requests for amendments to the charter. Under section 3, the petitions must be signed "by a number of qualified electors residing within such city equal to twenty-five per centum of the total number of votes cast at the next preceding general municipal election."

The statutes reiterate these petition requirements in Arizona Revised Statutes sections 9-281 and 9-283. The predecessor to these statutes was enacted by the First Legislature in 1912. *See* Laws 1912, 1st Special Session, chapter 11, sections 1 and 2.

This is not a matter of neutrality of the City Clerk, but a matter of correctness of the face of the petition. It does not invade the neutrality of the City Clerk to make sure that the petitions are in regular form. He thinks and believes that it is her duty. Whether the laws or case law, has not defined the clerk in determining the number of valid signatures, they impose the duty to make sure that each signature, each petition, is substantially in regular form.

If they need wiggle room, without changing the charter, he thinks that they can rest assured in the City Clerk's duties, that when she is counting the signatures she could also make sure that they are in regular form.

Steve Blair, 1802 Northside Drive, commented that it takes a big person to step up and file a lawsuit. He thinks that there should be a Charter change and the County should oversee the complaints. He thinks that they should ask the public that vote on how they want it to read. They do not need to look to the State or League to do it. They need to do it in the City of Prescott. He is setting up a legal defense fund for Tammy Linn. People can e-mail him at sblair1802@cableone.net because he thinks it is unfair that someone should have to spend \$1000 to \$2000 to rectify something they should be doing in their Charter.

Mayor Wilson asked if there was general agreement to go forward with legislative solution. Councilwoman Suttles asked if he was going to wait and go through the legislative process.

Mayor Wilson said that he though that they should go through the legislature. He wanted to see if he could get a feeling from the Council to instruct staff to start working on what it takes to bring it forward to the League of Cities and talk to the representatives. They can prepare both if they would like.

Councilwoman Lopas said that she would like them to prepare both. They will be too late to get it on the ballot this year. If they do not get League support, they can still do it next year.

Mayor Wilson said that they would prepare both approaches and take it forward to the League this year and Mr. Lamerson will be working on the Resolution Committee on the day of the election.

I.* Discussion and possible action of Initiative Process and required signatures.

Mr. Kidd said that Councilman Roecker and Councilman Bell asked to have this put on the agenda for discussion purposes. When the process on this item was brought to the Clerk's office, she followed Title 19. That is

the process for initiatives for charter amendments which is provided by State Statute. She advised the individuals who were taking out the petition that was the process, and that is a process that has used by the state for some time. It is also the process that the City of Prescott has used in the past.

He said that part of his department's reviews is to flag election issues. A number of years ago they had Prop 400. There were a number of issues during that time, regarding signature requirements; there was a challenge. The City became involved in that matter, as a friend of the court. There were additional issues that had to be interpreted by resolutions.

When he did the research he also had Matt Podracky work on it. In conjunction with other issues, they discovered that their Charter refers back to the Arizona Constitution.

The problem with the Charter is that it does not mention what section of the Constitution it refers back to. In general legal interpretation you go to the one that applies to Cities. There is a section in the Arizona Constitution, Article 13 which pertains to municipalities. That article, in section 2, says that charters may be amended by petitions. When going through the charter process for amending charter it refers to a board of free holders and a calculation of 25% signatures and another section that deals with what a petition is.

Title 19 also references 25%. When he became aware of the problem he sent an e-mail to the City Manager, City Clerk and the Mayor to advise them that there was a potential legal issue. The Mayor set up a meeting and he presented information he had found. The Mayor asked the City Clerk to send a letter to the initiative group to advise them of a potential issue and then asked Mr. Kidd to write a legal opinion. They cannot provide private legal advice. He issued that opinion at that time.

They felt that they needed to make the people aware of the potential legal issue. Some feel there is a big conspiracy. There is a statute that says one thing and a charter that refers to the Constitution. In his legal opinion, the Constitutional section that pertains is the one that deals with the city charter amendments, which is article 13. There is a problem between the State Statutes and the Constitution.

The Mayor and City Clerk opted to make that opinion public and now they have an issue that has not been cited. A good argument can be made that the Constitution provided for amendment to charters and wanted 25% of people to sign those petitions. Just like they wanted 25% of the people to create the original charters, so that they would be able to create Home Rule Charter Cities.

The flipside of that argument is that the State Statute dealing with elections, in the League Manual, deals with the signature requirement of 15 %. It is based on the normal initiative and referendum, from the State Constitution, which provides that initiative and referendums require 15% signatures. The intent was to flag for the Council and the citizens that there is a legal issue.

He does not know how to reconcile the State Statutes and the State Constitution. There are some inherent problems in the process. To be conservative and safe, he would recommend the 25%. He acknowledged that the State Statute is different. He also acknowledges that they have told the citizens differently.

Mayor Wilson said that there has been some discussion by the public that they changed the rules in the middle of game and that is illegal. He asked Mr. Kidd to address that. Mr. Kidd said that he was sent a copy of State Statutes Section 19-117, but there has been no case on that particular point.

Mayor Wilson asked if they let the 15% go, if a citizen would then have an opportunity to challenge that on the Superior Court level and invalidate what had been done by the citizens. Mr. Kidd said yes. After the petitions were filed and it was going to the ballots, an elector could file a challenge.

Councilman Roecker said that it boils down to a fairness issue. This organization was told 15%. They are three weeks ahead of the due date and they are changing the rules. It is inherently unfair to require that. He does not agree with the initiative but he does think the process is being handled incorrectly. He asked if that body has the authority to accept 15% as the number to qualify to be put on the ballot.

Mr. Kidd answered yes, in his opinion. He said that he, as the City Attorney, gives the Council opinions and they have the ability to accept the recommendation from the City Attorney or not. If they were to make that decision, he would honor that.

Mr. Roecker said that after the discussion he will be making that motion.

Councilman Bell asked Mr. Kidd if he knew of any municipality, in the state that required 25%.

Mr. Kidd said that he did not know of any, but they did talk with Cathy Connolly who worked for the League of Cities for a number of years. She is the most learned expert in election law, and her opinion was 25%.

Councilman Bell said that the perception is that they brought this issue up because they were trying to stifle this initiative, and that was untrue. The people passing these petitions are entitled to do that. He said that he would be seconding Councilman Roecker's motion.

Councilman Luzius asked what prompted this inquiry. Mr. Kidd said that he had initially flagged it as an election issue to research the process. There were a number of discussions with staff members and other individuals over the last few months relating to the legality of this. The reason he did not get to it was because he was involved with AP&S and the SRP lawsuit.

Councilman Luzius asked him if it was his own initiative and not from anyone on the Council. Mr. Kidd said that it was his own initiative. There was not a single Council member who told him to find something wrong with that item.

Staff members do not like elections because there are inherent issues. Not a single Council member directed them to find a problem with that. When he became aware of the problem, he advised the City Clerk and the Mayor and they promptly released that opinion to let people know that there was a legal issue out there. He thinks that what the Mayor and the Clerk did was in the best interest of the people.

Councilman Luzius said the Mr. Kidd has told them that if it seems like a conflict of interest, it should be considered. His position is that if they think this is an issue of conspiracy it could be taken as that. Mr. Kidd said that he does not think there is any conspiracy whatsoever.

Councilman Luzius said that in retrospect it appears that there could be and for appearance sake he would like to echo what Councilman Bell and Roecker have said, that he thinks it is unfair to change the rules midstream. He would support what they are going to nominate and second.

Councilman Lamerson did not think that they were changing the rules. They are acknowledging that they did not know the rules. He commends Mr. Kidd for saying they fouled up. Everyone swore to uphold the Constitution and obey the laws of Arizona. He is not willing to vote against the Constitution or laws of the State of Arizona.

Councilwoman Lopas said that between this issue and the last agenda issue, it seems that there is some Charter ambiguity and asked when the last time was that the Charter was updated. She thinks they need to take a hard look at the Charter because they have some loopholes and something is wrong. She does not know how they should do it.

Councilwoman Suttles said that she appreciated Mr. Kidd's explaining of where they are. She said that they are in a gray area. They read it and had it presented to them. To sidestep the issue at that time, she does not think that is the right thing to do. She does understand the group finding out very late. She said that if they had done any of their homework and asked for any of the information, they would have seen it just like the Council did. No one is trying to hold them back. They need to clean some of this up and it is the Charter that they need to get on. She is going to back the City Attorney.

Councilman Roecker asked if there was anything illegal if he made the motion to go with 15%. Mr. Kidd said no, but there are some legal issues. If Mr. Roecker were to make that motion he would be following what the State Statute and the League Manual says to do. He would be following the referendum process in the State Constitution. He would be not complying with the other section of the State Constitution.

Councilman Roecker asked if there was a case law to say which one overrides the other and if either one could be a legal decision until challenged. Mr. Kidd said that was correct.

Mayor Wilson said that they tried to do the right thing when the legal opinion went out. There was no conspiracy. They did not have to release that. They released it to benefit those circulating petitions. If they move forward and say that it is 15%, it just says go out and do it. It does not say they cannot be sued for 25%.

Jerry Smith-Fornara, 405 Park Avenue, said that in 1964 she and the late Dr. Kern Sheils, head of Political Science section in the graduate school of the University of Arizona, founded the Arizona Consumers Council. They put forth and got tax law prescriptions and many other things through the years. Always through those statewide referendums, they were required to have 25% - no less and no more. Anyone that has looked at the state law since that date has known that it has been 25%. She does not know why anyone who started an initiative/referendum did not bother to look at State Statutes.

Brad DeVries, 444 Campbell, said he was the Chair of the Taxpayer Protection Committee. The City Attorney noted that if they look at the State Statute it is clear that it is 15%. They are confident that come November, no matter what happens, it will be on the ballot. They believe that for a number of reasons, because they believe they are on firm ground. Every city has interpreted the same Constitution for the last 97 years. That has been the rule and that has been the law and what they were told.

Mr. DeVries said that he could add a fairly clear chronology to the discussion. On April 15, he and John Danforth went into the City Clerk's office and requested petitions for the initiative. She told them that they would need 2,057 (2,058) valid signatures, which was 15%. They would be due the beginning of July. One and one half months later, approximately two-thirds of the way through the signature gathering process, they got a letter from the City Clerk, which he then read. It was recommended that they discuss the issue with their attorney and did not definitively state that the number would, in fact, be 25%. On June 8, they received a letter from the Mayor which was a cover letter over the City Attorney's legal opinion. He said that they may want to consult with their attorney about the issues raise in the memorandum. They did that. They firmly believe they are on firm ground insisting on 15%.

The section of the Constitution that the City Attorney is basing 25% on refers to the election to a board of freeholders to form a new city charter. There may be some ambiguity there, but it is very clear that it is about forming a new city charter. He urged them to go back and read that section of the Constitution in full.

On June 11 he received a letter in response to a June 10 document request. He thanked the City Clerk for a one day turnaround on the request. They asked for documents related to this. The Clerk responded that she had queried city clerks around the state, Tempe, Tucson, Phoenix, Flagstaff, and Bisbee. They all responded that they required 15% for Charter Amendments pursuant to the Constitution and State Statute.

On June 17, they finally received confirmation that the City would require 25%, two weeks before the conclusion of their signature gathering period. The City first said 15%, and then they said they were not sure, and then two weeks before signatures were due, they said 25%.

They believe the action is misguided and an attempt to abridge the public's right to the initiative process. They asked for it to be reversed. They would like to see a resolution before the City Council that does that, that evening. He would like to see that no city funds be expended in order to raise that limit to 25% at a later date.

Jim Lawrence, 345 High Chapparal Loop, commented that the City Attorney mentioned from a historical standpoint Prop 400. He said that in a weaker moment he had agreed to be the treasurer of Prop 400. Unfortunately, it almost cost him a 58 year marriage. When they applied for the initiative they received the count that was necessary based on 15% of the election. A few days after that, they found out, through an error, that

the wrong election was used so the 15% was not quite 15%. Fortunately, that was early on in the process.

They were sued by an organization challenging their signatures. The City of Prescott was also named in the suit, as was the county. One of the leading law firms challenged not only the signatures, the validity of them, number of them, and in some cases, alleged there was fraud on the signing of them. But, the situation, in reality, even though this was a prestigious law firm and possibly the best authority on this, they did not win. Finally, there was a unanimous verdict of the Supreme Court and they went ahead and got a good election. The thing that confuses him was that this law firm did not challenge on them on 25%, it used the 15%.

COUNCILMAN ROECKER MOVED TO APPROVE A 15% REQUIREMENT FOR BALLOT SIGNATURES TO PLACE THE TAXPAYER PROTECTION INITIATIVE ISSUE ON THE 2009 BALLOT; SECONDED BY COUNCILMAN BELL

Councilman Lamerson asked Mr. Kidd if Proposition 400 changed the Charter. Mr. Kidd answered yes.

Councilman Lamerson asked Mr. Kidd if he was correct that 15% was not in the Constitution. Mr. Kidd said that there was no case on point. He is convinced that with about an 80% chance, that is the correct legal opinion. He does think that there are problems with the Statutes and some ambiguities in the Constitution. There is a fair degree of uncertainty and there is no case law on that point.

Mayor Wilson asked Mr. Kidd if this got on the ballot at 15%, if someone could still bring a court case. Mr. Kidd said that there was nothing that they could do to preclude someone from challenging putting that issue on the ballot.

Councilman Roecker asked if the 15% is approved, and this passes, if it would become invalid if it were challenged on the 15% level. Mr. Kidd said that he did not know. The issue is whether once the election has passed, they can go back and open it up. There are some weird nuances in terms of constitutionality of ordinances or things that are passed. They can often be filed without regard to any statute of limitations. If they find anything is unconstitutional based on the statute of limitations, they can challenge it at any time. The other issue is by lapse of time, the failure to object to a ballot measure before it was passed, and that may prevent them from making the challenge.

**THE MOTION PASSED 5-2 WITH COUNCILWOMAN SUTTLES AND
COUNCILMAN LAMERSON CASTING THE DISSENTING VOTES.**

- IJ.*** Public Hearing on the Final Budget for Fiscal Year 2010 including expenditure limitation and proposed tax levy.

Mr. Woodfill said that this was the public hearing for the 2010 budget and also for the City of Prescott expenditure limitation for 2010 and for the property tax levee for 2010. He said that the budget was \$180,818,693.00 proposed for 2010, it was published by the City Clerk, twice in the paper, along with the hearing date.

Councilman Lamerson said that as he has stated in the past, he does not support the budget or the inclusion of items in the budget, specifically more money for Open Space. He is not in agreement of funding the Meals on Wheels. While they spend money on firecrackers and lightings, he thinks that their priorities are screwed up and the budget is a good indication of that.

**COUNCILWOMAN LOPAS MOVED TO CLOSE THE PUBLIC
HEARING; SECONDED BY COUNCILMAN ROECKER; PASSED 6-1
WITH COUNCILMAN LAMERSON CASTING THE DISSENTING VOTE.**

VI. ADJOURNMENT

The Regular Voting Meeting of June 23, 2009 adjourned at 5:30 p.m.

SPECIAL MEETING

1. Call to Order.

The Special Meeting was called to order at 5:30 p.m.

2. Adoption of Resolution No. 3974-0980 – A resolution of the Mayor and Council of the City of Prescott, Yavapai County, Arizona, finally determining and adopting estimates of proposed expenditures for the Fiscal Year 2010, and declaring that the same shall constitute the budget for the City of Prescott for said fiscal year and establishing the expenditure limitation, approving and updating the job roster for the City of Prescott and setting forth its determination as to unfunded capital and other unfunded budgetary requests.

Mr. Woodfill explained that this was the actual resolution to adopt the final 2010 budget.