


Memorandum

City of Las Vegas Office of the City Attorney

To: Beverly Bridges
City Clerk

From: Bradford R. Jerbic 
City Attorney

CC: Mayor Oscar Goodman
Mayor Pro Tem Gary Reese
Councilman Steve Wolfson
Councilwoman Lois Tarkanian
Councilman Steven Ross
Councilman Ricky Y. Barlow
Councilman David Steinman
Betsy Fretwell, City Manager

Date: March 4, 2009

Re: Referendum and Initiative Petitions Filed December 9, 2008

You have inquired concerning the validity of the referendum petition which seeks reconsideration of Ordinance No. 5830, adopting the redevelopment plan for Las Vegas. You have determined that the petition is sufficient with respect to the number of signatures, but you seek guidance concerning the substantive validity of the proposal.

It is clear that, if the City Council were to repeal Ordinance No. 5830, there would not be sufficient funds to repay the approximately \$23.3 million in bonds that have been issued for existing redevelopment projects plus \$50.8 million in tax increment notes. Nor would there even be a redevelopment agency to meet the repayment obligations. The committee failed to inform the signers of the petition of these impacts.

Under well-established case law, legislation that affects the ability of government to perform a covenant to repay bonds represents an unconstitutional impairment of contractual obligations under the Federal Constitution. See, United Trust Company of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505 (1977). Voter-approved legislation that has such effect is similarly invalid under either state or federal constitutional provisions that protect of the obligations of contract. Continental Illinois National Bank and Trust Company of Chicago v. State of Washington, 696 F.2d 692 (9th Cir. 1992); Ruano v. Spellman, 505 P.2d 447 (Wash. 1973).

In this instance, the obligations of the Redevelopment Agency to bondholders clearly would be impaired if the City Council were to repeal Ordinance No. 5830 or if the voters were to "reject" the ordinance by means of a vote under the referendum.

Therefore, it is the recommendation of this office that your office notify the petitioners of the legal insufficiency of the petition. The City is not obligated to put on the ballot any measure that would be invalid or unconstitutional if approved. Based upon the foregoing, it is the advice of this office that the "Referendum Petition" not be put on the ballot. Further, this memorandum will serve as advice to the City Council that the "Referendum Petition" cannot be adopted by the City Council for the reasons stated herein.

Submitted at City Council

Date 3/4/09 Item 14, 55, 56, 70

You have also inquired concerning the validity of the Initiative Petition. The Initiative Petition proposes the following language:

The People of the City of Las Vegas do enact as follows:

The Las Vegas Taxpayer Accountability Act

Section 1: Voter Approval for Certain City Development Projects.

A new Section 2.340 is added to the City of Las Vegas Charter:

Section 2.340. Voter Approval for Certain City Development Projects.

(1) Notwithstanding any other provision of the Charter or Municipal Code, the following provisions shall apply to any lease-purchase agreement for the construction or remodeling of a building or facility entered into pursuant to Section 2.145 of the City of Las Vegas Charter.

- (a) Annual appropriations of \$2 million or more to satisfy an obligation under any lease-purchase agreement for the construction or remodeling of a city building or facility shall be subject to voter approval.
- (b) the question of whether to make such an appropriation shall be presented to voters at the general municipal election proximately prior to the beginning of the fiscal year in which the obligation under the lease-purchase agreement is due. At such general municipal election, registered voters shall be presented with all proposed appropriations for the ensuing two fiscal years.
- (c) If a majority of the registered voters voting on the question is in favor of the proposed appropriation, the proposal is carried and otherwise the proposal is defeated and the proposed appropriation shall not be made.
- (d) The ballot question for proposed appropriations submitted to the registered voters must contain the amount and due date of the obligation for which each appropriation is proposed and the purpose of the lease-purchase agreement under which the payment is due.

(2) Notwithstanding any other provision of the Charter or Municipal Code, the registered voters of the City of Las Vegas, Nevada are deemed to be the "legislative body" within the meaning of Nevada Revised Statutes Sections 279.586, 279.604, and 279.608 to the exclusion of the City Council of Las Vegas and all other legislative bodies. Any and all redevelopment plans, and material deviations therefrom and amendments thereto, and contracts for redevelopment projects within the meaning of NRS 279.412, must be approved by the registered voters of the City of Las Vegas, Nevada.

A vote of the registered voters on any matter subject to this subsection may take place at any general municipal election, general statewide election or special election called for such purpose.

Article VIII, Section 8.270(2) is amended to read (underline language added; strikethrough language deleted):

With the exception of Section 2.340 of this Charter, No other law with respect to the exercise of any power which is granted in this article that provides for an election, requires an approval or in any way impedes or restricts the carrying out of the acts which are authorized by this article to be done may be construed as applying to any proceeding which is taken under this article or act done pursuant to this article, except as is provided in this article.

Section 2: Application.

Subsection (1) of the new Charter Section 2.340 added by this Initiative shall apply to all appropriations described herein after its effective date, regardless of whether the lease-appropriations described herein after its effective date, regardless of whether the lease-purchase agreement was entered into before or after such date.

Section 3: Severance.

Each word, sentence, provision and application of this Section is deemed severable. If any are invalidated by a court of competent jurisdiction, the remainder shall be given full force and effect. The courts are authorized to reform the provisions of this Section in order to ensure their maximum permissible effect.

The term "Legislative Body" is defined in NRS 279.396 as:

. . . the city council, board of county commissioners or other legislative body of a community.

Given the specific statutory definition above, the question becomes whether the "registered voters of the city of Las Vegas" may be a "legislative body" under NRS 279.396. If the answer is "no," then the submitted "Initiative Petition" is in conflict with State law and the Initiative should not be submitted for inclusion on the ballot.

Based on our analysis, we conclude that the legislature did not intend the term legislative body to include all of the registered voters of a particular municipality. The list of "legislative bodies" contained in NRS 279.396 refers to established legislative bodies which clearly have legislative power. (The only legislative power granted to the voters of a municipality is through the initiative and referendum.) To interpret the term "legislative body" as meaning the voters of the city is tantamount to redefining a term which has established meaning given by the legislature. Such action may only be accomplished by an act of the state

legislature.

Further, the Nevada Supreme Court has determined that the powers of the electorate to propose initiatives and referendums is limited to legislative acts, not acts which by their nature are administrative. Nevada has adopted the following test for drawing the distinction between an administrative and a legislative ordinance:

An ordinance originating or enacting a permanent law or laying down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents is purely legislative in character and referable, but an ordinance which simply puts into execution previously-declared policies, or previously-enacted laws, is administrative or executive in character, and not referable. Forman v. Eagle Thrifty Drugs and Markets, 89 Nev. 533, 537 (1973) citing Denman v. Quinn, 116 S.W.2d 783, 786, (Tex.Civ.App. 1938).

In Foreman, the Court looked at whether an initiative and referendum which sought to amend the City of Reno's zoning code to prohibit industrial or commercial use of land within 300 feet of a junior high or elementary school. In analyzing whether the proposed initiative and referendum was legislative or administrative, the court applied the Denman test. The court reasoned that whether the citizens of a particular town wished to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within a fixed area is a legislative matter subject to referendum. However, since the policy to have zoning was already determined and the changing of such areas was committed to the planning commission and the city council, such action was found to be administrative and not referable.

In 2002, the issue of administrative power and legislative acts was again addressed by the Nevada Supreme Court. As the Court aptly explained in Citizens for Public Train Trench Vote v. City of Reno, 53 P.3d 387, 391 (Nev. 2002) (emphasis added):

Initiative is the power of the people to propose and enact new laws. The power is contained within Article 19, Section 2(1) of the Nevada Constitution: "[T]he people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution, and to enact or reject them at the polls." According to the Nevada Constitution, the initiative powers provided in Article 19 "are further reserved to the registered voters of each county and each municipality as to all local, special and municipal legislation of every kind in or for such county or municipality." *The initiative power applies only to legislation, however; it does not extend to administrative acts.*

Here, the administrative functions as pertaining to redevelopment are relegated to the City Council under state law. Further, the power to appropriate funds is also an administrative act and not subject to delegation to the voters by the initiative process. As such, the changes proposed by the "Initiative Petition" should be viewed as administrative in nature, not legislative. Therefore, it is the recommendation of the Office of the City Attorney that the Initiative Petition cannot be adopted as law by the City Council is must not be referred to the ballot.

This memo is not intended to raise any legal issues that relate to the legal sufficiency of the referendum and initiative petitions. In fact, if this opinion is challenged in court, the City reserves the right to raise other issues including, but not limited to, whether or not the initiative petition meets the single subject matter test as proscribed by law (this office believes it does not), and whether or not the initiative petition impairs any existing development agreements that have been approved by the City Council (this office believes that existing development agreements may be impaired by passage of the initiative petition). If you require more information regarding these legal issues, this office will be happy to provide advice.

BRJ/cg

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