OFFICE OF THE CITY CLERK
LAKE HAVASU CITY

HAND-DELIVERED

September 11, 2013

Help Dr. Bill Stop a Sewer Rate Increase
Help Dr. Bill Replace the Current Sewer Fee Structure
c/o Mr. Jesse W. Ullery
735 Little Drive
Lake Havasu City, Arizona 86406

RE: INITIATIVE SERIAL NUMBERS LHC-13-117-INT AND LHC-13-118-INT

Dear Mr. Ullery,

This advisory is sent in my capacity as the election official for Lake Havasu City as designated by state law and on advice of legal counsel. A copy of those legal opinions are enclosed for reference.

By this letter I am informing the political committee that applied for the initiative serial numbers LHC-13-117-INT and LHC-13-118-INT that the initiative matters described in the applications are considered to be legally invalid under the initiative power reserved to the qualified electors of the City. This office has no choice but to refuse to accept the initiative petitions for verification of signatures if and when they are presented. As mandated by state law and controlling court decisions on exercise of the initiative power, the City Clerk also cannot take steps to place the proposed measures on the ballot. This decision is reached and issued in accordance with Arizona Revised Statutes § 19-122(A) and Barry v. Alberty, 173 Ariz. 387, 843 P. 2d 1279 (App. 1992).

Since the legal issues with the initiative measures will also result in all signatures on petition signature sheets being invalid, the decision was made not to wait until after the signature gathering period ends to provide this information. If you have questions on these matters including any challenges to this determination, you should seek the advice of your own legal counsel as this office is precluded from providing legal advice on election matters.

Respectfully,

Kelly Williams
Lake Havasu City Clerk

Enclosure

Cc: Kelly Garry, Lake Havasu City Attorney
File

GUST ROSENFELD
ATTORNEYS SINCE 1921 P.L.C.

MEMORANDUM

To	City Clerk Kelly Williams City Attorney Kelly Garry	Date	September 10, 2013
File	LHC – Initiatives (2013) File No. 023241-00006	From	David A. Pennartz, Esq. Partner/Member
RE	LHC-13-117-INT & LHC-13-118-INT		

SUBJECT: Whether the power of initiative applies to the proposed measures for which petition serial numbers LHC-13-117-INT & LHC-13-118-INT were issued?

ANALYSIS:

Background.

Two related political committees were formed and submitted applications under A.R.S. §19-111 for initiative petition serial numbers on two measures proposed to be placed on the ballot by initiative, dealing generally with sewer rates, fees, taxes, and payment of sewer revenue bonds. As provided in A.R.S. §19-111(B), the City Clerk (acting as the City's elections official in fulfillment of statutory duties) issued serial numbers LHC-13-117-INT and LHC-13-118-INT, respectively, for the two proposed measures and petition drives. In so doing, the City Clerk acted as required of the election official under statute and did not make a determination as to whether the proposed measures were valid as presented or would qualify for the ballot. Election officials are not permitted to give legal advice to organizers of a petition drive. This memorandum will provide legal advice to the City Clerk acting in her capacity as the City elections official and provide an explanation of the analysis underlying the legal opinion. We understand that bond counsel will address municipal finance aspects of the issue.

MEMORANDUM

GUST ROSENFELD PLC
David A. Pennartz, Esq.

Re: LHC-13-117-INT &
LHC-13-118-INT

September 10, 2013

A. The power of the initiative and referendum under the Arizona Constitution.

The legislative powers of initiative and referendum are reserved to the people of the State by Art. IV, Part 1, §1 of the ARIZONA CONSTITUTION ("Sec. 4-1-1"). These powers were further reserved to the qualified electors of cities and towns (and counties) solely "as to all local, city, town, or county matters on which such incorporated cities, towns, and counties are or shall be empowered by general laws to legislate." ART. IV, PT. 1 §1(8), ARIZ. CONST ("Subsection 8").

(1) As the Arizona appellate courts have applied Sec. 4-1-1 and particularly Subsection 8, two constitutional limitations on application of the initiative or referendum power have been identified in the controlling court decisions. Firstly, the act to be initiated or referred for a vote of the people must be "legislative" in nature as defined in the court opinions in this area of the law. Administrative, quasi-judicial or of other matters or actions of a non-legislative nature that are or may be taken by local government, may not be passed under the power of the initiative or referred to the ballot by referendum. This point holds true regardless of what may be the perceived importance of the matter or the level of public interest in the subject. Letting or administering a contract, implementing previously-made policy decisions, and other administrative matters may generate a high level of public interest and discussion of various viewpoints. Neither on the one hand, a heightened level of public interest, nor on the other hand any apparent lack of interest in the matter among the general public, have any bearing on whether a matter may be placed on the ballot by initiative or referendum within the authorization of Sec. 4-1-1 or Subsection 8.

(2) Secondly, even if legislative in nature, the measure proposed by initiative must be within the legislative power delegated by the Legislature to the city or town by the general laws of the state. *See,* Sec. 4-1-1, Subsection 8. The essence of this constitutional limitation is that the electorate shares with the city or town council the power to legislate on a matter that has been delegated to the city or town. The electorate can have no greater power to directly legislate by the initiative than the city or town council (or board of supervisors of a county) has by legislative grant.[1] Cities and towns are creatures of the state and possess only such powers as are expressly granted to them by state law. *City of Scottsdale v. Superior Court,* 103 Ariz. 204, 205-206, 439 P.2d 290, 291-292 (1968) ("The cities and towns of this state are municipal corporations created by the state and possessory of no greater powers than those delegated to them by the constitution and the general laws of the state;" Cities and towns do not have the authority the state legislature is granted in the Constitution to refer legislative matters [except charter amendments] to the

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[1] While Arizona law allows the duly-adopted charter of charter cities to permit some additional grants of authority, Lake Havasu City is a "general law" city which must receive its authority by state statutes.

ballot). If an initiated measure is not within the authority granted to the city, town or county and its governing body, then the electorate does not have the power to enact it by initiative under Sec. 4-1-1 and Subsection 8. *Hancock v. McCarroll,* 188 Ariz. 492, 937 P.2d 682 (Ct. App. 1996) (as county board of supervisors had no county authority to control or dissolve a special district after fulfilling its statutory authorization to vote on formation of the district, county's electors could not refer to the ballot by power of initiative a measure to dissolve the district).

In general, therefore, whether a measure can be placed on the ballot by initiative, or if passed in the first instance by the City Council, whether the measure can be referred to the ballot by referendum, depends principally on whether the proposed measure is legislative in nature as specified in Sec. 4-1-1 ***and*** is within the power delegated to the City under the general laws of the state as required by Subsection 8. It must satisfy both constitutional requirements or the power of the initiative or referendum reserved to the qualified electors of the City cannot and does not apply to the proposed measure.

(3) The Arizona Constitution also contains additional limitations on the power of the initiative and referendum and exceptions as to specific matters that are not subject to exercise of one or both related powers. It also authorizes the Legislature to adopt implementing legislation, which the Legislature has done in Title 19, Arizona Revised Statutes ("A.R.S."). *See,* A.R.S. §19-102, §19-111 *et seq.* on initiative drives and petitions, and A.R.S. §19-141 through §19-143 on initiatives and referenda in cities, towns, and counties. Case law from the decisions of the Arizona Supreme Court and Court of Appeals further interprets and rules on proper interpretation and application of the constitutional and statutory authorizations and requirements for exercise of the initiative and referendum. These additional constitutional, legislative, and judicial limitations, exceptions and requirements will be appropriately discussed in this memorandum as they are pertinent to the issues posed for analysis in this memorandum.

B. Petition measure for serial number LHC-13-117-INT.

The proposed initiative for which initiative serial number LHC-13-117-INT was issued seeks to amend the City Code with a provision that would require referral to the electorate any increase in the City's adopted and existing "sewer fees and taxes". The operation of the measure is rather unique, in that it is an initiative that requires a future referendum without compliance at that future time with the referendum limitations, processes and requirements set forth in Sec. 4-1-1 and Subsection 8 and statutes.

Two problems are immediately encountered with the measure to be passed by initiative. Firstly, while the powers of the initiative and referendum spring from the same constitutional provisions and are very closely related, a measure to be adopted in the future (even if assumed to be legislative and generally subject to the initiative and referendum) cannot be made subject to

the referendum process ahead of time by initiative. The very construct of the power of referendum prevents it from being triggered before a referable measure is adopted. Even then, the 30-day period and all requirements for valid exercise of the power of referendum must be complied with strictly in order to require a municipal act to be referred to the ballot. *Western Devcor, Inc. v. City of Scottsdale,* 168 Ariz. 485, 821 P.2d 767 (1991). Just as with these initiative drives themselves, a referendum requires an application for serial number upon filing a copy of the measure to be referred, minimum numbers of signatures of registered voters, the verification and legal certification steps to be completed, and more. Those referendum requirements cannot be avoided by an initiative measure passed in advance purporting to require direct referral to the voters of any measure on a given subject without compliance with any of the constitutional and statutory referendum requirements.

Secondly, and equally fundamental, the proposed measure seeks to amend the State Constitution by City code, specifically the limitation on the authority of cities and towns to refer measures for public vote. It is quite fundamental constitutional law that the constitution cannot be amended by regular enactments of law by legislative bodies. As noted by the Arizona Supreme Court in *City of Scottsdale v. Superior Court*, cities and towns cannot grant themselves more power under the constitutional referendum provisions and limitations in Subsection 8. The framers of the constitution saw fit to grant the voluntary referendum authority to the legislature and to withhold it from the legislative bodies of cities, towns and counties. *See* Section 4-1-1, Subsection 15. The City Council, therefore, could not lawfully pass the measure. *City of Scottsdale.* The electorate acting as a legislative branch of local government is limited by the same constitutional constraint. *Hancock v. McCarroll.* A proposed initiative measure that is beyond the power of the city to pass, precludes the initiative from truly enacting anything if it were to pass and is therefore an unauthorized "opinion poll" of the electorate and not initiated legislation. *Saggio v. Connelly,* 147 Ariz. 240, 241, 709 P.2d 874, 875 (1985).

With a view toward its essential operation and intent, which is to refer sewer fee increases to the ballot, the initiative also must be analyzed under the limitations of a referendum. The Arizona Constitution excepts from the referendum power, the legislative body's appropriation and taxing measures for the support and operation of governmental departments and operations. Sec. 4-1-1, Subsection 3; *Garvey v. Trew,* 64 Ariz. 342, 170 P.2d 845 (1946). Adoption by the City Council of sewer fees and taxes make necessary provision for the support and operation of the wastewater system, financing and administration. The fees or taxes enactment against which the initiative would operate are likely to be adopted as part of the City's annual budget adoption and accompanying levy of taxes and fees for operation of the City, which is itself excepted from the referendum under the policy choice made in the adoption of the constitutional provision that the very operation of the government not be able to be shut down or hindered by referendum.

This initiative also seeks to control the setting of sewer rates and fees in a manner that conflicts with the mandatory procedure required by statute. A.R.S. §9-511.01 was adopted under the Legislature's general power to prescribe city and town authority. *See, City of Scottsdale v. Superior Court,* p. 2 above. When the legislature grants cities and towns certain authority and specifies how that power may be exercised, the statutory process must be complied with for the exercise of the municipal power to be authorized, valid and legally effective. *City of Scottsdale v. Superior Court,* 103 Ariz. at 207, 439 P.2d at 293. Where the Legislature mandates specific notice and hearing requirements for a municipal action,[2] that action is necessarily exempt from the initiative process so that the notice and hearing requirements set forth in the statute are not by-passed. *Id.,* at 208, 439 P.2d at 294 (holding that an attempted zoning by initiative should be rejected by the City Clerk as the municipal election official and will be enjoined if necessary to prevent the invalid matter from appearing on the ballot); *Transamerica Title Ins. Co. v. City of Tucson,* 157 Ariz. 346, 757 P.2d 1055 (1988) (legislative rezoning action).

In that same vein, the Legislature alone holds the right to regulate municipally-owned and operated utilities. Section 9-511.01 also is an exercise by the Legislature of its regulatory power over municipal water and wastewater utility operations and charges. For any increase in municipal wastewater "rates and rate components, fees or service charges," the statute sets forth specific advance publication, notice and hearing requirements for a notice of intention to adopt the increase. The statute also requires preparation of a study of the municipal rates and revenue requirements and that the report be provided to the governing body and made available to the public in advance of the adoption of the increase. The study must support the rate increase proposed by the notice of intention for the increase to be adopted. As with the zoning cases, our opinion is that municipal wastewater rates cannot be adopted by initiative, nor may the power of the initiative be used to mandate a different adoption process for increases in wastewater rates than that required by Sec. 9-511.01. If the Legislature had meant to require an automatic referral of the proposed rate increase to the ballot for voter approval, it could have and would have added the requirement to the statute, but it did not do so. The initiative power of the City's electors cannot be used to amend the statute and change the mandated process for wastewater rate adoption. Therefore, in our opinion the initiative is invalid and is subject to injunction if necessary to keep it off of the ballot. *City of Scottsdale v. Superior Court.*

As the increases in wastewater fees may well be required to fund sewer revenue bonds or other long-term financial and contractual commitments, there also is a substantial issue as to whether the proposed measure could unlawfully impair the obligations of existing contracts under Art. 2, §25. This is an issue on which the City's bond counsel should advise the City.

[2] This preemption analysis applies equally to municipal actions that are legislative in nature for these purposes, as it does to administrative actions. The initiative only applies to legislative actions, some of which are excepted as noted above.

C. Petition measure for serial number LHC-13-118-INT.

The measure proposed by initiative number LHC-13-118-INT would prohibit the City's payment of interest and principal on existing bonded indebtedness out of sewer revenues "under an existing ordinance." Instead, the debt service would be required to be made from revenues raised by "property taxes or dedicated sales taxes or by a combination thereof." Again, this opinion will leave the substantial impairment of contract issues with the proposed measure to bond counsel to cover.

Additionally, assuming it constituted a "legislative" measure, the proposed measure has substantial problems under initiative law as discussed above. It is an attempt to re-write and change the basic nature of previous enactments of the City Council after the fact and, crucially, after the time to refer those enactments to the ballot has long since expired. The failure to follow referendum requirements to mandate voter approval of a City Council enactment precludes a later effort to force it to the ballot. *Western Devcor.* That constitutional requirement cannot be sidestepped by a later initiative attempting to rewrite the earlier enactment that has validly gone into effect upon the expiration of the referendum period.

The initiative also is limited to the power that the City holds to legislate. In some ways, the failure of the City to properly adhere to the conditions and requirements of the action of the past City Council and the electorate that went through the required process of adoption of a sewer revenue bond measure which was then approved by the electorate might be viewed as simply a default under those documents, for a City Council to do so also arguably would be an attempt to revise the voter approval of the bond issuance.[3] There is no authority provided in the statutes for the City to unilaterally alter in such a fundamental manner the voter approval of a revenue bond issuance. As the City Council likely would be determined to hold no such power, the initiative cannot be used to enact it. *Hancock v. McCarroll; Saggio v. Connelly.*

In *Wennerstrom v. City of Mesa,* 169 Ariz. 485, 821 P.2d 146 (1991), the Arizona Supreme Court held that a bond election in which the City Council proposed and the voters approved issuance of bonds for street improvements constituted the legislative act and that later action by the City Council to implement that decision, approving the street projects and making payment for the work was a non-legislative administrative action by the Council which was not subject to the referendum. In that light, the voter approval of bonding, including the plan of payment and pledge of specific revenues to service the bonded indebtedness constituted the

[3] The specifics of bond issuances and impairments are left to bond counsel. This opinion addresses the subject in the municipal initiative law context.

legislative act by the City and its voters. The initiative therefore may be an administrative act not within the power of the initiative.

CONCLUSION:

Proposed initiative measures attempt to exercise authority that likely is beyond the electorate's power to legislate. The state constitutional requirements and limits on the exercise of the initiative and referendum power in several ways would be disregarded and undermine the validity of the proposed measures. It is our opinion, based on the analysis and discussion in this memorandum, that the proposed measures likely do not qualify for the ballot under the initiative power provided the City's qualified electors under Art. 4, Pt. 1, Sec. 1(8) of the Arizona Constitution as authoritatively interpreted and applied by the Arizona Supreme Court.

GUST ROSENFELD, PLC

David A. Pennartz
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September 9, 2013

Kelly Williams, City Clerk
Lake Havasu City, Arizona

Re: Validity of Proposed Wastewater Initiatives

Dear Ms. Williams:

In our capacity as bond counsel to Lake Havasu City, Arizona (the "City"), we have been asked to advise you whether a proposed Rate Initiative or a proposed Indebtedness Initiative (each as defined below) can validly eliminate or restrict the City's authority and obligation to establish and collect fees for use of its wastewater utility system in amounts sufficient to pay the operation and maintenance expenses of the utility and to pay the principal and interest as it comes due on the City's outstanding wastewater revenue obligations. As discussed in further detail below, we do not believe, for several reasons, that either of the initiatives would be valid under Arizona law.

Background:

The City's authority to finance a wastewater system with bonds is set out in Title 9, Chapter 2, Article 4, particularly A.R.S. §9-276, and Title 9, Chapter 5, Article 2 of the Arizona Revised Statutes (collectively, the "Act").[1] In the Act, the Arizona legislature provides a mechanism for a municipality to finance the construction and maintenance of a wastewater utility and authorizes the municipality to set, collect and pledge revenues from the operation of the utility in amounts sufficient to pay (i) the costs of operation and maintenance of the utility and (ii) the principal and interest on obligations issued to finance the acquisition and construction of the utility.[2]

On November 6, 2001, the voters of the City authorized the issuance and sale of its bonds or other obligations in an amount not to exceed $463,000,000 (the "Bond Election") to finance the acquisition and construction of a wastewater collection and treatment system (the "Wastewater System"). Pursuant to and in accordance with the authority provided in the Act and the Bond Election, the Mayor and Council of the City adopted Resolutions Nos. 02-1692 and 02-1700 (jointly, the "Master Wastewater Resolution")

[1] A.R.S. §§9-512 to -540.

[2] *Id.*

on August 20, 2002, and September 17, 2002, respectively, to establish a system of funds and accounts to support the City's Wastewater System, to provide for the issuance and payment of bonds or other obligations of the City to finance the Wastewater System, and to permit such bonds or other obligations to be secured by a pledge of the net revenues of the City's Wastewater System.

With respect to the issuance of bonds or other obligations, Section 9-512 of the Arizona Revised Statutes specifically requires a municipality which has constructed a public utility with the proceeds derived from the sale of bonds to fix rates charged for service to the public as nearly as practicable to pay the interest and not less than three percent per annum on the principal of the bonds, in excess of the expenses of maintenance and operation of the utility.

And, more specifically, Section 9-530.A. of the Arizona Revised Statutes states:

> The governing body of the municipality issuing the bonds shall prescribe service charges, and shall revise them when necessary, so that a utility undertaking for which the bonds were issued shall always remain self-supporting with revenue sufficient:
>
> 1. To pay when due all bonds, interest and continuing fees and expenses on the bonds, or, if applicable, on the reimbursement agreement, for the payment of which the revenue has been pledged, encumbered or charged.
>
> 2. To provide for all expenses of operation, maintenance, expansion and replacement of facilities.
>
> 3. To provide reasonable reserves.

Finally, Section 9-531.B. of the Arizona Revised Statutes states that "The provisions of this article and any such resolution [for the issuance of bonds or other obligations] shall be deemed a contract with the holders of the bonds, and the duties of the municipality and its governing body and officers under this article and such resolution shall be enforceable by mandamus or other appropriate action in a court of competent jurisdiction."

Pursuant to the authority provided by the Arizona statutes, in Section 4.01 of the Master Wastewater Resolution, the City "irrevocably pledges and grants a lien on and a security interest in the Net Revenues [gross revenues after provision for operation and maintenance expenses] of the Wastewater System as security for the payment of debt service on all Parity Obligations issued and Outstanding pursuant hereto." And in Section 5.01(1) of the Master Wastewater Resolution, the City covenants and agrees with the holders from time to time of any Parity Obligations that it will establish and maintain schedules of rates, fees and charges for all services supplied by the Wastewater System fully sufficient at all times to pay the operation and maintenance expenses of the Wastewater System and produce Net Revenues equal to 120% of the principal and interest due on the City's Wastewater System obligations during each fiscal year.

Subsequent thereto the City issued its wastewater revenue obligations, referred to in the authorizing resolutions as "Parity Obligations", on the following dates and in the following amounts for the following purposes:

Date	Amount	Purpose
October 7, 2002	$5,765,000	Engineering/Design
October 7, 2002	8,507,500	Senior Construction
October 7, 2002	8,507,500	Junior Construction
April 9, 2004	3,560,000	Engineering/Design
April 9, 2004	5,940,000	Senior Construction
December 17, 2004	5,075,000	Engineering/Design
December 17, 2004	17,775,000	Senior Construction
December 17, 2004	32,290,000	Junior Construction
August 30, 2005	58,070,000	Junior Construction
December 1, 2005	6,220,000	Senior Construction
October 26, 2006	12,430,000	Senior Construction
October 26, 2006	48,405,000	Junior Construction
June 27, 2007	5,700,000	Senior Construction
August 17, 2007	52,703,467	Senior Construction
October 7, 2008	29,468,259	Junior Construction
July 10, 2009	4,900,833	Senior Construction
October 30, 2009	62,534,728	Senior Construction

Each of the resolutions adopted by the Mayor and Council of the City in connection with the execution and delivery of the foregoing wastewater revenue obligations contained substantially the following provision:

> For the purposes of the Master Resolution, the...Loans will constitute ...Parity Obligations and Loan Payments with respect thereto will be payable from and secured by a first and prior pledge of and a lien on and security interest in the Net Revenues of the Wastewater System, on a parity with prior and future obligations incurred pursuant to the Master Resolution....[and, in the case of junior obligations, the pledge and lien are expressly made subject and subordinate to outstanding and future senior obligations].

On August 21, 2013, a resident of the City applied for serial numbers for two initiative petitions that if placed on the ballot and approved by the voters at the November 4, 2014 general election, would prevent the City from raising its wastewater rates (the "Rate Initiative") and require the City to repay its outstanding wastewater revenue obligations from sources other than wastewater revenues (the "Indebtedness Initiative").

Law and Analysis

The Arizona Constitution reserves the powers of referendum and initiative to the qualified electors of every incorporated city as to matters of local concern.[3] The powers of referendum and initiative are contained in Article 4, Part 1 of the Arizona Constitution,[4] Title 19 of the Arizona Revised Statutes,[5] and Title 2 of the Lake Havasu City Code.[6]

Section 9-511.01 of the Arizona Revised Statutes provides that a municipality shall not increase wastewater fees until such time as a notice of intention has been adopted at a regular council meeting, a public hearing has been held and a resolution or ordinance has been adopted for that purpose. Arizona statutes also require that any rate, fee or service charge adjustment be just and reasonable in light of the benefit received.[7]

A. Constitutional and Statutory Compliance with Initiative Requirements

Arizona Courts have provided some guidance in determining the sufficiency of an initiative and have noted that while strict compliance with constitutional and statutory requirements is necessary in the context of a referendum, only substantial compliance is required in the context of an initiative. Arizona statutes require that petitioners file an impartial analysis of the provisions of each proposed referendum or initiative measure. Such analysis must include a description of the measure in clear and concise terms and may also include background information relating to the effect of the referred or initiated measure on existing law.[8]

When analyzing whether each of the proposed initiatives is sufficiently clear and concise, we have considered whether the meaning of the proposed measure, the changes it makes and its effect if adopted are adequately described. The Rate Initiative and the Indebtedness Initiative each attempts to amend the City Code and each includes the proposed text of the amendment, but it is not entirely clear from the proposed text that the initiatives seek to deviate from the requirements of the Arizona statutes and repeal existing contractual arrangements that have previously been authorized by the Mayor and Council. It is not clear from the proposed text that the effect of the proposed initiatives would be (i) to rescind statutory authority to increase rates following a public hearing and adoption of an appropriate resolution or ordinance and (ii) to disregard a process that already exists for challenging utility rates considered to be excessive. While we believe these deficiencies exist, they are not, in our opinion, sufficiently compelling to justify rejection of the proposed initiative petitions, if submitted, and, in any event, the dispositions of the additional issues discussed below make it unnecessary to reach such clarity and adequacy issues.

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[3] Ariz. Const. art. 4, pt. 1, § 1.

[4] Ariz. Const. art. 4, pt. 1, § 1(8).

[5] A.R.S. § 19-143.

[6] Lake Havasu City Code §§ 2.12.060-2.12.080.

[7] A.R.S. § 9-511.01.A.

[8] A.R.S. § 19-124.B.

B. Scope of Initiative Power

As interpreted by the Arizona courts, the Arizona Constitution provides that the powers of the initiative and referendum are limited to legislative matters[9] and do not extend to administrative matters. Several Arizona court cases have provided a framework for distinguishing between administrative matters and legislative matters. In *Wennerstrom v. City of Mesa*, the Arizona Supreme Court explained that "[t]he power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body."[10] In *Stop Exploiting Taxpayers v. Jones*, a case almost directly on point, albeit involving a proposed referendum rather than a proposed initiative, the Arizona Court of Appeals considered whether a municipal ordinance establishing utility rates was a legislative act, and therefore subject to a voter referendum, or an administrative act that would not be subject to a voter referendum.[11] The court reasoned that the existing statutory framework was established to permit a governing body to use bonds to finance projects and to ensure the marketability of such bonds by securing the revenue pledged for bond repayment,[12] and therefore that rate-setting was an administrative act and not subject to voter referendum.

The analysis of the Court in *Stop Exploiting Taxpayers* is both directly on point and clear:

> ...determining that utility rate increases are subject to referendum would be inconsistent with other statutory provisions. In evaluating the relation between setting rates for municipal utilities and Arizona statutes governing utilities, we consider the comprehensive regulatory scheme which permits municipalities to issue bonds to finance its utility services. The purpose of these statutes is to insure the marketability of the bonds. To give effect to this intent, the revenue pledged to bond repayment must be secure. [The] voters approved the issuance of revenue bonds which support the utilities involved in this appeal. The bonds are to be repaid solely out of utility revenues. [The] governing body is required to establish charges sufficient to repay those bonds at a rate not less than one hundred twenty-five percent of the rate in effect on the date of determination. ... freezing rates at the current level would directly violate the provisions of A.R.S. §9-531.B (1996), which states that bond resolutions are deemed to be contracts with the bond holders that may be enforced by court action. One of the many provisions in a bond resolution, as well as the statutory scheme itself, is a mandate that the governing body adjust rates from time to time to keep the utility on a self-sufficient basis. See A.R.S. §9-530.C. This statute would be ineffective if it could be circumvented by referendum. In setting utility rates the City...must act in accordance with A.R.S. §§9-521 to -540. This is further indicia that it is engaged in an administrative function under the tests set forth in *Wennerstrom*. (125 P.2d at 400-401)

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[9] Ariz. Const. art. 4, pt. 1, § 1(8).

[10] *Wennerstrom v City of Mesa,* 169 Ariz. 485, 821 P.2d 146 (1991).

[11] *Stop Exploiting Taxpayers v. Jones,* 211 Ariz. 576, 125 P.3d 396 (Ariz. App. 2005).

[12] *Id.*

Substituting the word "initiative" for the word "referendum" in the foregoing analysis is, essentially, dispositive of this case. Accordingly, it is our opinion that the proposed Rate Initiative and the Indebtedness Initiative, if submitted, should properly be rejected on the grounds that each attempts to circumvent an administrative function, i.e. rate setting and the source of payment for the City previously-incurred wastewater revenue obligations. If enacted, the proposed initiatives would limit the City's authority to carry out its plan to finance the Wastewater System as previously authorized by the voters and the Mayor and Council of the City.

C. Conflict with Statute

The Arizona Court of Appeals, Division 2, held in *Robson Ranch Quail Creek, LLC v. Pima County*[13] that "an ordinance that conflicts with a statute is invalid", citing *City of Casa Grande v. Arizona Water Co.*[14]. In the case of the Rate Initiative and the Indebtedness Initiative, each proposes the adoption of an ordinance that would conflict with the Arizona statutes requiring the City to set and revise rates, fees and charges from time to time in an amount sufficient to pay the maintenance and operation expenses of the Wastewater System and the debt service with respect to the revenue obligations issued to finance the acquisition and construction of the Wastewater System.

Accordingly, it is our opinion that the Rate Initiative and the Indebtedness Initiative, if submitted, should properly be rejected on the grounds that each would conflict with the applicable Arizona statutes imposing obligations on the City with respect to its outstanding wastewater revenue obligations.

D. Impairment of Contracts

Article 1, Section 10 of the United States Constitution prohibits the adoption of laws which impair the obligation of contracts. Similarly, Article 2, Section 25 of the Arizona Constitution provides that "no ... law impairing the obligation of a contract shall ever be enacted." The Arizona Court of Appeals has clarified the constitutional prohibition against impairment of contracts in *Picture Rocks Fire District v. Pima County*, in which the Court stated that "The obligation of a contract is impaired when the legislative enactment changes the obligation in favor of one party against another, either by enlarging or reducing the obligation. In order for a statute to offend the constitutional prohibition against the enactment of laws impairing the obligation of contracts, the statute must have the effect of rewriting antecedent contract, that is, of changing the substantive rights of the parties to existing contracts."[15] Clearly, in the instant case, the proposed Rate Initiative and the Indebtedness Initiative would rewrite the antecedent contact between the City and the holders of its wastewater revenue obligations, changing the substantive rights of the parties to those contracts.

Although not an Arizona case, the holding of the Court in *Rorick v. Board of Commissioners of Everglades Drainage District*[16] is based on facts similar to the instant case and is therefore instructive. In

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[13] *Robson Ranch Quail Creek, LLC v. Pima County*, 215 Ariz. 545, 161 P.3d 588 (Ariz. App. 2007)

[14] *City of Casa Grande v. Arizona Water Co.*, 199 Ariz. 547, 20 P.3d 590 (Ariz. App. 2001)

[15] *Picture Rocks Fire District v. Pima County*, 152 Ariz. 442, 444-445, 733 P.2d 639 (Ariz. App. 1986)

[16] *Rorick v. Board of Commissioners of Everglades Drainage District*, 57 F.2d 1048 (N.D. Fla. 1932)

that case, legislation was adopted which had the effect of authorizing the Board of Commissioners of a special district to reduce the rate of taxes previously levied to pay the operating expenses of the district and debt service on its bonds. The Court stated:

> Legislation by authority of which bonds are issued, and their payment provided for becomes a constituent part of the contract with the bondholders. Such a contract is within the protection of the Constitution, art. 1, §10. The obligation of the bond contract, of which such legislation is a part, cannot be impaired, nor its fulfillment hampered or obstructed, by subsequent legislation to the prejudice of the vested rights of bondholders. This rule has reference to subsequent legislation which affects the contract directly, and not incidentally, or only by consequence. (*citing cases*) (57 F.2d at 1055)

Cases based on similar fact patterns from a variety of jurisdictions stretching over a number of centuries have all reached the same conclusion, that any effort to alter or reduce a tax or fee dedicated to the payment of debt service on outstanding bonds or other obligations constitutes an unconstitutional impairment of the contract with the holders of those bonds or other obligations. See, e.g., *Siebert v. United States ex rel. Lewis*[17], *State of Minnesota ex. rel. Atty Gen. vs. Young*[18], and *Bryson City Bank v. Town of Bryson City.*[19]

Based on the foregoing, it is our opinion that the Rate Initiative and the Indebtedness Initiative, if submitted, should properly be rejected on the grounds that each would not only impair the contract with the holders of the City's Wastewater System obligations by undermining the source of payment and the security pledged to repay the City's outstanding wastewater obligations but would also impair the entire regulatory scheme adopted by the City in the Master Wastewater Resolution and the subject resolutions authorizing the execution and delivery of the successive wastewater revenue obligations that financed the acquisition and development of its Wastewater System.

Conclusion:

While it is not entirely clear that the Rate Initiative and the Indebtedness Initiative substantially comply with the constitutional and statutory requirements for initiative petitions, it is clear that the initiatives each seek to limit the City in performing an administrative function and would, if adopted, conflict with the Arizona statutes requiring municipalities to fix and collect rates, fees and rates sufficient to provide for the payment of debt service on their wastewater obligations, and therefore would be invalid. Similarly, the Rate Initiative and the Indebtedness Initiative, if adopted, would each constitute an unconstitutional impairment of the City's contract with the holders of the City's wastewater revenue obligations and therefore would also be invalid. Accordingly, if submitted to you, you should properly reject both the Rate Initiative and the Indebtedness Initiative on these grounds.

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[17] *Seibert v. United States ex rel. Lewis*, 122 U.S. 284, 7 S. Ct. 1190, 30 L.Ed. 161 (1887)

[18] *State of Minnesota ex rel. Atty Gen. v. Young*, 29 Minn. 474 (1881)

[19] *Bryson City Bank v. Town of Bryson City*, 213 N.C. 165, 195 S.E. 398 (N.C. 1938)

The foregoing opinions are rendered on the basis of the laws of the State of Arizona as in effect and as construed on the date hereof, are solely for your benefit and may not be relied upon by any other person without our prior written consent. This opinion letter is limited to the matters expressly set forth herein, and no opinion is to be inferred or may be implied beyond the matters expressly so stated.

Respectfully submitted,

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