To: The Honorable Chris Cummiskey

Arizona State Senate

September 11,2000
Re:Use of City or County Funds to Educate the Public on Ballot Measures

I00-020
(R00-027)

Question Presented

You have asked: (1) whether a city or county may spend general fund monies to educate its citizens on the possible impact of ballot measures, without advocating for or against the measure; and (2) whether a city or county may spend general fund monies for those purposes before a measure has qualified for the ballot.

Summary Answers

The Legislature has prohibited cities and counties from using resources "for the purpose of influencing the outcome of elections." Arizona Revised Statutes ("A.R.S.") §§ 9-500.14, 11-410. These statutes prohibit general fund expenditures that support or oppose measures that have not yet qualified for the ballot as well as measures that have qualified for the ballot. Whether the prohibitions in A.R.S. §§ 9-500.14 and 11-410 extend to educational materials that do not expressly advocate for or against a measure requires analysis of the specific materials and the circumstances relating to their distribution to determine whether the materials are "for the purpose of influencing the outcome of election."

Background

In 1996, the Legislature prohibited the use of city, town, county, and school district resources to influence the outcome of elections. *See* 1996 Ariz. Sess. Laws ch. 286 (codified in part as A.R.S. §§ 9-500.14, 11-410, 15-511). The statute governing cities, A.R.S. § 9-500.14(A), provides:

A city or town shall not use its personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections. Notwithstanding this section, a city or town may distribute informational reports on a proposed bond election as provided in section 35-454. Nothing in this section precludes a city or town from reporting on official actions of the governing body.

(Emphasis added.) Other statutes approved in the same bill place an identical restriction on the use of county and school district resources to influence elections. *See* A.R.S. §§ 11-410 (counties), 15-511 (school districts).[(1)]

Before the 1996 legislation, the principal statute directly addressing the political subdivisions' use of resources to influence elections required the State Board of Education to adopt rules concerning this subject that would apply to school districts. *See* former A.R.S. § 15-511 (repealed by 1996 Ariz. Sess. Laws ch. 286). The 1996 statutes purportedly codified the Department of Education rule then in effect and extended its application to other political subdivisions. *Hearing on SB 1247 Before the House of Representatives Comm. on Government Operations,* 42nd Legis., 2nd Reg. Sess. 10 (Ariz., March 6, 1996).[(2)] The 1996 legislation also addressed bond election procedures and, according to testimony in Senate hearings on the measure, it was part of "an ongoing effort to reform bond procedures." *Hearing on SB 1247 Before the Senate Comm. on Government Reform,* 42nd Legis., 2nd Reg. Sess. 3 (Ariz. February 6, 1996).

Other statutes require cities, towns and counties to provide certain election information to voters. For example, a jurisdiction having a bond election must mail informational pamphlets to the residence of each registered voter within the political subdivision. A.R.S. § 35-454(A). The Legislature specified the information that must be included in this pamphlet.[(3)] *Id.* For primary and general elections, jurisdictions must mail sample ballots to households. A.R.S. §§ 16-461 (sample primary ballots), -510 (general election sample ballots). For local initiative and referendum measures, the city or county distributes publicity pamphlets describing the measures, including arguments for and against the proposals that citizens have submitted. A.R.S. § 19-141(A), (B).

Analysis

1. Sections 9-500.14 and 11-410 Limit the Ability of Cities and Counties to Use General Fund Monies to Educate Voters about Ballot Measures.

Sections 9-500.14 and 11-410, A.R.S., prohibit the use of any city or county resources "for the purpose of influencing the outcomes of elections."[(4)] The phrase "for the purpose of influencing the outcomes of elections" is drawn from state and federal election laws defining campaign contributions and expenditures. *See* A.R.S. §§ 16-901(5), -901(8) ; 2 U.S.C. § 431(8). The campaign finance laws establish contribution limits and disclosure requirements for contributions and expenditures that are "for the purpose of influencing elections." *See* A.R.S. §§ 16-901 through -925. While the Legislature did not incorporate the complex campaign finance regulatory scheme into its statutes limiting the use of local governmental resources, some of the principles from campaign finance law help guide interpretations of the prohibitions in A.R.S. §§ 9-500.14 and 11-410. Under federal campaign finance law, the test of whether something has the purpose of influencing an election is an objective test, rather than a test "based on the subjective state of mind of the actor." *Federal Election Comm'n v. Ted Haley Congressional Comm.,* 852 F.2d 1111 (9th Cir. 1988) (holding that post-election loan guarantees were campaign contributions). In addition, campaign expenditures "for the purpose of influencing elections" do not include "non-partisan activity designed to encourage individuals to vote or to register to vote." A.R.S. § 16-901(8)(b).

Applying these principles from campaign finance law, the Legislature has prohibited cities and counties from using general fund monies to advocate for or against a measure that will be on the ballot. The only "educational" materials regarding ballot issues that are clearly permitted are those authorized by statute, such as the bond informational pamphlet, sample ballots, and publicity pamphlets. Informational materials that do not advocate for or against a measure, but are not specifically required by statute, would require case-by-case evaluation to determine whether they are, based on all relevant circumstances, materials to influence the outcome of an election in violation of statute. This analysis requires "careful consideration of such factors as the style, tenor and timing of the publication." *Stanson v. Mott*, 551 P.2d 1, 12, 130 Cal. Rptr. 697, 708 (1976) (analyzing distinction between unauthorized campaign expenditures and authorized informational activities by public entity).

The statutory prohibition in A.R.S. §§ 9-500.14 and 11-410 does not "bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity." *Id.* Thus, a city or county may use its resources to respond to citizen inquiries that may concern election issues, but it must do so in a neutral manner that does not urge support or opposition to a measure. Similarly, A.R.S. §§ 9-500.14 and 11-410 do not prohibit the use of city or county facilities for non-partisan forums that educate voters about issues or candidates. Nor do they prohibit a public entity from making its

buildings and facilities available to partisan groups on the same basis and conditions as other groups. *Cf.* A.R.S. § 15-1105 (governing use of school property); Ariz. Att'y Gen. Op. I86-024 (analyzing constitutional aspects of regulating political activity on public property).

The statutes also provide "[n]othing in this section precludes a [city, town or county] from reporting on official actions of the governing body." A.R.S. §§ 9-500.14(A) and 11-410(A). This provision makes it clear that if, for example, a city council or county board of supervisors proposes a measure that will appear on the ballot for the voters' consideration, A.R.S. §§ 9-500.14 and 11-410 do not preclude the use of public resources to inform people of that official action. However, this provision must be read in a manner consistent with the general prohibition against using public resources to influence an election. Thus, a local governing body may not adopt a resolution supporting or opposing an initiative or referendum and then under the guise of "reporting on official actions" mail brochures to all residents. Any official action supporting or opposing an initiative or referendum necessarily requires the use of public resources and its purpose is to influence the election by having the public entity formally take a position on a matter that is coming before the public for a vote. Such official action supporting or opposing ballot measures, other than those the governing body itself is referring to the voters, are prohibited by A.R.S. §§ 9-500.14 and 11-410. Otherwise, any broader reading of the last sentence would create a loophole that would permit campaign activity by the public body through passing resolutions and then communicating those resolutions to the voters.

Although the governing body cannot take formal positions on ballot measures, individual members of those governing bodies may express their views on public policy issues. As one court commented, "the effective discharge of an elected official's duty would necessarily include the communication of one's considered judgment of . . . [a] proposal to the community which he or she serves." *Smith v. Dorsey*, 599 So. 2d 529, 541 (Miss. 1992). Elected officials "acting in their official capacity shed no First Amendment rights in their advocacy of policies." *Id.* Although individual elected officials of cities and counties may advocate for or against matters that may be on the ballot, they cannot use public resources to support their efforts because of the prohibitions in §§ 9-500.14 and 11-410. Moreover, city and county policy- makers may use city or county resources to assess the potential impact of a proposed ballot measure on their jurisdictions, but they cannot use public resources to disseminate information about the measure in a manner that violates A.R.S. § 9-500.14 and 11-410.

In sum, A.R.S. §§ 9-500.14 and 11-410 do *not* prohibit

- .elected officials from speaking out individually regarding measures on the ballot;
- .the use of public resources to respond to questions about ballot measures, although responses should provide factual information that suggest neither support nor opposition to the measure;
- .the use of public resources to investigate the impact of ballot measures on a jurisdiction;
- .the use of public resources to prepare and distribute the election information required by statute; and
- .the preparation and dissemination of materials "reporting on official actions of the

governing body."

2. Timing of Expenditures.

You also asked if the prohibitions in A.R.S. §§9-500.14 and 11-410 apply to expenditures before a measure qualifies for the ballot. Under campaign finance laws, the requirements to disclose expenditures and contributions and to form political committees apply before a measure qualifies for the ballot. *See* A.R.S. § 16-901(5) (contribution), -901(8) (expenditure), -901(19) (political committee). The definition of expenditure, for example, expressly includes payments "supporting or opposing the circulation of a petition for a ballot measure, question or proposition." A.R.S. § 16-901(8). The definition of contribution includes the same language. A.R.S. § 16-901(5). In addition, any group proposing a ballot measure must register as a political committee. A.R.S. § 19-111(C); *see also* A.R.S. § 16-901(19) (political committee includes group that engages in political activity in support of or opposition to an initiative or referendum and that applies for a serial number and circulates petitions). These statutes recognize that political activity to influence the outcome of a ballot measure begins before a measure qualifies for the ballot. Similarly, the prohibitions in A.R.S. §§ 9-500.14 and 11-410 apply before a measure qualifies for the ballot.

Conclusion

Sections 9-500.14 and 11-410, A.R.S., prohibit cities and counties from using their resources, including spending general fund monies, to influence the outcome of elections. Even educational materials that do not expressly advocate for or against a ballot issue may fall within this prohibition, depending on the specific facts and circumstances. The limitations in A.R.S. §§ 9-500.14 and 11-410 apply before a measure qualifies for the ballot.

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1. Although this Opinion focuses on the statutes applicable to cities and counties, the same analysis applies to A.R.S. § 15-511(A) concerning school districts.

2. Although the legislative history suggests the language in the current statutes was based on a former Department of Education rule, the statutory language differs from the rule. In part, the rule stated that "consistent with constitutional provisions regarding public monies, the school district may not use its equipment, materials, buildings or other resources to present or engage in express advocacy to influence the outcome of any election," with exceptions for leases of school property under A.R.S. § 15-1105 and informational reports on overrides. *See* former Arizona Administrative Code ("A.A.C.") R7-2-1201 (repeal effective Feb. 20, 1997). The rule also provided "nothing in this rule shall preclude school districts from reporting on official actions of the governing board or producing and distributing impartial information on elections other than school district budget override elections." *Id.*

3. The pamphlet includes: amount of bond authorization, maximum interest rate of the bonds, estimated debt retirement schedules for the proposed bond authorization, the current amount of bonds outstanding, showing both principal and interest payments and the estimated tax rates, source of repayment, estimated issuance costs, estimated tax rate impact on the average assessed valuation of both owner-occupied residential property and commercial and industrial property for the current year, current outstanding general obligation debt and constitutional debt limitation, the purpose for which the bonds are to be issued, polling location, and the hours when polls will be open. A.R.S. § 35-454(A).

4. The Arizona case law regarding using public resources to influence elections is limited. In *Sims v. Moeur*, 41 Ariz. 486, 19 P.2d 679 (1933), the Arizona Supreme Court approved the Governor's removal of certain Industrial Commission members for their use of State Compensation Fund monies to prevent an initiative repealing workers' compensation laws from being placed on the ballot and to urge voters to defeat the measure. *Id*. at 503, 19 P.2d at 685. The Court upheld the removal after finding the record showed inefficiency and malfeasance in office. *Id*. at 503-4, 19 P.2d at 685. Courts in other jurisdictions have limited public expenditures promoting or opposing ballot issues but recognized the government's ability to provide impartial information to its citizens regarding elections. *See, e.g., Stanson v. Mott,* 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Citizens to Protect Public Funds v. Board of Educ. of Parsippany-Troy Hills TP.,* 98 A.2d 673, 179-80 (N.J. 1953)*; Palm Beach County v. Hudspeth*, 540 So. 2d 147 (Fla. App. 1989); *see also Smith v. Dorsey,* 599 So. 2d 529, 549 (Miss. 1992) .

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