

SALT LAKE CITY CORPORATION

LAW DEPARTMENT

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MAYOR

June 5, 2012

TO: Mayor Ralph Becker
David Everitt
Chris Meeker
Salt Lake City Council
Cindy Gust-Jensen

FROM: Ed Rutan
Boyd Ferguson
Neil Lindberg

RE: Initiative Petition of Move to Amend

Background

A group of people submitted to the City Recorder an initiative petition that reads as follows:

We, the undersigned citizens of Salt Lake City, Utah, respectfully demand that the following proposed law entitled 'Resolution of Support for a Constitutional Amendment to Declare That Corporations Are Not People' be submitted to: the Salt Lake City Council for its approval or rejection at its next meeting; and to the legal voters of Salt Lake City at a Special Election on November 6, 2012, if the Salt Lake City Council rejects the proposed law or takes no action on it. . . .

RESOLVED, the People of Salt Lake City, Utah, stand with the Move to Amend campaign and cities and counties across the country to defend democracy from the corrupting effects of undue corporate power by amending the United States Constitution to establish that:

1. Only human beings, not organizations, are endowed with constitutional rights, and,
2. Money is not speech, and therefore regulating political contributions and spending is not equivalent to limiting political speech.

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BE IT FURTHER RESOLVED, that the People of Salt Lake City, Utah hereby instruct our state and federal representatives to enact resolutions and legislation to advance this effort.

Based on the information provided by the Salt Lake County elections division, the City Recorder determined that the statutorily required number of signatures were on the petition. Furthermore, as required by Utah Code § 20A-7-501(2), on May 21, 2012, the City Recorder delivered the petition to the City Council, without having made any judgment about the validity of the petition other than her determination about the adequacy of the number of signatures.

Legal Issue

Even if the petition is supported by the legally required number of voter signatures, must it be rejected by the City if the action proposed by the petition would not create legislation or a local law?

Short Answer

The better interpretation of the law is that the proposed “resolution” fails to constitute “legislation,” or a “local law” and therefore is not the proper subject of an initiative under the Utah Constitution and statutes, although the law is not absolutely clear on this question.

Utah Constitution

Art. VI § 1 of the Utah Constitution says:

- (1) The **Legislative power** of the State shall be vested in:
 - (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and
 - (b) the people of the State of Utah as provided in Subsection (2). (emphasis added)

Art. VI § 1(2)(b)(i) of the Utah Constitution provides that the legal voters of any city may initiate any desired “**legislation**” In contrast, art. VI § 1(2)(b)(ii) authorizes a referendum vote with respect to “any **law** or **ordinance** passed by the law making body of the . . . city” (emphasis added).

Statutes

Utah Code § 20A-7-102(1)(b) provides that Utah voters may initiate any desired “**legislation**” and cause it to be submitted to a local legislative body or to a vote of the people if it is a “local law.”

Section 20A-7-101 does not define “legislation.” However, the statute indicates that the word includes at least a “state law” (in the case of the Utah Legislature) and a “local law”¹ (in the case of a city council).

Utah Code § 20A-7-101(6) defines “initiative” as “a new law proposed for adoption by the public as provided in this chapter.”

Utah Code § 20A-7-501 contains procedural steps regarding initiatives and repeatedly refers to a proposed “law.”

If an initiative petition contains the required number of signatures, a city recorder does not have discretion to reject it summarily.² However, the Utah Supreme Court has held that a city recorder has authority to reject a petition if it is legally insufficient or is directed to a matter not subject to an initiative. Salt Lake On Track v. Salt Lake City, 939 P.2d 680, 682 (Utah 1997); White v. Welling, 57 P.3d 703 (Utah 1936).

Most of the Utah reported litigation in this area has dealt with whether a particular proposed initiative or referendum was “legislative” in nature (which is subject to initiative or referendum) or was “administrative/executive” (which is not). However, in White the Court said that, for a statewide initiative, the secretary of state would not be required to submit to the people an initiative in the following situations:

- (a) something merely calling for their opinion or other belief; or
- (b) something which, if voted on favorably by the people, would not have any of the characteristics or attributes of a law; or
- (c) something which is so unintelligible, incomprehensible, or meaningless that it will not permit of a determination as to whether or not, if passed, it would be a law; or
- (d) some matter which was not contemplated by the Initiative and Referendum Act, such as a proposed amendment to the Constitution.

Id. at 705.

Under this analysis, in some situations the city recorder would have to determine if a proposed initiative would constitute a “law” if approved by the voters.

¹ Section 20A-7-101(12) defines “local law” as including “an ordinance, resolution, master plan, and any comprehensive zoning regulations adopted by ordinance or resolution.”

² If the petition is found to be legally sufficient, Utah Code § 20A-7-501(3)(b) allows the City Council to (i) adopt the proposed law and refer it to the people; (ii) adopt the proposed law without referring it to the people; or (iii) reject the proposed law. Utah Code § 20A-7-501(3)(d)(ii) provides that if the Council “rejects the proposed ordinance or amendment, or takes no action on it,” the City Recorder must submit it to Salt Lake City’s voters at the next municipal general election.

Black's Law Dictionary defines "law" as, in its generic sense, "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions of legal consequences is a law." It also includes a "statute or enactment of legislative body; administrative agency rules and regulations; judicial decision, judgments, or decrees; municipal ordinances"

In Citizens for Responsible Transportation v. Draper City, 190 P.3d 1245, 1249 (Utah 2008), a referendum petition was filed with respect to a city council resolution endorsing a proposed corridor for a commuter rail system to be constructed by the Utah Transit Authority. The court held that the resolution was not a law, and therefore was not subject to referendum. It said:

"Resolution No. 06-71 has no effect beyond expressing Draper City's preference for a particular rail location and therefore does not constitute a law or ordinance. The city's preference has no legal effect and is not enforceable. . . . Resolution 06-71 does not have the force of law. Rather, it is merely Draper City's declaration of support for the proposed location for the commuter rail system and, as such, is not subject to referendum."

In White v. Welling, the initiative petition related to the following proposed resolution:

Wherefore, be it resolved by the People of the State of Utah . . . to petition and request each state of this Union and the United States government at Washington, D. C., to ask all nations and their people that each consider and cooperate to create world peace with a united tax system that will organize the people of each state and nation so that they all may properly support their governments and at all times be ready to resist every form of tyranny or aggression.

Of the proposed resolution, the court said: "It would not be a law if it received the required number of "yeses" at the election. No provision is made in the Initiative and Referendum Act for resolutions by the people."³ Case law makes it clear that the title of the enactment is not determinative, but rather what it actually does.⁴

The Utah Constitution and the initiative statute both refer to the initiation of "legislation." Dictionaries define "legislation" in terms of making "laws," and Utah court cases support that notion.⁵ The Move to Amend petition does not involve a "law" or "legislation" in that sense.

³ Note that the initiative statute now expressly includes resolutions as a kind of "local law."

⁴ See Citizens for Responsible Transportation v. Draper City, 190 P.3d 1245, 1249 (Utah 2008) ("the title of an action . . . is not dispositive; rather, what an action accomplishes determines if it is legislative or administrative in nature."); Low v. City of Monticello, 54 P.3d 1153 (Utah 2002) (overruled on other grounds) ("the formal label of a city council's action is not determinative," and citing Utah Power & Light, 74 P.2d 1191, 1200 (Utah 1937), in which a resolution regarding issuing revenue bonds was held to be legislative and subject to referendum.)

⁵ Sevier Power Company, LLC v. Board of Sevier County Commissioners, 196 P.3d 583, 585 (Utah 2008) (the court referred to "the legislative power—the power to set public policy by law"); Carter v. Lehi City, 269 P.3d 141 (Utah 2012) ("A ballot initiative should be deemed an appropriate legislative act where it proposes a law of general applicability. Laws that prescribe rules of conduct for the general population are squarely within the ambit of generally applicable rules, and ballot initiatives posing such laws are per se legislative.")

In Mouty v. The Sandy City Recorder, 122 P.3d 521, 531 (Utah 2005), the court did state that “*all acts* taken by a city council in a city organized pursuant to the council-mayor form of government are necessarily legislative and subject to referenda” (emphasis added). However, the context there was whether the governmental action taken was legislative or executive, not whether a mere opinion was being expressed.

The most recent initiative case in Utah is Carter v. Lehi City, 269 P.3d 141 (Utah 2012). In Carter the Utah Supreme Court adopted a “new paradigm” for analyzing initiatives. The court overruled the three part balancing test that the Court had established in Citizen’s Awareness Now v. Marakis, 873 P.2d 1117, 1123 (Utah 1994). The Court was particularly critical of the third prong of the Marakis test – whether voter participation was “appropriate.”

We also disavow the inquiry into whether a particular matter is practically “appropriate” for determination by voters. [footnote omitted] The constitution leaves no room for the courts to question whether voter initiatives address issues “of such complexity that it is not practical for the public to give [them] sufficient time and attention to make a proper determination of the matter.” [citation and footnote omitted] As judges, our role is to interpret the meaning of the legislative power afforded to the people under the text of article VI. We have no business questioning the wisdom or efficiency of the exercise of the people’s constitutional authority, least of all on the ground that the people may not be sophisticated enough to use their power intelligently or efficiently.”

Carter, 269 P.3d 141, ¶ 61. There is no question that the Court expressed a strong intent to permit citizen initiatives beyond the scope that would be permitted under the Marakis test. However, the context in Carter and Marakis was legislative action v. administrative/executive action, not “legislation/law” v. “opinion.” The Court did not refer to the White or Citizens for Responsible Transportation decisions in Carter, and there is no express indication that the Court intended to overrule those decisions as well. See Carter, 269 P.3d 141, ¶ 54.

Portions of Carter appear to support the position that the Move to Amend initiative is legally insufficient. For example, the Court reaffirmed that the initiative power is limited to legislative (versus administrative/executive or judicial) action, stating that legislative power generally (1) “involves the promulgation of laws of general applicability”; and (2) is based on the weighing of “broad, competing policy considerations.” Id. at 147, 151. Also, at one point the Court says “the people may propose any measure that is ‘desired’—so long as it is ‘legislation’ . . .” While the opinion sometimes refers to “legislation” in more general terms (“any substantive topic and any legislative act” (Id. at 148)), most references in the opinion seem to say a proper initiative must involve a proposed “law.” For example, the Court said, “a ballot initiative should be deemed an appropriate legislative act where it proposes a law of general applicability. Laws that prescribe rules of conduct for the general population are squarely within the ambit of generally applicable rules, and ballot initiatives posing such laws are per se legislative.” Id. at 155.

At the same time, it is important to recognize that in Carter the Utah Supreme Court was emphatic that “Nothing in the text or structure of article VI suggests any difference between the

power vested simultaneously in the ‘Legislature’ and ‘the people.’ The initiative power of the people is thus parallel and coextensive with the power of the legislature.” Id. at 148.

It is well known that the Utah Legislature often adopts resolutions on matters related to the policies of the federal government. Examples from the session just ended are H.J.R.3 (Joint Resolution on Federal Transfer of Public Lands); H.J.R.14 (Joint Resolution Urging Congress to Support Equity and Sales Tax Fairness); and S.J.R.2 (Joint Resolution on Taiwan).

If the people’s legislative power is coextensive with the Legislature’s legislative power, why can’t the people express their opinions on similar issues by initiative? The answer is that the Legislature’s and the people’s “legislative power” under Article VI of the Utah Constitution is “legislative power” in a separation of powers sense, see Article V, not “legislative power” in the general sense of whatever actions a legislative body is authorized to take. In a separation of powers form of government, expression of opinions is not unique to the Legislative Branch.

Utahns for Better Dental Health v. Davis County, 175 P.3d 1036 (Utah 2007), indicates that a legally insufficient initiative petition must be rejected and not placed on the ballot. The Court held that:

[T]he blocking from the ballot of an unconstitutional initiative petition is an actual and concrete benefit to a large number of citizens and voters, especially in light of the potential costs associated with campaigns to secure or avoid the initiative’s passage. We have previously stated, “Because the people’s right to directly legislate through initiative and referenda is sacrosanct and a fundamental right, Utah courts must defend it against encroachment and maintain it inviolate.” Gallivan v. Walker, 54 P.3d 1069 (Utah 2002).

Thus, in our view the better interpretation of the law is that the Move to Amend petition does not qualify as a proper initiative under the Utah Constitution and statutes and the City Recorder is therefore required to reject it as legally insufficient.