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May 18, 1990

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

RE: MUNICIPAL INITIATIVE AND REFERENDUM POWER

Dear Jack:

You recently asked whether the city of St. Anthony is required to go forward with an initiative petition presented to determine whether an ordinance will be adopted requiring a vote of the people before the city can lease its property. Before addressing the question of whether the initiative process is appropriate, it is necessary to discuss the nature of the authority of a city to enter into a lease.

Idaho Code § 50-1409 provides in pertinent part:

The mayor and council may, by resolution, authorize the lease of any property not needed for city purposes, upon such terms as may be just and equitable.

The Idaho Supreme Court in the case of Bopp v. City of Sandpoint, 110 Idaho 488, 491, 716 P.2d 1260 (1986), stated: "This power to lease is a purely discretionary function entrusted to the elected officials of the municipality. . . ." [Emphasis added.] Thus, the legislature has established a policy that cities have the authority to lease city property at the discretion of elected city officials. The establishment of this policy is important in the analysis of whether decisions to lease are subject to the initiative process.

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Jack Hoopes  
May 18, 1990  
Page 2

The question then becomes whether this authority to lease is subject to the initiative process. Idaho Code § 50-501 states in part: "The city council of each city shall provide by ordinance for direct legislation by the people through the initiative and referendum." [Emphasis added.] Clearly, the right to legislate is reserved to the people, both at the state level, Idaho Constitution, article 3, section 1, and at the local level, § 50-501. The people, just as the legislature, even have the right to consider unconstitutional proposals even though the legislation may never take effect for the same reason. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1987). However, the right to initiative and referendum generally has not been extended to executive or administrative acts, 5 McQuillen on Municipal Corporations § 16.55, and for good reason.

On a day-to-day basis, elected city officials are required to make decisions on administrative functions facing the city, such as purchase of city vehicles, establishment of parking fees, and the proper maintenance of city-owned lands and buildings. . . . [T]o subject each such decision to referendum [or initiative] would result in chaos and bring the machinery of government to a halt. . . . The rule that administrative functions are not subject to referendum [or initiative] is therefore both logical and well grounded in common sense. Moreover, even to the extent that it excludes the referendum [or initiative], this limitation on the referendum [or initiative] power does not leave citizens without remedy. Citizens who disagree with the manner in which their municipal government is administered are free to elect new officials or recall those who are currently in office.

Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986) [Bracketed material added.]

To determine whether a measure is legislative or administrative in character, Witcher v. Canon City, *supra*, provides specific instruction. In that case, the court set forth and reaffirmed three specific tests for determining whether a municipal action was legislative or administrative in nature.

First, actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not. [Citations omitted.] Second, "acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative." [Citations omitted.] Third, if an original act was legislative, then an amendment to the original act must also be legislative. [Citations omitted.]

716 P.2d at 450, *citing from City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977).

In the context of a lease, the creation, execution and amendment of a lease of real property clearly is not a permanent act. "Moreover, in the context of a lessor-lessee relationship, changing circumstances often require amendments to an original agreement between parties. In making changes to a lease, neither party presumes an amendment to be permanent in nature." 716 P.2d at 450.

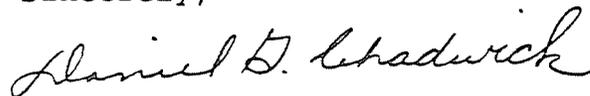
The issue of public policy was resolved by the Idaho Legislature in adopting Idaho Code § 50-1409, which gives city officials the discretionary authority to lease unneeded city property. Furthermore, "[t]he question of approval of the specific terms and conditions of the lease is not a matter of public policy. The negotiation of the leases and the amendments thereto are administrative acts. . . ." 716 P.2d at 450. The third test is not applicable to this situation since the original

Jack Hoopes  
May 18, 1990  
Page 4

act consists of entering into a lease which by definition is an administrative act as opposed to a legislative act.

The foregoing analysis clearly indicates that leasing city property is not a legislative function but an administrative function. As such, whether or not to enter into a lease is not subject in the first instance to the initiative or referendum process. Based on Witcher and the cases cited therein, the city of St. Anthony clearly can deny the petition and refuse to hold the election. Amalgamated Transit Union-Division 757 v. Yerkovich, 545 P.2d 1401, 1404, n. 7 (Or. App. 1976). To do otherwise would subject the city's day-to-day operations to the chaos described in Witcher.

Sincerely,



Daniel G. Chadwick  
Chief, Intergovernmental  
Affairs Division

cc: Association of Idaho Cities