

February 18, 2010

Dear Mayor Lewis:

We commend you and your legal staff for your consideration of Arizona laws limiting the Town's use of public resources to influence the outcome of elections. We understand that the topic of a sales tax increase is scheduled to be referred to a vote in a few months, and it appears from your February 9, 2010 public meeting that your legal staff, undoubtedly in good faith, advised you that allowing residents to discuss the tax increase at Council meetings would violate the law. We respectfully disagree for the reasons below, and we urge the Town to consider the compelling free speech rights in permitting residents to share their views in a public forum.

As you referenced at the February 9 meeting, the Town may not "use its personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections." (A.R.S. § 9-500.14(A)) The "test for determining whether a communication is designed to influence the outcome of an election [is whether it] . . . taken as a whole, unambiguously urges a person to vote in a particular manner."¹ It is important to note, however, that the law prohibits only the *Town* from using public resources to influence elections. Notably, it does not prohibit a Town's *residents* from using public buildings to express their opinions.

There is a significant legal difference between a Town Councilmember or employee who uses the Town's computers or facilities to try to sway votes in an election (this violates Arizona law), and a Town that opens up its building as a forum for open discussion and debate of an important political issue (which does not violate the law). Of course, a Town could not permit a group of citizens from organizing a rally at the Town Hall to oppose the proposed tax increase while denying that opportunity to tax supporters. However, the Town using public buildings for an open, public meeting on an election matter is certainly not prohibited.

In fact, that precise activity is imperative for the exercise of free speech, to offer residents a forum to express their opinions. The Town creates a public forum (even if it is a "limited" public forum) at its meetings by allowing discussion on some public topics, but apparently it has chosen to exclude discussion on the proposed tax increase. Refusing to allow residents to speak on this important political issue amounts to a complete

¹ *Kromko v. City of Tucson*, 202 Ariz. 499, 502-03, 47 P.3d 1137, 1141 (App. Div. 2, 2002) (citation omitted).

prohibition on speech on the basis of the speaker's content—the most highly-scrutinized type of restriction on the constitutional freedom of speech.² Additionally, the Town's prohibition on speaking about the tax increase may unconstitutionally impair the First Amendment right to petition the Town for redress of grievances, since the Town Council could still decide to remove the topic from the ballot.

We are pleased to see Gilbert acknowledging and attempting to comply with limitations in the Arizona law, and we urge you to consider our interpretation and the speech rights that you may be limiting (even if unintentionally). In the interest of ensuring that the best policies are achieved for your Town, we request that you permit the public to discuss the proposed tax increase at public meetings according to your normal policy. Please do not hesitate to contact the Goldwater Institute, or have your legal advisors do so, should you have any questions or if we can be of assistance. We wish the best of luck to you and your Town in enduring this financially challenging time.

Very sincerely,

Carrie Ann Sitren, esq.

cc: Councilmember Linda Abbott
Councilmember Dave Crozier
Councilmember Jenn Daniels
Councilmember Les Presmyk
Councilmember John Sentz
Councilmember Steve Urie
Town Manager George Pettit

cc: Susan Goodwin (Curtis, Goodwin, and Sullivan, 501 E Thomas, Phoenix AZ 85012)

² *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).