



CITY OF
TUCSON
OFFICE OF THE
CITY ATTORNEY

July 6, 2020

Linley Wilson
Assistant Attorney General
Unit Chief Counsel
Government Accountability
OFFICE OF THE ARIZONA ATTORNEY GENERAL
Civil Litigation Division
1275 W. Washington
Phoenix, Arizona 85007-2926

***Re: Your June 17, 2020 Notice of Submission of Legislator Request for
Investigation Pursuant to A.R.S. Sec. 41-194.01; and Request for Response***

Dear Ms. Wilson,

This letter is offered as the City of Tucson's (City) response to Senator J.D. Mesnard's June 16, 2020 *Legislator Request for Attorney General Investigation of Alleged State-Law Violation by County, City or Town.* Any questions you might have relating to this response can be directed to me.

I. Introduction

Senator Mesnard's request for investigation arises from the City's lawful, Charter-mandated procedures and practices in holding its candidate elections for Mayor and Council Members in odd-numbered years. The City operates under the authority of the Tucson City Charter, which was adopted and ratified pursuant to Article 13, Sec. 2 of the Arizona Constitution. Pursuant to its Charter and constitutional authority, the City has established procedures and practices for the dates of its candidate elections.

Senator Mesnard's request for investigation is premised upon the application of the provisions of various acts of the Arizona Legislature [A.R.S. §§ 16-204, 204.01, and 204.02] that, on their face, would seem to require the City to begin conducting its candidate elections for the offices of Mayor and Council Members in even years beginning in 2022.

However, under Arizona law, specifically Article XIII, § 2 of the Arizona Constitution, the City's Charter empowers it to control the method and manner, and specifically the odd-year timing, of its elections for its Mayor and Council Members. See *Strode v. Sullivan*, 72 Ariz. 360 (1951); *City of Tucson v. State of Arizona*, 229 Ariz. 172 (2012); *City of Tucson v. State of Arizona*, 235 Ariz. 434 (App. 2014), *review denied* (March 17, 2015).

CITY HALL • 255 W. ALAMEDA • P.O. BOX 27210 • TUCSON, AZ 85726-7210
(520) 791-4221 • FAX (520) 791-4188 • TTY (520) 791-2639

www.cityoftucson.org



To the extent that the Arizona statutes cited by Senator Mesnard conflict with the provisions of the City's Charter, those statutes have no application to the City. The City's odd-year elections for its Mayor and Council Members are not in violation of state law, but instead are lawful under the supreme law of the State of Arizona, namely the Arizona Constitution.

The City requests that the Office of the Attorney General reject Senator Mesnard's request for investigation submitted pursuant to A.R.S. Section 41-194.01, determine that the City has not acted in violation of law, and refrain from taking any further actions described in SB 1487, including the withholding or redistribution of state shared revenues.

II. Factual Background

A. The City utilizes a charter-based, odd-year election system

The City is a charter city framed under Article 13, § 2 of the Arizona Constitution, and is sovereign in all matters that are of strictly local, municipal concern.

According to the Tucson Charter, "The [C]ity shall have power... [t]o provide for the manner in which and the times at which any municipal election shall be held Tucson Charter, Chapter IV, § 1, ¶ 20.

Specific provisions of the Tucson Charter enacted by the City's voters in 1960 and initially implemented in 1961 require odd-year elections of the Mayor and of Council Members for four-year terms, with Council Member terms staggered so that a portion of the governing body is elected through a primary and general election held every two years.¹ Tucson Charter, Chapter XVI, §§ 2-4.

B. According to the Arizona Supreme Court and Court of Appeals, that charter-based system supersedes state law, because the City's elections are matters of purely local concern.

¹ Prior to the enactment of the current provisions, the Tucson Charter (adopted in 1929) required elections of the Mayor and of Council Members for two-year terms, with Council Member terms staggered and a portion of the governing body elected in the spring of every year. A primary election was held on the first Tuesday in March (changed in 1948 to the third Tuesday in February), and a general election was held on the first Tuesday in April. Holding City elections in the Spring assured that in even years, those elections would still be separate from the State's Fall primary and general elections. When the City's voters enacted the current Charter provisions in 1960, they sought to preserve this separateness of City and State elections through the current requirement of biennial, odd-year Fall elections for City office.

In 2012, the Arizona Supreme Court held that A.R.S. § 9-821.01, a statute purporting to prohibit partisan city elections, was superseded by the City's charter, because the City's method and manner of conducting city council elections was not a matter of statewide concern. *City of Tucson v. State*, 229 Ariz. 172 (2012) ("*Tucson II*"). The decision reaffirmed the Court's prior holding that charter cities control the method and manner of their election in *Strode v. Sullivan*, 72 Ariz. 360 (1951).

Less than six weeks after that Arizona Supreme Court decision, the Arizona Legislature amended A.R.S. § 16-204 by adding a new subsection (E), purporting to mandate that charter cities hold their candidate elections in even years, simultaneously with state and national candidate elections.

In 2014, citing both *Tucson II* and *Strode*, the Arizona Court of Appeals specifically held that A.R.S. § 16-204(E)'s mandate of even-year candidate elections "improperly intrudes on the constitutional authority of charter cities" and "does not preempt city charters that require odd-numbered year election dates." *City of Tucson v. State*, 235 Ariz. 434, 435 (App. 2014) ("*Tucson III*"). The Arizona Supreme Court denied review on March 17, 2015.

C. A.R.S. §§ 16-204.01 and 16-204.02 are the Legislatures' latest attempt to circumvent the City's charter power to hold odd-year elections.

Despite these consistent court rulings, the Arizona Legislature's attempted interference with the timing of the City's candidate elections now continues. During the Arizona Legislature's 2018 Regular Session (Fifty-Third Legislature, Second Regular Session), it enacted House Bill (HB) 2604, which added brand new A.R.S. §§ 16-204.01 and 16-204.02, seeking to link statewide consolidated election dates and voter turnout.

In a nutshell, A.R.S. § 16-204.01, provides that beginning with municipal elections in 2018, other than special or recall elections, if a "significant decrease in voter turnout" occurs, the municipality shall hold its subsequent elections on the even-year Statewide election dates provided for in A.R.S. § 16-204(E) beginning three (3) calendar years after the occurrence of the significant decrease in voter turnout. A.R.S. § 16-204.02(A) correspondingly lengthens the term of incumbent municipal elected officials to align with the new election dates. As stated in A.R.S. § 16-204.01, both of these statutes expressly purport to apply to charter cities as well as to all other cities and towns.

Governor Doug Ducey signed HB 2604 on April 17, 2018, and it was chaptered in the 2018 Session Laws as Chapter 247. Pursuant to Ariz. Const. Art. 4, Part 1, § 1, ¶ 3, amended A.R.S. §§ 16-204.01 and 204.02 took effect on August 3, 2018, the general effective date for nonemergency statutes passed during the Fifty-Third Legislature, Second Regular Session.

According to A.R.S. § 16-204.01, "'voter turnout' means the number of ballots cast in a specific candidate race prescribed by this section divided by the total number of active registered voters in that political subdivision or portion of a political subdivision, as applicable, or if no specific candidate race is prescribed by this section, the number of ballots cast in that political subdivision or portion of a political subdivision, as applicable, divided by the total number of active registered voters in that political subdivision or portion of a political subdivision at the election prescribed by this section."

According to A.R.S. § 16-204.01, "[s]ignificant decrease in voter turnout" means the voter turnout for the office that received the highest number of votes in the most recent candidate election for a political subdivision in which candidates are elected at large, or portion of a political subdivision if candidates are not elected at large, is at least twenty-five percent less than the voter turnout in that same political subdivision or portion of a political subdivision for the most recent election in which the office of the governor appeared on the ballot." The statute does not make clear if "at least twenty five percent less" is to be calculated by multiplying the state turnout percentage by 0.75 or by subtracting 25% from the state voter turnout percentage.

In an express attempt to circumvent or evade *Tucson III*, A.R.S. § 16-204.01 also states as follows:

A. After consideration of the court's opinion in City of Tucson v. State, 235 Ariz. 434 (Ct. App. 2014), the legislature finds and determines that it is a matter of statewide concern to increase voter participation in elections, including elections for cities, including charter cities, towns and other political subdivisions, and the legislature finds and declares that if cities, including charter cities, towns and other political subdivisions demonstrate low voter turnout in elections that are not held on the consolidated election dates prescribed in § 16-204, the low voter turnout constitutes sufficient factual support for requiring candidate and other elections to be held on certain specific consolidated dates. The legislature further finds and declares that after evidence of low voter turnout in city, including charter city, and town elections and in elections held for other political subdivisions, increasing voter turnout through the use of consolidated election dates for candidate and other elections as prescribed by this section is a matter of statewide concern. This section preempts all local laws, ordinances and charter provisions to the contrary.

D. Subsequent to the passage of these statutes, the City's voters reaffirmed their support for Charter-based, odd-year elections

The Mayor and Council immediately recognized that the new statutes were subject to challenge as a violation of the City's Charter powers over its own elections, as granted by Article XIII, § 2 of the Arizona Constitution and the three cases cited above.

However, the City faced a potential dilemma in deciding whether to immediately bring such a challenge. On the one hand, it was not clear that the Arizona courts would consider such a challenge by the City to be “ripe” unless and until the City had actually met the conditions for the statute’s actual application to it, which could not possibly occur prior to the City’s November 2019 election. On the other hand, waiting until the City might be faced with the application of the statute could leave the City pressed for time in seeking to litigate the matter.

For those reasons and others, the Mayor and Council decided to give City voters an opportunity to express their will about the timing of the City’s elections. Accordingly, during the Study Session held on May 22, 2018, the Mayor and Council voted to direct staff to prepare a proposed Charter amendment to refer to City voters at the November 2018 election, which if approved by voters would have moved City candidate elections to even-numbered years beginning in 2020.

Under the proposed Charter amendment (presented to the voters as Proposition 408), the Mayor and those Councilmembers whose terms were set to expire in 2019 (Wards 1, 2, and 4), would have continued in office until 2020, at which time there would be primary and general elections for those four offices for four-year terms ending in 2024. Those Councilmembers whose terms currently expire in 2021 (Wards 3, 5, and 6) would have been continued in office until 2022, at which time there would have been primary and general elections for those three offices for four-year terms ending in 2026.

Tucson’s voters rejected Proposition 408 at the November 2018 election, with 42.16% (66,699 votes) voting “Yes” and 57.84% (91,513) voting “No.” As a result, the provisions of the Tucson Charter and Arizona statutes relating to the timing of the next City candidate election remained squarely in potential, but not yet actual, conflict pending the City’s 2019 elections.

E. A conflict now exists between the City’s Charter and new A.R.S. §§ 16-204.01 and 16-204.02, and the Charter prevails.

Using A.R.S. § 16-204.01’s statutory definition, the “voter turnout” in the 2018 Statewide election, as measured within the City limits, was just over 67%. Using the statutory definition, the “voter turnout” in the City’s 2019 election was just over 39%. Using either possible method of calculation of “at least twenty five percent less,”² voter

² If a City voter turnout “at least twenty five percent less” than the state voter turnout in the 2018 Statewide election is to be calculated by multiplying the Statewide voter turnout percentage of 67% by 0.75, then any City voter turnout under 50.2% in the City’s 2019 election would have triggered the statute, assuming it can apply. If it is to be calculated by subtracting 25% from the Statewide voter turnout percentage of 67%, then any City voter turnout under 42% in the City’s 2019 election would have triggered the statute, assuming it can apply

Linley Wilson
Assistant Attorney General
Page 6
July 6, 2020

turnout in the City's 2019 election was "at least twenty five percent less" than the state voter turnout in the 2018 Statewide election.

If A.R.S. § 16-204.01's provisions applied to the City of Tucson, the statute would have now been theoretically triggered, so there is now an actual conflict. Under the statute, the next City candidate election for Wards 3, 5, and 6 would have to occur in 2022, rather than 2021; and the 2023 election for Mayor and Wards 1, 2, and 4 would have to be rescheduled to 2024.

But A.R.S. § 16-204.01 does not apply to the City of Tucson. The City is continuing to hold elections as mandated under its Charter, rather than A.R.S. § 16-204.01, which is superseded by the Charter and inapplicable.

Accordingly, on February 19, 2020, the Mayor and Council enacted Ordinance No. 11731 (Attachment 1 to this Complaint), calling the August 3, 2021 City Primary election and the November 2, 2021 City General Election, and gave notice that these elections, and any special elections occurring on either of those dates, will be conducted as mail ballot elections supplemented by on-site voting locations in each ward.

On May 1, 2020, the City filed a special action Complaint in Pima County Superior Court seeking declaratory and injunctive relief against the application of A.R.S. § 16-204.01 to its candidate elections.

Six weeks later, on June 16, 2020, Senator Mesnard's filed his request for investigation.

III. Analysis

Given the prior history and existing precedent regarding the issue, the analysis here is straightforward, and the City's Charter controls.

Article 13, § 2 of the Arizona Constitution was adopted by the Constitutional Convention in 1910 in order to change the legal relationship between the Legislature and charter cities. The concept adopted by the drafters of the Constitution was that charter cities be granted "home rule" authority free from the interference of the Legislature. I believe that the intentions and purposes of the Constitutional Convention in adopting that provision are under direct attack by the Legislature, in particular through the enactment of SB 1487.

The intended purpose of Article 13 § 2 was recognized by the Arizona Supreme Court in *Tucson II*, ¶¶ 7-10, where the Court noted that the prevailing 19th-century view up to the time of the Constitutional Convention was that cities and towns should be entirely subordinate to the supreme authority of the Legislature:

Nineteenth century case law and legal commentary generally viewed cities and towns as entirely subordinate to and dependent on the state's legislature for any governmental authority. See, e.g., Lynn A. Baker &

Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 Den. U. L. Rev. 1337, 1340 (2009) (noting “near consensus view” that “municipalities had only those powers delegated to them by state legislatures”); David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2277-88 (2003) (describing nineteenth century views of local government and rise of home rule movement).

But, the Supreme Court in *Tucson II* went on to note that the framers of the Constitution rejected that view and wished to change it by the insertion of the charter city provision in Article 13, § 2 of the Constitution. The Court expressed this understanding in a lengthy discussion. I set out that discussion below, and add my own italics and bold to highlight my point that the framers of the Arizona Constitution deliberately and intentionally rejected that view:

The framers of Arizona's Constitution, however, rejected that view, valuing local autonomy. See Toni McClory, *Understanding Arizona's Constitution* 178 (2d ed. 2010). Accordingly, Arizona's Constitution bars the state legislature from enacting “local or special laws” with respect to “[i]ncorporation of cities, towns, or villages, or amending their charters,” Ariz. Const. art. 4, pt. 2, § 19(17), and requires “the legislature, by general laws, [to] provide for the incorporation and organization of cities and towns and for the classification of such cities and towns in proportion to population.” *Id.* art. 13, § 1.

More importantly, our Constitution also permits any city of more than 3500 people to “frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state.” *Id.* art. 13, § 2. ***The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible.*** *City of Tucson v. Walker*, 60 Ariz. 232, 239, 135 P.2d 223, 226 (1943) (quoting *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613, 614-15 (1942)).

Upon approval by the city's voters and the governor, the “charter shall become the organic law of such city and supersede any charter then existing (and all amendments thereto), and all ordinances inconsistent with said new charter.” Ariz. Const. art. 13, § 2. ***Thus, under Arizona's Constitution, eligible cities may adopt a charter—effectively, a local constitution—for their own government without action by the state legislature. “[A] home rule city deriving its powers from the Constitution is independent of the state Legislature as to all subjects of strictly local municipal concern.*** *City of Tucson v. Tucson Sunshine Climate Club*, 64 Ariz. 1, 8-9, 164 P.2d 598, 602 (1945); see *Buntman v. City of Phoenix*, 32 Ariz. 18, 25-27, 255 P. 490, 492-93 (1927) (holding that city charter provided legislative authorization for municipal operation of railway under Ariz. Const. art. 2, § 34); *The Records of the Arizona Constitutional Convention of 1910* 515 (John S. Goff ed., 1991) [hereinafter Records] (statement of sponsoring delegate noting that charter provision relieved cities of need “to go to the legislature for a charter”); John D. Leshy, *The Arizona State Constitution* 265-66 (1993).

Thus, Article 13 § 2 of the Arizona Constitution was intended to change the relationship between the Legislature and those cities that adopt a charter. The change in that relationship, incorporated into the Constitution, prohibits the Legislature from interfering in the local affairs of a charter city. As the Supreme Court noted in *Tucson II* in 2012, the concept that the Legislature can control a charter city was rejected by the framers of the Constitution when Article 13 § 2 was adopted.

This principle is particularly applicable to the City's elections as shown by *Tucson II*, *Strode*, and *Tucson III*, which are controlling precedent here. *Tucson II* and *Strode* both recognize that there is no more inherently local interest than the method and manner of conducting elections for a charter city. In both cases, the Arizona Supreme Court noted several times that the method and manner of conducting local elections is not a matter of statewide concern, regardless of how the Legislature may attempt to justify its intervention. And just six years ago, in *Tucson III*, the Arizona Court of Appeals applied those two cases and their principles specifically to the precise issue now being raised again, even-year versus odd-year elections, and found that the City's charter controls this issue.

The current language of A.R.S. § 16-204.01 seeks to justify itself, and escape the controlling precedent, by utilizing the preemptive and generalized statement that "voter participation" is of statewide concern. But that attempted justification ignores the fact that the voter turnout being discussed is related to a strictly local election, which by its nature is *not* of statewide concern. See ARS § 16-204.01(4).

This basic flaw is further manifested in the statute's circular, irrational structure and definitions. For example, "voter turnout" as defined by A.R.S. § 16-204.01(D)(4) compares voter turnout in a strictly local election to voter turnout in a statewide election, an apples and oranges comparison that has no rational basis or, in the case of charter cities, legal sanction. While there are multiple reasons why voter turnout may differ between these two elections, for example, an uncontested mayoral election or a nationwide pandemic, the Legislature provides no rationale as to how the state's interests, particularly those outside of the subject charter city, are impacted if they do. The comparison itself is also fundamentally flawed as it seeks to equate two fundamentally dissimilar elections. Because there is no requirement that the comparison election have any candidates at all, let alone a mayoral candidate, the calculation required by A.R.S. § 16-204.01(D)(4) could differ wildly just based on the slate of local ballot measures at issue or whether a candidate has another candidate opposing them.

Likewise, the definition of "significant decrease in voter turnout" in A.R.S. § 16-204.01(D)(2) makes an arbitrary distinction of a 25% differential in voter turnout between the statewide election and the local election, for which the Legislature provides no specific rationale. Indeed, what the Legislature arbitrarily chooses to view as a "significant decrease" from a statewide election to an ensuing local election may simply indicate, and have been produced by, a relatively high turnout for the previous state election.

Linley Wilson
Assistant Attorney General
Page 9
July 6, 2020

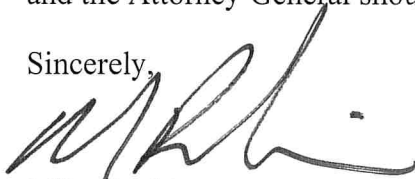
This brings up yet another irrational flaw in the statute. While the statute defines "significant decrease in voter turnout," it does not define "low voter turnout," the concept that according to the Legislature "constitutes sufficient factual support for requiring candidate and other elections to be held on certain specific consolidated dates" in even years (A.R.S. §§ 16-204.01(A), 16-204(E)). The failure to do so is significant, especially given the Legislature's attempt to compare state and local elections that have no common characteristics. A locality's voter turnout may actually be "high" or "very high" according to objective, uniformly applied criteria, including comparison with other localities. But according to the Legislature that does not matter, so long as there is a 25% decrease in voter turnout between a state and local election that, as stated above, differ in their basic characteristics and cannot be compared in the first place. Conversely, according to the Legislature's flawed thinking, a jurisdiction with an objectively low (e.g., 10%) voter turnout for *both* state *and* local elections apparently does not have any voter turnout problem at all that would or should make the statute applicable.

This brings us right back to the basic, fatal problem with this statutory scheme. It fails to describe, justify, or provide any other rational basis for, why an election concerning strictly local issues and candidates is of statewide importance so as to allow this state interference and attempted control in the first place. *See e.g., Tucson III, 235 Ariz. at 439-40* (failure to show factual support for how the state's own interests would be affected fatal to similar attempt at showing statewide concern).

The Legislature has many options to choose from in seeking to increase voter participation, but those options do not include removing from Tucson's voters their constitutionally granted charter authority to determine "whether they want their municipal elections shaped by state, county, or federal partisan issues." *Tucson III, 235 Ariz. at 439.*

The City's charter-based choice of odd-year elections does not violate state law, and the Attorney General should so find.

Sincerely,



Mike Rankin
City Attorney

MR/dg