

January 22, 2019

Lynda Lowry
Director of Finance and Administration
Office of the Boise City Clerk
City Hall
VIA HAND DELIVERY

RE: Certificate of Review: Proposed Initiative to Add New Chapter to Title 1 of Boise City Code Requiring a Vote by the People to Approve any Plan, Design, or Construction of a New Library in Downtown Boise

Dear Director Lowry:

On December 21, 2018, the Office of the Boise City Clerk received a proposed initiative petition ("Initiative") with 75 signatures from the group Boise Working Together ("Petitioners"). The Ada County Election's Office subsequently verified 68 of the signatures satisfying the number of signatures required by Idaho Code § 34-1804 to trigger a review of the Initiative. Pursuant to Idaho Code §§ 34-1801B and 34-1809, the Office of the City Attorney ("City Attorney") reviewed the Initiative and prepared the following advisory comments. Given the strict statutory timeframe for review, this City Attorney's review only identifies areas of concern and does not provide an in-depth legal analysis. Further, the review statute (Idaho Code § 34-1809(1)(b)) does not require the Petitioners to accept any of the recommendations contained herein. Additionally, these advisory comments do not include any analysis of the potential impacts of the Initiative, nor does it offer an opinion on any policy issues that may be raised by the Initiative.

I. BALLOT TITLE

Following the filing of the Initiative, the City Attorney will prepare a short and a long ballot title. The ballot titles will impartially and succinctly state the purpose of the proposed measure without being argumentative or creating prejudice for or against the measure. The Petitioners may submit proposed ballot titles for consideration by the City Attorney. Proposed ballot titles must be consistent with the standards set forth in Idaho Code § 34-1809.

II. MATTERS OF STYLE AND FORM

In reviewing the Initiative for form and style the City Attorney relied in part upon the Legislative Drafting Manual, Concise Version, ("Manual") created by the Idaho Legislative Services Office as reference material to assist in the drafting of legislation. See available at <https://legislature.idaho.gov/wp->

content/uploads/research/draftingmanual.pdf. The Initiative should be drafted using “legislative format” and legislative drafting principles. After reviewing the Initiative for form and style pursuant to Idaho Code § 34-1809(1)(c), the City Attorney recommends the following revisions:

First, when stating dollar amounts or other numbers, the correct format is to write out the amount and then repeat it with numerals in parentheses. *Manual*, at 27. In Section 1-27-02 of the Initiative, the term “\$500,000” should read “five hundred thousand dollars (\$500,000)”.

Second, definitions should be in alphabetical order. *Id.* at pg. 15. The terms set forth in Section 1-27-03 of the Initiative should be in the following order: Expenses, Library, and Plan and Design. Additionally, the definition for “Expenses” does not follow the same format as the other defined terms. All the defined terms should follow a consistent format.

Third, nouns and other references should be consistent. In this Initiative, City of Boise is referenced in three different ways: 1) City of Boise; 2) the City; and 3) Boise City. A better approach would be to use a longer reference at first with a shorter reference clearly set forth for use throughout the rest of the Initiative. For example, city of Boise City (“City”) and then simply City thereafter.

Fourth, the term “electors” used in Section 1-27-02 would be more accurately stated as “qualified electors.” See Idaho Code §§ 34-106 and 50-402(c).

Fifth, sentences in legislation ideally should be brief and address a single concept. *Manual*, at pg. 29. Section 1-27-02 of the Initiative is only one sentence but is five lines long, contains eighty-two words, and addresses multiple concepts. This sentence should be shortened (or divided into multiple sentences) and edited to address a single concept.

Sixth, the definition provided for the term “Library” in Section 1-27-03(B) of the Initiative does not meet generally accepted legislative drafting standards. In the Initiative’s definition of “Library” the term being defined (i.e. “Library”) is used in the text of the definition. This is improper legislative construction as it requires the reader to look elsewhere for a complete meaning of the term. See *Drafting Legal Documents, Definitions*, National Archive Website, available at <https://www.archives.gov/federal-register/write/legal-docs/definitions.html>. Additionally, as the Initiative is regarding a specific structure it is recommended that the Petitioners provide a physical address or some other legal description for the property in question within this definition.

Seventh, the term “Library” is used inconsistently within the Initiative. As a general principle, terms should be used consistently throughout legislation. *Manual*, at pg. 29. In Section 1-27-03(B), “Library” is defined as “any facility which requires the demolition of the present downtown Library building and replaces it with a new structure ... [but] does not include any remodeling, addition, or other construction which does not involve destruction or demolition of the present structure.” However, the commonly accepted meaning of the term “Library” as used within the body of this definition (i.e. a facility that stores and loans books and other periodical and materials to the public) is different than the provided definition for that same term (i.e. “*any facility*” built to replace the current structure in a specific location). Thus, it appears the Petitioners are not trying to define a “Library,” but rather a “New Library Project” or

"Downtown Library Project". It is recommended that the Petitioners revise the term "Library" to more accurately reflect the intent of the definition provided. Revising the term "Library" is also advised because as drafted it conflicts with the current Boise City Code ("B.C.C.") § 11-012-02.1.M.2. definition for the same term, which states that a "library" is, "[a] permanent facility for storing and loaning books, periodicals, reference materials, audio and videotapes, and other similar media to city residents."

Eighth, the Initiative inconsistently uses the Oxford comma within its text. For example, the Oxford comma is used in Section 1-27-03(B), "'Library' does not include any remodeling, addition, or other construction...." However, the same punctuation rule is not employed in the other sections of the Initiative. For example, Section 1-27-03(A) reads, "'Plan and Design' means a proposal that includes any element of the cost, method of financing, location, design and size of a proposed new Library." All grammar, including the Oxford comma, should be consistent throughout the Initiative.

III. SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

The Initiative seeks to add a new chapter to Boise City Code ("Chapter"), that would limit any expenditure by the city of Boise City ("City") for a new downtown library to five hundred thousand dollars (\$500,000). The proposed Chapter would also require a future election for voter approval of the "plan and design" of such library. The Initiative defines "plan and design" to include "any element of the cost, method of financing, location, design and size of a proposed new Library." Upon reviewing the Initiative for substantive issues pursuant to Idaho Code § 34-1809(1)(a), the Chapter proposed by the Initiative is likely unconstitutional, preempted by State law, could expose the City to lawsuits for breach of contract, and may give rise to tortious interference with contract claims. These issues are discussed below.

A. The Initiative is unconstitutional because it is administrative in nature.

The subject matter of the Initiative is likely administrative in nature, and therefore unconstitutional. Article 3, Section 1 of the Idaho Constitution authorizes referenda and initiatives. The Idaho Supreme Court has held that "referenda and initiatives in Idaho are constrained to addressing 'acts' or 'measures' passed by a legislative body. In other words, a referendum can only seek to reject an 'act' or 'measure,' and an initiative can only seek to implement an 'act' or 'measure.'" *Weldon v. Bonner County Tax Coalition*, 124 Idaho 31, 38, 855 P.2d 868, 875 (1993). Subjects that are legislative in nature are appropriate for action by initiative. Whereas subjects that are administrative in nature are not appropriate for action by initiative. *City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). Idaho courts have not adopted a bright line rule distinguishing legislative acts from administrative acts. *Weldon*, 124 Idaho at 38, 855 P.2d at 875. Consequently, Idaho courts will likely consider how other jurisdictions have addressed the distinction between legislative and administrative.

The Colorado Supreme Court addressed this distinction in a case with similar underlying facts as the Initiative at hand. In that case, a city council approved the purchase of real property and the relocation of an historical building to that parcel and renovated as the new city hall. Two petitions for initiated ordinances were filed. The first initiative would have repealed any city council measures that approved the purchase of the land and the relocation of the historical building. The second initiative would have prohibited the appropriation of funds for the relocation of the historical building or purchase of land for the relocation of the historical building. *City of Idaho Springs v. Blackwell*, 731

P.2d 1250, 1251-52 (Colo. 1987). The court analyzed the subject of these initiatives under two tests and found under both that the initiatives were improper subjects for initiated ordinance because they were administrative. *Id.* at 1254-55.

The first test the court utilized, which is used in several other jurisdictions, considered whether the initiatives were related to a subject of a permanent or general character rather than a subject of temporary and special character. *Id.* at 1254. *See e.g.* Use of Initiative and Referendum to Affect City Budgets, Idaho Att’y Gen. Op. No. 7614 (1987) (quoting *Cuprowski v. City of Jersey City*, 242 A.2d 873, 101 N.J. S. 15 (1968)); *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wash.2d 740, 748, 620 P.2d. 82, 87 (1980); *Campbell v. City of Eugene*, 116 Or. 264, 273, 240 P. 418, 421, (Or. 1925). The court concluded that the selection of a site and structure for a city hall was not a permanent or general act and thus administrative in nature. *See Idaho Springs*, 731 P.2d at 1254. The second test the court employed considered whether an initiated action is necessary to carry out existing legislative policies and purposes or whether it constitutes a declaration of public policy. *Id.* The court held that the proposed initiatives were administrative under this test as well, stating that “[t]he choice of location and structure for the new city hall is an act ‘necessary to carry out’ the existing legislative policy to build a new city hall” and thus administrative. *Id.* at 1255. Like the initiatives reviewed by the Colorado Supreme Court, this Initiative seeks to address a matter of special character, i.e. the location, cost, and design of a new downtown library structure. Moreover, the choice of the location, cost, and design of a new library are acts necessary to carry out the existing legislative policy to update and expand the downtown library. Given the similarities between this Initiative and those in the *Idaho Springs* case, this Initiative is likely administrative as opposed to legislative in nature and therefore unconstitutional.

The Initiative also is administrative in nature because it is related to municipal budgeting and appropriation processes. Several courts, including the Idaho Supreme Court, have held that initiatives and referenda related to budget decisions are administrative in nature. *See e.g. Weldon*, 124 Idaho at 33-34 and 39, 855 P.2d at 870-71, and 876 (The court found that a referendum vote on budget decisions by county commissioners administrative in nature and therefore prohibited.); *Sevier Power Co., LLC v. Board of Sevier County Com’rs*, 196 P.3d 583, 587 (Utah 2008) (“When an initiative seeks to undo an accomplished action taken pursuant to existing law, it most likely falls within the administrative action category. Adoption of budgets are within this category.”) If passed, the Initiative would significantly alter statutory budget and appropriation processes and interrupt existing budgetary commitments to construct the new downtown library. The Initiative is therefore administrative and thus unconstitutional.

For all the reasons discussed above, the Initiative is likely to be found administrative in nature and thus unconstitutional.

B. The Initiative is preempted by Idaho Code on municipal finances.

Idaho law preempts the Initiative from amending municipal budgeting and appropriation processes. Idaho Code Title 50, Chapter 10 governs municipal finances including budgeting and appropriations. Under state code, all cities are authorized to develop their budgets under a specific statutory framework. The Initiative however, would require the City to seek voter approval on its downtown library building plan, a project for which the City Council has already allocated initial funding.

This Initiative would alter the budgetary process under which the City would operate regarding a new downtown library.

Article 12, Section 2 of the Idaho Constitution states that a city ordinance may not conflict with a state statute. A “conflict” between a municipal ordinance and a state statute can be found if preempted by the state either expressly or impliedly. *Idaho Dairymen’s Ass’n, Inc. v. Gooding County*, 148 Idaho 653, 659, 227 P.3d 907, 913 (2010) (citing *Envirosafe Serv. Of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987)). The *Envirosafe* court addressed preemption stating that it “typically applies in instances where, despite the lack of specific language preempting regulation by local governmental entities, the state has acted in an area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.” *Id.*

In this case, the scope and breadth of Idaho Code Title 50, Chapter 10, Finances, implies that the legislature intended to fully occupy this area of regulation. The Idaho Supreme Court has noted that, “since local regulations cannot conflict with general state laws, ‘any referendum procedure for review [of] county budget decisions [pursuant to Bonner County Ordinance No. 141] would be improper....’” *Weldon*, 124 Idaho at 33-34 and 39, 855 P.2d at 870-71, and 876 (quoting district court’s decision.) Courts in other jurisdictions have found that statutes preempt local ordinances regarding municipal finance regulations. *See e.g. City of Ocean City v. Sommerville*, 403 N.J.Super. 345, 363-65, 958 A.2d 465, 475-78 (2008) (“It is evident from both the legislative scheme and history that a municipality’s budgetary powers ... are like the budgetary process exercised by a county, clearly subject to the dominion of the Legislature ... [and therefore] statutorily immune from the referendum process.”) Since the Initiative, would alter the statutorily created budgeting and appropriation framework for a new downtown library, it is likely that this Initiative is preempted by state law.

C. The Initiative proposes improper limitation on future city councils.

This Initiative may be an improper limitation on the decision-making abilities of future City councils. The Initiative seeks to limit how future Boise City Councils may appropriate, spend money for, or otherwise plan, design, and build a new downtown library. As a general principle, one legislative body cannot tie the hands of future legislative bodies. *See e.g. Cooper Wells & Co. v. City of St. Joseph*, 232 Mich. 255, 258, 205 N.W. 86, 87 (1925). If enacted, the Initiative would create an ordinance binding future City Councils’ ability to build a new downtown library. Consequently, the Initiative may be invalid because it would improperly limit the decision-making abilities of future City Councils.

D. The Initiative may be unconstitutional as it may cause the City to breach contracts.

The Initiative may be unconstitutional because it may cause breach of City contracts. Article 1, Section 16 of the Idaho Constitution states “[no] law impairing the obligation of contracts shall ever be passed.” *See also* U.S. Constitution, art. 1, § 10, cl. 1 (No state shall pass any law that impairs the obligation of contracts). The Idaho Supreme Court held “[i]t is a well-known fundamental rule of law that a state by the act of its Legislature cannot alter the nature or legal effect of an existing contract to the prejudice of either party ... It is not only private contracts that are protected from impairment by state law. The protection also extends to contracts made by a state or a municipal corporation.” *Fidelity State Bank v. North Fork Hwy. Dist.*, 35 Idaho 797, 209 P. 449 (1922).

The elements for a claim for breach of contract are: 1) the existence of a contract; 2) breach of the contract; 3) the breach caused damages; and 4) the amount of those damages. *Path to Health, LLP v. Long*, 161 Idaho 50, 57, 383 P.3d 1220, 1227 (2016) (citing *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013)). Courts have upheld that municipalities may be sued for breach of contract resulting from referenda and initiatives. See e.g. *West Haven Sound Dev. Corp. v. West Haven*, 201 Conn. 305, 316, 514 A.2d 734, 740 (1986) (Court found that evidence was sufficient to support a jury's determination that the city's breach of contract caused the failure of a redeveloper's restaurant after a local referendum halted the city's urban renewal plan.)

The City has entered into contracts for design and construction planning of the new downtown library. These contracts are for services, and in dollar amounts beyond the scope permitted under the Initiative without a public vote. If passed, the Initiative would require the City to obtain voter approval on the new downtown library plan and design. If the City cannot obtain a majority vote in support of its already implemented plan and design for the new downtown library, it would be forced to breach the contracts under which it is currently bound. To breach these contracts would expose the City to unknown levels of indebtedness. Consequently, the Initiative is likely unconstitutional because it may impair those existing contracts.

E. The Initiative may result in tortious interference with contract claims.

If this Initiative is passed and results in the City breaching its contracts for the new library, it may also trigger claims of tortious interference with contracts. Tortious interference with contract has four elements: 1) the existence of a contract; 2) knowledge of that contract on the part of the defendant; 3) intentional interference causing a breach of the contract; and 4) an injury to the plaintiff resulting from the breach. *Bybee v. Isaac*, 145 Idaho 251, 259, 178 P.3d 616, 624 (2008) (citing *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 283–84, 824 P.2d 841, 858–59 (1991) and *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1114 (1974)).

In the matter at hand, the elements of tortious interference with a contract may be met if the Initiative passes. Even if the Petitioners do not have actual knowledge of the City's contracts, they certainly have implied knowledge thereof. Courts have upheld imputed knowledge of an underlying contract for purpose of a tortious interference with contract claim, where the defendant did not have actual knowledge that the contract existed but "knew of the business relationship" between plaintiff and the third party. See e.g. *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 151, 555 S.E.2d 281, 290 (N.C. Ct. App. 2001); *Hopkins v. MWR Management Co.*, 2017 WL 2380227 (N.C. Sup. Ct. 2017) (not reported case).

Claims for tortious interference with contract may be brought against initiative and referendum petitioners. In an Ohio case, a land development company filed a tortious interference with business relationships claim against the petitioner who filed two referenda regarding the municipal approval of a planned development by the plaintiff landowner. Election on the referenda overturned the city's approval of the development. See *Kensington Land Co. v. Zelnick*, 95 Ohio Misc.2d 45, 706 N.E.2d 1279 (Ohio Com. Pleas 1998); *Kensington Land Co. v. Zelnick*, 94 Ohio Misc.2d 180, 182, 704 N.E.2d 1285, 1287 (Ohio Com.

Pleas 1997). The court concluded there was sufficient evidence for a trier of fact to consider whether the referendum on administrative actions (i.e. zoning for the development) constituted tortious interference with actual and prospective business relationships. Kensington, 95 Ohio Misc.2d at 60, 706 N.E.2d at 1289.

If the Initiative passes and the City breaches existing contracts, the Petitioners may be liable under tortious interference of contract claims by third-party contractors.

IV. CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to: Boise Working Together, 1104 Johnson Street, Boise, Idaho 83705.

Sincerely,



Natalie Mendoza, Interim Boise City Attorney

Analysis by:
Jennifer Pitino
Deputy Boise City Attorney

