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ARIZONA ATTORNEY GENERAL

Opinion No. 64-7
R-77
January 30, 1964

REQUESTED BY: THE HONORABLE JOHN HAUGH
State Representative

OPINION BY: ROBERT W. PICKRELL
The Attorney General

- QUESTIONS:
1. Can a political subdivision of the State of Arizona, to-wit, a city or county by duly enacted ordinance, regulate the solicitation of funds for charitable, health, welfare or other types of public service organizations ?
 2. What legal requirements can be placed by the political subdivision upon those seeking to raise funds and further what guarantees must the ordinance contain so that it does not deprive persons of their constitutional rights ?

- ANSWERS:
1. See body of opinion.
 2. See body of opinion.

Your first question raises the issue of the extent of police power of a city or county in Arizona.

In respect to the authority of an Arizona county to enact an ordinance regulating solicitation for charity within the county, it is the opinion of this office that a county does not possess such authority. A.R.S. §11-201 expressly limits the power of a county to five specific areas, which authority can be exercised only by the Board of Supervisors or agents and officers acting under the Board's authority. None of the five categories in any way relate to an inherent police power of a county or to such authority which would enable the county to pass an ordinance regulating solicitation of charity within its jurisdiction.

Concerning the authority of a municipal corporation, city or town, a city or town in Arizona can regulate the solicitation of charity if solicitation can be defined as a nuisance under A.R.S. §§9-240 (21) (a) and 9-276 (A) (16). Yet, the

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scope of the word nuisance is not a catch-all phrase for every conceivable evil. As explained by our Arizona Supreme Court in Hislop v. Rodgers, 54Ariz. 101, 113, 92 P.2d 527 (1939):

"Primarily, even in the absence of statutes, it is within the power of a municipal corporation to determine and declare what shall constitute a nuisance, and a large discretion rests in the municipal governing body in determining what these things are, but this power must be exercised reasonably and not arbitrarily, and a municipal corporation cannot make a thing a nuisance, which is not in truth one, merely by declaring it to be such. Its power is limited to such things as the common law declares to be nuisance."

The Court in the Hislop case ruled that certain business establishments in Phoenix were in fact nuisances and had been properly closed down by the Phoenix police. For a general discussion of what is a nuisance see the City of Phoenix v. Johnson, 51 Ariz. 115, 123-124, 75 P.2d 30 (1938). However, my research has not disclosed any judicial decisions ruling that the solicitation of charitable contributions is a nuisance. Consequently, an Arizona city or town can only pass such an ordinance regulating solicitation of charitable contributions if the city or town possess inherent police power, or definite authority from its charter provided it is a home rule city.

Yet, before determining whether or not a municipality has inherent police power, it should be noted that the police power itself is not an all encompassing power. In order for a governmental agency to exercise police power, there must exist an evil affecting the health, morals and welfare of the general public. See Nebbia v. New York, 291 U.S. 502, 78 L.Ed 940 (1934), a case dealing with a New York law regulating the price of milk.

Our Arizona Supreme Court has stated that the police power is always commensurate with public necessity but is likewise limited to those areas of public necessity. See Killingsworth

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v. West Way Motors Inc., 87 Ariz. 74, 78, 347 P.2d 1098 (1959)
and Edwards v. State Board of Barber Examiners, 72 Ariz. 108,
111 to 112, 231 P.2d 450 (1951).

In addition, there are definite constitutional limits which will be discussed, *infra*.

An example of our courts declaring that the State has overstepped its police power is Buehman v. Bechtel, 57 Ariz. 363, 272, 114 P.2d 227 (1941) where our court declared as unconstitutional a state law regulating the business of photography. The court explained on page 272 of 57 Ariz:

"The business or profession of making photographs is not inherently dangerous to society but is an entirely innocent occupation. If there be those engaged in it who make false representations as to the finish, quality or price of their product, it is not different in that respect from other lines of business. All businesses have their cheats, whose crimes are cared for by the general laws. Photography is not supposed to be an unhealthy or insanitary business needing medical supervision. It will not prosper the community or other lines of business or trade to limit the number of those who may engage in the business. It cannot harm those who pursue it nor anyone else, but may benefit its votaries in both health and finances. The police power, broad and comprehensive, as it is, may not be used to prevent a person from following a business or occupation so innocuous,"

In the specific area of regulating solicitation of charitable contributions such a state law was enacted in New York in 1954, Article 10 A sections 481 through 483(a), Social Welfare, Vol. 52 A of McKinney's Consolidated Laws of New York. The law has been involved in litigation under the name of Green v. Javits, 149 N.Y. Sub. 2d 854 (1956) and Application of

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Green, 166 N.Y. Sub. 2d 198, aff. 167 N.Y. Sub. 2d 431, app. den. 168 N.Y. Sub. 2d 607, app. dis. 4 N.Y. 2d 704, 171 N.Y. Sub. 2d 95 (1958). In this last citation, the New York Court of Appeals denied the motion for leave to appeal and a motion for certificate that a constitutional question was involved.

As for inherent police power of a municipality, our Supreme Court has ruled in Clayton v. State, 38 Ariz. 135, 145, 297 Pac. 1037 (1931) that "the police power inheres in the state and not its municipalities. The latter are agencies of the state and exercise police and other power only by grant given either directly or by necessary implication."

Our Arizona Supreme Court more recently stated in City of Phoenix v. Williams, 89 Ariz. 299, 302, 361 P.2d 651 (1961):

"In Paddock v. Brisbois, 35 Ariz. 214, 220, 276 P. 327, this Court said:

' A state Constitution . . . is a limitation of power, whereas a charter of a city, like the federal Constitution, is a grant of power. The organs through which the state speaks and acts may exercise all governmental powers not denied them by the Constitution and not surrendered to the federal government. A city may exercise only such powers as are delegated to it by the Constitution and the laws of the state and its charter.' (Emphasis supplied) (Court's emphasis)

'These basic principles regarding the power of a municipality have served as guides in numerous decisions since that time. City of Flagstaff v. Associated Dairy Products Co., 75 Ariz. 254, 255 P.2d 191; City of Phoenix v. Arizona Sash, Door & Glass Co., 80 Ariz. 100, 293 P.2d 438, opinion amended 80 Ariz. 239, 295 P.2d 854. It is obvious in

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summary, that an ordinance must conform and be subordinate to the city charter, as well as to the state laws and Constitution.

In *Schultz v. City of Phoenix*, 18 Ariz. 35, 39, 156 Pac. 75, 76, we said that the powers derived by a municipality from its charter are three-fold: those granted in express words, those fairly implied in the powers expressly granted, and . . . those essential to the accomplishment of the declared objects and purposes of the corporation - not simply convenient, but indispensable."

From the above quotation it is apparent that the powers of a city or town can be no larger than the power of the state, the latter being the source of power of the city or town.

Thus, while our state Legislature may pass a law requiring the regulation of the solicitation of charitable contributions, the question remains as to whether a city or town could pass this ordinance. As indicated by the quote from the *City of Phoenix v. Williams*, supra, the power of a city or town to pass such an ordinance must be derived from its charter in express words, those fairly implied in the powers expressly granted in the charter, and those essential to the accomplishment of declared objects and purposes of the city or town - not simply convenient but indispensable. Our office, therefore, can make no definite answer to your question without being referred to a specific charter in a particular city or town in Arizona. Yet, we can state what our Supreme Court has stated: that the State of a city or town in Arizona incapable of regulating in other fields of legislature and what cities outside of Arizona have been declared by the decisions of the respective courts as being capable of enacting in the area of regulation of charitable contributions. By way of dicta our Arizona Supreme Court stated that the City of Tucson could not in 1921 enact an ordinance regulating the practice of law in any manner. The Court stated in McCarthy

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v. City of Tucson, 26 Ariz. 311, 314, 225 Pac. 329 (1924):

"The ordinance in question, however, so far as it deals with attorneys, is clearly a revenue measure and is not police regulation. It does not undertake to supervise or regulate the powers of law in any manner, and, if it did, the attempt would be unsuccessful, because that regulation is not one subject to control by the police power, it being neither demoralizing nor dangerous to the public nor threatening to its health and safety."

Note that the opinion apparently assumes that Tucson has an inherent police power. Cf. Clayton v. State, *supra*, where such an inherent power of a municipality is denied to exist.

Some cities outside of Arizona have enacted ordinances regulating the solicitation of charitable funds. See Ex Parte Williams, 345 No. 1121, 139 S.W. 2d 845 (1940), cert. den. 311 U.S. 675, 61 Sup. Ct. 42, 85 L. Ed. 434; State v. Hundley, 195 N.C. 377, 142 S.E. 330 (1928) and State v. Hohensee, 164 Neb. 476, 82 N.W. 2d 554 (1957). The California Supreme Court similarly has upheld a Los Angeles ordinance regulating charitable solicitations. See Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 163 P. 2d 704 (1945), app. dis. 331 U.S. 543, 67 Sup. Ct. 1428, 91 L.Ed. 1662 and Rescue Army v. Municipal Court of Los Angeles, 28 Cal. 2d 460, 171 P.2d 8 (1946), app. dis. 331 U.S. 549, 56 Sup. Ct. 1407, 91 L. Ed. 1666.

The Los Angeles ordinance required that any person intending to solicit for any charitable purpose file a notice of intent ten (10) days in advance, showing the purpose, character, method, estimated expenses of solicitation, the need for the contribution to be solicited, the proposed use of the solicited funds, the amount that will remain available for charitable purposes over expenses, the amount received from solicitations in the preceding calendar year, the expense of such solicitation and the amount that remained available for charitable purposes. The solicitors were required to file a \$500.00 bond and pay a registration fee of \$1.00. Promoters were required to post a \$2,000.00 bond and to pay a registra-

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tration fee of \$25.00. Justice Traynor in writing the majority opinion upholding the Los Angeles ordinance, stated on page 709 of 163 P.2d supra:

"The information cards, which are in effect permits to solicit, are issued automatically upon the filing of the required information and the payment of four (4) cents for each card, the department [of Social Service] is given no authority to withhold such cards when these requirements are met, and we cannot assume it will abuse its authority in order to withhold them."

It should be noted that a California Legislature recently passed laws which basically are the same as the Los Angeles Ordinance involved in the Gospel Army v. City of Los Angeles, supra, and Rescue Army v. Municipal Court of Los Angeles, supra. See Chapter 1.7, enacted in 1951 and Chapter 1.8 enacted in 1959, of Division I of the California Welfare and Institutes Code. These California State laws still permit counties and municipal corporations to enact similar regulations. See Section 147.6 of Chapter 147 and Section 148.9 of Chapter 148. Consequently, there can arise no problem of state preemption. Cf. Clayton v. State, supra.

Therefore, the answer to your first question is as follows:

a) There is no specific statutory provision in A.R.S. enabling a city or county definitely to enact an ordinance regulating the solicitation of charitable funds.

b) A municipal corporation may, by virtue of its being a home rule city, enact such an ordinance provided it meets constitutional requirements discussed, *infra*, and provided such an ordinance is authorized by the city's charter in express words, or is implied in the powers expressly granted, or is essential to the extent of being indispensable and not merely convenient to the accomplishment of the declared objects and purposes of the corporation.

In reference to the constitutional requirements, the 14th Amendment of the Federal Constitution and Section 4 of Article 2 of our Arizona Constitution requires that the ordinance be in compliance with due process of law. Such a requirement is complied with only if the statute is neither arbitrary nor capricious and bears a reasonable relationship to the purpose of its enactment.

See Killingsworth v. West Way Motors, Inc., *supra*, at page 78 of 87 Ariz. and Nebbia v. New York, *supra*, at page 537 of 291 U.S. and 957 of 78 L. Ed.

Furthermore, in order to be neither arbitrary nor capricious, the ordinance must contain a sufficient standard so that the regulation of solicitation of charitable contributions is not left to the personal whim of a particular Board or public official. See Ex Parte Dart, 172 Cal. 47 155 Pac. 63, 65 (1916); Gospel Army v. City of Los Angeles, *supra*; Rescue Army v. Municipal Court of Los Angeles, *supra*; American Cancer Society v. Dayton, 160 Ohio St. 114, 114 N.E. 2d 219 (1953) and Hoyt Bros., Inc. v. City of Grand Rapids, 260 Mich. 447, 245 N.W. 509 (1932). Cf. Ex Parte Williams, *supra*, and State v. Hundley, *supra*, both of which involved municipal ordinances regulating solicitation of charitable funds with a particular board of official having sole discretionary power to determine which the charity was worthy and consequently entitled to be the subject of the solicitation of the funds. Despite this glaring arbitrary and capricious nature of these ordinances, the Missouri and North Carolina Supreme Court upheld the particular regulations.

There is the additional requirement of equal protection of the laws clause of the United States Constitution's 14th Amendment and the equal privileges and immunity requirement of our Arizona Constitution's Article 2, Section 13. Consequently, the municipal ordinance must have some rational basis for any exemptions of the law. See Elliott v. State, 29 Ariz. 389, 394, 242 Pac. 340 (1926). In Adams v. City of Park Ridge, 293 F. 2d 585 (7th Cir. 1961), the Seventh Circuit Court of Appeals held that a municipal ordinance regulating solicitation by all groups except the "Community

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Chest" was unconstitutional under the equal protection clause of the 14th Amendment to the United States Constitution.

Similarly, the ordinance cannot interfere with the free exercise of religion guaranteed by our United States Constitution's First Amendment and the exercise of religious freedom by our Arizona Constitution's Section 2, Article 12. However, our United States Supreme Court in Cantwell v. Connecticut, 310 U.S. 296, 305-307, 84 L.Ed. 1213, 1218-1219, stated:

"The general regulation, in the public interest, of solicitation, which does not involve any religious test, and does not unreasonably obstruct or delay the collection of funds is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibition, plus restriction on the free exercise of religion of interposing any inadmissible obstacle to its exercise.

* * *

" Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicity to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to present. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace,

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comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to law a forbidden burden upon the exercise of liberty protected by the Constitution."

For a case where the above views were applied, see American Mission Army v. City of Lynwood, 138 C.A. 2d 817, 292 P.2d 533 (1956). See generally Municipal Corporation Law, Vol. 1, page 316 (1963) by Antieau and McQuillan, Municipal Corporations, 3rd Ed., Vol. 5, §19.32, pp. 567-568.

Consequently, in order to be constitutional, the ordinance must: (1) bear a reasonable relationship to the avowed purpose of the ordinance, (2) provide a sufficient standard of operation so as to be neither arbitrary nor capricious, (3) have a reasonable basis for exemptions if exemptions are provided for, and (4) involve no religious test so as neither to interfere with the free exercise of religion nor to present a prior restraint in the free exercise thereof.

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