

OFFICE OF
G. P. BULLARD
ATTORNEY GENERAL
STATE OF ARIZONA

LEWIS T. CARPENTER
LESLIE C. HARDY
ASSISTANTS

November 15th, 1912.

His Excellency,
Honorable George W. P. Hunt,
Governor of the State of Arizona,
Phoenix, Arizona.

Dear sir:-

I herewith return to you the newly adopted Charter of the City of Phoenix, submitted by you to me for the purpose of obtaining an opinion as to whether or not the provisions of said Charter conflict with the Constitution of the State of Arizona or existing laws not relating to incorporated cities.

I desire to preface this opinion with an expression of regret that the freeholders who formulated this Charter did not confer with me relative to the provisions of the same prior to making a return of the same to the City. I do not say this in any spirit of criticism, as there was no legal reason why they should have consulted this office, but I would have been only too glad to have assisted in an humble way with the earnest and laborious work performed.

I find that the Charter, as submitted to me, conflicts with the Constitution in at least ten instances, as follows:

First: On page 24 of the Charter, commencing at the word "if", the Charter reads as follows:

"If during the said ten days a petition signed by qualified electors of the City equal in number to at least fifteen per cent of the entire vote cast for all candidates for Mayor or Commissioners at the last preceding general municipal election, at which a Mayor or Commissioner was elected, protesting against the passage of such ordinance, be presented to the Commission, the same shall thereupon be suspended from going into operation and it shall be the duty of the Commission to reconsider such ordinance, and if the same be not entirely repealed the Commissioners shall submit the ordinance, as is provided in Chapter 10 of this Charter, to the vote of the electors

His Excellency - 2

of the City, either at the next general election or at a said election to be called for that purpose, and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. "

This provision relates to the referendum and is in direct conflict with Subdivision 6 of Section 1 of Article 4 of the State Constitution, which reads as follows:

"The powers of the Initiative and the Referendum are hereby further reserved to the qualified electors of every incorporated city, town, and county as to all local, city, town, or county matters on which such incorporated cities, towns, and counties are or shall be empowered by general laws to legislate. ***** Under the power of the Initiative fifteen per centum of the qualified electors may propose measures on such local, city, town or county matters and ten per centum of the electors may propose the Referendum on legislation enacted within and by such city, town or county. "

The result of the above quoted provision of the Charter is that the citizens of Phoenix are, by the Charter, deprived of a right guaranteed them by the Constitution, to-wit, to have any legislative matter passed by the Commission referred by a petition signed by ten per cent of the qualified electors of the City.

Second: On page 26 of the Charter, in Section 2, the Charter requires that any person obtaining a recall petition must return and file the same within thirty days from its issuance. An examination of Article 6 of the Constitution applying to the recall from office will fail to disclose any such requirement, and I consider the same as an unlawful restriction of the power of recall as defined in the State Constitution.

Third: On page 26 of the Charter, in Section 3, will be found the following provision:

"A qualified elector of the City shall make affidavit thereto that each signature appended to the paper (referring to the recall petition) is the signature of the person whose name it purports to be. "

Section 2 of Article 8 of the Constitution provides that said petition shall be verified by one of the signers of the sheet or by the person circulating the sheet. This variance between the Charter and the Constitution, perhaps, is not vital but is apt to lead to much confusion and misapprehension of the law.

Fourth: On page 28 of the Charter, Section 7, will be found a provision relating to the recall, which reads as follows:

"And the Commission shall, if the officer does not resign within five days thereafter, forthwith, after said five day period, order and fix a date for holding the said election, not less than twenty days nor more than thirty days from the date of the City Clerk's certificate that a sufficient petition is filed, provided, however, that if any other municipal election is to occur within ninety days of the Clerk's certificate the Commission may, in its discretion, postpone the holding of the removal election to the date of such other municipal election."

This proviso is in direct conflict with Section 3 of Article 8 of the State Constitution, which reads as follows:

"If he (referring to the officer sought to be recalled) shall not resign within five days after a recall petition is filed, a special election shall be ordered to be held not less than twenty nor more than thirty days after such order, to determine whether such officer shall be recalled."

Fifth: On page 29 of the Charter, Section 11, will be found the following astounding provision:

"The incumbent shall continue to perform the duties of his office until the recall election. If then elected, he shall continue in office for the balance of the term, unless petitioners signing such petition shall first pay into the City Treasury which is paid such election expenses, all expenses of the preceding election."

Just what the framers of the Charter meant by this remarkable declaration, I am unable to comprehend. I can imagine no provision which would be more antagonistic to the spirit of the law of the recall. As far as I can construe the provision, if the officer sought to be recalled is vindicated and re-elected by the people he could not continue to serve his term out if the petitioners who sought to recall him were wealthy enough to pay into the City treasury the

expenses of that recall election.

Sixth: On page 29 of the Charter, Section 11, will also be found the following provision relating to the recall of a City officer, to-wit:

"If not then elected he shall be deemed removed upon the qualification of his successor, who shall hold office during the unexpired term. If his successor fails to qualify with TEN days after receiving notification of his election, the incumbent shall thereupon be deemed removed and the office vacant. "

This is in direct conflict with the following provision contained in Section 4 of Article 6 of the State Constitution, which reads as follows:

"In the event that his successor shall not qualify within FIVE days after the result of said election shall have been declared, the said office shall be vacant and may be filled as provided by law. "

Seventh: Section 1 of Chapter 19 of the Charter, on page 71, reads as follows:

"No franchise shall be granted by the City except upon the majority vote of the qualified tax paying electors voting in favor thereof and the question of its being granted shall be submitted to such vote upon deposit with the City Clerk of the estimated expense of such submission by the applicant for such franchise. "

This is in direct conflict with Section 4 of Article 13 of the State Constitution, which reads as follows:

"No municipal corporation shall ever grant, extend, or renew a franchise without the approval of a majority of the qualified electors residing within its corporate limits who shall vote thereon at a general or special election and the legislative body of any such corporation shall submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days' notice. "

I regard this as a very grave and vital conflict, as the Constitution gives every qualified elector the right to vote on a question of municipal franchise and the City, by its Charter, has no right to restrict the suffrage on said question to tax paying electors.

Eighth: Section 51 of Chapter 11, page 43 of the Charter, reads

His Excellency - 5

as follows:

"To fix and determine by ordinance in the month of November of each year, to take effect on the first day of January thereafter, the rates or compensation to be collected by any person, firm or corporation in the City for the use of water, heat, light, power, or telephone service supplied to the City or to the inhabitants thereof and to prescribe the quality of the service."

This is in direct conflict with certain provisions of Section 3 of Article 15 of the State Constitution, which reads as follows:

"The Corporation Commission shall have power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided, further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission."

There is no law at present granting to cities said power.

I have prepared an elaborate brief on this question but do not find it necessary to embody the same in its entirety in this Opinion. I will, however, call Your Excellency's attention to the following principles of law supported by the authorities herein cited:

In order that a city or town may have the power to regulate rates such right must be granted in expressed terms by the Legislature and there being no such law no such right is granted.

See Jones on Telephone & Telegraph Companies, Sec. 234;
Cook on Corporations, 6Ed., Vol. 4, Secs. 935-939;
Wyman on Public Service Corporations, Vol. 2, Sec. 1410;
St Louis vs. Bell Telephone Co. 96 Mo. 623;
State vs. Sheboygan, 111 Wisc. Wisc. 23
Wright vs. Gan Telephone Co. 112 N.Y.App.Div. 745;
Louisville Natural Gas Co. vs. State, 135 Ind. 49.
In re Pryor 41 Pac. 958.

Even where a city has the right under its charter to fix

His Excellency-6

rates when a constitutional provision is subsequently adopted fixing the power in a State Commission, the city loses the right and power.

State of Washington ex rel. Webster vs. Superior Court of Washington, 120 Pac. 661.

On this particular point I have briefed many other cases but the one above cited is particularly in point and comprehensively reviews practically all of the authorities.

From the above, it will be seen that this provision of the charter is not only in conflict with the Constitution, but also in conflict with a state law, to-wit, Chapter 90 of the Laws of the First Legislature of Arizona, and as said Chapter 90 is a general law and does not relate to cities it would not be suspended by the passage and approval of this Charter.

Ninth: The argument made in Subdivision 8 of this opinion applies equally to Section 3 of Chapter 19, page 71 of the Charter, which is also in conflict with both the Constitution of the State and said Chapter 90 of the Session Laws of the First Legislature of the State of Arizona.

Tenth: On page 77 of the Charter will be found the following provision:

"If a petition subscribed by twenty-five per centum of the qualified tax paying electors of the city, requesting that the question whether or not the people shall acquire said property, shall be submitted to a vote of the people, or within sixty days after the filing of said report be filed with the City Clerk, the Commission shall provide by ordinance for the submission of the question to a vote of the qualified tax paying electors."

This is in conflict with the provisions of the State Constitution heretofore quoted requiring petition in initiative to be signed by only fifteen per cent of the voters in order to initiate any matters. It is also in violation of the Constitution in providing that the matter of initiative shall be submitted to tax paying electors only instead of qualified electors.

His Excellency - 7

In conclusion, I have in this opinion only submitted to Your Excellency the most important examples of the conflict of the Charter with the State Constitution discovered by me on a casual examination of the same. As to whether Your Excellency should or should not approve the Charter in view of these conflicts is a matter for Your Excellency to determine under the Constitution and the said laws. See the following provision of Section 2 of Article 13 of the State Constitution, to-wit:

"If a majority of such qualified electors voting thereon shall ratify such proposed charter, it shall thereupon be submitted to the Governor for his approval, and the Governor shall approve it if it shall not be in conflict with this Constitution or with the laws of the State. Upon such approval said charter shall become the organic law of such city and supersede any charter then existing and all ordinances inconsistent with said new charter."

As to what would be the effect of your approval of said Charter in view of the provisions cited in this Opinion conflicting with the State Constitution, is not a matter which my office is required by law to determine, as the Attorney General's office is not the legal adviser of any municipality, and if Your Excellency should sign this Charter the consequent legal complications, if any, would devolve upon the legal department of the City of Phoenix to determine and would not rest with this Department to solve. I therefore do not find it either necessary or proper that I should go outside of the duties of my office to the extent of expressing any opinion as to whether or not the whole charter would be invalidated if Your Excellency should approve the same, or whether or not only such portions of the Charter as are in conflict with the Constitution are invalid. I can only point out that there are certain conflicts with the Constitution. The matter, then, of the approval or disapproval of the Charter, as I said

His Excellency - 8

before, is one that Your Excellency should determine.

Very respectfully,

Attorney General.