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March 29, 1957  
Opinion No. 57-53

REQUESTED BY: Honorable Ruth White, Member  
Arizona State Legislature

OPINION BY: ROBERT MORRISON, The Attorney General  
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QUESTIONS: 1. Do non-chartered cities and towns have  
the power to pass emergency legislation?

2. If such power exists, how many times  
must such emergency legislation be pub-  
lished in order for it to be effective?

3. If such power exists, may the decla-  
ration of an emergency be subjected to  
review in courts of law?

CONCLUSIONS: 1. Yes.

2. It becomes effective according to date  
set by municipal ordinance, except in  
ordinances imposing penalties, fines, for-  
feitures or other punishments.

3. No.

QUESTION 1.

(1) Emergency ordinances of an initiative and referendum nature: A.R.S. § 19-142 deals with emergency legislation of an initiative and referendum nature, and A.R.S. § 19-141 expressly refers to non-chartered cities as falling within the provisions of that chapter. Therefore, there is no question but that cities of this nature have such emergency power.

(2) Emergency ordinances of other than an initiative and referendum nature: Such legislation may be passed. No express authority exists in the Constitution or in the statutes for non-chartered cities and towns to pass emergency legislation of an ordinary kind. However, all texts, encyclopedias and cases treat the existence of this power as a matter of fact. The basic doctrine is that implied powers exist only in so far as they complement express powers, but the converse is true; in so far as they do complement express powers, implied powers exist. City of Flagstaff vs. Associated Dairy Products Co., 75 Ariz. 254, 255 P.2d 191.

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In A.R.S. § 9-240, the general powers of the Common Council are enumerated. Among those powers is the authority to deal with floods, pollution, riots, epidemics, nuisances, etc., that is, affairs which might well be of such actual emergency that the city's power to deal with them by emergency measures would appear implied, especially where A.R.S. § 9-240 (B) (28) states that the Common Council shall have the power:

" . . . To make, amend, or repeal all ordinances necessary or proper for the carrying into effect of the powers vested in the corporation, or any department or officer thereof." (Emphasis supplied.)

A further indication that the Legislature has contemplated the use of powers to pass emergency ordinances is found in the provisions of A.R.S. § 9-813 (which section is quoted in answer to the second question involved herein.) Suffice to say, since under Section 9-813, supra, the effective date of ordinances imposing penalties, fines, forfeitures or other punishments falls immediately upon the posting of such ordinances, emergency application of such ordinances clearly is contemplated.

#### QUESTION 2.

(1) Emergency ordinances of an initiative and referendum nature: Emergency legislation by non-chartered cities and towns of this nature must be published and become effective according to the provisions found in A.R.S. § 19-141, et seq.

(2) Emergency ordinances of other than an initiative and referendum nature: 35 A.L.R. 2d, 586, 587, states the general rule covering the effective date required for ordinary ordinances of an emergency nature:

" . . . In the absence of a statutory provision covering the time of passage, it rests within the power of the legislative body (the Council) enacting the ordinance to fix the time of its taking effect. . . . "

Regarding the publication and effective date of these ordinances, the Arizona Constitution under Municipal Corporations, Article 13, states nothing directly. As for ordinary non-emergency ordinances, A.R.S. §§ 9-811, 9-812 and 9-813 apply. Section 9-812, supra, states in part:

"§ 9-812. Publication of notices and ordinances

A. Notices of . . . laws and ordinances, and other notices of a public character issued by authority of the governing body of any city or town, shall be published as provided by § 39-204.

\* \* \* \* \*

A. R. S. § 39-204 states:

"§ 39-204. Publication of notice; time; place

A. When publication of a notice in a newspaper is directed or authorized by law, it shall be in a newspaper of general circulation printed in English.

B. If the number of times the notice is to be published is not specified, publication shall be:

1. If in a weekly newspaper, once each week for four consecutive weeks, with not less than twenty days intervening between the first and last publication.

2. If in a daily newspaper, six consecutive times.

\* \* \* \* \*

(Emphasis supplied.)

Nothing is expressly stated in these sections regarding emergency ordinances.

Considering the general law as quoted in 35 A.L.R. 586, 587, and the same implied powers discussed in answer to Question No. 1 (2), the indication is strong that non-chartered towns do have the power to pass ordinances concerning the effectiveness and publication of emergency legislation, and such power would necessarily be concurrent with the provisions of A.R.S. § 39-204 (B) above. Any other rule would in essence nullify the powers of municipalities to deal immediately with actual emergency situations.

However, an exception prevails where penalties, fines, forfeitures or other punishment is imposed. In this regard, it is stated in 2 McQuillen, Municipal Corporations, 2d Ed., Section 734, "Due notice of contemplated action upon the part of the municipal authorities is a wise and salutary rule, and is rigidly enforced by the courts as a fundamental constitutional right."

Therefore, in its wisdom the State Legislature has seen fit to pass A.R.S. § 9-813. The provisions of this statute are:

"§ 9-813. Posting of penal ordinances

Every ordinance imposing a penalty, fine, forfeiture or other punishment, shall in addition to the provisions of § 9-812, be published after its enactment by posting in three or more public places within the city or town, and shall be in force from and after the date of posting.  
. . . ." (Emphasis supplied.)

Clearly, such ordinances partake of an emergency nature in that they "shall be in force from and after the date of posting." The effective date is the date of posting as required in this statute, and cities may immediately enforce such ordinances. However, as to publication requirements, the above statute states unequivocally that such ordinances shall be posted as prescribed in A.R.S. § 9-813, supra, "in addition to the provisions of Section 9-812." Section 9-812, supra, prescribes that the method of publication shall be in accordance with Section 39-204. Section 39-204, supra, is the statute previously quoted which sets out publication requirements for non-emergency ordinances. Therefore, in Section 9-813, supra, the Legislature has provided for the effective date of such ordinances imposing penalties, etc., to be immediately upon posting, but, no doubt mindful of due notice as a fair and just right to the people of the city, the Legislature has provided that publication continue according to the provisions of Section 39-204, supra, in expressly the same manner as ordinances of a non-emergency nature would be published.

QUESTION 3.

As a practical matter, the question of court review of a declared emergency is raised. Court review of the question of a "declared emergency" per se is not permitted in Arizona. There are three rules found through the nation as to whether or not the council's declaration of an emergency is subject to review in a court of law. The first view is that such review is proper. The second rule permits such review but holds that the council's declaration of an emergency is prima facie evidence of an actual emergency which must be overcome by the plaintiff-petitioner. Courts in this State appear to take the following, third view as cited in City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 386, 227 P.2d 1011, (See also discussion in 35 A.L.R. 2d. 586, 595); this view holds that the declaration of an emergency by a city

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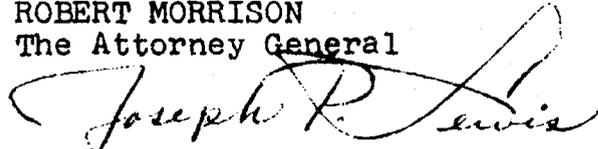
council is final. This Court said, at Page 387:

" . . . There seems to be no valid reason why the principle of the Orme case (that a legislative declaration of emergency is not reviewable by the Courts) should not be applied to the legislative bodies of cities and we now so hold.

\* \* \* \* \*

In the absence of any decisions by our Court concerning the power of unchartered cities to pass emergency legislation, the Landrum case, supra, is the closest case on point for unchartered cities to follow; therefore, a court review of a municipal declaration of an emergency is not permitted.

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