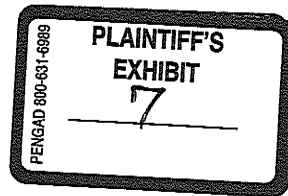


OFFICE OF THE CLERK AND RECORDER
ELECTIONS DIVISION

Amber F. McReynolds, Director



Debra Johnson
Clerk and Recorder
Public Trustee

May 16, 2013

John Case
10081 East Cornell Ave.
Denver, CO 80231

Dear Mr. Case:

On May 13, 2013, this office received your initial submittal of documents containing: 1) an affidavit of petitioner's committee; 2) a petition title and text; and, 3) a sample petition packet for a proposed referendum to repeal Ordinance No. 170, Series of 2013. According to the proposed Bill Title, Ordinance No. 170, Series of 2013, relates to the "...approval of a proposed contract to exchange property between the City and County of Denver and School District 1 in the City and County of Denver, by which the City divests itself of a portion of the Hampden Heights Open Space, also known as the Hentzell Park Designated Natural Area..."

Please be advised that our office has completed its review of these documents, and pursuant to Section 8.3.2(C) of the Denver Charter, the Clerk and Recorder rejects the submission due to the following reason:

Denver Clerk and Recorder Rule 6.4.5, Rejection for Failure to Propose Municipal Legislation, states that: "The clerk and recorder may reject a petition sample on the grounds that the petition does not propose to repeal municipal legislation." [Footnote omitted].

Ordinance No. 170, Series of 2013, approves a real estate agreement between the City and County of Denver and School District No. 1 in the City and County of Denver and State of Colorado to exchange real property. The action required of the City Council was to approve or disapprove the proposed real estate transaction. The City Council's approval of the proposed contract allowed the City to execute the contract with the school district. Thus, the City Council was acting in an administrative capacity, not a legislative capacity.

By its terms, Ordinance No. 170, does not create new municipal laws or establish generally applicable rules of conduct. Because Ordinance No. 170 concerns an administrative matter of approving or disapproving a real estate transaction, it is not subject to referendum under Section 8.3.1 of the Denver Charter. Therefore, the proposed petition to repeal Ordinance No. 170 is rejected.

Furthermore, Section 8.3.2 (C) of the Denver Charter requires the Clerk and Recorder, in reviewing a proposed ballot title for a Petition for Referendum to consider the public confusion that might be caused by a misleading title. We also give consideration to other language in the petition sample that may be misleading. Therefore, the petition sample is rejected for the following additional reasons:

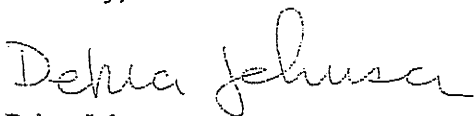
- a) The references to Election Rule 5.3 and Section 8.3.2. of Charter on the Affidavit of Petitioners' Committee are incorrect. Referendum petitions are governed by Election Rule 6 and Charter Sections 8.3.1, 8.3.2, and 8.3.4.
- b) The language stating "YES and NO" should not appear underneath the ballot title.
- c) The proposed Referendum Petition seeks to repeal Ordinance No. 170, Series of 2013 which states: (See attachment)

The last phrase of the proposed bill title starting with "...by which the City divests itself of a portion of the Hampden Heights Open Space, also known as the Hentzell Park Designated Natural Area?" does not reference the location of the City owned property that is referenced in Ordinance No. 170. The proposed bill title may create public confusion because some members of the public will have no way of knowing, based on the proposed petition name, whether "Hampden Heights Open Space" or "Hentzell Park Designated Natural Area" is the property located at "the intersection of East Girard Street and South Havana Street".

Therefore, the Clerk has determined that the proposed bill title is misleading and likely to confuse the public as to the specific location of the property that is the subject of Ordinance No. 170.

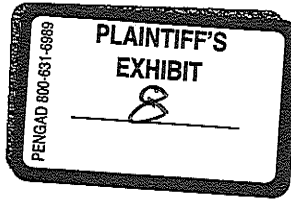
If you have any questions, please don't hesitate to contact the Denver Elections Division at 720-865-4872.

Sincerely,



Debra Johnson
Clerk and Recorder
City and County of Denver

cc: Amber F. McReynolds, Director of Elections



John Case
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EILEEN S. KOTTENSTETTE | KARI JONES | ELIZABETH T. MECK

+ also admitted in Texas ++ also admitted in Wyoming

May 20, 2013

Ms. Debra Johnson
Clerk and Recorder
Elections Division
200 W. 14th Ave. Suite 100
Denver, CO 80204

By Hand Delivery 4:51 p.m. May 20, 2013
By email 5:35 p.m. May 20, 2013

Dear Ms. Johnson,

RE: Referendum Petition for Ordinance 170, Series 2013

I am writing in response to your letter postmarked Friday, May 17, 2013, which I received Saturday, May 18. The purpose of this letter is to explain why your rejection of our affidavit, petition sample, and ballot title (our "materials") is both unconstitutional, and devoid of legal effect.

First and foremost, your rejection of our materials is invalid because you failed to issue your ruling by the deadline set forth in Denver Clerk and Recorder Rule 6.4.1. The rule provides:

The clerk and recorder will have *three (3) full working days from the time of the filing of the affidavit* to review the affidavit, petition sample, and ballot title. At the end of three (3) working days, the clerk and recorder will either accept or reject the affidavit, petition sample, and ballot title. If the affidavit, petition sample, or ballot title is rejected, the clerk and recorder will make written findings specifying the defects. (emphasis added).

Our affidavit, petition sample, and ballot title were filed at 2:58 p.m. on Monday, May 13, 2013. Accordingly, you had until 2:58 p.m. on Thursday, May 16 to issue your decision. Your email notification regarding the denial of our materials was sent at 9:01 a.m. on May 17. Your letter was postmarked that same day. Because both your letter and your email were sent after the applicable deadline, your ruling is void and of no legal effect.

Additionally, your rejection of our materials is invalid because your decision conflicts with applicable law. As authority for your decision to reject our petition you

state: “the clerk and recorder may reject a petition sample on the grounds that the petition does not *propose to repeal* municipal legislation.” (emphasis added). As authority for this proposition you cite Denver Clerk and Recorder Rule 6.4.5. That Rule, in turn, cites Section 31-11-106(1) of the Colorado Revised Statutes. However, Section 31-11-106(1) requires only that a petition “*propose* municipal legislation” in order to be valid.¹ There is no requirement that a petition “*propose to repeal*” municipal legislation. Given this discrepancy in language, it seems clear that Denver Clerk and Recorder Rule 6.4.5 misstates the applicable law. Because Rule 6.4.5 misstates the applicable law, your denial of our materials based on that Rule is devoid of legal effect.

Even assuming that your interpretation is correct, and that a petition must propose to repeal legislation in order to be considered valid, your denial of our materials remains unsound because the City Council’s approval of the property exchange between the City and County of Denver and Denver School District 1, constituted legislative action for purposes of initiative and referendum.²

In assessing whether a proposed ordinance is to be classified as legislative or administrative for purposes of a referendum, the central inquiry is “whether the legislation announces new public policy or is simply the implementation of a previously declared policy.”³ Two general guidelines assist in making this determination. First, “actions that relate to subjects of a *permanent or general character* are legislative, while those that are temporary in operation and effect are not.”⁴ Second, “acts that are necessary to carry out existing legislative policies or purposes, or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative.”⁵

Regarding the first guideline, the City’s decision to approve the land transfer was certainly legislative in that the City’s decision is permanent and cannot be easily undone. With regard to the second guideline, the City’s decision was also clearly legislative in that the transfer of the land was not necessary to carry out an existing public policy, but rather created a new public policy under which it is permissible for city-owned properties which have long been designated as “natural areas” to be transferred by the City Council in exchange for public buildings.

Finally, your rejection of our materials is invalid because it unconstitutionally infringes upon the people’s right of initiative and referendum. The right of people to propose initiatives and referendums is a fundamental right protected by the Colorado

¹ C.R.S. § 31-11-106(1) (“The clerk may reject a petition or a section of a petition on the grounds that the petition or a section of the petition *does not propose* municipal legislation pursuant to section 1(9) of article V of the state constitution.” (emphasis added)).

² See *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1254 (Colo. 1987).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Constitution.⁶ Given the nature and importance of this right, the Colorado Supreme Court has declared that statutory provisions governing the initiative and referendum process must be “liberally construed” in favor of the right of the people to exercise that power.⁷ Conversely, limitations on right of initiative and referendum must be “narrowly construed.”⁸


In rejecting our materials you failed to abide by established deadlines, and declined to base your decision in applicable law. In doing so you failed to liberally construe the referendum process and unconstitutionally infringed upon the right of the people to lawfully participate in their government.

For your information, I am attaching to this letter the revised original Affidavit of Petitioners Committee and the revised Petition Section for Referendum Petition. This is the same petition that was submitted May 13, 2013, but I corrected the documents in accordance with the technical objections that you stated in your letter May 17, 2013. Our position is that the clerk and recorder has no authority to interfere in the form, content, or circulation of attached documents, because any such authority was waived when the clerk and recorder failed to comply with Rule 6.4.1, and because any such interference is an unconstitutional infringement of the power of the people to repeal legislation by referendum.

Please be advised that a Colorado non-profit corporation will circulate petition sections according to law, and present the signed referendum petition to you for placement on the ballot.

Respectfully,

BENSON & CASE, LLP



John Case

JC/js
Enclosures
cc:

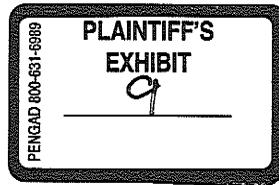
⁶ COLO. CONST. Art. 5, § 1(9); *Bernzen v. Boulder*, 525 P.2d 416, 419 (1974) (“We view recall, as well as initiative and referendum, as fundamental rights of a republican form of government which the people have reserved unto themselves.”).

⁷ *Margolis v. District Court*, 638 P.2d 397, 302 (Colo. 1981). *See also, Billings v. Buchanan*, 555 P.2d 176, 178 (Colo. 1976) (“Article V, Section 1, of the Colorado Constitution, which reserves the power of referendum to the people, and the statutes that implement it must be liberally construed so as not to unduly limit or curtail the exercise of the initiative and referendum rights.” (citations and internal quotations omitted)); *Clark v. City of Aurora*, 782 P.2d 771, 777 (Colo. 1989) (“Because [the rights of initiative and referendum] are fundamental in character and self-executing they must be liberally construed so as to effectuate their purpose and facilitate their operation” (citations omitted)).

⁸ *Margolis*, 638 P.2d at 302.

OFFICE OF THE CLERK AND RECORDER
ELECTIONS DIVISION

Amber F. McReynolds, Director



Debra Johnson
Clerk and Recorder
Public Trustee

May 22, 2013

John Case
10081 East Cornell Ave.
Denver, CO 80231

Dear Mr. Case:

On May 20, 2013, this office received your second submittal of documents containing 1) an affidavit of petitioner's committee; 2) a petition title and text; and, 3) a sample petition packet for a proposed referendum to repeal Ordinance No. 170, Series of 2013. According to the proposed Bill Title, Ordinance No. 170, Series of 2013, relates to the "...approval of a proposed Contract to Exchange Property between the City and County of Denver and School District No. 1 in the City and County of Denver, by which the City divests itself of a parcel of land consisting of 10.771 acres, more or less, located approximately at the intersection of East Girard Street and South Havana Street, which the City previously designated as part of the Hentzell Park Natural Area?"

Please be advised, our office has completed its review of these documents, and pursuant to Section 8.3.2(C) of the Denver Charter, the Clerk and Recorder rejects the submission due to the following reason:

Denver Clerk and Recorder Rule 6.4.5, entitled Rejection for Failure to Propose Municipal Legislation, states that: "The clerk and recorder may reject a petition sample on the grounds that the petition does not propose to repeal municipal legislation." [Footnote omitted].

Ordinance No. 170, Series of 2013, approves a real estate agreement between the City and County of Denver and School District No. 1 in the City and County of Denver and State of Colorado to exchange real property. The action required of the City Council was to approve or disapprove the proposed real estate transaction. The City Council's approval of the proposed contract allowed the City to execute the contract with the school district. Thus, the City Council was acting in an administrative capacity, not a legislative capacity.

By its terms, Ordinance No. 170, does not create new municipal laws or establish generally applicable rules of conduct. Because Ordinance No. 170 concerns an administrative matter of approving or disapproving a real estate transaction, it is not subject to referendum under Section 8.3.1 of the Denver Charter. Therefore, the revised proposed petition to repeal Ordinance No. 170, submitted on May 20, 2013, is rejected.

In response to your letter dated May 20, 2013, Denver Clerk and Recorder Rule 6.4.5 is consistent with the requirements of Sec. 31-11-106(1), Colo. Rev. Stat, Section 1 (9) of Article V of the Colorado Constitution, and a large body of case law such as *Vagneur v. City of Aspen*, 296 P.3d 493 (Colo 2013). The power to petition the government for referendum applies only to acts that are legislative in character and do not include executive or administrative functions of government.

In response to your statement that you will start gathering signatures on the revised petition sample, please be aware that Denver Charter Sec. 8.3.2(C) clearly prohibits a committee from gathering signatures until the petitioner's affidavit, petition sample, and ballot title have been approved. To date, I have informed you that both petition samples have been rejected. Please see Denver Charter Sec. 8.3.2 (C) which states:

(C) Review and approval of affidavit, ballot title and petition sample by Clerk and Recorder. The affidavit, ballot title, and petition sample shall be reviewed by the Clerk and Recorder: for a determination of compliance with the requirements of this Charter, with any and all other applicable State or City and County laws, and with the rules of the Clerk and Recorder. In reviewing the ballot title, the Clerk and Recorder shall consider the public confusion that might be caused by a misleading title. The Clerk and Recorder shall have three (3) full working days from the time of the filing of the affidavit to review the affidavit, petition sample, and ballot title. At the end of the three (3) working days, the Clerk and Recorder must either accept or reject the affidavit, petition sample, or ballot title. If the affidavit, petition sample, or ballot title is rejected, the Clerk and Recorder shall make written findings specifying the defects in the affidavit, petition sample, or ballot title. The petitioners' committee, if not satisfied with the decision of the Clerk and Recorder, may institute legal proceedings with the appropriate court. No petition shall be circulated nor shall any signatures be procured until such affidavit, petition sample, and ballot title are approved by the Clerk and Recorder.

Moreover, with regard to your statement that I do not have the authority to "interfere in the form, content, or circulation" of citizen petitions, please note that the Charter Section 8.3.2 (B) expressly confers the power to set requirements concerning the format and style of petitions.

§ 8.3.2 - Provisions applicable to all petitions.

(B) Contents of affidavit, ballot title, and petition sample. The affidavit shall contain the notarized signatures of each member of the petitioners' committee; shall state the names, addresses, and telephone numbers of each member of the petitioners' committee and an address to which notices to the committee shall be sent; and shall specify one member of the committee to serve as the primary contact. Any affidavit for an initiative or referendum shall specify in full the text of the ordinance to be initiated or referred and shall include a ballot title which shall contain in summary form the major provisions of the ordinance, which shall be

true and impartial and shall not be an argument, nor likely to create bias, either for or against the measure. The title for an initiative shall begin with the words: "Shall the voters for the City and County of Denver adopt...." unless different wording is required by the State Constitution. The title for a referendum shall begin with the words: "Shall the voters of the City and County of Denver repeal...." unless different wording is required by the State Constitution. Any affidavit for a recall shall state the name of the elected official to be recalled and a statement of the grounds upon which recall is sought. The petitioners' committee shall append to any affidavit a sample petition form in a style and format that complies with the requirements of this Charter and of the Clerk and Recorder.

Lastly, there was no violation of the deadline referenced in rule 6.4.1. I am required to make a final decision to reject or approve a proposed petition sample within three full working days from the time the sample petition is submitted. There is no express requirement that notice of rejection or approval must also be transmitted according to that same deadline. The decision to reject was made by the end of the third working day (May 16). The slight extension of time, until 9 a.m. on May 17, 2013, to email and mail the final letter, did not violate any notice requirements to the committee. Thus, there has been no waiver of authority to approve or reject the petition sample. In any event, the second submission on May 20, 2013, of revised petition sample documents has eliminated any relevant dispute on that point.

If you have any questions, please don't hesitate to contact the Denver Elections Division at 720-865-4872.

Sincerely,



Debra Johnson
Clerk and Recorder
City and County of Denver

cc: Amber F. McReynolds, Director of Elections