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Mayor Bert Wilson
City Recorder Marilyn Banasky
Lehi City Council
LEHI CITY
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ATTORNEY/CLIENT PRIVILEGED, PROTECTED, AND CONFIDENTIAL

Not to be released to the public without City Council consent and action.

Re: Citizen Initiative Nos. 1 and 2

Dear Mayor Wilson, City Recorder Banasky, and Councilmembers,

Lehi City has retained Smith Hartvigsen, PLLC, to provide legal opinions to advise City officials regarding two forthcoming citizen initiative applications (hereinafter the "Citizen Initiatives" or "Initiative Applications"). It is our understanding that Smith Hartvigsen was selected due to both its experience and expertise in local government law, particularly initiative and referendum matters, and its independence in not previously representing the City on other matters.[1] The first Citizen Initiative ("Initiative No. 1") seeks to set maximum salary and total compensation limits for the City's elected and appointed officers. The second Citizen Initiative seeks to create a requirement that certain appointed City officials reside within the City as a condition of employment ("Initiative No. 2"). We have been asked to opine regarding the appropriateness of the matters for adoption by initiative and the likelihood of litigation that may arise out of each of the initiative petitions. Our opinion regarding each Initiative is set forth below. We apologize for the length of this Opinion, but we felt the need to full and carefully address these important public issues.

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[1] Lawyers of Smith Hartvigsen have been involved in a number of contested matters involving initiative or referendum petitions, including two recent matters involving Beaver County and Mapleton City. *See Save Beaver County v. Beaver County*, 2009 UT 8, 203 P.3d 937; *Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11, 228 P.3d 1238.

THE INITIATIVE PROCESS

"Utah voters may, subject to the restrictions of [the Utah Constitution] and [statute] ... initiate any desired legislation and cause it to be submitted to . . . a local legislative body or to a vote of the people if it is a local law."[2] Although the Utah courts have liberally construed this right of initiative, the courts have limited the applicability of initiatives by holding that the people's right to initiate legislation reserved by the Utah Constitution "must be read to mean *any substantive topic* and *any legislative act*, unless otherwise forbidden by the constitution."[3] Consequently, to qualify as a proper initiative, the subject of the proposed ordinance must be legislative, rather than administrative, in nature, and the proposed ordinance must be constitutional.[4]

Further, an initiative can only propose "such legislation as the legislative body of the city has the power to enact under the law defining the powers of such body."[5] Quoting a California case, the Utah Supreme Court has noted that "when the method for the exercise of the power is prescribed by the statute such method is the measure of the power to act."[6] Therefore, if the state legislature has delegated a power to a city council to be exercised in a particular way, an initiative petition cannot be used to by-pass the state statute, and "unless the general law [delegating the power] is affected by repeal or amendment by the legislature, . . . the statute guides [the exercise of that power] and directs the means by which it is to be accomplished."[7]

In addition to these substantive standards, initiative and referendum petitions must also meet procedural requirements regarding the number of qualified signatures, timing, etc., to qualify for ballot placement. As of the date of this Opinion, the facts necessary to determine the procedural qualifications of the Citizens Initiatives are unknown and are thus not addressed herein.

If an initiative petition is legally insufficient or is directed to a matter that is not subject to an initiative, the Utah Supreme Court has held that "a public official to whom an initiative or referendum petition is presented for filing does have the authority to reject that petition."[8] Due

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[2] Utah Code Ann. § 20A-7-102(1)(b).
[3] *Sevier Power Co., LLC v. Board of Sevier County Comm'rs*, 2008 UT 72, ¶10, 196 P.3d 583.
[4] *See id.*; *see also Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11, ¶¶7-8, 228 P.3d 1238, 1241-42.
[5] *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 4, 277 P.2d 805, 807 (1954).
[6] *Id.* at 5, 808 (quoting *Hurst v. Burlingame*, 207 Cal. 134, 140, 277 P. 308, 311 (1929). Although *Hurst* was overruled by the California Supreme Court, *see Associated Home Builders v. Livermore*, 18 Cal. 3d 582, 596, 557 P.2d 473, 480 (1976), the Utah Supreme Court has evidenced its continuing approval of the principles articulated in that case as shown by its citation with approval to *Dewey* in *Wilson v. Manning*, 657 P.2d 251, 253 n.2 (Utah 1982).
[7] *Dewey*, 3 Utah 2d at 7, 277 P.2d at 809.
[8] *Salt Lake on Track v. Salt Lake City*, 939 P.2d 680, 682 (Utah 1997).

to the importance and political implications of the Initiative Applications in this matter, including the impact they could have on City officials including the City Recorder, we recommend that the City Recorder act only after consulting the legal advice in this letter and consulting with the Mayor and City Council.

With this background on the Initiative Process, we will now address the validity of each of the Citizen Initiatives.

CITIZENS INITIATIVE NO. 1

A. Initiative No. 1 Is an Improper Initiative Subject

In this case, Initiative No. 1 seeks to have Lehi City set the maximum salary and total compensation limits for all elective and appointive offices of the City. Further, it prohibits the City from adopting compensation schedules or plans in excess of the limits contained in the initiative. Because Initiative No. 1 concerns a matter expressly held to be administrative by the Utah Supreme Court, is quite possibly unconstitutional, and conflicts with State law, Initiative No. 1 is not a proper subject for an initiative petition and should be rejected by the City Recorder.

1. Initiative No. 1 Concerns an Administrative Matter

The Utah Supreme Court has observed that "matters presented as initiative measures which address administrative actions are not suitable for legislative action by the people through initiative, but are more properly left to officers of government."[9] This concept is rooted in the fundamental separation of governmental powers in both the United States and Utah Constitutions, *i.e.*, the three independent branches of government, to wit legislative, executive (administrative), and judicial. Whether the substance of an initiative should be considered legislative or administrative often turns on the initiative's language. Generally speaking, "when an initiative seeks to undo an accomplished action taken pursuant to existing law, it most likely falls within the administrative action category."[10] Utah law specifically excludes budget considerations or "changes in a budget" from the initiative process.[11]

In *Shriver v. Bench*,[12] the Utah Supreme Court confronted the question of whether an initiative petition that attempted to set "salaries for policemen and firemen" working for Provo

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[9] *Sevier Power*, 2008 UT 72 at ¶13.
[10] *Id.*
[11] Utah Code Ann. § 20A-7-401(1); *see also Sevier Power*, 2008 UT 72 at ¶13.
[12] 6 Utah 2d 329, 313 P.2d 475 (Utah 1957).

City was a proper subject for an initiative petition.[13] In that case, the Utah Supreme Court determined that the setting of salaries was in fact administrative and not subject to initiative petition.[14] In doing so, it relied heavily on the fact that setting of salaries is not of a "permanent character," *i.e.*, "[e]xperience teaches that there are many factors, . . . which are constantly subject to change, necessitating the reexamination of the question of salaries at frequent intervals."[15]

The Court also considered the "'practicality test'"—

> The fixing of salary schedules in a modern city with its numerous departments and various classes of employees is a duty which can best be performed by persons having specialized training and experience in municipal government generally and particular knowledge of the affairs, fiscal and otherwise, of the city. They must be conversant with many facts, such as: prevailing wage scales for similar services both in public service and private industry; the supply and demand for labor of the classes involved; the demands of the various departments upon the public treasury and the balance to be maintained among them; the current inflationary or deflationary trend of money; the extent of the public debt; the money resources available; the tax potential and its limitations; and the overall budget within which the city is required by law to operate.[16]

Accordingly, the Court reasoned that "it is much simpler, easier, and comports more with reason and the practical exigencies of the operation of city government that the salaries be adjusted by the administrative procedure set up in the charter."[17] The Court also noted that courts generally "tend toward the conclusion that initiative and referendum provisions are not applicable" "[i]f the result would be to impair the efficient administration of the municipality."[18]

Finally, the Supreme Court gave "paramount importance" to the "method which has been set up for the fixing of salaries" for the employees at issue.[19] The Court looked to the form of government and based its analysis on the procedure employed—(1) personnel director prepares a

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[13] *Id.* at 476.
[14] *Id.* at 477-78
[15] *Id.* at 478.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

schedule of pay; (2) city manager reviews schedule and makes changes; and (3) city manager forwards recommendation to city council for adoption.[20]

Although initiative law has developed significantly since 1957, in one of the latest initiative cases to come before the Utah Supreme Court, *Citizen's Awareness Now v. Marakis*,[21] the Court cited the *Shriver* case with approval, and the *Shriver* case has never been questioned or overturned.[22]

In this matter, as in *Shriver*, Lehi City has adopted a policy to provide "[a] citywide system of employment in municipal government free from personal and political considerations."[23] The policy adopted by Lehi City further provides for "[a]ppointments, promotions and all other personnel actions . . . based upon systematic and validated tests and evaluations" and for the adoption and publication of "rules and regulations for the appointment . . . compensation, benefits . . . and all other employment practice policies and procedures which affect city employees."[24] To this end, the Lehi City Code delegates authority to the "mayor or his designee" to "recommend and submit to the council . . . such new or revised personnel rules and regulations," including "[a] pay plan for all positions."[25] Finally, consistent with Section 10-3-818 of the Utah Code, the Lehi City Code provides that "[t]he elective and appointive officers of the city shall receive such compensation for their services as the city council may fix by ordinance adopting compensation or compensation schedules enacted after public hearing."[26]

Given that Lehi City's procedure for recommending and adopting salary schedules for its employees is almost identical to the method examined in the *Shriver* case and because the proposed Initiative No. 1 would, if adopted, deprive the Mayor of his designated role in recommending personnel rules or regulations, including pay plans,[27] it is our opinion that Initiative No. 1 is administrative, not legislative, and is therefore not a proper topic for an initiative petition.

2. Initiative No. 1 Is Quite Possibly Unconstitutional

Article I, section 18 of the Utah Constitution provides that "[n]o ... law impairing the

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[20] *Id.* at 479.
[21] 873 P.2d 1117 (Utah 1994).
[22] *Id.* at 1123. It is the prerogative of only the Utah Supreme Court to overturn one of its earlier decisions.
[23] Lehi City Code § 2.80.010(A)(1).
[24] *Id.* at § 2.80.010(A)(3) and (4).
[25] Lehi City Code § 2.80.030.
[26] Lehi City Code § 2.52.010. The fact that an act is accomplished by ordinance is not the touchstone as to whether the act is administrative or legislative in nature. *See Friends of Maple Mountain*, 2010 UT 11 at ¶8.
[27] Lehi City Code §§ 2.52.010; 2.80.030.

obligation of contracts shall be passed."[28] "[T]he obligation of a contract is impaired when a party is deprived of the benefits of the contract by law or when the statute takes from the party his or her whole contract and all the rights that it was intended to confer."[29] Only when the law is "reasonable and necessary to serve an important public purpose" will it withstand a constitutional challenge.[30]

In this case, the City issued certain employment offer letters to many of the employees that would be subject to the provisions of Initiative No. 1 if it were adopted by the electorate. In those letters, the City specifically set forth the salary to be paid to each employee, which, in certain cases, exceeds the specified limit in the Initiative. Because it is likely that a court would construe the offer letters as an express or implied contract regarding the salary to be paid, there is a possibility that the court would also find that the provisions of Initiative No. 1 violate the prohibition against the impairment of contracts when the Initiative would have the effect of negating the City's contractual responsibilities to pay the promised salaries. Until this constitutional question can be resolved, we recommend that the City Recorder, under our legal advice and upon consultation with the Mayor and City Council, reject the petition and refuse to refer it to the City Council.

3. Initiative No. 1 Is Contrary to State Law

The Utah Supreme Court has held that "where a city ordinance is in conflict with a state statute, the ordinance is invalid at its inception."[31] By force of reason, this same principle applies to ordinances enacted by initiative. According to the test developed to determine whether an ordinance conflicts with a state statute, courts consider "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."[32] If there is no express conflict, Utah courts "will uphold a challenged ordinance unless there is some indication of incompatibility with the state statutory scheme."[33] An initiative petition that proposes a change in the city ordinance that would conflict with statutory law or state legislative mandates is thus invalid.

The Utah Legislature has enacted laws governing the fixing of salaries by incorporated cities. Pursuant to those laws, "[t]he elective and statutory officers of municipalities shall

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[28] *See also* U.S. Const. art. I, sec. 10 ("No State shall … pass any … Law impairing the Obligation of Contracts …").
[29] 328 Am. Jur. 2d Constitutional Law § 775.
[30] *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977).
[31] *Salt Lake City v. Newman*, 2006 UT 69, ¶7, 148 P.3d 931 (quoting *Hansen v. Eyre*, 2005 UT 29, ¶15, 116 P.3d 290).
[32] *Id.*
[33] *Id.* at ¶10.

receive such compensation for their services as the governing body may fix by ordinance adopting compensation or compensation schedules enacted after public hearing."[34] The governing body may review or consider compensation or salary schedules "for the purpose of determining whether or not it should be adopted, changed, or amended."[35] Before adopting compensation or compensation schedules, the governing body must hold a public hearing "at which all interested persons shall be given an opportunity to be heard."[36] Only at the conclusion of the properly noticed public hearing may the governing body enact "an ordinance fixing, changing, or amending the compensation of any elective or appointive officer of the municipality."[37]

State law also permits the governing body of a municipality to "maintain as to all elective or appointive officers and employees, including heads of departments, a system for the payment of health, dental, hospital, medical, disability and death benefits to be financed and administered in a manner payable upon the terms and conditions as the governing body of the municipality may by ordinance or resolution prescribe."[38]

If adopted, Initiative No. 1 would create a separate ordinance in the Lehi City Code limiting the state's legislative mandate to the City Council to adopt compensation or compensation schedules. Indeed, Initiative No. 1 would prohibit the adoption of any compensation plans or schedules exceeding its express limitations.[39] Annual adjustments would only be made based upon the inflation rate established for the prior calendar year by the Governor's Office of Planning and Budget,[40] and the proposed ordinance could only be repealed in its entirety if the unemployment rate has remained below 5.25% for three consecutive quarters or nine consecutive months.[41] These provisions are in direct conflict with other provisions of the Lehi City Code, including Sections 2.80.010, 2.80.030 or 2.52.010. More importantly, these provisions seek to void the mandatory provisions of Section 10-3-818 of the Utah Code. Because Initiative No. 1 is in direct conflict with State law, it is not a proper subject for an initiative petition.

Because it is not a proper issue for an initiative petition, the Recorder should reject the petition and refuse to deliver it to the City Council for further action for placement on the November ballot. If the Recorder "refuses to accept and file any initiative petition, any voter

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[34] Utah Code Ann. § 10-3-818(1) (2010).
[35] *Id.* at § 10-3-818(2).
[36] *Id.*
[37] *Id.* at § 10-3-818(4).
[38] Utah Code Ann. § 10-3-1103(1) (2010).
[39] Initiative No. 1, § 2.02.010.
[40] *Id.* at § 2.02.025.
[41] *Id.* at § 2.02.026

may apply to the supreme court for an extraordinary writ to compel him to do so within 10 days after the refusal."[42] There is a substantial likelihood that rejection of, or refusal to file, the petition for Citizen's Initiative Application No. 1 will lead to litigation before either the Utah Supreme Court or the Fourth District Court for the State of Utah.[43] However, it is our opinion that refusal to accept or file the petition for Citizens Initiative Application No. 1 would withstand judicial scrutiny.

B. Even if Setting Salaries Were the Proper Focus of Initiatives, Certain Employees Could Have Substantial Employment Contract Claims.

If the petition for Citizen Initiative Application No. 1 is submitted to the voters at the next municipal general election and approved by the voters, there is a significant likelihood that litigation may be brought by affected Lehi City employees. Utah law provides that employers and employees are free to enter into contractual relationships with each other. Although most employment contracts are unilateral contracts which can be changed at the whim of either side so long as the other party continues to perform,[44] if contracts are created either explicitly or by implied-in-fact contractual provisions found in personnel manuals or offer letters, a party can, in appropriate circumstances, be bound by those contractual terms.[45]

The proposed Initiative No. 1 provides that all "Employee Compensation in excess of these limits will be corrected as of the effective date of [the] Ordinance except that employees under written contract with the City as of November 30, 2010, will have a grace period of 60 days prior to the adjustment being made to either terminate their contractual relationship with the City according to the provisions of their [sic] contract, or negotiate a new agreement with the City that is in compliance with the provisions of this section."[46]

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[42] Utah Code Ann. § 20A-7-507(5)(a).

[43] Original jurisdiction in the Utah Supreme Court, bypassing the district court, is rather unusual. However, the undersigned represented Park City Municipal Corporation in just such a matter more than 20 years ago. Following briefing and a non-evidentiary hearing, the Utah Supreme Court affirmed the rejection of the initiative petition by the Park City Recorder.

[44] *See Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1001-02 (Utah 1991) ("In the case of unilateral contract for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer.")

[45] *Carbaness v. Thomas*, 2010 UT 23, ¶55, 232 P.3d 486; *see also Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1069 (Utah 1981) ("By entering into an employment contract of the type before us, the parties assume continuing obligations to one another: the employee to render services, the employer to pay salary. Those obligations continue until they are extinguished.")

[46] Initiative No 1, § 2.02.022.

To the extent that any employee has an employment offer letter that provides for a stated rate of pay for a specific period of time above the limits set in Initiative No. 1, litigation is likely to arise out of this ordinance's provision requiring renegotiation of existing contracts. We know of several employment offer letters that inform Lehi City employees of the compensation they will receive. Therefore, Lehi City may be exposed to liability to these Lehi City employees whose compensation will necessarily be affected if Citizens Initiative Application No. 1 is approved by the voters.[47]

C. Passage of the Initiative Could Subject the City to Civil Rights Claims

If Initiative No. 1 does, in fact, materially interfere with existing compensation contracts and vested contract rights, those affected employees might attempt to make claims against the City for violation of their federal civil rights under 42 U.S.C. § 1983, also known as "Section 1983." Prevailing parties under Section 1983 are entitled to an award of their attorney's fees pursuant to 42 U.S.C. § 1988. We would anticipate that employees whose compensation has been drastically reduced with no individualized hearing or an individualized opportunity to be heard may attempt to claim, in addition to an impairment of their contractual rights, that their right to due process of law has been violated as well.

CITIZENS INITIATIVE NO. 2

D. Initiative No. 2 Is Likely an Improper Initiative Subject

In this case, Initiative No. 2 seeks to impose a residency requirement on several appointive positions, including, but not limited to, the City Recorder, the City Treasurer, the Police Chief, the Public Works Director, the City Administrator, the Assistant City Administrator, the Power Director, the Fire Chief, the Planning Director, the Information Systems Manager, the City Attorney, and the City Engineer.[48] The proposed initiative also limits relocation expenses available to employees residing outside City limits and prohibits existing employees who resided outside City limits as of December 1, 2010, from receiving relocation expenses.[49]

As discussed below, Initiative No. 2 raises several concerns regarding its validity as an initiative petition. For example, because Initiative No. 2 seeks to impose an employment condition, there is a question as to whether Initiative No. 2 concerns administrative matters not properly subject to an initiative petition. In addition, the ordinance proposed by Initiative No. 2

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[47] It is our good faith estimate that the potential litigation cost over such issues could be between $0 and $360,000.00.
[48] Initiative No. 2, § 2.02.030.
[49] *Id.* at § 2.02.050.

poses constitutional concerns regarding the prohibition against the impairment of contracts. Finally, the ordinance proposed by Initiative No. 2 also appears to conflict with State law governing the appointment of certain city officials and the law governing removal of elected officials by judicial proceeding. Until such concerns regarding the validity of Initiative No. 2 can be resolved, it is our opinion that Initiative No. 2 should not be submitted to the electorate.

1. Initiative No. 2 Likely Concerns Administrative Matters

The ordinance proposed by Initiative No. 2 would impose a residency requirement on certain City employees. Such a requirement is similar to an ordinance on the City's books from as early as 1977 until 2010,[50] and is also similar to a new ordinance passed by the City Council in early 2011.[51]

The question of whether a residency requirement is an administrative matter and, therefore, not a proper subject for an initiative petition has never been addressed by the Utah courts. However, certain principles may be culled from the Utah Supreme Court's opinion in *Shriver v. Bench*,[52] which support a determination that the imposition of employment conditions is an administrative task. In *Shriver*, the Court ruled that the fixing of salaries is an administrative function, relying, in part, on the "practicality test."[53] After reviewing the factors involved in fixing a salary, the Court declared as follows:

> It can readily be seen from the foregoing that analyzing the factors which should be taken into consideration in fixing salaries, together with other considerations which must be weighed in individual cases, presents a problem of such complexity that it is not practical for the public to give it sufficient time and attention to make a proper determination of the matter, and further, that the changes which are continually occurring make it highly desirable that there be some expeditious method of re-examining the situation at frequent intervals.[54]

The *Shriver* Court then concluded by declaring, "[i]f the result would be to impair the efficient administration of the municipality, the courts tend toward the conclusion that initiative and referendum provisions are not applicable."[55]

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[50] *See* Lehi City Code § 2.04.050.
[51] *See* Lehi City Code § 03-2011.
[52] 313 P.2d at 480.
[53] *Id.* at 478.
[54] *Id.*
[55] *Id.*

In this matter, it is clear that if Initiative No. 2 were enacted as a city ordinance, it would impair the efficient administration of the municipality. Indeed, because Initiative No. 2 lacks any grandfathering provisions, the ordinance may potentially require the City to terminate the employment of at least six appointed officials, thereby requiring the City to hire and train replacement employees who may or may not be as qualified as their predecessors. Thus, Initiative No. 2 would indirectly control the City's hiring decisions, and it would substantially impair the efficient administration of the municipality. Applying the Court's reasoning in *Shriver*, it is likely that a Utah court would find that, in accordance with the practicality test, the imposition of any employment conditions, including residency requirements, is an administrative task not properly the subject of an initiative petition.

Additional support for the finding that the imposition of a residency requirement is an administrative matter can be found in the City's historical treatment of this issue. The Utah Supreme Court has held that, when determining whether an initiative petition concerns a legislative or administrative matter, the Court "must look to the substance of the city council's action to determine if it is legislative or administrative."[56] Reviewing the substance of the City Council's action regarding residency requirements in this case shows that the Council believes the issue is an administrative matter within the purview of the City's executive and administrative officials.

For example, although the City Council has adopted an ordinance relative to employment and has given general policy guidance on personnel issues, it has expressly left to the non-voting Mayor the responsibility and authority to administer these functions by, among other things, "[r]ecommend[ing] and submit[ting] to the council . . . such new or revised personnel rules and regulations to include . . . [p]ractices and procedures necessary to the administration of the personnel system."[57]

The history of ordinances and resolutions in this case are particularly enlightening. In 1977, the City Council adopted § 2.04.050.B in which it declared that

> All full time employees of the city shall reside in Lehi City upon the first day of their employment and thereafter shall remain residents of the city as a condition precedent to their continued employment, unless it is extended by the mayor to one hundred twenty (120) days. The city council may grant relief from the terms of this subsection for employees of the city at the time this subsection takes effect, by allowing outside residency.

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[56] *Friends of Maple Mountain*, 2010 UT 11 at ¶8.
[57] Lehi City Code § 2.80.030(D).

It then exercised its discretion to permit the Mayor to allow for outside residency by adopting by resolution the Lehi City Personnel Policies and Procedures/Safety Manual. In that manual, which by ordinance was recommended by the Mayor as part of his administrative duties, the City specifically granted relief to the employees under Section III.2 by stating a preference that city employees live within or near the corporate limits of Lehi rather than requiring residency in most instances.[58]

Thus, given the extant case law in Utah and the history of the residency requirement in Lehi City, which shows that it has historically been treated as a discretionary administrative matter, there is a likelihood that the Utah courts would conclude that Initiative No. 2 is not a proper subject for an initiative petition.[59]

It should be noted that similar residency requirements have been the subject of initiative or referenda petitions in other states. For example, in *Ohio Patrolmen's Benevolent Association v. City of Perrysburg*,[60] the Ohio Court of Appeals recognized that, pursuant to state law, a limited residency requirement may be enacted by an initiative petition.[61] Additionally, in *Newark Council No. 21 v. James*,[62] the court addressed the enforceability of the City of Newark's residency ordinance, which had been the subject of a referendum.[63] And in *City and County of Denver v. State*,[64] the Colorado Supreme Court was tasked with determining whether an amendment to the City Charter requiring residency, accomplished by an initiative, was enforceable in light of a state statute that prohibited residency requirements.[65] Although the *Ohio Patrolmen's*, *Newark Council*, and the *City and County of Denver* courts did not analyze whether a residency requirement was legislative or administrative in nature, it is likely that proponents of Initiative No. 2 would attempt to rely on such cases to support their claim that the imposition of a residency requirement is, in fact, legislative and, therefore, a proper subject for an initiative petition.

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[58] Lehi City Policy and Safety Manual, August 2006, at III.2. Although the Policy Manual states that elected, appointed statutory, and appointed executive and department head employees must "typically secure residency within a twelve (12) month period," the manual expressly provides that "extensions may be authorized by the mayor/city council." *Id.* at III.2.D.

[59] As a practical matter, it should be noted that many municipalities have found it advantageous not to impose residency requirements on certain employees, particularly those engaged in certain adjudication or enforcement positions such as a judge or a building official as such officials often find that awkward encounters can occur at social or religious events if that person encounters a person or family member recently sentenced or a builder whose building project was red tagged.

[60] 2011 Ohio 644, 2011 Ohio App. LEXIS 516.

[61] *Id.* at ¶¶12-15.

[62] 723 A.2d 127 (N.J. Super. Ct. App. Div. 1999).

[63] *Id.* at 131 n.7.

[64] 788 P.2d 764 (Colo. 1990).

[65] *Id.* at 765.

However, such reliance would be misplaced. Indeed, in addition to the fact that the courts did not provide any analysis to aid in the resolution of the actual issue present in this case, i.e., whether the imposition of a residency requirement concerns administrative, rather than legislative, matters, the Utah Supreme Court has already recognized that its position regarding the administrative/legislative dichotomy is contrary to that adopted by many of the jurisdictions, including New Jersey.[66] Despite its knowledge that "the numerical weight of authority of jurisdictions in this country, which have passed upon the question, take the position that the fixing of salaries is a proper subject for legislative action,"[67] the *Shriver* Court nonetheless held that such action was indeed administrative, relying heavily on its application of the "practicality test."[68] As discussed above, many of the same considerations that led the Court to hold that the fixing of salaries is an administrative task are present in this case, thereby leading to the conclusion that imposing employment conditions such as a residency requirement would likewise be deemed administrative.

As noted above, while the initiative law in Utah has been significantly developed since 1957, the Utah Supreme Court has never overruled *Shriver*. However, there still exists the possibility that the Court would refuse to extend its holding in *Shriver* to residency requirements. Nevertheless, based upon the law as it presently exists in Utah, there is a strong possibility that a Utah court would hold, based upon the reasoning in *Shriver*, that setting employment conditions, such as imposing a residency requirement, is also administrative in nature.

2. Initiative No. 2 Is Quite Possibly Unconstitutional

Assuming *arguendo* that a court would find that a residency requirement is a legislative matter, such a finding is not dispositive to the resolution of the question of whether Initiative No. 2 is a proper subject for an initiative petition. As discussed above, in addition to qualifying as being legislative in nature, a proposed ordinance must be constitutional to be a proper subject for an initiative petition.[69] In this case, the residency requirement proposed by Initiative No. 2 raises the question of at least one constitutional violation.

Although in *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City*,[70] the Utah Supreme Court held residency requirements are generally constitutional under Article I, Sections 1 (Inalienable Rights), 7 (Due Process), 18, (Impairment of Contracts), 22 (Takings), and 24 (Equal Protection), the Court recognized one highly relevant exception, declaring: "[W]e cannot

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[66] *Shriver*, 313 P.2d at 477.
[67] *Id.*
[68] *Id.* at 477, 478.
[69] *Sevier Power Co.*, 2008 UT 72 at ¶10.
[70] 449 P.2d 239 (Utah 1969).

subscribe to the theory ... that place of residence is a God-given, constitutional right, determinable and enforceable by an employee against his employer who offers and gives the employee his job, ***unless such right contractually is protected***."[71]

In this case, the City of Lehi entered into a contract with at least one of the employees that would be affected by Initiative No. 2, in which it unequivocally agreed to waive the residency requirement. Indeed, the waiver provides that the employee "may continue his employment by the city without losing any benefits in the event he moves his residence outside the city limits on a permanent basis after the date of this Waiver." Given this contractual right, it appears that the holding in *Salt Lake City Fire Fighters* is inapplicable and an impairment of contracts analysis is required to determine whether Initiative No. 2 is unconstitutional.[72]

Article I, section 18 of the Utah Constitution provides that "[n]o ... law impairing the obligation of contracts shall be passed."[73] "[T]he obligation of a contract is impaired when a party is deprived of the benefits of the contract by law or when the statute takes from the party his or her whole contract and all the rights that it was intended to confer."[74] Only when the law is "reasonable and necessary to serve an important public purpose" will it withstand a constitutional challenge.[75]

In this case, the proponents of Initiative No. 2 may argue that the residency requirement is necessary for a variety of reasons. However, given the breadth of the appointive positions subject to the provisions of Initiative No. 2, including the Human Resource Director, the Economic Development Coordinator, the Planning Director, and other non-emergency personnel, it appears unlikely that the proponents would be able to demonstrate that the residency of such employees is essential to an important public purpose. Thus, there is a question regarding the constitutionality of the ordinance proposed by Initiative No. 2, which should preclude it from being a proper subject of an initiative petition.[76] As with Initiative No. 1, acceptance and

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[71] *Id.* at 240 (emphasis added).

[72] Proponents of Initiative No. 2 may argue that the City could not waive the right to enforce its residency requirement ordinance. However, as discussed below, Utah courts have recognized that a governmental entity may be enjoined from enforcing its ordinances under certain circumstances. *See, e.g., Utah County v. Young*, 615 P.2d 1265 (Utah 1980); *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671 (Utah Ct. App. 1990). Moreover, administrative issues may be waived without legislative action. Thus, the waiver in this instance supports the City's position that this is an administrative issue that is not suitable for an initiative.

[73] *See also* U.S. Const. art. I, sec. 10 ("No State shall ... pass any ... Law impairing the Obligation of Contracts ....").

[74] 328 Am. Jur. 2d Constitutional Law § 775.

[75] *United States Trust Co. of New York*, 431 U.S. at 25.

[76] It should be noted that, if a court were to determine that the imposition of a residency requirement is an administrative function and, therefore, not a proper subject for an initiative petition, the City would not be in violation of Article I, Section 18 of the Utah Constitution if it were to enact (or enforce) a similar residency

placement of Initiative No. 2 on the ballot could subject the City to lawsuits for breach of contract and civil rights lawsuits for impairment of the obligation of contracts.

3. Initiative No. 2 Conflicts with State Law

Finally, in addition to the fact that there are significant questions as to whether Initiative No. 2 is administrative in nature and is constitutional, Initiative No. 2 is an improper initiative subject because it conflicts with State law. As noted above, an "ordinance proposed by the electors of a city under the initiative law must constitute such legislation as the legislative body of the city has the power to enact under the law defining the powers of such body."[77]

In this case, the Utah Code provides that the mayor of a municipality operating under the six member council form of government "may ..., with the council's advice and consent...appoint a person to fill ... a municipal office."[78] When addressing the power of appointment, the Utah Supreme Court has held that "the general rule is that the power of removal or suspension, unless controlled by statute, is an incident to the power of appointment."[79] This rule is in accordance with the principle that "those in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint."[80] Thus, "[w]hen an individual is appointed by an official, the office is held during the pleasure of the authority making the appointment."[81]

In this case, Initiative No. 2 is directed at the positions that the Mayor is granted authority by State law to appoint. Because Initiative No. 2 does not provide a grandfathering provision which would allow such appointed officials to remain in their positions despite their current residency outside of the City, the Initiative has the effect of stripping from the Mayor his right and responsibility to remove the officials that he has appointed. Such a result is in conflict with Utah law.[82] As a result, Initiative No. 2 is not a proper initiative subject.

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requirement in the future because the Contract Clause provision applies only "to legislative enactments after contracts have been entered into and not to administrative acts or court decisions." *Fuller-Toponce Truck Co. v. Public Serv. Comm'n*, 96 P.2d 722, 726 (Utah 1939). However, such conduct may still subject the City to breach of employment contract claims by certain of its employees, as discussed in more detail below.

[77] *Dewey*, 277 P.2d at 807.

[78] Utah Code Ann. § 10-3b-104(1)(c)(v)(B)(I).

[79] *Sheriff of Salt Lake County v. Board of Comm'rs of Salt Lake County*, 268 P. 783, 784 (Utah 1928).

[80] *Id.* at 785.

[81] *Hutchison v. Cartwright*, 692 P.2d 772, 774 (Utah 1984) (internal quotations omitted).

[82] *Sheriff of Salt Lake County*, 268 P. at 785 ("[W]hatever summary power of suspension or removal of a deputy may be exercised is to be exercised by the [appointing official] and not by the board of county commissioners, except as may directly or indirectly result from a determination by the board that the services of the deputy or deputies theretofore appointed are no longer necessary, and even then we think it would be within the province of

Additionally, Initiative No. 2 also includes a provision that would compel the prosecution of the Mayor for neglect of duty in the event he refuses to enforce the proposed ordinance. Utah law provides that an elected official may be removed from office for neglect of duty by judicial proceedings.[83] However, the statutes governing that procedure expressly grant the county or district attorney with discretion to determine whether to prosecute any given accusation.[84] In conflict with Utah's statutorily granted prosecutorial discretion, Initiative No. 2 mandates prosecution by requiring that the Mayor "shall be charged with neglect of duty and prosecuted pursuant to Utah Code Title 10 Chapter 3 Section 826." Because this provision is not compatible with State law, Initiative No. 2 is not a proper initiative subject.

In summary, Initiative No. 2 presents several substantial questions regarding its status as a proper subject for an initiative petition. Accordingly, we recommend that the City Recorder, under the specific direction of the City Council, reject the petition and refuse to refer it to the City Council. Although it is likely that such conduct will result in litigation, either before the Utah Supreme Court or the Fourth District Court, we believe that it is in the City's best interest to have such questions resolved before submitting the initiative to the electorate.

B. Even if Initiative No. 2 Were the Proper Subject of an Initiative Petition, Certain Employees Could Have Substantial Employment Contract Claims.

As noted above, Utah law provides that employers and employees are free to enter into contractual relationships with each other. Although most employment contracts are unilateral contracts which can be changed at the whim of either side so long as the other party continues to perform,[85] if contracts are created either explicitly or by implied-in-fact contractual provisions found in personnel manuals or offer letters, a party can be bound by those contractual terms.[86]

The proposed Citizens Initiative No. 2 provides that certain enumerated employees "are required to establish residency within the City within 6 months of their hire date." Additionally,

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the [appointing official] to indicate which of his deputies were to be retained and which dismissed or let out, unless the commission had determined that the service of no deputy longer was necessary.").

[83] Utah Code Ann. § 10-3-826; *see also id.* § 77-6-4.

[84] *Id.* § 77-6-4(2)(a).

[85] *See Johnson*, 818 P.2d at 1001-02 ("In the case of unilateral contract for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer.")

[86] *Carbaness*, 2010 UT 23 at ¶55; *see also Piacitelli*, 636 P.2d at 1069 ("By entering into an employment contract of the type before us, the parties assume continuing obligations to one another: the employee to render services, the employer to pay salary. Those obligations continue until they are extinguished.")

to the extent that they are not residing within the city limits as of December 1, 2010, these employees are not entitled to relocation assistance otherwise granted to new employees.

As discussed above, the City has contractually waived any residency requirement with respect to at least one of the employees to which Initiative No. 2 is directed. Thus, to the extent that Initiative No. 2 becomes law, there is a strong probability that any employees who received such a waiver will sue to enjoin the City from enforcing Initiative No. 2. Although an ordinance requiring residency was in effect at the time the waiver was executed, Utah's courts have held that a governmental entity may be prohibited from enforcing the provisions of its ordinances under certain circumstances. For example, in *Eldredge v. Utah State Retirement Board*, the Utah Court of Appeals held "[w]here a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment."[87] Similarly, with respect to a zoning dispute, the Utah Supreme Court held in *Utah County v. Young* that the county may be estopped from enforcing its zoning ordinance if it can be shown that the county "committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses."[88]

In this case, it is likely that the affected employees will argue that they relied, to their detriment, on the City's waiver by either moving outside of the City's limits or by accepting employment with the City while residing outside of the City's boundaries. Although the City may be able to present evidence to refute an employee's claim of reliance, it is likely that the City will incur substantial legal fees in contesting a challenge to the ordinance proposed by Initiative No. 2.[89]

In addition to the waiver(s) executed by the City, employees may also claim that their employment offer letters provided the employees the right to remain in their current residences while employed by the City. Additionally, although the City may have the reserved right to require relocation into the city boundaries under some employment arrangements, if the City were to now adopt a policy that would require residency, employees may be likely to argue that an implied contract was created by the employee manual that allowed them to live outside of the city limits.[90] While most employees may not be able to prevail under such an argument, the likelihood of litigation is significant given the highly fact dependent nature of such claims.

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[87] 795 P.2d 671, 676 (Utah Ct. App. 1990) (internal quotations omitted).
[88] 615 P.2d 1265, 1267 (Utah 1980).
[89] It is our good faith estimate that the potential litigation cost over such issues could be between $0 and $360,000.00.
[90] *See Carbaness*, 2010 UT 23 at ¶¶54-55.

C. Passage of Initiative No. 2 Could Subject the City to Civil Rights Claims

For the reasons mentioned in connection with Initiative No. 1, above, passage of Initiative No. 2 could subject the City to claims for money damages under 42 U.S.C § 1983 and attorney's fees awards under 42 U.S.C. § 1988. In a very real sense, the City has the Hobson's choice of potentially being sued by the initiative sponsors for not placing these initiatives on the ballot or potentially being sued by the employees they will affect for breach of contract and deprivation of their constitutional rights as explained above. Since an initiative lawsuit cannot lead to an award of money damages or attorney's fees against the City, we think it would be wiser for the City to obtain a judicial determination of the validity of the initiatives prior to a vote by the citizens rather than be subjected to potential money damages and attorney fee claims from affected employees after the fact if the initiatives are passed.

OPTIONS AVAILABLE TO THE CITY

Due to the public importance of these initiatives and the potential for litigation, we have been asked to provide recommendations addressing what actions the City might take to minimize or avoid extended litigation on the Citizen Initiatives. In preparing this opinion and recommendations, we have again examined the Initiative Applications, conducted legal research of relevant statutes, case law, ordinances, administrative regulations, and local court rules and procedures. We have also drawn upon our experience in other initiative and referendum matters, as well as our experience with employment law and various civil rights statutes. In light of the above, we recommend the following.

The filing of the Citizen Initiatives places Lehi City in a somewhat precarious political and legal situation. In determining how best to proceed with the Initiative Applications, Lehi City finds itself stuck between two opposing interests. On the one hand, are the citizen sponsors of the Initiative Applications, who believe they are exercising their important constitutional right to enact legislation by initiative. On the other hand, the City Recorder has an equally important constitutional responsibility to reject an initiative that addresses a subject matter that cannot be legislated via initiative. These are both important public policy concerns. This is a difficult and politically delicate position for the City to be in, and the public's perception of how the Initiative Applications are dealt with is of high importance.

Based on Utah case law, the City Recorder has a legal responsibility to refuse to accept, process, or enact the ordinances sought by the Citizen Initiatives.[91] As discussed previously, the Initiative Applications seek to enact ordinances that will set maximum salary and total

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[91] *See, e.g., Low v. Monticello*, 2002 UT 90, ¶8; *Salt Lake on Track*, 939 P.2d 680 at 682..

compensation limits for all elected and appointed city officials, and require that certain city officials reside within city limits. The Utah Supreme Court has held that the setting of salaries is in fact administrative and not subject to initiative petition, and through its reasoning, it appears likely that the Court would hold that issues involving "conditions of employment" are similarly not subject to initiative petition. However, the City does not have the final say on whether or not either or both of the initiative applications move forward to a vote by the public. That rests, ultimately, with the Utah Supreme Court.

Section 20A-7-507 provides that, "[i]f the local clerk refuses to accept and file any initiative petition, any voter may apply to the supreme court for an extraordinary writ to compel him to do so within 10 days after the refusal."[92] The Utah Supreme Court has held that such language does not "limit either the remedies that can be sought or the court in which those remedies can be pursued, but rather provides for a particular remedy and the limitations to which that remedy is subject."[93] Thus, the proponents of the Citizen Initiatives may apply to the Utah Supreme Court for an extraordinary writ or may file suit in the Fourth District Court for the State of Utah, seeking injunctive and/or declaratory relief. Clearly, if the citizens were to file suit in either court, there is a strong likelihood that the City may be criticized for ignoring the rights of the voting citizens.

On the other hand, in the event that Lehi City decides to accept and process the Initiative Applications, and thereafter the voters approve the initiatives adopting ordinances limiting salary/compensation and imposing a residency requirement on appointed officials, there is likely to be litigation seeking attorney's fees and money damages filed against the City by appointed City officials or administration whose livelihood would be significantly impacted by the enactment of salary/compensation limits and/or residency requirements. As stated above, there are legal grounds that may potentially support claims by City officials or administration that ordinances limiting their salaries and requiring residency cannot be passed by a citizen initiative. This type of litigation could also have a significant impact on public perceptions of the City and its officials, and such litigation would likely be very divisive.

Accordingly, if the City follows the advice in this letter, the next question is whether the City should simply wait for a proponent of the Citizens Initiatives to bring suit or whether the City should file a declaratory action. In legal cases, or potential legal cases, where an issue of statute or case law interpretation is pivotal to the adjudication or settlement of a dispute, a legal action may be brought to the court for a declaratory judgment. In a declaratory judgment action, the plaintiff or petitioner asks the court to make a ruling to determine "rights, status, and other

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[92] Utah Code Ann. § 20A-7-507(5)(a) (2011).
[93] *Low*, 2002 UT 90 at ¶16.

relations within its [] jurisdiction,"[94] and any person or entity "whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance... may request the district court to determine any question of construction or validity arising under the[] statute [or] ordinance [] and obtain a declaration of rights, status, or other legal relations."[95]

In this case, Lehi City could file a declaratory judgment action that asks the court to determine whether the Citizens Initiatives are proper subjects for initiative petitions. To bring such an action, it would be necessary for the City to name the citizens who sponsored the Initiative Applications as defendants or respondents in the case; additionally, it may be necessary to also add the City officials who would be affected by the ordinances that the Initiatives seek to enact.[96] As defendants or respondents in the case, the citizen sponsors of the Initiative Applications will have the opportunity to file legal briefs in support of their positions and on the matters before the court.

However, it is our advice that the most efficient and least costly method to obtain a final determination as to the appropriateness and legality of the Citizen Initiatives is to reject the Petitions and allow a proponent to appeal the rejection directly to the Utah Supreme Court. Both the City and the citizens will save considerable time and attorney fees if the matter is referred directly to the Utah Supreme Court pursuant to Section 20A-7-507 rather than filed as a declaratory judgment action in the Fourth District Court. Indeed, once an application for extraordinary writ is filed, the parties will be able to have the Utah Supreme Court, which is responsible for having the final say on the issues, address the matter in a timely fashion, whereas, in the district court, the parties will likely be required to undergo an expensive and time-consuming trial only to then end up at the Utah Supreme Court if either party appeals the district court's decision.

As only the proponents of the Citizen Initiatives have the ability to seek an extraordinary writ from the Utah Supreme Court to compel the City to accept and file the initiative petitions and because both the City and the citizens will be able to benefit from the expedited process authorized by Section 20A-7-507, we recommend that the City Recorder, upon legal advice and in consultation with the Mayor and City Council, reject the petitions and refuse to refer them on to the City Council on the grounds that the Citizen Initiatives are not proper subjects for initiatives, as discussed herein. The City must then wait to see whether the proponents will choose to initiate litigation. If so, the fastest and least expensive route for the City and the citizens would be the direct appeal to the Utah Supreme Court.

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[94] Utah Code Ann. § 78B-6-401(1).
[95] Utah Code Ann. § 78B-6-408.
[96] Utah Code Ann. § 78B-6-403(1-2).

Please contact us if you have any questions regarding the advice and recommendations set forth in this letter. We look forward to discussing this important matter further at the upcoming City Council meeting.

Sincerely,

SMITH|HARTVIGSEN, PLLC

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Kathryn J. Steffey
R. Christopher Preston

cc: Kenneth A. Rushton, City Attorney
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