2001 WL 1892476 (Utah A.G.)

Office of the Attorney General
State of Utah

Opinion Number 01-001

July 12, 2001

RE: Validity of Passage of Proposition 1 in the 2000 General Election

David E. Yocum
Salt Lake County District Attorney
Paul T. Morris
West Valley City Attorney

Dear Mr. Yocum and Mr. Morris:

The request of West Valley City, dated June 25, 2001, for an opinion from the Attorney General's Office was assigned to me for response. We begin by noting that, as set forth in the Attorney General's Policy Manual:

5.10 Opinion Policy
Introduction - Utah law requires the Attorney General to "give the attorney general's opinion in writing and without fee to the Legislature or either house, and to any state officer, board, or commission, and to any county attorney or district attorney, when required, upon any question of law relating to their respective offices." (Utah Code Ann. 67-5-1(7) (as amended 2001))

In light of this, under normal circumstances, our office would decline to issue an opinion to a municipality, such as West Valley City. However, the Salt Lake County District Attorney's office, through a letter dated June 25, 2001, from Karl Hendrickson, Deputy County Attorney, joined in the request from your office. We therefore believe our office is authorized to issue the following opinion.

Issues

In your request, you indicated there is one main issue, and two sub-issues:

Main Issue: Can municipalities and counties issue excise tax bonds in reliance on the validity of the amendment to article XIV, section 3 of the Utah Constitution contained in Proposition 1 which was approved by the Utah electorate on November 7, 2000?

Sub-Issues:
1. How would Utah courts deal with a post-election legal challenge to the amendment of article XIV, section 3?

2. Would the courts uphold the amendment even though there was not strict compliance with the constitutional and statutory noticing provisions and the amendment was not specifically mentioned in the ballot title?

Short Answers

Main Issue: Municipalities and counties can rely on the validity of the amendment to article XIV, section 3 of the Utah Constitution contained in Proposition 1 which was approved by the Utah electorate on November 7, 2000.

Sub-Issues:
1. Only the Utah courts know how they would deal with a post-election challenge to the amendment of article XIV, section 3, and what standards they would use to arrive at their decision. We can say, though, that in our considered judgment, the Utah courts would uphold the validity of the amendment.

2. Again, in our view, the Utah courts would uphold the validity of the amendment even though there was not strict compliance with the constitutional and statutory noticing provisions and the amendment was not specifically mentioned in the ballot title.

Relevant Utah Constitutional Provisions

***2** 1. Utah Const. art. XIV, § 3 (prior to amendment in November 2000).

> Sec. 3. [Debts of counties, cities, towns, and school districts not to exceed revenue - Exception.]
> No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt.

2. Utah Const. art. XIV, § 3 (after amendment in November 2000).

> Sec. 3. [Certain debt of counties, cities, towns, school districts, and other political subdivisions not to exceed revenue - Exception.]
> No debt issued by a county, city, town, school district, or other political subdivision of the State and directly payable from and secured by ad valorem property taxes levied by the issuer of the debt may be created in excess of the taxes for the current year unless the proposition to create the debt has been submitted to a vote of qualified voters at the time and in the manner provided by statute, and a majority of those voting thereon has voted in favor of incurring the debt.

3. Utah Const. art. XXIII, § 1.

> Section 1. [Amendments: proposal, election.]
> Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if two-thirds of all the members elected to each of the two houses, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays taken thereon; and the Legislature shall cause the same to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this Constitution

Relevant Parts of Relevant Statutes

1. Utah Code Ann. § 20A-7-103 (1998). Constitutional amendments and other questions - Procedures for submission to popular vote.

(1) The procedures contained in this section govern when:

(a) the Legislature submits a proposed constitutional amendment or other question to the voters; and

(b) an act of the Legislature is referred to the voters by referendum petition.

(2) The lieutenant governor shall, not later than 60 days before the regular general election, publish the full text of the amendment, question, or statute in at least one newspaper in every county of the state where a newspaper is published.

(3) The legislative general counsel shall:

***3** (a) designate the amendment or question by number and order of presentation on the ballot;

(b) draft and designate a ballot title that summarizes the subject matter of the amendment or question; and

(c) deliver them to the lieutenant governor.

2. Utah Code Ann. § 20A-7-209 (Supp. 2000). Ballot title - Duties of lieutenant governor and Office of Legislative Research and General Counsel.

(1) By July 6 before the regular general election, the lieutenant governor shall deliver a copy of all of the proposed laws that have qualified for the ballot to the Office of Legislative Research and General Counsel.

(2) (a) The Office of Legislative Research and General Counsel shall:

(i) prepare a ballot title for each initiative; and

(ii) return each petition and ballot title to the lieutenant governor by July 20.

(b) The ballot title may be distinct from the title of the proposed law attached to the initiative petition, and shall express, in not more than 100 words, the purpose of the measure.

(c) The ballot title and the number of the measure as determined by the Office of Legislative Research and General Counsel shall be printed on the official ballot.

(d) In preparing ballot titles, the Office of Legislative Research and General Counsel shall, to the best of its ability, give a true and impartial statement of the purpose of the measure.

(e) The ballot title may not intentionally be an argument, or likely to create prejudice, for or against the measure.

(3) By July 21, the lieutenant governor shall mail a copy of the ballot title to any sponsor of the petition.

(4) (a) If the ballot title furnished by the Office of Legislative Research and General Counsel is unsatisfactory or does not comply with the requirements of this section, at least three of the sponsors of the petition may, by July 30, appeal the wording of the ballot title prepared by the Office of Legislative Research and General Counsel to the Supreme Court.

(b) The Supreme Court shall:

(i) examine the ballot title;

(ii) hear arguments; and

(iii) by August 10, certify to the lieutenant governor a ballot title for the) measure that fulfills the intent of this section.

(c) By September 1, the lieutenant governor shall certify the title verified to him by the supreme court to the county clerks to be printed on the official ballot.

3. Utah Code Ann. § 20A-7-702 (Supp. 2000). Voter information pamphlet - Form - Contents - Distribution.

(2) The voter information pamphlet shall contain the following items in this order:

* * * *

(g) information pertaining to all measures to be submitted to the voters, beginning a new page for each

measure and containing, in the following order for each measure:
(i) a copy of the number and ballot title of the measure;
(ii) the final vote cast by the Legislature on the measure if it is a measure submitted by the Legislature or by referendum;
(iii) the impartial analysis of the measure prepared by the Office of) Legislative Research and General Counsel;
***4** (iv) the arguments in favor of the measure, the rebuttal to the arguments) in favor of the measure, the arguments against the measure, and the rebuttal to the arguments against the measure, with the name and title of the authors at the end of each argument or rebuttal;
(v) for each constitutional amendment, a complete copy of the text of the constitutional amendment, with all new language underlined, and all deleted language placed within brackets; and
(vi) for each initiative qualified for the ballot, a copy of the measure as) certified by the lieutenant governor;
* * * *
(3) The lieutenant governor shall:
(a) ensure that one copy of the voter information pamphlet is placed in one issue of every newspaper of general circulation in the state not) more than 40 nor less than 15 days before the day fixed by law for the election;
(b) ensure that a sufficient number of printed voter information pamphlets are available for distribution as required by this section;
(c) provide voter information pamphlets to each county clerk for free distribution upon request and for placement at polling places; and
(d) ensure that the distribution of the voter information pamphlets is completed 15 days before the election.

Effect of Opinion from the Attorney General's Office

As stated in the Attorney General's Policy Manual:

5.10 Opinion Policy

D. Effect of Opinion:
1. For the Attorney General, a formal opinion constitutes a judgment as to what the law requires in particular circumstances. Absent a change in law, factual circumstances or overriding public policy, the Attorney General ordinarily will be guided by prior published opinions and legal precedents.

2. For the requesting official, a formal opinion constitutes the Attorney General's carefully, considered judgment as to what the law requires in the circumstances presented by the request. . . .

3. Legal Binding on the Courts. For the courts, formal opinions may have persuasive effect, but do not constitute binding authority. . . .

In short, the opinion of this office is simply that, an opinion. It is, as stated above, our office's best “considered judgment as to what the law requires in the circumstances presented by the request.”

BACKGROUND

During the 1999 General Session, the Utah Legislature passed a proposed constitutional amendment that was

titled S.J.R. 5. The vote in the Senate was 23 yeas, 4 nays, and 2 absent, and the vote in the House of Representatives was 62 yeas, 0 nays, and 13 absent. S.J.R. 5 proposed to amend eleven (11) sections, enact four (4) sections, and repeal two (2) sections, of the Utah Constitution. One of the sections proposed to be amended was Utah Const. art. XIV, § 3. S.J.R. 5 was to be presented to the voters during the General Election to be held in November of 2000.

In the 2000 General Session, the Utah Legislature passed S.J.R. 8, which further amended one of the constitutional provisions that would have been amended by S.J.R. 5, and deleted one of the new sections that had been proposed in S.J.R. 5. The vote in the Senate was 28 yeas, 0 nays, and 1 absent, and the vote in the House of Representatives was 70 yeas, 1 nay, and 4 absent. The section that was further amended in S.J.R. 8 was not article XIV, section 3. S.J.R. 8 stated that the amendments proposed in S.J.R. 8 superceded the amendments proposed in S.J.R. 5, and the amendments in both were to be presented as one, i.e., not separately, to the voters. When, pursuant to statute, the Office of Legislative Research and General Counsel ("LRGC") sent the proposed amendments to the Election Office of the Lieutenant Governor's Office for publishing, LRGC sent the text of S.J.R. 8, but failed to send the text of S.J.R. 5 with it. LRGC designated the text of S.J.R. 8 as Proposition 1 for the statewide election. Accordingly, when the text of Proposition 1 was published on August 28, 2000, to comply with Utah Code Ann. § 20A-7-103, only the text of S.J.R. 8 was published.

***5** Proposition 1 was again published as part the Voter Information Pamphlet, as required by Utah Code Ann. § 20A-7-702(3). This time, however, the full text of S.J.R. 5, as amended by S.J.R. 8, was included, in accordance with the statute. The Voter Information Pamphlet was distributed for inclusion in newspapers of general circulation approximately 30 days before the election, in compliance with section 20A-7-702(3).

As required by section 20A-7-103(3), LRGC prepared a title for Proposition 1. Section 15 of Proposition 1 would amend article XIV, section 3, to provide explicitly that only debt incurred by a local government that would be repaid by ad valorem taxes would need be submitted to the voters. There was no specific mention in the title that if Proposition 1 passed, there would be a modification of any constitutional debt provision. There was also no analysis of this change in the Voter Information Pamphlet.

On November 7, 2000, the voters approved Proposition 1. The vote was 471,064 for, and 215,243 against. Of those that voted on Proposition 1, 69% voted for, and 31% voted against.

DISCUSSION

Two main questions have arisen with respect to this election: (1) Were constitutional and statutory requirements regarding publication met? and (2) Did the failure to mention the modification of debt provisions in the title to Proposition 1 invalidate the entire proposition, and especially Section 15 thereof? These two questions will be addressed separately.

A. PUBLICATION

Article XXIII, section 1 of the Utah Constitution states that:

> [T]he Legislature shall cause the [proposed amendment] to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection

This section of the Constitution provides several general guidelines for publication of proposed amendments to the Constitution. First, the Legislature is charged with the responsibility of causing the publication to occur.

Second, the Constitution requires that any proposed amendment be published in newspapers. Third, the Constitution requires that the amendment be published in at least one newspaper in every county of the State in which a newspaper is published. Fourth, the Constitution requires that the amendment be published for two months immediately preceding the general election.

The Legislature is charged with causing the publication of the proposed amendment to occur, but there is nothing to suggest that the responsibility cannot be delegated. The Legislature has in fact delegated that responsibility originally to the Secretary of State, and the more recent incarnation of that office, the Lieutenant Governor. This practice was implicitly approved by the Utah Supreme Court in Snow v. Keddington, 195 P. 234, 238 (Utah 1948).

***6** There is no question that the publication requirement of article XXIII requires that the amendment be published in newspapers. Television and radio broadcasts, Internet postings, and other methods serve to spread notice of both the amendment itself and the potential consequences of the amendments, but such methods do not satisfy the constitutional requirement. While it is possible that the newspaper publication requirement is somewhat outdated in today's modern society as far as being the primary source of information for the public, the requirement that the amendments be published in a newspaper, and in at least one newspaper in every county of the State in which a newspaper is published, does at least ensure voters they will have widespread access to a paper copy of the amendment they can review at their leisure.

Article XXIII also requires that the amendment be published "for two months immediately preceding" the election. However, no specific requirements are mentioned for the number of times the amendment is to be published, or how often the amendment is to be published. Thus, while the use of the word "for" in the phrase "for two months" might suggest repeated publication, the term itself is broad and ambiguous.

The only Utah case that has referenced the publication provision of article XXIII, section 1, is Snow v. Keddington, 195 P. 234, 238 (Utah 1948). In Snow, the plaintiff challenged the effective date of an amendment to the Utah Constitution on the grounds that the Salt Lake County Clerk did not publish the effective date on cards that the Clerk was required by statute to place in voting booths and at the polls. With respect to the constitutional provision requiring the amendment to be published "for two months," the Supreme Court said:

> Under the constitutional provision, Section 1, Article XXIII, the legislature is required to have the amendment published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election. This duty was carried out by the secretary of state and the amendment was published as required. * * *

(195 P.2d at 238; emphasis added.)

The briefs that were filed in Snow state that the amendments were published once each week for nine weeks prior to the election. Given the Supreme Court's declaration in Snow that "the amendment was published as required," it is clear that the constitutional requirement that the amendment be published "for two months" does not mean the amendment need be published every day. The question is, can the constitutional requirement be met by publishing less frequently than once a week for nine weeks before the election, and, if so, how much less frequently can the amendment be published and still meet the constitutional requirement?

1. Legislative History of Utah Statutes Requiring Publication of Constitutional Amendments (Utah Code Ann. §§ 20A-7-103(2) and 20A-7-702(3) and Their Predecessors).

***7** The Supreme Court has stated that in the absence of specific standards in the Constitution, the Legislature is

free to consider the problem and to legislate in the area. State ex rel. Breeden v. Lewis, 72 P. 388, 389 (Utah 1903). To implement the publication provisions of article XXIII, section 1, the Utah Legislature has, over time, enacted several statutes.

It is unclear whether before 1973 there was any legislation as to how often the text of an amendment had to be published. However, in 1973, the Legislature passed what became § 20-1-18. That section read as follows:

> Whenever a proposed amendment to the Constitution of Utah is to be placed on the ballot for consideration by the voters of the state in a general election, the secretary of state shall cause the amendment to be published at least four times during the period of two months immediately preceding the election in at least one newspaper in every county of the state where a newspaper is published. The publication shall include the existing language of the section or article to be amended and also the language of the proposed amended section or article in a manner which will allow easy comparison between the existing constitutional provisions and the proposed amendment.

{H.B. No. 27, 1973 Gen. Sess., emphasis added.}

Two years later, the 1975 Legislature provided for the first time a voter information pamphlet ("VIP") when it enacted S.B. No. 96. The VIP, as enacted by S.B. No. 96, only provided information on measures to be submitted to the voters, including constitutional amendments. There was no information on candidates for offices or on judges facing retention elections (as is the case now). Arguments for and against measures to be submitted to the voters, and an impartial analysis by the "director of research of the legislative council" (now the LRGC), were to be included in the VIP. The complete text of the measure was also to be included, along with an explanation of how to vote for or against the measure.

Section 10 of S.B. No. 96 provided for the mailing of the VIP as follows:

> The secretary of state shall mail one copy of the voter information to each resident mailing address in the state not more than 40 nor less than 15 days before the day fixed by law for the election, and except as required by section 20-1-18, no other official publication of such measures shall be made. The secretary of state shall cause to be printed voter information pamphlets equal to 1 1/3 times the number of resident mailing addresses in the state as determined by the U. S. Post Office at the time of publication. Those pamphlets not needed for mailing by the secretary of state in accordance with this section shall be distributed by him on the basis of population to each county clerk for free distribution upon request and for placement at polling places. The mailing of the voter information pamphlets shall be completed 15 days prior to the election. Two copies of the voter information pamphlets shall be kept at every polling place while an election is in progress, so that they maybe freely consulted by the voters.

***8** (S.B. No. 96, 1975 Gen. Sess.; emphasis added.)

S. B. No. 96 also reduced the number of times for publication required by section 20-1-18 from four to three. Thus the Legislature had made the determination that the publication requirements of article XXIII, section 1, could now be accomplished by requiring publication in at least one newspaper of general circulation in each county in which a newspaper is published at least three times, instead of four, in the two months prior to the election. In all likelihood, the Legislature determined that since it was now requiring the VIP - which would contain a highly detailed explanation of the amendment, as well as the complete text of the amendment - to be mailed to each residence in the State, it could reduce by one the number of times it would require the text of the amendment to be published in the newspapers; the public would still have access to the text four times during the two months immediately before the election, even though one of the times would no longer be through publication in the newspapers. The constitutional requirement that the text be published for two months immediately

before the election would continue to be met by requiring publication at least three times in that medium.

In 1982, another major change in the statutes regarding publication of constitutional amendments took place. S.B. No. 84 amended the section on distribution of the VIP (at that time section 20-11a-10) so that the Lieutenant Governor (formerly the Secretary of State) now was to "cause to be distributed one copy of the [VIP] in one issue of every newspaper of general circulation in the state not more than 40 nor less than 15 days" before the election. In addition, S. B. No. 84 repealed section 20-1-18, which had required publication by the Lieutenant Governor of the text of the amendment in at least one newspaper in each county in which a newspaper is published at least three times during the two months prior to the election. The bill also deleted the language that "except as required by section 20-1-18, no other official publication of such measures shall be made," which language was obviously now obsolete with the repeal of section 20-1-18. This meant that the only official publication of the text of an amendment was now in the VIP.

It appears that six years later, the Legislature became concerned that this lone publication of a proposed amendment in the VIP was not sufficient to meet the "for two months" publication requirement in the constitution. In 1988, S. B. No. 178 amended both § 20-3-41 (now part of section 20A-7-103) and section 20-11a-8 (the former section 20-11a-10, and now part of section 20A-7-702). The relevant part of the amendments to section 20-3-41 provided as follows:

> (1) The lieutenant governor shall, not later than 60 days before the general election, cause the full text of the amendment to be published in at least one newspaper in every county of the state where a newspaper is published.

***9** (S. B. No. 178, 1988 Gen. Sess.)

The sponsor of the bill, Senator Hillyard, was the only person to address the bill on the Senate floor, and he was extremely brief in his explanation of the bill. After stating that the bill was the result of some discussions between Senator Barlow and himself, in which Senator Barlow had expressed a desire that the VIP include not only the new language to be inserted in any measure presented to the voters, but also the old language being repealed, and Senator Hillyard stating that under S.B. No. 178 the old language would now be shown and enclosed in brackets, Senator Hillyard continued, "We've also brought our statute in conformity with the constitution about printing these [amendments] at least 60 days before the general election, which is in the constitution."

To summarize the legislative history, at least as early as 1973, the Legislature required publication of the text of amendments in at least one newspaper in every county in which a newspaper was published at least four times in the two months prior to the election. In 1975, the number of times publication in at least one newspaper in every county in which a newspaper was published was required was reduced to three, but the VIP was to be mailed to every residence in the state, as well. Then in 1982, the requirement that the text be published in at least one newspaper in every county in which a newspaper was published was repealed, and the Lieutenant Governor was to "cause to be distributed one copy of the [VIP] in one issue of every newspaper of general circulation in the state not more than 40 nor less than 15 days" before the election. Finally, in 1988, the Lieutenant Governor was required to have the full text of an amendment published in at least one newspaper in every county in which a newspaper was published.

It thus appears that from 1982 until 1988, the only "publication" of amendments was in the distribution of the VIP from 15 to 40 days before the election. It is true that the 1982 Act also deleted the provision that in addition to the distribution of the VIP, "except as required by section 20-1-18, no other official publication of such measures shall be made"; therefore, there was no longer any prohibition on other official publications of the amend-

ment, so the Lieutenant Governor or anyone else could have caused the text of the amendment to have been published once or more "in at least one newspaper in every county in which a newspaper was published". However, that seems unlikely, given the comments of Senator Hillyard in 1988.

2. Utah Case Law Strongly Indicates the Supreme Court Would Find the Constitutional Publication Requirements Were Met When Proposition 1 Was Passed.

The Utah Supreme Court has never ruled directly on the constitutional publication requirement for constitutional amendments. Nonetheless, the Court has shown itself to be reluctant to overturn elections on the basis that there were technical, innocent errors, even when constitutional provisions were violated.

***10** In Hardy v. Beaver City, 125 P. 679 (Utah 1912), in an election to see whether intoxicating liquors would be allowed to be sold within the city limits, the printer of the ballots had innocently placed numbers on the backs of some of the ballots. The vote was 244 for and 330 against. Of the ballots cast, 370 were numbered, and 204 were not. The plaintiff argued the election should be vitiated, since the numbering of the ballots was in violation of Utah Const. article IV, section 8, which states in part that "All elections shall be by secret ballot." After twice noting that the numbering of the ballots was an honest mistake, and that the voters accepted the ballots, and that there had been no showing that any voter was intimidated by the numbering of the ballots, the Court said:

> Where an election takes place which is held or conducted in violation of some express constitutional or statutory provision, or where, through some act of commission or omission prohibited by law on the part of the voters, or some of them, the result of an election is affected, or if it be shown that fraud, intimidation, or other illegal methods were practiced, then an election cannot stand. In this case, it is not claimed that any of the foregoing conditions prevailed. All that is claimed is that, by reason of the numbering of the ballots, it was made possible to destroy their secrecy. Is this, when standing alone and under the circumstances detailed, sufficient to authorize a court to declare an election invalid, because such ballots were used? We think not.

(125 P. at 682.)

The Court went on to find that although the Constitution requires elections to be secret, absolute secrecy is almost an impossibility, since the Australian ballot allows people to write in votes for persons whose names are not on the printed ballot. In addition, the Court noted that under Utah statutes, even if a ballot prepared for one precinct is used in another precinct, so that persons voting in the latter precinct would not have been able to vote for all persons or issues on the ballot, the ballots will be counted for those persons for whom and those issues for which the voters would have been able to vote had they had the correct ballots.

What is important to note about this case is that the plaintiff had in fact alleged that "an election [had taken] place which [was] held or conducted in violation of some express constitutional . . . provision," which the Court, in the quote above, had stated that if true, the "election cannot stand." Yet the Court found a way to uphold the validity of the election. In rejecting the argument that the use of non-secret ballots should vitiate an election, the Court further opined:

> Such, in our judgment, is not the law. We think the true doctrine is that, although it be shown that ballots which were not secret were used and voted, yet, unless the contestant goes farther and shows that the result of the election was in fact affected by voting such ballots, he cannot prevail in contesting an election so held. The electors cannot be disfranchised by declaring their votes void for an act or omission of some election officer, or some one else, unless such act or omission violates some express constitutional or statutory provision, or amounts to intimidation or fraud. To this effect is the great weight of authority. [Citations omitted.]

***11** (125 P. at 682-83; emphasis added.)

Furthermore, after citing the Utah statute that says that even if ballots have been used in a precinct other than the precinct for which they were prepared, the ballots will still be counted (at least for those persons for whom the voters in the precinct using them could have voted had the correct ballots been provided to them), the Court said:

> These provisions are in strict harmony with the doctrine announced by the courts that voters are not to be disfranchised, nor is the result, as the same is expressed by their ballots, when legally marked and cast, to be set aside, except for some substantial reason which affected the fairness or legality of the election. The numbers placed on the backs of the ballots in question did not constitute distinguishing marks, in view that they were not placed there by the voters, or with their knowledge, connivance, or consent; and hence the voters could not have been intimidated or influenced thereby, nor could they have intended the numbers as distinguishing marks. Moreover, the ballots in question here were the official ballots, and were, by the proper election officers, tendered to the voters as such. The voters therefore had the right to receive them and accept them as proper ballots to be cast by them.

(125 P. at 683.)

In Lee v. Price, 181 P. 948 (Utah 1919), a challenge to a statute was brought because the statute had been enacted pursuant to a constitutional amendment. The validity of the amendment was challenged, because while the complete text of the amendment had been entered in the journal of the Utah Senate, it had not been entered in the journal of the Utah House of Representatives. The argument was that the language in article XXIII, section 1 (the same article and section in which the publication requirement is found) provides that if two-thirds of each house votes to approve the proposed amendment, ". . . such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays taken thereon; . .".

The Court rejected the challenge. In doing so, the Court reasoned that "entered" did not necessarily mean the entire text needed to be included, citing cases in other states that had so held at the time the Utah Constitution was being drafted, and noting that elsewhere in the Utah Constitution the drafters had used the phrase "entered in full" when they meant the entire matter needed to be spelled out. In addition, the Court quoted from the Constitutional Prohibitory Amendment Cases, 24 Kan. 700, where, in the words of the Utah Supreme Court, the Kansas Supreme Court had "brushed aside all sophistry and all technicalities, and discussed the question under consideration in these clear and forceful words:"

> Is a proposition to amend the Constitution in the nature of a criminal proceeding, in which the opponents of change stand as defendants in a criminal action, entitled to avail themselves of any technical error or mere verbal mistake; or it is rather a civil proceeding, in which those omissions and errors which work no wrong to substantial rights are to be disregarded? Unhesitatingly, we affirm the latter. * * * Again, in constitutional changes the popular voice is the paramount act. While to guard against undue haste and temporary excitement, to prevent unnecessary and frequent appeals to constitutional amendments, the assent of two-thirds of the Legislature is prescribed as a condition precedent, yet, after all, that which determines constitutional changes is the popular will. This is a government by the people, and, whenever the clear voice of the people is heard, Legislatures and courts must obey. True, a popular vote without previous legislative sanction must be disregarded. There is no certainty that all who could would take part in such a vote, or that they who did, all realize that it was a final action. It lacks the sanction of law, is a disregard of constitutional methods and limitations, and should be taken as a request for a change, rather than as a change itself. But, notwithstanding this, legislative action is simply a determination to submit the question to popular decision. It is in no sense final. No number of Legislatures, and no amount of legislative action, can change the fundamental

> law. This was made by the people, who alone can change it. The action of the Legislature in respect to constitutional changes is something like the action of a committee of the Legislature in respect to the legislative disposition of a bill. It presents, it recommends, but it does not decide. And who ever thought of declaring a law invalid by reason of any irregularities in the proceedings of the committee which first passed upon it? It is the legislative action which is considered in determining whether the law has been constitutionally passed; and it is the popular action which is principally to be considered in determining whether a constitutional amendment has been adopted.

***12** (Quoted at 181 P. at 950 (asterisks in original).)

Thus in Hardy, 125 P. 679, the Utah Supreme Court refused to overturn an election where there was a facial violation of the explicit constitutional right to a secret ballot; in Lee, 181 P. 948, the Court refused to overturn an election based on a statute passed pursuant to a constitutional amendment, where there was a facial violation of the explicit constitutional requirement that an amendment be entered on the journal of both houses of the Legislature. In both cases, the Court found a way to uphold the elections, using strong language to indicate that short of fraud or intentional wrongdoing, the will of the voters will not be upset. Also, as stated in Hardy, "The electors cannot be disfranchised by declaring their votes void for an act or omission of some election officer, or some one else, unless such act or omission violates some express constitutional or statutory provision, or amounts to intimidation or fraud." (125 P. at 682-83.)

In determining whether the ratification of Proposition 1 by the electorate should be set aside for failure to comply with the statutory publication requirements that implemented the constitutional publication requirements, a number of facts would likely be important for the Court to consider. As noted above, from 1982 to 1988, the only statutory requirement for publication of proposed amendments was the distribution of the VIP through at least one newspaper of general circulation in every county in which a newspaper is published. The first question would be whether distribution of the VIP for insertion in newspapers of general circulation would be "publication" in those newspapers. There seems little question that by making the VIP available for insertion in newspapers of general circulation, there was a "publication" of the amendment in the newspaper, i.e., there is no constitutional requirement that the amendment be published (printed) in, for example, the "Legal Notices" section of a newspaper. Again, the Legislature determined that providing the VIP met the constitutional publication requirement, and the Court gives deference to legislative determinations implementing broad constitutional provisions.

The next question would be whether, by providing copies of the VIP to every newspaper of general circulation, the constitutional requirement that a proposed amendment be "published in at least one newspaper in every county of the state, where a newspaper is published" was met. While we aren't certain to whom copies of the VIP were distributed in the early 1980's, in the election of 2000, the Lieutenant Governor's office provided enough copies of the VIP to the forty-seven newspapers that publish in the state that are members of the Utah Press Association ("UPA"), which are published in 24 of the 29 Utah counties, and which cover the state. We also don't know how distribution was accomplished in the early 1980's, but it is likely this same method was used, i.e., providing copies for distribution to all members of UPA. Almost certainly they were distributed by the Salt Lake Tribune and The Deseret News, each of which has circulation in all 29 counties in the state. Furthermore, it isn't as if the Lieutenant Governor merely provided copies of the VIP to the newspapers, hoping they would insert them in their papers. The newspapers are paid by the State to insert the VIPs, just as the State would have paid the newspapers to print the text of an amendment in the newspaper's legal notices section or elsewhere. Therefore, between distribution by members of UPA, and especially by the Salt Lake Tribune and The Deseret News, there is little, if any, doubt that the VIP was distributed in newspaper in every county in

which a newspaper is published. As a result, it is clear that the text of Proposition 1 was published at least once in compliance with the constitutional requirement that the amendment be published in at least one newspaper of general circulation in every county in which a newspaper is published.

***13** The final aspect of the constitutional publication requirement is the one that is more vexing, and, of course, is the question that generated this opinion request - was there publication "for two months immediately preceding the next general election," since the text of S.J.R. was not published pursuant to section 20A-7-103(2). As stated above, for six years, the Legislature had provided that the distribution of the VIP under section 20A-7-702(3) was sufficient to meet the constitutional publication requirement. In 1988, however, it seems clear from Senator Hillyard's remarks that the Legislature intended to modify its statutory procedures for complying with the constitutional publication requirement by requiring an additional publication "not less than 60 days before the election," pursuant to what is now section 20A-7-103(2). Unfortunately, if "for two months immediately preceding" the election is deemed to be "60 days or less," as a common interpretation would deem it to be, then in order to comply with both the constitutional publication requirement and with the publication requirement of section 20A-7-103(2), publication would have to take place exactly 60 days before the election. This was not done in any event in 2000, even with the text of S.J.R. 8, or with the text of Proposition 2. Both were to be published during the week of August 28, meaning the last date of publication was not later than September 3, 2000. Since the general election was held on November 7, 2000, publication of the text of S.J.R. 8 would have been at best 65 days before the election. Of course, the text of S.J.R. 5 was not published at that time, but even had it been, it would not have been within two months prior to the election.

Given the problems with the timing of the publication requirements of section 20A-7-103(2) in meeting the constitutional publication requirements, even had the text of S.J.R. 5 been published with the rest of Proposition 1 at that time, and given that for six years the Legislature only required publication the one time, in the VIP, we think the Utah courts, looking at a post-election challenge, would say that the one publication in the VIP was sufficient. There has been now showing that there was any deliberate attempt to defraud or deceive, and thus under Hardy, 105 P. 679, any such challenge would be futile. Certainly LRGC, which works for the Legislature that overwhelmingly passed both S.J.R. 5 and S.J.R. 8, had no reason to deliberately not send the text of both S.J.R. 5 and S.J.R. 8 to the Lieutenant Governor for publication. Furthermore, the electorate had approved Proposition 1, with 69% of those voting on the measure voting to approve it.

Looking at these facts, and given the deference by the Courts to the Legislature to interpret broad constitutional provisions (State ex rel. Breeden v. Lewis), and the several statutory changes wrought by the Legislature to meet the constitutional requirement that the amendment be "published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election," in our view the Utah courts would find that the constitutional publication requirement had been met, and the election would not be overturned.

3. Utah Courts Could Adopt the "Substantial Compliance" Rule Which Has Been Adopted By Many Other States, Especially When They Are Looking At Post-Election Challenges.

***14** While Utah courts have never addressed the issue of what meets the constitutional publication requirements for amending the Utah constitution, a number of other states have addressed their constitutional publication requirements for amending their constitutions. Many of these states have adopted the "substantial compliance" test or rule, especially when examining constitutional amendments post-election; in fact, only Arkansas [FN1] and Montana appear to have opined that literal compliance is necessary, and only Montana has actually nullified a constitutional amendment after it had been adopted in an election. [FN2]

A number of cases could be cited from several different states that have adopted the substantial compliance rule, [FN3] but only two will be discussed herein to make the point. In Opinion of the Justices, 275 A.2d 558 (Del. 1971), the Delaware Supreme Court addressed a request from the Delaware Governor on their constitutional publication requirement on several amendments. The Delaware constitutional provision regarding publication of a proposed constitutional amendment reads almost exactly like Utah Const. art. XXIII, § 1, except that their Secretary of State was to publish the amendment "three months before" the election. However, in Delaware, the voters do not vote on constitutional amendments directly; instead, after the election for which the publication of the proposed amendment is made, the new Legislature must vote again on the proposed amendments, with at least two-thirds in each house again having to approve the amendment before it can take effect.

Several proposed amendments at issue were not printed until 81 to 87 days before the election, and some others were never published at all. In his request, the Governor had noted the widespread coverage given to the amendments in the media, in debates, and elsewhere.

With respect to the amendments published 81 to 87 days before the election, the Delaware Supreme Court said:

> The determinative question thus emerges: Does [the publication requirement of the Delaware Constitution] require literal compliance with the time provisions for publication, or is substantial compliance therewith sufficient?
>
> Publication requirements for proposed constitutional amendments, such as those set forth in [the Delaware Constitution], are commonplace in state constitutions. While the authorities are not uniform, it is generally agreed that it is sufficient if there is substantial compliance with such publication requirements. Literal compliance is not generally required so long as it is clear that the electorate has not been misled and that the purpose and intent of the constitutional provision has been actually fulfilled by publication for a substantial part of the prescribed period. See generally 16 Am.Jur.2d "Constitutional Law:, § 35; 16 C.J.S. Constitutional Law § 9(3).
>
> The rationale of the substantial compliance rule most acceptable in our view is that while the constitutional publication requirements are mandatory, they are essentially procedural; that a rigid adherence to such procedural mandate will not be required if it is clear that a substantial compliance provides realistic fulfillment of the purpose for which the mandate was incorporated in the constitution. While some authorities classify the publication requirements as directory rather than mandatory, we are of the opinion that they are mandatory - but subject to the substantial compliance rule.

***15** (275 A.2d at 561.)

Having adopted the "substantial compliance rule," the Delaware court turned to applying the rule to the facts presented:

> First a definition of "substantial compliance": there has been substantial compliance, we think, when there has been a partial compliance and when it is reasonable to conclude that the objective sought by the constitutional provision has been as fully attained thereby, as a practical matter, as though there had been a full and literal compliance. "Substantial compliance" means such compliance with essential requirements of the constitutional accomplishment of the purposes thereof. (Comparative citation omitted.)
>
> This definition requires a restatement of the purpose and intent of the publication requirements of [the Delaware constitutional publication requirement]. The purpose is to insure that the people of the State are informed, accurately and completely, of the details of a proposed amendment to the Constitution in ample time for them to ascertain the positions relative thereto of the candidates for election to the next General Assembly; and to enable the electorate to express their approval or disapproval of the proposed amendment by voting for representatives in the next General Assembly who best reflect their preference in the matter.

(275 A.2d at 562.)

After concluding that the amendments that were published from 81 to 87 days before the election, the court turned to those amendments that had never been published. With respect to these proposed amendments, the court stated:

> It seems clear that substantial compliance may not be predicated upon no compliance. As we have stated, the constitutional provisions for publication are mandatory; they may not be ignored even though something less than literal compliance may be acceptable under certain circumstances. The Constitution sets forth clearly and unmistakably, what must be done in order to change the fundamental law. Failure to comply therewith, at least substantially, is fatal to any effort to follow another course. Other channels of publicity, used at other and different times, may supplement the publication provisions of [the Delaware constitutional publication requirements], but they may not be substituted therefor; for to do so would be to engraft new and different procedures upon [the Delaware constitutional publication requirements] and to rewrite the constitutional specifications for a very important atage in the amendatory process. [Comparative citation omitted.]

(275 A.2d at 562-63, emphasis added.)

In a case cited in Opinion of the Justices, the West Virginia Supreme Court adopted the substantial compliance test with respect to publication of proposed constitutional amendments. In Morgan v. O'Brien, 60 S.E.2d 722 (W.Va. 1948), the proposed amendment was published only 60 days before the election, even though the West Virginia Constitution required publication at least three months before the election (as did the enabling act of the proposed amendment). The petition for a writ of mandamus prohibiting the amendment from being presented to the voters was filed two weeks before the election. The court refused to issue the writ, and issued its opinion some six weeks after the election.

***16** The court admitted that the facts in this case made it borderline for application of the substantial compliance test. However, citing a prior West Virginia case, Herald v. Townsend, 169 S.E. 74 (W.Va. 1933), the court said that had the challenge come post-election, its decision would have been much easier. "It is true that if this case had arisen after the vote on the amendment, and this record disclosed that the amendment had been voted upon by a substantial vote and passed by a large majority, we would be aided by the rule that every reasonable presumption should be given to the adoption of an amendment, as in the case of every law. [Citations omitted.]" (60 S.E.2d at 729 (emphasis added).) The court, though, determined that whether the challenge was pre-election or post-election was not controlling - Herald had determined West Virginia's constitutional publication requirement, while mandatory, was also only procedural, and did not require literal compliance.

On this point, the court noted that to find otherwise would give elected officials responsible for seeing to the publication of the amendments, or newspaper editors who have control over what is printed in their newspapers, a veto power over amendments proposed by the Legislature, since the official could deliberately delay the publication, and the editor could refuse to publish at all (which, if the editor ran the only newspaper in the county, could thwart the amendment, since the West Virginia constitution, like Utah's, requires the amendment to be published in every county in which a newspaper is published). On this point, the West Virginia court quoted from the Constitutional Prohibitory Amendment Cases in Kansas (cited above):

> The two important, vital elements in any constitutional amendment, are, the assent of two-thirds of the legislature, and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because, by them, certainty as to the essentials is secured. But they are not themselves the essentials. Take a strong illustration: The constitution requires that the "secretary of state

> shall cause the same to be published in at least one newspaper in each county of the state where a newspaper is published, for three months preceding," etc. Suppose a unanimous vote of both houses of the legislature, and a unanimous vote of the people in favor of a constitutional amendment, but that the secretary had omitted to publish in one county in which a newspaper was published, would it not be simply an insult to common sense to hold that thereby the will of the legislature and the people had been defeated? Is it within the power of the secretary, either through ignorance or design, to thwart the popular decision? Is he given a veto, or can he create one?

(Quoted at 60 S.E.2d at 727.)

The court then examined the purpose of the constitutional publication amendment, and found that it was to provide the electorate with information on proposed amendments, and to do it so they would have sufficient time to make reasoned choices. Noting the publication requirement was adopted in their Constitution of 1863, that the main means of transportation back then was by river, and that modern means of communication, such as radio and television, had not been available back then, the court found that through these modern means of communication, the people had been adequately informed, which was the purpose of the constitutional publication requirement. The court concluded, "In our opinion, in view of the great change in the facilities of communication, transportation and dissemination of knowledge, there has been such a substantial compliance as to publication with [the West Virginia constitutional publication requirement] that, in the absence of a showing that the delay in publication caused the voters to be defrauded, deceived or misinformed, the writ prayed for in the relators' petition was properly refused." The court noted the widespread publicity the amendment at issue had been given, including the publicity resulting from the amendment not having been published three months before the election, but stated that none of that had any bearing on whether there had been substantial compliance with the publication requirement. The court found, though, that because of that publicity, "[W]e are not met with the question here whether the voters of West Virginia were, in fact, deceived or misled in voting for or against, or in failing to vote, on the proposed amendment. We are, of course, not aided in this case as this court was in the Herold case, which was instituted after the people had voted on the constitutional amendment. Nevertheless, because there is no affirmative showing and no attack on the submission of the question as to the voters in this case on the basis that the voters were wrongfully misled or were misinformed or uninformed as a result of the official dereliction involved here, we are at liberty to apply the substantial compliance rule on the single question whether a sixty-day publication is sufficient." (Morgan v. O'Brien, 60 S.E.2d at 733.) [FN4]

***17** As stated above, Arkansas and Montana are the only states that have required literal compliance with constitutional notice requirements, even where the challenge is post-election, and only Montana has actually nullified the ratification of an amendment post-election. The reasoning of the Arkansas Supreme Court and Montana Supreme Court is that the requirements for amending the constitution should not be disregarded. It is unlikely any other state's highest court would disagree with that view pre-election, but post-election - after the voters have ratified the amendment - all the other states that have addressed the question of whether substantial compliance was adequate have found substantial compliance to be adequate. Even the stern dissent in Morgan conceded that had the challenge there been post-election, substantial compliance was all that was necessary.

In our view, the better reasoned cases are those in which the courts have found that substantial compliance is all that is necessary when considering a post-election challenge. We believe if presented with the question, Utah Courts would follow the majority rule.

If the Utah Supreme Court were to adopt the substantial compliance rule in examining a post-election challenge to the validity of Proposition 1, the Court would find a number of reasons to find there had been substantial

compliance with the constitutional publication requirement. The complete text of Proposition 1, along with a detailed explanation of what the amendment would do, was printed in the VIP, which was distributed to all 47 newspapers that are members of the UPA. The text of S.J.R. 8, which was published pursuant to section 20A-7-103(2), made reference to S.J.R. 5, and the context of S.J.R. 8, if read, would have informed the reader that there was more to Proposition 1 than just the language printed in that notice. Also, like the court in Morgan, the Utah Courts could note that the means of communicating the content of proposed amendments in 1896, when article XXIII, section 1 was adopted, have greatly changed; in fact, since Morgan was a 1948 case, the means of communication are likely more improved now over what they were in 1948 than they were in 1948 compared to 1863, when West Virginia's constitution was adopted. Proposition 1 was discussed in editorials in newspapers and on television and radio, mostly within the two months immediately prior to the election, and the full text was available on the Lieutenant Governor's home page on the Internet during the two months prior to the election. If the purpose of the constitutional publication requirement is to give the public notice of the proposed constitutional amendments, and access to the text of proposed constitutional amendments, there has been substantial compliance with that requirement.

4. Summary on Question of the Adequacy of the Publication of Proposition 1.

In our view, though, the Utah Courts would uphold the validity of the passage of Proposition 1 using one or more of the following approaches:

***18** A. The Court would interpret the facts to find that the constitutional publication requirement had been met, just as they did with the secret ballot requirement addressed in Hardy, 125 P. 679, and the requirement that proposed amendments be entered on the journals of both houses of the Legislature in Lee, 181 P. 948. The Court could do this by finding that while "for two months" seems to indicate more than once, for a period of six years, the Legislature deemed distribution of the VIP to be sufficient to meet the constitutional publication requirement, and the Court will not overturn a legislative implementation of a broad constitutional requirement. While it is true that S.J.R. 5 was not published in compliance with section 20A-7-103(2) , all of Proposition 1 was included in the 2000 VIP; that publication in the VIP would have been sufficient in and of itself from 1982 to 1986, and the fact that the Legislature now requires an additional publication which was not complied with for S.J.R. 5 is not sufficient grounds to overturn the will of the people after they have approved the amendment. Furthermore, the public has already overwhelmingly approved the amendments, and absent a showing of fraud or deliberate attempt to mislead, of which there has been none, the courts will not overturn the decision of the electorate.

B. The Court would adopt the "substantial compliance" rule, finding that while the constitutional publication requirement is mandatory, it is also procedural, and therefor literal compliance is not necessary. This would not be a great leap for the Court to make, based upon its prior rulings in Hardy, 125 P. 679, and Lee, 181 P. 948. The Court would find that although one of the two publications required by the Legislature was missed, the inclusion of Proposition 1 in the VIP, which contained not only the text of the amendment, but also an explanation of the amendment, and arguments for and against, plus rebuttal, and which was widely distributed, was enough to provide every voter with the information necessary, and was provided soon enough, to allow the voters to be informed when they voted on Proposition 1, thus meeting the purpose of the constitutional publication requirement. Proposition 1 was discussed in editorials and articles in newspapers, and in editorials and news programs on television and the radio. S.J.R. 8, which references S.J.R. 5, was printed pursuant to section 20A-7-103(2), and anyone who had read the text of S.J.R. 8 would know there was more to Proposition 1 than just the text of S.J.R. 8. In addition, since the question has arisen after the voters have approved the amendment, substantial compliance is all that will be required.

With respect to "substantial compliance," we would also expect the Utah Courts to caution as the Delaware Supreme Court did in Opinion of the Justices, when the Delaware Justices said:

> In approving the substantial compliance rule, we note a caveat: a determination of substantial compliance depends upon the circumstances of each case. Any extension of the substantial compliance principle must be carefully guarded and limited in order that mandatory provisions of the constitution may not be unduly subverted. The line of substantial compliance, therefore, must be carefully drawn and observed. * * *

***19** (275 A.2d at 562.)

Nonetheless, in our view, the Utah Courts would rule that the constitutional publication requirements had been met.

B. PROPOSITION TITLE

The Legislature has by statute directed that when preparing a constitutional amendment for the ballot, Legislative General Counsel is to "draft and designate a ballot title that summarizes the subject matter of the amendment or question." Utah Code Ann. § 20A-7-103(3)(b). This is the only specification given for preparing the title for a proposed constitutional amendment.

The title Legislative Counsel prepared for Proposition 1 was as follows:

> Shall the Utah Constitution be amended to: (1) modify terms used to identify certain local government entities; (2) expand the types of services special service districts may be authorized to provide; (3) authorize the Legislature to provide for the creation of local government entities in addition to counties, municipalities, school districts, and special service districts; (4) modify county seat and optional forms of county government provisions; (5) require the Legislature to provide in statute for municipal dissolution; (6) clarify election provisions; (7) modify the exclusive uses of specified highway revenues; and (8) repeal language that is redundant or obsolete relating to state and local governments?

This title makes no specific mention of the subject matter of the changes that would be wrought by Section 15 of Proposition 1, which would amend article XIV, section 3. In comparison, we note that the title to S.J.R. 5 says that one of the amendments the provisions therein would accomplish is "Modifying Debt Provisions"; there is no such specific reference to modifying debt provisions in the title to Proposition 1, nor was there any mention in the VIP of this change.

This raises the question of whether the failure to include any specific mention of the subject matter of Section 15 in the title is cause to invalidate the entire proposition. As noted, the requirements for titling a proposition are very simple - to designate a ballot title that "summarizes the subject matter of the amendment." It does not require that each detail be specified, nor does it require a word length. Nor is there any statutory provision for challenging the adequacy or accuracy of the title for a constitutional amendment.

This is in contrast to the titling requirements of an initiative as set forth in section 20A-7-709. That statute requires that the title not use more than 100 words, that it gives a true and impartial statement of the purpose of the measure, and that it not intentionally be an argument, or be likely to create prejudice, for or against the measure. The statute also provides for a means to challenge the title prepared by LRGC for accuracy and fairness.

It is likely the difference in requirements stems from the differing procedures for presenting propositions and initiatives to the voters: initiatives are put on the ballot by voter petition, whereas propositions are put on the ballot only after the Legislature has discussed, debated, and approved by a two-thirds vote of both houses the proposed constitutional amendments. The Legislature presumably requires a more stringent guideline to be fol-

lowed in titling an initiative than a proposition because while a super-majority of the people's representatives have discussed, debated, as approved the proposed constitutional amendment for presentment to the voters, initiatives are likely to have been prepared by relatively few members of the public, with petitions signed by a larger, but still relatively small, group of eligible voters.

***20** We first note that the requirement for the preparation of a title for a constitutional amendment is statutory, not constitutional. We also note that Proposition 1, as it finally appeared, proposed to amend eleven sections of the Constitution, enact three sections, and repeal two sections. Third, we note that it is the Legislature's own LRGC that prepared the ballot title. With S.J.R. 5 and S.J.R. 8 having both passed both houses overwhelmingly, there was little reason for anyone to try to mislead or deceive the public on the content of Section 15 of Proposition 1, and there is no evidence that anyone tried to do so.

Making some mention in the title that Proposition 1 would modify debt provisions would probably have been a good idea, in retrospect, but the failure to mention it is not fatal to Proposition 1, or to the amendment of article XIV, section 3. As mentioned, the titling requirements of a constitutional amendment are far less stringent than for a voter initiative. However, even for a voter initiative, the Utah Supreme Court has said that "the ballot title cannot sustain the entire burden of informing the voters." Stavros v. Office of Legislative Research and General Counsel, 2000 UT 63 28, 15 P.3d 1013. Rather, as the Court said in that case, "[T]he ballot title must... direct the voter to the main and dominant purpose of the measure, and anticipate that in exercising the vital opportunity to vote on the adoption of the measure, voters will be aided by the information included in the Voter Information Pamphlet supplied by the lieutenant governor, the text of the initiative itself, and the ebb and flow of public debate and media coverage." Id.

The Utah Courts have never addressed a question on a title to a constitutional amendment, but it is hard to imagine it would rule any differently than it did in Stavros with respect to titles on a voter initiative. In addition, a number of other state courts have held that a ballot title of a constitutional amendment is acceptable where, though it might be incomplete, it was not misleading or fraudulent. This is especially true where a court is looking at the question post-election. In Kurrus v. Priest, 29 S.W.3d 699 (Ark. 2000), the Arkansas Supreme Court stated, "This court has recognized the impossibility of preparing a ballot title that would please everyone. Thus, the ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote based on the ballot title." (29 S.W.3d at 672.) The Colorado Supreme Court also has opined, "It is not necessary... to describe every feature of a proposed amendment. However, the [person writing the title must determine] whether public confusion might be caused by misleading titles and must avoid titles which would create confusion and would not provide a general understanding of the effect of a 'yes' or 'no' vote." Matter of Title, Ballot Title and Submission Clause, and Summary Approved on April 6, 1994 for Proposed Initiated Constitutional Amendment Concerning Fair Fishing, 877 P.2d 1355 (Colo. 1994).

***21** Most importantly on the question of the adequacy of the title, it is likely that Legislative Counsel determined that subsection (8) of the title, stating that Proposition 1 would "repeal language that is redundant or obsolete relating to state and local governments," accurately described the amendments that would be made to Art. XIV, Sec. 3. If this is correct, they did so with good reason, and they were more than likely right. Prior to its amendment in the 2000 election, article XIV, section 3, read as follows:

Sec. 3. [Debts of counties, cities, towns, and school districts not to exceed revenue - Exception.]

No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or

by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt.

Early in the State's history, the Courts had ruled that "taxes" included virtually all revenues a local government receives. See, e.g., Fjeldstead v. Ogden, 28 P.2d 144 (Utah 1933) and Wadsworth v. Santaquin, 28 P.2d 161 (Utah 1933). However, more recent cases have backed away from this position. Thus, in two unpublished cases, the Utah Supreme Court in 1980 allowed city officials to make payments on bonds that had been issued without voter approval, where the bonds were paid from revenues other than taxes. (Murray v. Brown and Salt Lake City v. Higham, both of which were issued on January 25, 1980.) Also, in Spence v. Utah State Agricultural College, 255 P.2d 18 (Utah 1950), the Utah Supreme Court ruled that debts, as contemplated by the constitutional provisions, meant debts to be paid from a general property tax, and not from funds raised from some other source.

In the May 8, 1998 interim meeting of the Utah Constitutional Revision Commission ("UCRC"), the UCRC considered proposed amendments to article XIV, section 3. The minutes from that meeting state as follows:

4. Discussion of Article XIV, Section 3 concerning property ownership requirement for bond elections - Mr. [Jerry] Howe [an LRGC research analyst] suggested that the commission consider the language of Article XIV, Section 3 concerning the requirement that voters must have paid a property tax in the year preceding a bond election because it probably violates the Federal Constitution, is inoperative under Utah Case Law, and is inconsistent with Article IV, Section 7. He also explained the relationship between Article IV, Section 7 and Article I, Section 4.

MOTION: Sen. Nielson [UCRC member] moved to approve the change in language as drafted in Article XIV, Section 3. The motion passed unanimously with Sen. Dmitrich absent for the vote.

MOTION: Dr. White [UCRC member] moved to delete the last sentence of Article I, Section 4, "No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution." The motion passed unanimously with Sen. Beattie, Sen. Dmitrich, and Mr. Strong absent for the vote.

***22** Chair McKeachnie suggested that Dr. White's recommendation be incorporated in the local government article. (Minutes of the interim meeting of the Utah Constitutional Revision Commission, May 8, 1998.)

Given the interpretation by the Utah Supreme Court in Spence, 28 P.2d 18, that the debts contemplated in article XIV, section 3, which the voters in a local governmental would have to approve before the debt could be incurred did not include debt to be paid from sources other than property taxes, and the view of the UCRC, as explained by Mr. Howe, that the language was not in harmony with the Federal constitution and current Utah case law, and was inconsistent with another constitutional provision, not only could LRGC have thought that the amendments to article XIV, section 3 in Proposition 1 would just "repeal language that is redundant or obsolete relating to state and local governments," it's hard to see how they could conclude it would do anything else. Furthermore, since Mr. Howe is an employee of LRGC, if this was the view of the UCRC when the amendment was being prepared, it should come as no surprise that LRGC didn't see the need to mention any specifics on the contents of Section 15 in the title to Proposition 1. In LRGC's view, and in the UCRC's view, the amendment was only deleting language that had been made obsolete (through, as Mr. Howe explained, probable conflicts with the United States Constitution, Utah case law (such as Spence, 28 P.2d 18), and its inconsistency with article IV, section 7, which provides that "No property qualification shall be required for a person to vote or hold office"), and clarifying the language so it would be consistent with those interpretations. Therefore, there was no "omission," in the title, any more than not describing in more detail in the title any deletions in other articles to

be amended was an "omission." This also likely explains why the proposed amendment to article XIV, section 3, was never specifically mentioned in the floor debate on S.J.R. 5 in either the Senate (where Senator Nielsen, a member of the UCRC, was the sponsor, and where the closest he came to mentioning the proposed amendment to article XIV, section 3, was to say at the beginning of his remarks that except for the proposed amendment to article XI, section 7, "The remaining provisions are . . . mainly . . . technical corrections, deleting obsolete language . . .") or the House of Representatives, and why there was no mention in the VIP that Proposition 1 would modify any debt provisions.

Finally, we observe again that any challenge to the validity of Proposition 1 based on the failure of the title of Proposition 1 to include any mention of a modification of the debt provisions would have to be made post-election, an election in which 69% of those voting on the proposition, and a total of 471,064 voters, approved the proposition. Under current Utah case law, the challengers would have to show some type of fraud or intimidation to the voters, which has not been shown, and if the Utah Courts adopted the substantial compliance rule, there is certainly enough compliance for the Courts to find substantial compliance.

***23** In summary, we believe Utah courts would rule that the failure to mention in the title to Proposition 1 that it would modify any debt provisions was not fatal to the passage of either Proposition 1 or Section 15 of Proposition 1. Under either existing Utah case law, or the substantial compliance rule, if the Court adopted that rule, they could find the following facts, which would allow them to uphold the validity of the Proposition:

A. There was no omission in stating Proposition 1 would modify debt provisions. The amendment to article XIV, section 3, merely did, as stated in subsection (8), " repeal language that is redundant or obsolete relating to state and local governments." There was therefore no need to mention a modification of debt provisions.

B. A title to a constitutional amendment need not address every change, especially where the proposition is long and contains a number of different provisions. It is enough that the title "direct the voter to the main and dominant purpose of the measure." The amendments to article XIV, section 3, were not the main and dominant purposes of the measure. In addition, the general nature of the language in subsection (8) of the title would put a reader on notice that there were matters being deleted that were not addressed in the other seven subsections of the title.

C. If there was an omission, it was harmless. No one has shown there was any deliberate effort to mislead or deceive. Unlike a title to an initiative, where LRGC might, for whatever reason, not prepare a title that would give a fair rendering of the contents of the initiative, despite its best efforts (as was determined in Stavros), LRGC has no reason not to prepare a fair, complete title for constitutional amendments proposed by the Legislature, for whom the LRGC works. The fact that the Legislature has not set up a mechanism by which a challenge can be brought on the wording in a title to a constitutional amendment, as it has provided for challenges to the title of an initiative, or required that titles to constitutional amendments be fair and unbiased, as it has required in the preparation for titles for initiatives, likely indicates the Legislature has determined the LRGC, which is an arm of the Legislature, is going to prepare titles that are fair and accurate, since the LRGC would have no reason to do otherwise. As stated in Hardy, "The electors cannot be disfranchised by declaring their votes void for an act or omission of some election officer, or some one else, unless such act or omission violates some express constitutional or statutory provision, or amounts to intimidation or fraud." (125 P. at 682-83.)

CONCLUSION

Again, our office obviously cannot say how Utah Courts would rule if they were presented with the issues in this

opinion. However, it is our view that the Utah Courts would uphold the passage of Proposition 1, and would reject any challenges (1) that Proposition 1 was invalid because the constitutional publication requirement had not been met, or (2) that the failure to mention anything about debt modification in the title to Proposition 1 was fatal either to Proposition 1 itself, or to Section 15 of Proposition 1, which amended article XIV, section 3.

Sincerely,
***24** Bryce H. Pettey
Assistant Attorney General

[FN1]. Walmsley v. McCuen, 885 S.W.2d 10 (Ark. 1994). This was actually a pre-election case. In ruling that literal compliance with a constitutional notice requirement was necessary in this pre-election challenge, however, the Arkansas Supreme Court, by implication, rejected the substantial compliance rule, stating that it must always give a literal interpretation to plain and common meaning of its constitution.

[FN2]. See, e.g., Montana Citizens v. Waltermire, 738 P.2d 1255 (Mont. 1987). However, in this most recent case in which the Montana Supreme Court struck down an amendment that had been challenged post-election, it is doubtful the amendment could have been upheld under the substantial compliance rule, anyway. Only the summary of the amendment, and not the amendment itself, had been published before the election. In addition, the only publication of the full test of the amendment, in the Montana voter information pamphlet, had indicated the language to be amended by deletion was instead going to be added.

[FN3]. See, for example, In re Opinion of the Justices, 47 So.2d 643 (Ala. 1950); State ex rel. Cooper v. Caperton, 470 S.E.2d 162 (W.Va. 1996); and State ex rel. Thompson v. Winnett, 110 N.W. 1113 (Neb. 1903).

[FN4]. Interestingly, the court's final comment was that, “Our holding is that where, as here, the vital conditions as to the proposed amendment have been fully met, namely, the assent of the elected members of both houses of the Legislature by a two-thirds vote, properly entered in the journals of both the House and Senate, and the procedural provision of [the West Virginia constitutional publication requirement] has been substantially complied with, the writ prayed for was properly denied by this Court's order...”. (60 S.E.2d at 733-34 (emphasis added).) Earlier in the opinion, the court had stated:

> In our opinion, most, if not all of the provisions of the Constitution are mandatory rather than directory [citation omitted], and some are so vital to the integrity of the Constition itself that only a literal compliance therewith will suffice. Thus, the provision of Section 2, Article XIV of the Constitution that a proposed amendment, sought to be made without the use of a convention...must be assented to by two-thirds of the members elected to the Legislature, after being read on three separate days in each hous and the proposed amendment, with the yeas and nays thereon, entered on the journals of both Houses; * * * are so vital to the adoption of any constitutional amendment, under Section 2 of Article XIV, that a literal compliance therewith is required.
>
> [60 S.E.2d at 726-27; emphasis added.]

Thus, the West Virginia court would apparently have ruled just the opposite of the Utah Supreme Court in Lee v. Price, with the West Virginia court apparently considering the entry of the amendment on the journals of both houses of the Legislature to be “vital to the adoption of any constitutional amendment.” Given that the Utah Supreme Court gave a less vital reading to the necessity of entering the amendment on the journals of both houses, and given that Morgan was a pre-election case, the Utah courts could be expected to give at least as broad of a reading to the Utah “for two months” constitutional publication requirement with respect to Proposition 1 as the West Virginia Supreme Court gave to their more exacting “three months before the election” constitutional pub-

lication requirement.

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