


MEMORANDUM

DATED: OCTOBER 15, 2008
TO: SONIA CUELLO, CITY CLERK
FROM: GLENN GIMBUT, CITY ATTORNEY 
RE: DEADLINE TO PRESENT RECALL PETITIONS

This memorandum is a formal legal opinion of the Office of the City Attorney. At present time, a political committee has requested, and received, petition numbers for recall petitions for the Mayor and three members of council. The petitions have not yet been submitted for verification pursuant to A.R.S. §19-203. A question has been presented as to when is the last day petitions may be presented for verification, and if the City offices are closed on that day, can the time be extended? The answer is that the time may not be extended by the City Clerk.

A.R.S. §19-203.B provides:

“B. A recall petition *shall not be accepted for such verification if more than one hundred twenty days have passed* since the date of submission of the application for recall petition, as prescribed by section 19-202.01.” [Emphasis added.]

This statutory provision sets a mandatory maximum date. No official has the individual power to amend or change a statute. There is no discretion provided to extend this time. How time is counted, and what extensions may be granted, is also provided by statute. A.R.S. §1-243 provides how time is to be calculated for all statutes of the State of Arizona. A.R.S. §1-243.A states:

“A. Except as provided in subsection B, the time in which an act is required to be done shall be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded.”

A.R.S. §1-301 enumerates and defines “holiday.” A.R.S. §1-301.A 1 provides that Sunday of each week is a holiday. In addition, A.R.S. §1-303 provides:

“When anything of a secular nature, other than a work of necessity or charity, is provided or agreed to be done upon a day named or within a time named, and the day or the last day thereof falls on a holiday, it may be performed on the next ensuing business day with effect as though performed on the appointed day.”

In this particular case, I am informed, and therefore believe, that the one hundred twentieth day from the submission of the applications for recall petitions will be October 17, a Friday. No provision exists making either Friday, October 17, 2008 or Saturday, October 18, 2008 a “holiday” pursuant to A.R.S. §1-301. As a result, A.R.S. §1-243.A would provide that

October 17 is the last day, without the right to either exclude it, or the following Saturday from the calculation of the one hundred twenty day maximum period.

At present time the City administration building will be closed on October 17. Nothing in state law mandates that the City administration building will be open, or that the City Clerk must be available for acceptance of petitions on that particular day. It does mandate that petitions shall not be accepted after that date.

A cardinal rule of construction is to “follow the text.” *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 595, 790 P. 2d 242, 250 (1990). When the language of a provision is clear and unambiguous, courts generally will apply that language without resort to other means of statutory construction. *Calik v. Kongable*, 195 Ariz. 496, 498, 990 P.2d 1055, 1057 (1999).

An instructive case is *Fisher v. City of Apache Junction*, 200 Ariz. 484, 28 P.3d 946 (Ariz.App. Div. 2,2001). This case involved the filing of referendum petitions. The City Clerk refused to accept the petitions for verification. A.R.S. §19-121.01 requires any legal action challenging that decision to be filed in ten (10) days. In this particular case, the tenth day was a Sunday, a day when the Courts were closed. Mr. Fisher filed his action on the eleventh day, a Monday. The Superior Court granted Apache Junction’s motion to dismiss the action as untimely. Mr. Fisher appealed. Here the opinion at page 485 states:

“Although Fisher appears to suggest in his opening brief that he was deprived of actual hours because of the time lost between 5:00 p.m. and midnight of each calendar day, he seems to have abandoned that argument in his reply brief. *Rather, he complains that it is simply unfair that there is no “slot” or other place in which he could have deposited the petition on Saturday or Sunday or after 5:00 p.m. on Friday and that this court should take this into account in the “murky world of statute.”* In light of this so-called murkiness, he asks us to apply Rule 6(a), Ariz. R. Civ. P., 16 A.R. S., Pt. 1, in counting the days, which would eliminate intervening Saturdays, Sundays, and holidays.

¶ 6 *In Board of Supervisors v. Superior Court*, 103 Ariz. 502, 446 P.2d 231 (1968), our supreme court stated that time limits in the election statutes must be strictly construed. And, in *Barry*, Division One of this court held that the portion of Rule 6, Ariz. R. Civ. P., that Fisher asks us to adopt does not apply to proceedings seeking to compel the secretary of state to accept and file petitions for initiative or referendum. See also *Bedard v. Gonzales*, 120 Ariz. 19, 583 P.2d 906 (1978) (five-day limit for challenging nomination petitions means five calendar days, and Rule 6(a) does not apply); *Smith v. Board of Dir.*, 148 Ariz. 598, 716 P.2d 55 (App.1985) (Rule 6(a) does not extend five-day limitation provided in statute for contesting election authorizing issuance of bonds by hospital district; time periods in election statutes must be strictly construed). Nevertheless, we conclude that the petition was timely filed.

¶ 7 Section 1-243(A), A.R.S., provides that “the time in which an act is required to be done shall be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded.” Like the case law, the statute does not exclude intervening Saturdays and Sundays. § 1-243(B). However, A.R.S. § 1-303 provides that, if the last day for performing an act falls on a holiday, “it may be performed on the next ensuing business day with effect as though performed on the appointed day.” Section 1-301(A)(1), A.R.S., includes “Sunday of each week” in the list of days that are holidays. Thus, because the tenth day was a holiday, Fisher was entitled to file the petition the following Monday, as he did.” [Emphasis added.]

From a clear reading of this opinion, the fact that Courts or public offices may not be open on Saturday, and there is no place a person may present something on that day, is of no moment. The statutes must be strictly applied when dealing with elections, and that includes recall in addition to referendum and initiative. Mr. Fisher was allowed until Monday because the last day was Sunday and that, by statute, is a “holiday”, and pursuant to A.R.S. §1-303 must be excluded.

With respect to the present case, neither October 17 nor October 18 are “holidays” and must be included in any count. By allowing presentation on October 20, your office would be allowing these days to be included in the count of time from the date on which application for recall petitions were made. This means that acceptance of the petitions for verification would occur on the one hundred twenty second day, two days beyond the time provided by A.R.S. §19-203.B. Since the Clerk has no legal power to accept petitions beyond one hundred twenty days, it is the opinion of this office that accepting on the one hundred twenty second day would be illegal, and beyond the legal power of the Office of City Clerk.