



July 21, 2022

MEMORANDUM

To: Ms. Suzanne Clark
Ms. Marcella Gaydosh
Ms. Laurie Facsina
Mr. Lynn Clark
Attorney Warner Mendenhall

CC: Sam Scaffide, Mayor
City Council
Summit County Board of Elections

From: Shannon Collins, Clerk of Council
Matt Vazzana, Law Director

Subject: Sufficiency Determination re: Referendum Petition on Council Res. No. 57-2022

The Referendum Process in Ohio

The Ohio Constitution, pursuant to Article II, Section 1f, reserves the power of initiative and referendum to the people of each municipality "...on all questions which such municipalities may now or hereafter be authorized by law to control by **legislative** action..." (Emphasis added). The Ohio Supreme Court has interpreted this Constitutional provision to exclude from the reach of referendum proceedings a City Council's administrative actions. And the Ohio Supreme Court has held this interpretation as applicable to Charter municipalities.

In *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 56 O.O.2d 6, 271 N.E.2d 864, the Ohio Supreme Court held that pursuant to Article II, Section 1f of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are authorized by law to control by legislative action. *Myers* at paragraph one of the syllabus. In *Buckeye Community Hope Foundation v. City of Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 697 N.E.2d 181, the Ohio Supreme Court held that a section of the Charter of Cuyahoga Falls that provided for voters to exercise the power of referendum on any ordinance or resolution passed by the City Council to be constitutionally invalid. *Id.* at 543. The *Buckeye* Court held that, regardless of the language contained in the Cuyahoga Falls Charter, Article II, Section 1f of the Ohio Constitution does not authorize the voters of Cuyahoga Falls to exercise the power of referendum on any ordinance or resolution by City Council. *Id.* at 543-544. The Court concluded that the Constitution permits referendum powers only on those matters that constitute legislative action. *Id.* at 544.

In *Donnelly v. Fairview Park*, the Ohio Supreme Court outlined the test for determining whether an action of a legislative body was administrative or legislative:

The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence. (1968), 13 Ohio St.2d 1, 233 N.E.2d 500, paragraph two of the syllabus.

In discussing the *Donnelly* test, the *Buckeye* Court explained that the test requires an examination of the nature of the action taken rather than the action's form. *Id.* at 544. Notably, both *Buckeye* and *Donnelly* involved situations where a city council was reviewing the recommendation of a city planning commission. And in both *Buckeye* and *Donnelly* the Ohio Supreme Court found the city council's action of reviewing the recommendation of a planning commission to be administrative and not legislative.

The Petitioner's Referendum Petition on Resolution No. 57-2022 (And Simultaneous Administrative Appeal of Resolution No. 57-2022)

On June 14, 2022, pursuant to Twinsburg Codified Ordinance Section 1181.09, City Council passed Res. No. 57-2022 to confirm the Planning Commission's action of approving the final site plan for Project Gumbo.

On June 27, 2022 a committee of four Twinsburg residents (Ms. Suzanne Clark, Ms. Marcella Gaydosh, Ms. Laurie Facsina, and Mr. Lynn Clark (collectively, the "Petitioners")) filed notice with the Twinsburg Clerk of Council of their intent to circulate a referendum petition to place Res. No. 57-2022 on the November 8, 2022 ballot.

Because Ohio law precludes an administrative act from being subject to referendum, and with a desire to save Petitioners the time and effort of circulating petitions in vain, on June 30, 2022, Twinsburg Law Director, Matthew Vazzana, notified the Petitioners (and their legal counsel, Warner Mendenhall) that Res. No. 57-2022 was an administrative act subject to an administrative appeal (versus a legislative act that would be subject to referendum). The Law Director's June 30, 2022 correspondence further confirmed with Petitioners and Mr. Mendenhall that the administrative appeal filing deadline was July 14, 2022. Mr. Mendenhall acknowledged receipt of the Law Director's notice with the reply: "Matt, Thank you for the clarification."

Thereafter, on July 14, 2022, Mr. Lynn Clark (via his attorney Warner Mendenhall's Office) filed an **administrative appeal** against Res. No. 57-2022 in the Summit County Court of Common Pleas (Case No. CV-2022-07-2332). Confusingly, however, nearly simultaneously to his filing of the aforementioned administrative appeal, Mr. Lynn Clark also filed a referendum petition to place Res. No. 57-2022 on the November 8, 2022 ballot.

Under Ohio Law, it is an accepted legal principle that a Council action cannot be subject to both the referendum process and the administrative appeal process at the same time. It is one or the other. In other words, an individual would not file an administrative appeal against a Council action if they believe the action is subject to the referendum process – and vice versa. Put more simply, Petitioner Clark's action in filing an administrative appeal against Res. No. 57-2022 on July 14, 2022 was an affirmative recognition by Petitioner Clark and his attorney, Warner Mendenhall, that Res. No. 57-2022 was not a

legislative act and, therefore, was never subject to the referendum process in Ohio to begin with. Given the above, it is unknown why Petitioner Clark continued circulating his referendum petition for some two additional weeks after receiving notice from the Twinsburg Law Department (that was acknowledged by his attorney, Warner Mendenhall) that Res. No. 57-2022 was an administrative action – not a legislative action and was, therefore, not subject to the referendum process in Ohio.

Conclusion

City Council, through Res. No. 57-2022, administered a law that was already in existence – Twinsburg Codified Ordinances Section 1181.09. Res. No. 57-2022 did not enact a new law, ordinance, or regulation. Therefore, pursuant to Ohio law, Res. No. 57-2022 is an administrative action and, therefore, not subject to referendum proceedings. Consequently, it is determined that the Petition is not sufficient and Res. No. 57-2022 will not be sent to the November 8, 2022 ballot because the subject matter of the Petition is not an action that is subject to referendum proceedings. The appropriate and legal forum to address Petitioners' concerns with Res. No. 57-2022 is through the filing of an Administrative Appeal, which Petitioners and their legal counsel, Warner Mendenhall, have acknowledged through having actually already filed said appeal.