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May 16, 2018

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Via U.S. Regular Mail and Email

City of Green, Ohio
1755 Town Park Blvd.
Uniontown, OH 44685
Attn: William Chris, Law Director
WChris@rlbllp.com

Re: NEXUS Gas Transmission, LLC
City of Green, Ohio Resolution and Potential Referendum

Dear Mr. Chris:

The law firm of Brennan, Manna & Diamond, LLC ("BMD") has been retained by the City of Green, Ohio ("City") to provide a legal opinion as to the sufficiency and validity of a certain referendum petition of Resolution 2018-R09 that challenges that certain Settlement Agreement and Release, dated January 31, 2018 ("Settlement Agreement"), by and between the City and NEXUS Gas Transmission, LLC ("NEXUS").

I. BACKGROUND

(a) Litigation

On August 25, 2017, the Federal Energy Regulatory Commission issued a Certificate of Public Convenience and Necessity to NEXUS authorizing NEXUS to construct, operate and maintain an interstate natural gas pipeline system in Ohio and Michigan, including through the City.¹ As part of the project, NEXUS needed to acquire certain easement interests in property owned in fee by the City, as well as utilize certain roads within the City.

On September 19, 2017, the Ohio Environmental Protection Agency issued NEXUS a Section 401 Water Quality Certification ("401 Certification"). On September 26, 2017, the City appealed the 401 Certification with the Ohio EPA Review Appeals Commission ("401 ERAC

¹ FERC Docket No. CP-16-22-000.

Appeal”)² and the United States Court of Appeals for the Sixth Circuit (“401 Sixth Circuit Appeal”).³

On October 2, 2017, NEXUS filed a condemnation action pursuant to 15 U.S.C. 717f(h) in the United States District Court for the Northern District of Ohio, seeking the acquisition by eminent domain of certain easement interests from the City (“Condemnation Action”).⁴ On December 28, 2017, the Northern District determined that NEXUS has the authority to condemn the requisite easement interests in the property owned in fee by the City.

On February 1, 2018, the City appealed the Northern District’s decision regarding the Condemnation Action to the Sixth Circuit (“Condemnation Appeal”).⁵

On January 31, 2018, NEXUS and the City entered into a Settlement Agreement to avoid continued litigation and costs, and to fully resolve all disputes, claims, petitions, appeals, and/or counterclaims that were or could have been raised in all pending lawsuits/litigation arising from or related to the project, including, but not limited to the Condemnation Action, the Condemnation Appeal, the 401 ERAC Appeal and the 401 Sixth Circuit Appeal.

On February 7, 2018, City Council adopted Resolution Number 2018-R09 by a four to three vote, and the Mayor approved (“Resolution 2018-R09”). Resolution 2018-R09, *inter alia*, approved the Settlement Agreement.

As a result of the Settlement Agreement, on February 9, 2018, the Sixth Circuit dismissed the City’s appeal regarding the Condemnation Action.⁶ Resolution 2018-R09 was enacted on March 8, 2018.

(b) Referendum

A referendum petition was circulated throughout the City in response to Resolution 2018-R09 (“Referendum”). The Referendum was subsequently submitted to the City’s Finance Director on or about March 8, 2018. The Referendum, if approved, would require Resolution 2018-R09 to be submitted to the electors of the City at a general election for their approval or rejection.

On April 19, 2018, the City, by and through counsel, filed an Objection to the Referendum (“Referendum Objection”). As set forth in the Referendum Objection, the City objects to the Referendum on the following grounds:

² *City of Green v. Butler*, Case No. ERAC 17-6940.

³ *City of Green v. Ohio Environmental Protection Agency and NEXUS Transmission, LLC (Intervenor)*, Case No-17-4016.

⁴ *NEXUS Gas Transmission, LLC v. City of Green, Ohio et al.*, Case No. 5:17-cv-2062.

⁵ *NEXUS Gas Transmission, LLC v. City of Green*, Case No. 18-3112.

⁶ *NEXUS Gas Transmission, LLC v. City of Green*, 2018 WL 2072616 (6th Cir. 2018).

- (1) City Council's approval of Resolution 2018-R09 is an administrative act and is not subject to referendum under Section 1f, Article II of the Ohio Constitution;
- (2) The Referendum, if successful, would violate the Contract Clause of the United States and Ohio Constitutions; and
- (3) The Referendum fails as it did not attach the correct resolution to the Referendum and due to the invalidity of a number of individual part-petitions that contain material flaws.

For the purposes of this legal opinion, BMD will only opine as to the sufficiency and validity of the Referendum as submitted.

II. LAW AND ANALYSIS

(a) Petition Requirements under the Ohio Revised Code

Ohio Revised Code Section 731.28 provides the following procedure for municipal initiative petitions:

- (1) When a petition for an initiated ordinance or other measure is signed by the required number of electors (not less than ten percent [10%] of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation), the city auditor or village clerk has a mandatory, ministerial duty, after ten (10) days from the date the petition was filed, to transmit the petition and a certified copy of the text of the proposed ordinance or other measure to the board of elections;
- (2) Within ten (10) days of receiving the petition, the board of elections is required to determine the number of electors of the municipal corporation who signed the petition and return the petition to the auditor or clerk together with a statement attesting to the number of valid electors;
- (3) The auditor or clerk then exercises limited, discretionary authority to determine the sufficiency and validity of the petition; and
- (4) If the auditor or clerk certifies the sufficiency and validity of the initiative petition to the board of elections, the board must submit the proposed ordinance or other measure at the next succeeding general election occurring after ninety days from the certification of the board of election, but only if the board of elections determines under O.R.C. § 3501.11(K) and § 3501.39 that the petition is sufficient and valid.⁷

⁷ O.R.C. § 731.28.

A “certified copy” means a copy containing a written statement attesting that it is a true and exact reproduction of the original proposed ordinance or measure or the original ordinance or measure.⁸

Each signatory to a petition must be an elector of the municipal corporation in which the election, upon the ordinance or measure proposed by such initiative petition, or the ordinance or measure referred to by such petition, is to be held.⁹ All signatures found to be irregular shall be rejected, but no petition shall be declared invalid in its entirety when one or more signatures are found to be invalid, except when the number of valid signatures is found to be less than those required by O.R.C. § 731.28.¹⁰

(b) Limited Discretionary Review of Petitions by City Auditors and Village Clerks

In determining the sufficiency and validity of municipal initiative petitions, the Ohio Supreme Court has held that the discretion of city auditors and village clerks is similar to the limited discretion of municipal legislative authorities in deciding the sufficiency of petitions to amend a city charter.¹¹ “A municipal legislative authority’s discretion in these cases is ‘limited to matters of form, not substance,’ is ‘more restricted than that of a board of elections,’ does not involve ‘judicial or quasi-judicial determinations, e.g., analyzing if the requirements of O.R.C. § 3501.38(F) have been satisfied,’ and does not permit ‘inquir[ing] into questions not apparent on the face of the petitions themselves or which require the aid of witnesses to determine.’”¹² As such, a city auditor or village clerk’s review of a petition is limited to whether the petition is valid on its face.¹³

(c) Whether the Referendum is Facially Insufficient and Invalid

The Ohio Supreme Court has held that O.R.C. § 731.31 must be met with strict compliance.¹⁴ In *Esch*, the Court rejected the board of elections’ argument that the lack of ordinance title in a petition was merely a technical defect and should not serve to invalidate the petition. The Court held that the title provides notice of the proposal to the signers of the petition, immediately alerts the signers of the nature of the proposed legislation and helps prevent the signers from being misled.

⁸ O.R.C. § 731.28.

⁹ O.R.C. § 731.31.

¹⁰ *Id.*

¹¹ See *State ex rel. Sinay v. Sadders*, 80 Ohio St.3d 224 (1997).

¹² *Webb*, 106 Ohio St.3d 437, 442 citing *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 55 (1994).

¹³ See *Webb*, 106 Ohio St.3d, 437, 442.

¹⁴ See *State ex rel. Esch v. Lake Cty. Bd. Of Elections*, 61 Ohio St.3d 595, 596-98 (1991).

Notwithstanding the foregoing, a petition that lacks a proper title does not, in itself, invalidate the petition.¹⁵ The title requirement under O.R.C. § 731.31 is to “immediately alert[] signers to the nature of the proposed legislation and helps prevent the signers from being misled.”¹⁶

Assuming proper title or, at a minimum, a title that does not mislead the signers, a petition will still be facially insufficient and, therefore, invalid, if it fails to include the proper text of a proposed ordinance.¹⁷ In *Schultz*, a zoning resolution contained four properties for consideration. The township trustees disapproved of one of the four actions and approved the other three. A referendum petition was circulated that included all four properties in the title and included a copy of a resolution that was different from the resolution passed by city council. Specifically, the petition circulated did not indicate anywhere that one of the paragraphs included in the title of the resolution to be voted on was not adopted by the township trustees.

Similarly, in *State ex rel. Golem v. Cuyahoga County Bd. Of Elections*, 2000 Ohio App. LEXIS 4303 (8th Dist. 2000), the Eighth District Court of Appeals addressed the issue of what constitutes compliance with the “full and correct copy of the title and text of the proposed ordinance” required under O.R.C. § 731.31. In *Golem*, petitioners twice filed a copy of the ordinance at issue with the city auditor. The Court determined that the petitioners did not properly file an attested copy of the zoning ordinance with the city auditor and therefore failed to comply with O.R.C. § 731.32. As such, the petition “lack[ed] the essential indicia of authenticity and reliability.”¹⁸

III. LEGAL OPINION

Based upon the foregoing analysis and authority, the Referendum is insufficient and invalid. Attached to the Referendum is a copy of an ordinance that impermissibly differs from Resolution 2018-R09 as follows:

- (1) The words “AND DECLARING AN EMERGENCY” in the title were struck in Resolution 2018-R09;

¹⁵ See *State ex rel. Carrier v. Hilliard City Council*, 144 Ohio St.3d 592 (2016) (holding that the amendment consisted of merely two provisions, the text of which comprised of four brief paragraphs, and the entire amendment, including explanatory captions, fit easily on a single page, and, therefore, there was no risk that the captioning format would interfere with the petition’s ability to fairly and substantially present the issue or mislead the electors.).

¹⁶ *Esch*, 61 Ohio St.3d 595, 597.

¹⁷ See, generally *State ex rel. Schultz v. Cuyahoga Cty. Bd. Of Election*, 48 Ohio St.2d 173 (1976); *State ex rel. Burech v. Belmont Cty. Bd. Of Elections*, 19 Ohio St. 154 (1985) (holding that each petition paper shall contain a full and correct copy of the title and text of the resolution or rule sought to be referred.”).

¹⁸ *Golem*, 2000 Ohio App. LEXIS 4303, 14.

- (2) Section Four of the text was struck in Resolution 2018-R09;
- (3) The signatures of the City Council President, Clerk, Mayor and Law Director were omitted in the ordinance attached to the Referendum;
- (4) The roll call tabulation of votes of City Council was omitted in the ordinance attached to the Referendum; and
- (5) The Settlement Agreement attached to Resolution 2018-R09 was omitted.

Based on the foregoing and subject to the following limitations, the City Finance Director can readily determine that the unsigned and incomplete version of the ordinance attached to the Referendum does not contain the same title or text as Resolution 2018-R09 and was likely to mislead signers; thus rendering the Referendum facially insufficient and, therefore, invalid.

IV. LIMITATION OF LEGAL OPINION

In connection with this opinion, we have examined originals or copies, certified or otherwise authenticated to our satisfaction of the following documents:

- (1) The Settlement Agreement;
- (2) Resolution 2018-R09; and
- (3) The Referendum.

We are qualified to practice law in the State of Ohio. The opinions expressed herein are specifically limited to the laws of the State of Ohio and the federal laws of the United States of America. No opinion is expressed or implied as to the laws of any other jurisdiction or the effect thereof.

In rendering the opinions set forth herein, we have relied upon and have assumed:

- (1) The accuracy of documents, records, and papers presented to us with respect to the factual matters set forth therein, including the accuracy of representations of factual matters in the Settlement Agreement, Resolution 2018-R09 and the Referendum;
- (2) The authenticity of all documents submitted to us as originals or photocopies of originals;
- (3) The genuineness of all signatures to the Settlement Agreement, Resolution 2018-R09 and the Referendum;

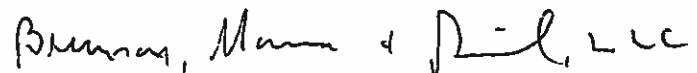
- (4) Each individual executing the Settlement Agreement, Resolution 2018-R09 and the Referendum had sufficient legal capacity to execute such documents and perform their obligations thereunder; and
- (5) No consents, permissions or authorizations, which have not been obtained, are required from any parties in connection with the execution and delivery of the Settlement Agreement, Resolution 2018-R09 and the Referendum.

We bring to your attention the fact that our legal opinion is an expression of professional judgment and is not a guarantee of result. Moreover, we do not undertake to advise you of matters which may come to our legal attention subsequent to the date hereof which may affect our legal opinion expressed herein.

This opinion is limited to the matters expressly stated herein. No implied opinion may be inferred to extend any opinion expressed herein beyond the matters expressly stated herein. This opinion is being delivered to the City of Green, Ohio and is intended solely for its sole use. This opinion may not be otherwise reproduced, circulated, quoted, filed publicly or otherwise relied upon by any other person or entity for any without the express written consent of the undersigned.

Very truly yours,

BRENNAN, MANNA & DIAMOND, LLC



CJM