

BEFORE THE SUMMIT COUNTY BOARD OF ELECTIONS

In the Matter of the Objections of:) Docket No. _____
James D. Schweikert)
Staci E. Schweikert) PROTEST
Ted A. Mallo)
Glenn L. Witsaman)
Rebecca B. Witsaman)
Roberta Ravagnani)
Dale Brott)

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We, the undersigned, object to the petition named below pursuant to R.C. 3501.39, and state as follows:

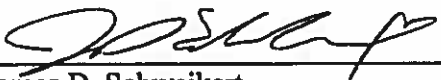
1. We reside as follows: James D. Schweikert and Staci E. Schweikert, 1261 Steese Road, Uniontown, Ohio 44685, which residence is within the City of Green, Election Precinct 2150/1 Green 3-D. Ted A. Mallo, 3379 Ashton Drive, Uniontown, Ohio 44685, which residence is within the City of Green, Election Precinct 2030/1 Green 1-B. Glenn L. Witsaman and Rebecca B. Witsaman, 3431 Greensburg Road, North Canton, Ohio 44720, which residence is within the City of Green, Election Precinct 2110/1 Green 2-E. Roberta Ravagnani, 2841 Stratford Cir., Akron, Ohio 44312, which residence is within the City of Green, Election Precinct 2060/1 Green 1-E. Dale Brott, 1850 Raber Road, Uniontown, Ohio 44685, which residence is within the City of Green, Election Precinct 2080/1 Green 2-B.
2. James D. Schweikert, Staci E. Schweikert, Ted A. Mallo, Glenn L. Witsaman, Rebecca B. Witsaman, Roberta Ravagnani, and Dale Brott are citizens of the United States and citizens of the State of Ohio, and each of us is a qualified elector of the City of Green.
3. We, and each of us individually, object to and hereby protest the petition, filed with the City of Green Finance Director on or about March 8, 2018, entitled *Referendum Petition*, which purports to contain approx. 1500 signatures and which proposes that the City of Green Ordinance No. 2018-R09 be submitted to the electors, on the following grounds:
 - a. Green City Council's approval of Ordinance No. 2018-R09 is an administrative act and not subject to referendum under Section 1f, Article II of the Ohio Constitution.
 - b. The Referendum Petition, if successful, would violate the contract clause of the United States and Ohio Constitutions.
 - c. As argued by Protester, Nexus, the Referendum Petition fails as it did not attach the correct resolution to the Petition and, further, due to invalidity of a number of individual part-petitions that contain material flaws.
4. Wherefore, we state that the above Referendum Petition is invalid on these grounds and the Summit County Board of Elections is required to conduct a hearing to

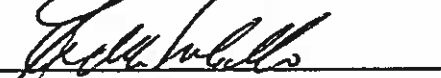
SUMMIT COUNTY BOARD OF ELECTIONS AKRON, OHIO

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determine the validity of the petition, whether Ordinance No. 2018-R09 is subject to referendum, and whether the proposed Referendum Petition can be submitted to the electors of the City of Green at the November 6, 2018, general election. A memorandum in support of this protest is attached hereto and by reference incorporated herein.

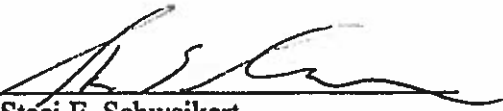
Respectfully submitted,

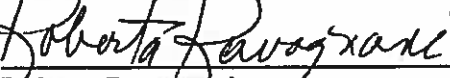

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MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

On or about October 27, 2017 Nexus Gas Transmission, LLC (“Nexus”) filed suit against the City of Green (the “City”) in the Federal District Court for the Northern District of Ohio, Case No. 5:17-cv-02276 (in addition to other pending matters), for declaratory relief regarding a stop work order issued by the City and alleged conflict with Nexus’ right to proceed with a pipeline through the City after receiving approval from the Federal Energy Regulatory Commission. Subsequently, the City filed for an extension of time to answer said complaint pending negotiations with NEXUS. Sometime thereafter, the parties reached a mutually advantageous settlement agreement and the case was dismissed.

On February 7th, 2018, the Council for the City of Green (the “Council”) approved Ordinance No. 2018-R09 authorizing and directing the Mayor, Gerard Neugebauer, to enter into a Settlement Agreement and Easement with Nexus regarding Case No. 5:17-cv-02276. A Referendum Petition (the “Petition”) was circulated throughout the City of Green in response to Council’s approval of Ordinance No. 2018-R09.

II. LAW AND ARGUMENT

A. Council’s approval of Ordinance No. 2018-R09 is an administrative act not subject to voter referendum.

The Board must deny certification of the referendum petition in its entirety because Ordinance No. 2018-R09 is an administrative act and not subject to referendum. This argument stems from Section 1(f), Article II of the Ohio Constitution which provides: “The initiative and referendum powers are hereby reserved 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; such powers shall be exercised in the manner now or hereafter provided by law.”¹

Section 1(f), Article II of the Ohio Constitution is the “sole constitutional source of initiative and referendum powers, reserved by the people of the state to the people of each municipality.”² Significantly, this section “clearly limits referendum and initiative powers to questions that are legislative in nature.”³ The actions taken by the Council regarding settlement of the City’s lawsuit with Nexus were administrative.

The Ohio Supreme Court in *Donnelly v. City of Fairview Park*,⁴ established the test to determine whether an act is legislative or administrative. An act is legislative if “the action taken is one enacting a law, ordinance, or regulation” and an act is administrative if the action taken is “executing or administering a law, ordinance or regulation already in existence.”⁵

Council approved Ordinance No. 2018-R09, authorizing and directing the Mayor to enter into a settlement agreement with Nexus concerning the pending litigation. Council was acting pursuant to section 715.01 of the Revised Code which vests in municipal corporations the power to sue and be sued.⁶ It is unquestionably recognized that incident to Council’s general power to sue and be sued is “the legal power and authority to compromise and settle bona fide claims in favor of or against the

¹ Ohio Const. Art. II, § 1(f).

² *Buckeye Community Hope Fund v. City of Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 542, 697 N.E.2d 181.

³ *Id.* at 543.

⁴ (1968), 13 Ohio St.2d 1, paragraph two of the syllabus.

⁵ *Id.*

⁶ “Each municipal corporation is a body politic and corporate, which shall have perpetual succession, may use a common seal, *sue and be sued*, ...” R.C. 715.01 (Emphasis added).

municipality.”⁷ Applying the *Donnelly* test, Council was executing a law already in existence and, as such, the Board should correctly find that this act was administrative in nature.

The Petition supporters may argue that Council’s act was legislative, however such an argument is without merit under Ohio law. In this situation, it is appropriate for the Board to examine “the nature of the action taken, rather than the mere form in which it is taken.”⁸ It is undisputed that Council approved Ordinance No. 2018-R09. In furtherance of the general power to sue and be sued, municipal corporations may exercise and enforce this power in passing ordinances and resolutions. R.C. 715.03. Here, Council’s act was necessary to affect the settlement of the pending litigation and grant the easement to NEXUS, which under Ohio law was proper. As Council’s actions are consistent with executing their statutory power to settle pending litigation, Council’s actions are administrative in nature and not subject to referendum under Section 1(f), Article II of the Ohio Constitution. Further, those activities which affect the use, encumbrance or disposal of real property, such as the easement granted to NEXUS, have “no general, prospective applications such that the action taken would fit within the usual and customary meaning of the phrase ‘legislative action’ contained in Section 1(f), Article II.”⁹

⁷ 1934 OAG Opinion 3355, at paragraph one of the syllabus. (Emphasis added). See also, *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.*, 150 Ohio App.3d 728, 2002-Ohio-7078, ¶37; *Columbus Gas & Fuel Co. v. City of Columbus* (S.D. Ohio 1941), 42 F.Supp 762, 769.

⁸ *Buckeye Community Hope Fund v. City of Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 544, 697 N.E.2d 181.

⁹ *Buckeye Community Hope Fund v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 545, 697 N.E.2d 181 (1998).

Additionally, the Board's determination that the action before it is administrative in nature would be consistent with Ohio Supreme Court precedent.¹⁰ In *Buckeye* a group of voters filed a referendum petition in opposition to city council's adoption of an ordinance regarding a zoning plan.¹¹ While the underlying dispute in *Buckeye* can be distinguished from the settlement controversy of this case, the general rule of law is directly applicable. In that case, the Ohio Supreme Court found that city council's approval of the ordinance was administrative because "the ordinance merely approves the planning commission's application of existing zoning regulations to the plan submitted by appellants."¹² Likewise, in *Talarico*, the Ohio Supreme Court held that council's act was administrative when they acted under an existing statutory code section and thus the actions were not subject to voter referendum.¹³

Applying the *Donnelly* test and in light of the controlling precedent, the Board can and should correctly find that Council's approval of Ordinance No. 2018-R09 was administrative, rather than legislative in nature. Thus, the voter's lack the constitutional power of referendum in this case and the Board should reject the Petition.

B. The Referendum Petition, if successful, would violate the contract clause of the United States and Ohio Constitutions.

Both the United States and Ohio constitutions prohibit the state from enacting any legislation impairing the obligation of contracts.¹⁴ The contract clause limits the power of the State to modify its own contracts, as well as to regulate those between private

¹⁰ *Buckeye Community Hope Fund v. City of Cuyahoga Falls* (1998), 82 Ohio St.3d at 545; *State ex rel. Oberlin Citizens for Responsible Development v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, ¶ 27-31.

¹¹ *Id.* at 540.

¹² *Id.* at 545.

¹³ *Talarico* at ¶ 27-31.

¹⁴ Section 10, Article I, United States Constitution; Section 28, Article II, Ohio Constitution.

parties.¹⁵ As such, “[n]o state, much less a municipality within a state, may pass any law impairing the obligation of contracts, including contracts of its own.”¹⁶

The important question and inquiry regarding contractual impairment cases, is whether the state or municipal law has, in fact, operated as a substantial impairment of a contractual relationship.¹⁷ Here, as argued *supra*, the settlement agreement between the City and NEXUS is a contract, as is the easement. Further, since the legislation adopted by the City through Ordinance No. 2018-R09 approved said contracts, revocation of said ordinance would constitute a total destruction of contractual expectations, which would be a substantial impairment of said contracts. Indeed, not only would this impair the contractual responsibilities of the City, but the contractual benefits it receives from the settlement with NEXUS. Moreover, NEXUS’ reasonable expectations under the contract may be disrupted to the point where the contractual impairment could vitiate the entire settlement agreement. Thus, this Board should grant the protest against the Referendum Petition as violative of both the Ohio and United States Constitutions of contract clauses.

C. As argued by protester, NEXUS, the Referendum Petition fails as it did not attach the correct Resolution to the petition and, further, due to invalidity of a number of individual part-petitions that contain material flaws.

NEXUS, claiming status as a landowner and developer in the City of Green, has filed a contemporaneous Protest regarding Ordinance No. 2018-R09. To the extent that NEXUS’ standing is at issue, Protesters herein fully adopt the NEXUS Protest and restate the same as additional grounds for their protest to the Referendum Petition.

¹⁵ *United States Trust Co. v. New Jersey* (1977), 43 U.S.1, 97 S.Ct. 1505.

¹⁶ *Haught v. Dayton* (1972), 32, Ohio App.2d 133, 136, reversed on other grounds (1973), 34, Ohio St.2d 32.

¹⁷ *Allied Structural Steel Co. v. Spannus* (1978), 438 U.S. 234, 98 S.Ct. 2716.

In particular, Protesters adopt the argument that the Petition is invalid because the Petitioners failed to attach the correct Resolution. As cited by NEXUS in their Protest, the Resolution, as it was introduced, differs materially from the version of the Resolution that was passed. Pursuant to R.C. 731.31, the Petitioner is required to include "a full and correct copy of the title and text of the proposed Ordinance or other measure". Ohio courts have long held that defects in a Referendum Petition such as this are material, and the Petitioners failed to attach the final version of the Resolution that was passed to their Petition. This Board should reject the entire Petition as a result.¹⁸ Secondly, Protesters herein adopt the arguments contained in NEXUS' Protest regarding the granting of an easement, as well as entering into a settlement argument as argued *supra*, as administrative actions. Just like in the Protest herein, NEXUS argues that the actions of the Council, in entering into the easement and settlement agreement with NEXUS, are administrative and not legislative actions. As administrative actions are not subject to Referendum Petition, this Board should reject the Petition as it seeks to refer administrative actions to the voters.

Finally, to the extent that the NEXUS Protest includes allegations that specific part-petitions of the Petition are invalid, Protesters herein adopt said arguments regarding both the failure to file a pre-circulation copy of the Resolution, as well as the invalid 23-part-petitions attached to NEXUS' Protest in their entirety.

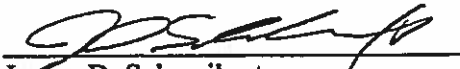
III. CONCLUSION


Wherefore, for the forgoing reasons, the Protestors, James D. Schweikert, Staci E. Schweikert, Ted A. Mallo, Glenn L. Witsaman, Rebecca B. Witsaman, Roberta

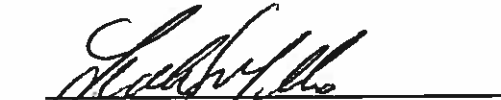
¹⁸ *Christy v. Summit County Board of Elections*, 77 Ohio St.3d 35, 38, 671 N.E.2d 1 (1996).

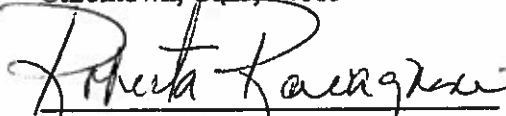
Ravagnani, and Dale Brott respectfully request the Summit County Board of Elections conduct a hearing to determine the validity of the part-petitions, whether Ordinance No. 2018-R09 is subject to referendum, and whether the proposed Referendum Petition can be submitted to the electors of the City of Green at the November 6, 2018, general election.

Respectfully submitted,


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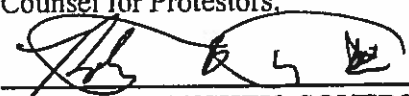

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