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May 30, 2018

Steven Schmidt, CPA  
Director of Finance  
City of Green  
1755 Town Park Boulevard  
P.O. Box 278  
Green, Ohio 44232-0278

Re: Sufficiency and Validity of Referendum Petition

Dear Mr. Schmidt:

As you are aware, the Director of Finance has a statutory duty under Section 731.31 of the Ohio Revised Code to certify the sufficiency and validity of a referendum petition after the petition's signatures have been verified by the Board of Elections. The referendum petition that orders Ordinance No. 2018-R09 to be submitted to the November 6, 2018 general election ("Petition") should not be certified as sufficient and valid.

The Petition is Invalid on its Face

The Ohio Supreme Court has clearly stated that a municipal legislative authority's discretion in determining the sufficiency and validity of a petition is "limited to matters of form, not substance"<sup>1</sup> and "does not permit inquiring into questions not apparent on the face of the petitions themselves or which require the aid of witnesses to determine."<sup>2</sup> This includes making juridical or quasi-judicial determinations, e.g. whether the underlying ordinance is an administrative or legislative action. Because the Petition does not contain a true and accurate copy of Ordinance No. 2018-R09 ("Ordinance"), nor did it contain a copy of the Settlement Agreement and Release that was central to the Ordinance, the Petition is invalid on its face and should be deemed insufficient.

<sup>1</sup>State ex rel. N. Main St. Coalition v. Webb, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 30 (2005)

<sup>2</sup> Id.

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Section 731.31 of the Ohio Revised Code (“ORC”) mandates that petitions shall contain “a full and correct copy of the title and text of the proposed ordinance or other measure, and each part of any referendum petition shall contain the number and a full and correct copy of the title of the ordinance or other measure sought to be referred.” The Ohio Supreme Court has held that ORC §731.31 must be met with “strict compliance”<sup>3</sup> because the purpose of a petition’s title is to “immediately alert signers to the nature of the proposed legislature.”<sup>4</sup> However, failure to meet ORC §731.31 with strict compliance does not automatically invalidate a petition; rather, noncompliance with the statute will only serve to invalidate the petition when such noncompliance will “interfere with the petition’s ability to fairly and substantially present the issue or mislead the electors.”<sup>5</sup>

The Petition contains 71 part-petitions that were circulated and signed. Each of these part-petitions contain a copy of the original “as introduced” version the Ordinance rather than a copy of the final Ordinance that was passed. The final version of the Ordinance differs from the original in that it strikes Section Four of the Ordinance, as well as the words “And Declaring An Emergency” from its title. More importantly, each of the part-petitions omits the Settlement Agreement and Release that is central to the Ordinance and attached to which as “Exhibit A.”

The failure to include the Settlement Agreement in the Petition substantially hinders the electors’ ability to understand the issues that the underlying Ordinance presents. The Ordinance itself merely authorizes the Mayor to enter into a settlement agreement. Neither the Petition nor the Ordinance contain the terms of the settlement agreement. Rather, the Settlement Agreement’s 55 pages of terms are summarized in 3 brief sentences in the middle of the Ordinance. The signers of the Petition need to know what the terms of the Settlement Agreement are before they are able to make an informed decision about the Ordinance.

The issues presented by the Petition and underlying Ordinance are further obfuscated by the emergency language found in the title of the original Ordinance but absent from the title of the final version. Although the title of both versions of the Ordinance alert the electors to the general terms of the Ordinance, the title of the final version is no longer “Declaring An Emergency.” This additional clause not only changes the immediacy of which the Ordinance may take effect but misleads the electors by imposing a sense of urgency and trepidation that is absent from the final version of the Ordinance. The language of Section Four, which was present in the original version but removed from the final version, furthers this sense:

Council declares this to be an emergency immediately necessary for the preservation of the public peace, health, safety and welfare of the citizens of

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<sup>3</sup> *State, ex rel. Esch, v. Lake Cty. Bd. of Elections*, 61 Ohio St.3d 595, 597, 575 N.E.2d 835, 836 (1991).

<sup>4</sup> *Id.*

<sup>5</sup> *State ex rel. Carrier v. Hilliard City Council*, 144 Ohio St.3d 592, 2016-Ohio-155, 45 N.E.3d 1006 (2016)

Green and in order to permit resolution of the aforementioned legal actions at the earliest possible time. (Relevant language cited).

The effect of the Petition's noncompliance with ORC §731.31 has already been realized. Two individuals came into the Finance Office to cross out their signature on the Petition based on the fact that they were misled into thinking that the Petition's purpose was to stop construction of the pipeline. While the exact reasons why the individuals felt misled are unknown, the removal of the emergency language and attachment of the Settlement Agreement would have made the actual purpose of the Petition more readily apparent.

Thus, the Petition's failure to comply with ORC §731.31's requirement that a full and correct copy of the ordinance and other measures sought to be referred be contained in the petition goes beyond a mere technical error. It interferes with the Petition's ability to fairly and substantially present the issues and misleads the electors. As such, it should be deemed facially invalid.

#### The Petition is an Administrative Action

Although it is outside the current scope of the Financial Director's authority, the Petition is not subject to referendum as it was an administrative action taken by the City Council.

Section 1f, Article II of the Ohio Constitution provides referendum power only on those questions that municipalities "may now or hereafter be authorized by law to control by legislative action." Conversely, "actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings."<sup>6</sup>

The Ohio Supreme Court has stated that "[t]he 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."<sup>7</sup> Refining the Court's analysis, the Ninth District Court of Appeals stated that legislative actions "are normally generalizations concerning a policy or state of affairs: they do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion."<sup>8</sup> Administrative action, on the other hand, "results in the application of a general rule or policy."<sup>9</sup>

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<sup>6</sup> *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998)

<sup>7</sup> *Donnelly v. City of Fairview Park*, 13 Ohio St.2d 1, 233 N.E.2d 500 (1968)

<sup>8</sup> *Shaheen v. Cuyahoga Falls City Council*, 9th Dist. Summit No. 24472, 2010-Ohio-640 citing *Developments in the Law-Zoning*, 91 Harv. L.Rev. 1502, 1510-11 (1978)

<sup>9</sup> *Shaheen v. Cuyahoga Falls City Council*, 9th Dist. Summit No. 24472, 2010-Ohio-640 citing Michael S. Holman, Comment, *Zoning Amendments-The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St. L.J. 130, 135 (1972)

The Ordinance at issue authorized the Mayor to enter into a settlement agreement, the effect of which granted NEXUS an easement from the City, entered the City into a maintenance agreement, and dismissed the City's pending litigation with NEXUS. There are no new rules or policies enacted by the Ordinance; rather, it is an action guiding the application of established laws. Both the act of entering into a settlement agreement and the effects of the settlement agreement are powers that are explicitly granted to the municipality by Section 715.01 of the ORC:

Each municipal corporation is a body politic and corporate, which shall have perpetual succession, may use a common seal, sue and be sued, and acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any authorized municipal purpose, and may hold, manage, and control such property and make any rules and regulations, by ordinance or resolution, required to fully carry out the provisions of any conveyance, deed, or will, in relation to any gift or bequest, or the provisions of any lease by which property may be acquired.

Moreover, Section 3.3(C) of the Charter of the City of Green states:

The Mayor shall, unless otherwise provided by ordinance, or other provisions of this Charter, execute on behalf of the City all authorized conveyances, evidences of indebtedness, and all other instruments to which the City is a party and shall, where required, attach thereto the official seal of this office, which shall be the Seal of the City.

Thus, although it is outside of your statutory duty under Section 731.31 of the ORC to certify the sufficiency and validity of the Petition, it is important to note that the City Council was taking administrative action in approving the Ordinance, and thus, the Petition is not subject to referendum.

Very truly yours,

William G. Chris