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May 18, 2010

To: Mayor Welo, City Council
From: Michael P. Lograsso, Director of Law
Re: Ordinance 19-10.

This office has been asked to provide a legal opinion on the issue of “whether or not Ordinance 19-10, which rolls back the income tax credit in section 171.1901, is subject to referendum.”

LAW

Section 1f, Article II of the Ohio Constitution authorizes initiative and referendum power only on those questions that municipalities “may now or hereafter be authorized by law to control by legislative action.” Conversely, pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to initiative or referendum proceedings. State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Db. Of Elections, 115 Ohio St. 3d 437, 2007-Ohio-5379; State ex rel. Marsalek v. S. Euclid City Council, Ohio St. 3d, 2006, Ohio 4973.

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.

Donnelly v. Fairview Park, (1968), 13 Ohio St. 2d 1, 42 O. O. 2d 1, 233 N. E. 2d 500, paragraph two of the syllabus. Moreover, “actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative.” State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Db. Of Elections, 115 Ohio St. 3d 437, 2007-Ohio-5379; 5 McQuillin, The Law of Municipal Corporations (3d Rev. Ed. 2004) 407 Section 16:54.

In order for a party to be entitled to a writ to force city council to submit any referendum petitions to the board of elections for placement on the ballot, there must be a corresponding clear legal duty on the part of council to do so and the lack of an adequate remedy in the ordinary course of the law. State ex rel. Miles v. McSweeney, 96 Ohio St. 3d 352, 2002-Ohio-4455, 775 N. E. 2d 468, p.13.

ANALYSIS & CONCLUSION

Applying the test described in Donnelly to the facts surrounding ordinance 19-10 the question becomes “whether the actions taken by city council in passing that ordinance enacted a new law, ordinance or regulation or was council executing or administering a law, ordinance or regulation already in existence at the time?”

The tax credit in question was originally established in 1983 by ordinance 36-83, (Section 171.1901 currently) and was therefore in existence at the time council amended it.

In addition, under the second test, it must be determined whether councils’ actions relate to a subject of a permanent and general character or to a temporary and special character. Clearly in 19-10 council made it specific that its actions were temporary in

nature by the fact that they put a sunset provision in the ordinance terminating it as of a specific date. Also, the subject matter at hand, a “tax credit roll-back”, is special in character to that issue and cannot be classified as “general character.”

The law in this case has been clearly established for some time. Council acted to administer an ordinance already in existence at the time and their actions were of a temporary and special character. Therefore, the actions taken by council in passing ordinance 19-10 were administrative in character.

Any referendum petitions submitted to council requesting council submit the issue to the board of elections would be void by their very nature and would fail to establish a clear corresponding legal duty on the part of council to do so. The fact that councils’ passing of 19-10 was an administrative act precludes it from being subject to referendum under Section 1f, Article II of the Ohio Constitution and the case law of the Supreme Court of Ohio.

Respectfully submitted,

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Director of Law
City of South Euclid