

May 26, 2017

Via fax to 216.664.2663, email to [blanghenry@city.cleveland.ohio.us](mailto:blanghenry@city.cleveland.ohio.us), and Certified U.S. Mail

Barbara A. Langhenry  
Director of Law  
City of Cleveland  
601 Lakeside Ave., Room 106  
Cleveland, OH 44114

Re: *Taxpayer demand under R.C. 733.59 and City of Cleveland Charter § 90 that the Clerk of Council accept the petition submitted by taxpayers on May 22, 2017 for a referendum on Ordinance No. 305-17 under Charter §§ 59–60 and 64.*

Dear Director Langhenry:

I write on behalf of City of Cleveland taxpayers Diane S. Bufford, Jennifer A. Blakeney, Verdia Y. Conner, Khalilah A. Worley, and Linda C. Robinson (“Taxpayers”), under R.C. 733.59 and City of Cleveland Charter § 90, to demand that that the Clerk of Council accept the petition submitted by Taxpayers on May 22, 2017 for a referendum on Ordinance No. 305-17 under Charter §§ 59–60 and 64.

Ordinance No. 305-17 (attached as **Exhibit 1**) would commit an estimated \$88 million of City tax revenue to a discretionary renovation of Quicken Loans Arena’s exterior and concourse area and has been the subject of vigorous public debate. It is entitled “an Emergency Ordinance to amend Section 195.03 of the Codified Ordinances of Cleveland, Ohio, 1976, as amended by Ordinance No. 595-13, passed April 29, 2013, relating to exemptions from Admissions Tax; and to authorize the Directors of Finance and Law to enter into an agreement to the Cooperative Agreement between the City and Cuyahoga County dated as of September 15, 1992.”

- 1. City of Cleveland Charter §§ 59–60 and 64 mandate that the Clerk of Council accept Taxpayers’ petition for referendum and certify Ordinance No. 305-17 to Council for reconsideration and, if necessary, a vote of the electors of the City of Cleveland.**

Chapters 7 and 9 of the Charter of the City of Cleveland (§§ 59–66) set forth the process by which ordinances passed by Cleveland City Council are subject to referendum.

Charter § 59 provides that within 30 days of the passing of an ordinance by Council, “a petition signed by electors equal in number to ten percent (10%) of the total vote cast at the last preceding regular Municipal election of the City [may] be filed with the Clerk of the Council requesting that the ordinance, or any specified part thereof, be repealed or

submitted to a vote of the electors.” This petition “shall ... become operative” once it is “prepared and filed in the manner and form prescribed in [Chapter 7] for an initiative petition for an ordinance.” *Id.*

Charter § 64 provides that ordinances passed as “emergency measures,” like the ordinance at issue here, “are subject to referendum in like manner as other ordinances” unless, unlike the ordinance at issue here, they are “passed as emergency measures for the immediate preservation of the public peace, property, health, or safety and providing for the refinancing of bonds, notes or other securities of the City.” *See* **Ex. 1.**

Charter § 60 provides that,

When [a petition for referendum] is filed with the Clerk of the Council he shall determine the sufficiency thereof in the manner provided in this Charter for an initiative petition for an ordinance. If the petition be found sufficient, or be rendered sufficient by amendment as provided in Sections 52, 53 and 54 hereof, the Clerk shall certify that fact to the Council, which shall proceed to reconsider the ordinance. If, upon such reconsideration, the ordinance be not entirely repealed the Council shall provide for submitting it to a vote of the electors of the City, and in so doing the Council shall be governed by the provisions of Sections 57 and 66 hereof respecting the time of submission and manner of voting on ordinances proposed to the Council by petition.

On May 22, 2017, Taxpayers submitted a referendum petition to the Clerk of Council consistent with the above provisions, containing 20,603 signatures of Cleveland residents (more than three times the number required), and directing the Clerk “that Ordinance No. 305-17, passed by Council of this City on the 24th day of April, 2017, be submitted to the electors of Cleveland for their approval or rejection.”

There is no indication from the Council Clerk or otherwise that Taxpayers’ petition does not meet the requirements of the Cleveland Charter as set forth above or otherwise. Yet the Council Clerk has refused to accept the petition, with Deputy Clerk Allan Dreyer, ostensibly acting as Clerk of Council Pro Tem, having stated as follows in a letter of May 22, 2017 (attached as **Exhibit 2**): “A referendum seeking repeal of Ordinance No. 305-17 would unconstitutionally impair an already executed and binding contract. Therefore I do not accept the petition papers for such referendum.”

Mr. Dreyer followed this letter with another one of the same date (attached as **Exhibit 3**), stating as follows: “I, Allan Dreyer, Deputy Clerk/Clerk of Council Pro Tem am in receipt of a referendum petition seeking the repeal of Ordinance No. 305-17. We are taking custody of such petition at your request, but do not consider the petition to be filed with the Clerk.”

This correspondence from Mr. Dreyer lacks any legitimate justification for the Clerk’s refusal to accept Taxpayers’ petition, and no such justification exists. As explained below, Mr. Dreyer’s invocation of the U.S. Constitution’s Contract Clause does not apply to Taxpayers’

petition. Thus, Cleveland's Charter requires the Council Clerk to accept Taxpayers' petition for referendum and certify Ordinance No. 305-17 to Council for reconsideration and, if necessary, a vote of the electors of the City of Cleveland.<sup>1</sup>

**2. Contrary to the Clerk's misrepresentation, the U.S. Constitution's Contract Clause does not apply to Taxpayers' petition for referendum.**

The U.S. Constitution's Contract Clause (Article I, Section 10, Clause 1) provides that, "**No State shall** enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; *pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts*, or grant any Title of Nobility." (Emphasis added.)

Thus, by its plain language, the Contract Clause only bars *the passing* of laws "impairing the obligation of contracts." It has no application to an electorate's rejection of a newly proposed or newly enacted law subject to referendum. Not only has no Ohio court ever held to the contrary, but our research suggests that no Ohio party has ever advanced this specious argument. Indeed, it is unimaginable that the Contract Clause was intended to give government officials carte blanche to propose new laws against the will of the electorate and then rush into contracts in an effort to void the electorate's statutory right to repeal those laws. Of course, any party that has entered a contract regarding the controversial Ordinance at issue has done so on notice not only that the Ordinance was subject to referendum, but that it was likely to be put to the test through the referendum process. Thus, no contractual obligations could be considered "substantially impaired" here even if the Contract Clause did apply (again, it does not). *See M&F Supermarket v. Owens*, 997 F. Supp. 908, 914–15 (S.D. Ohio, 1997) (noting that substantial impairment of contractual obligations could not be found where "[p]laintiffs were on notice that at any time the local community could vote [in the manner that impacted plaintiffs' business]" and where "[p]laintiffs [c]ould have put a clause in their lease that allowed them to cancel the lease if the community voted [in the manner at issue]."). Simply put, any contracting parties were on notice and would and should have known better.

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<sup>1</sup> Mr. Dreyer's statement that "[w]e ... do not consider the petition to be filed with the Clerk" might reflect the Clerk's intent to claim that taxpayers' right to a referendum is now time-barred due to the Clerk's own unlawful refusal to accept taxpayers' petition that was lawfully submitted in advance of Charter § 59's 30-day deadline. Here, the Law Director should note that the Supreme Court of Ohio's holding that "when the board of elections ultimately certifies the validity of a petition and [any] delay was not the fault of the initiative's supporters, a writ of mandamus will issue to place the matter on the ballot. Any other result would be unfair and thwart the constitutional right of initiative." *State ex rel. Meigs Cty. Home Rule Comm. v. Meigs Cty. Bd. of Comm'rs*, 148 Ohio St. 3d 63, 2016-Ohio-5658, 68 N.E.3d 781 ¶ 19, citing *State ex rel. Stern v. Quattrone*, 68 Ohio St. 2d 9; 426 N.E.2d 1389 (1981).

**3. Taxpayers request that the Clerk of Council accept the petition for referendum and certify it to Council for reconsideration and, if necessary, a vote of the electors of the City of Cleveland.**

Please arrange for us to receive by **June 7, 2017** written assurance from the Clerk of Council that Taxpayers' petition for referendum be accepted and certified to Council for reconsideration under Charter Sections 59–60 and 64.

If the Clerk fails to accept Taxpayers' petition as the Charter expressly requires, then R.C. 733.58 and Cleveland Charter § 89 require you as Law Director to seek a writ of mandamus forcing the Clerk of Council to perform the duty.

Swift action is required. Not only is the City apparently expending resources against the will of the electorate under the false pretense of a so-called “emergency measure,” it is invoking inapplicable constitutional arguments in an apparent effort to thwart the electorate’s statutory right to referendum. Continued delay in subjecting Ordinance No. 305-17 to referendum will irreparably harm taxpayers.

If you file litigation against the Clerk of Council under your R.C. 733.58 and Charter § 89 duties, then please name our clients as party defendants under R.C. 733.581 so that we may assist in presenting all issues of law and fact in the matter as that statute authorizes.

**If we do not receive timely reassurance that the requested actions will occur promptly, then we will file taxpayer litigation on Taxpayers' behalf under R.C. 733.59 and Cleveland Charter § 90 against the Council Clerk, the Council members, and you.**

R.C. 733.59 provides as follows:

**733.59 Taxpayer's suit.**

If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

Cleveland Charter § 90 is identical in effect and provides as follows:

**§ 90 Taxpayer's suit**

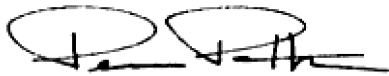
In case the Director of Law, upon written request of any taxpayer of the City, fails to make any application provided for in the preceding three sections, such taxpayer may institute suit or proceedings for such purpose in his own name on behalf of the City. No such suit or proceeding shall be entertained by any court until such request to the

Director of Law shall first have been made, nor until the taxpayer shall have given security for the costs of the proceedings. (Ord. 4273-16; passed 7/26/16.)

Our clients will be entitled to their attorneys' fees and costs if they are successful. Charter § 92; R.C. 733.61 (providing for attorneys' fees and costs for successful taxpayer lawsuits); *State ex rel. Fisher v. City of Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, 845 N.E.2d 500, ¶ 45. It is difficult to see how our clients would *not* be successful given the Charter's clear and unambiguous mandate. If you, the Clerk of Council, and Council fail to act swiftly, you will be subjecting Cleveland's taxpayers to needless cost of litigation, when your respective duties to act otherwise under the Charter are plain.

We will follow up with a call to you early next week to discuss the matter further. Again, time is of the essence before the Clerk's continued refusal to fulfill her legally mandated duties further harms the public.

Sincerely,



Peter Pattakos



Subodh Chandra

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