

18 January 2019

MEMORANDUM

To: Mayor, City Council, and City Manager

From: City Solicitor's Office

Subject: Procedural Analysis re: Resolution No. 18-196 – Advisory Election on Downtown Phase II

Issue: Does Resolution No. 18-196 need to be passed as an emergency measure so as to ensure timely filing with the Summit County Board of Elections by February 6, 2019 for placement on the May 7, 2019 ballot?

Short Answer: No. It is not necessary for Resolution No. 18-196 to become *effective* prior to the election filing deadline. City Council need only to *pass* Resolution No. 18-196 as a standard measure prior to the filing deadline.

Nevertheless, out of an abundance of caution and appropriate practices, the Council should keep the emergency clause in the Resolution in the event at least five members vote in favor of passage of the Resolution. Passage as an emergency simply avoids any question being raised with respect to the passage, effective date and timely filing of the Resolution with the Board of Elections.

Background

Hudson City Council introduced a resolution that, if approved, would authorize placing an issue for an advisory election on the May 7, 2019 ballot (the “Resolution”). The Resolution proposes an advisory election that seeks the opinion of the voters of Hudson on whether the City of Hudson should continue with the redevelopment of the Downtown Phase II area (the “Advisory Election”). The Resolution has been read twice at two different Council meetings. Unless the three-reading rule is suspended by a vote of Council, legislation must be read at three separate Council meetings prior to its passage.

Upon passage as a standard measure, legislation generally goes into effect thirty days after it is filed with the Mayor. If the legislation is passed as an emergency measure necessary for the immediate preservation of the public peace, health, or safety of the City of Hudson, then that legislation is immediately effective. The filing deadline for the May 7, 2019 election is February 6, 2019. City Council is set to vote on the Resolution at the regular meeting scheduled for January 22, 2019. January 22, 2019 is less than thirty days from the February 6 filing deadline for the May 7, 2019 election.

City Council has requested whether Resolution No. 18-196 needs to be passed as an emergency measure or as a standard measure in order to meet the Summit County Board of Elections filing

deadline. Emergency measures require an affirmative vote of five of the six currently sitting Council members to pass while a standard measure requires only a simple majority – four of the six.

Filing Deadline for Certification of the Advisory Election to the Summit County Board of Elections

Pursuant to Ohio Revised Code Section 3501.02(F)(1), “...any question or issue, except a candidacy, to be voted upon at an election shall be certified, for placement on the ballot, to the board of elections not later than four p.m. of the ninetieth day before the day of the election.”

Given Section 3501.02(F)(1), for the Advisory Election to be timely filed for the May 7, 2019 primary election, the City of Hudson must certify and submit to the Summit County Board of Elections a Council measure that authorizes the Advisory Election by four p.m. on February 6, 2019.

The Resolution Need Not Become Effective Prior to the Filing Deadline

In *State ex. rel. McCormick v. Fouts, et al.*, 103 Ohio St. 345, 132 N.E. 729 (1921), the Ohio Supreme Court held that legislation or measure need not become effective prior to the filing deadline for placement of an issue on the ballot. The legislation need only be passed by the legislative authority prior to the filing deadline.

The *Fouts* holding makes it clear that legislation seeking to send an issue to the ballot must only be passed, certified as passed by the City, and then delivered to the board of elections prior to the expiration of the filing deadline – it need not also become effective.

Projected Cost to the City of Hudson for the May 7, 2019 Election

The Summit County Board of Elections has projected that the election contemplated by Resolution No. 18-196 will cost the City of Hudson between \$18,000 and \$23,000. Notably, this cost is significantly less than if the City needed to hold a special election outside of a previously scheduled Summit County election date. In the case of a special election, the City is responsible for all of the costs incurred by the Summit County Board of Election in administering the special election.

An Alternative Reason that the Resolution, if Passed by Four Votes, May be Certified and Filed with the Board of Elections is that the Measure is an Administrative Action, Not Legislative, and, Therefore, Need Not Wait Thirty Days to Become Effective.

The Ohio Supreme Court has clearly held over the past several years that actions taken by local municipal councils, whether by resolution or ordinance, can be distinguished between legislative action or administrative action for the purpose of determining whether the electorate of the municipality have the right of referendum on the action taken. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181, paragraph two of the syllabus (1998); *State ex rel. City of Upper Arlington v. Franklin County Board of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093, 895 N.E.2d 177, ¶20, quoting *State ex rel. Oberlin Citizens for Responsible Development v. Talarico*, 106 Ohio St.3d 481, 836 N.E.2d 529, 2005-Ohio-5061, ¶22.

Article II, §1(f), of the Ohio Constitution limits the referendum power to legislative action:

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.

(Emphasis added).

Based on the foregoing, the question of whether the Resolution is subject to referendum depends on whether the action is legislative or administrative as follows:

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. City of Fairview Park, 13 Ohio St.2d 1, 233 N.E.2d 500, paragraph two of the syllabus (1968). Citing *Donnelly, supra*, the Ohio Supreme Court explained: "...the test requires an examination of *the nature of the action taken, rather than the mere form* in which it is taken." *Buckeye Community Hope Foundation, supra*, at 82 Ohio St.3d at 544.

In *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, this Court cited to McQuillin, *The Law of Municipal Corporations*, to further define what constitutes legislative action versus administrative action:

Moreover, '[a]ctions 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*.' 5 McQuillin, *The Law of Municipal Corporations* (3d Rev. Ed.2004) 407, Section 16:54. In addition, 'an act or resolution constituting a declaration of public purpose and making provision for the ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body.' *Id.* at 411. (Emphasis added)

Id. at ¶44. In addition, for an action to be legislative, it must create new law, be permanent in nature, and be of general application. *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 385 (Ak. 2014).

The significance in this situation of the legislative versus administrative distinction and whether a council measure is subject to a citizen referendum is that the purpose of the thirty-day waiting period for legislation to become effective after passage pursuant to Ohio Revised Code §705.16 (A) and §731.29 is that it provides the municipality's electors thirty days to draft a referendum petition, circulate the petition to obtain the required minimum number of valid signatures, and timely file it with the proper officer of the municipality within the thirty-day deadline from passage of the legislation as provided by Ohio Revised Code §731.29. Here, since the Resolution is clearly administrative action by the Hudson Council, not legislative action, the thirty-day waiting period for it going into effect is neither necessary nor required. The Resolution is simply executing or administering the Ohio Revised Code provisions for submitting an issue to the ballot. R.C. §3501.02 (F)(1).

Pursuant to the foregoing analysis, there is no reason that passage of the Resolution by the minimum number of four votes is not sufficient to timely file a certified copy of the Resolution with the Board of Elections.

Conclusion

For the foregoing reasons, Resolution No. 18-196 need only be passed by Hudson City Council as a standard measure prior to its delivery to Summit County Board of Elections – regardless of the effective date of the Resolution. Nevertheless, out of an abundance of caution and appropriate practices, the Council should keep the emergency clause in the Resolution in the event at least five members vote in favor of passage of the Resolution. Passage as an emergency measure simply avoids any question being raised with respect to the passage, effective date and timely filing of the Resolution with the Board of Elections.