



*Via Electronic Mail*

April 25, 2023

LaVera Scott, Director  
Tim Monaco, Deputy Director  
Lucas County Board of Elections  
3737 W. Sylvania Ave., Suite 121  
Toledo, OH 43623

Re: Tie Vote Regarding the Referendum on a Conditional Use Permit for an Amphitheater

Dear Director Scott and Deputy Director Monaco,

On April 4, 2023, the Lucas County Board of Elections held a regular board meeting to discuss several matters, including the question of whether to include a proposed Waterville Referendum Petition on the upcoming November 7, 2023 General Election ballot. During this meeting, it is my understanding that several interested parties were present to give testimony and submit briefs on whether the referendum could proceed to a public vote. At the conclusion of the presentation of evidence, the Board voted on the following motion made by Board Member Dawn Christen:

“[T]hat the Board find that [Waterville City Council] Ordinance 10-22 is legislative in nature and we approve the Waterville Referendum Petition to go on the ballot for November 7<sup>th</sup>, 2023.”

The resulting vote ended in a tie, with Board Members Kurt M. Young and Dawn Christen voting “yes” and Board Chairman Richard Schoen and Board Member Donald R. Miller voting “no.” Fourteen days later, on April 18, the Board of Elections certified this tie vote to my Office in accordance with Ohio Revised Code 3501.11(X) and Chapter 2 of the Ohio Election Official Manual. As required by the Revised Code, the Board also submitted substantial position statements and supporting evidence to consider.

Allow me to clarify at the outset that the question before my Office does not relate to the arguments for or against the underlying matter, specifically the development of an outdoor entertainment facility in the City of Waterville. The opinion stated in this letter applies only to the question of whether the city council’s approval of this development constitutes a legislative action that may be subjected to a vote of the people by referendum.

**1. Background on the Waterville Referendum Petition**

On November 28, 2022, the City of Waterville issued Ordinance 10-22, granting a Conditional Use Permit to DFG Waterville Landing LLC and HB Concerts permitting the operation of an outdoor entertainment facility (i.e., an amphitheater). Condition 8 in the permit states:

The developer/operator agrees to and will cooperate with the City of Waterville in the

establishment of an “Admission Tax”, as provided under the Ohio Revised Code, to offset any indirect costs incurred by the City due to the operation of the amphitheater site. Upon request, the developer/operator agrees to provide financial information to the City to verify the accuracy of admission tax receipts submitted to the City.

In response to the November 28, 2022 meeting, opponents of the amphitheater gathered signatures from registered voters in the City of Waterville to place a referendum issue on the November 7, 2023 General Election ballot, seeking to overturn Ordinance 10-22 (the “Waterville Referendum Petition”). On December 21, 2022, the Waterville Referendum Petition was submitted to the Waterville City Council with a total of 952 valid signatures from registered voters in the City of Waterville (i.e., more than 20 percent of the city’s currently registered voters).<sup>1</sup>

## **2. Availability of Referendums**

Ohio has a long history of allowing citizens to object to and oppose the enactment of new legislation through initiative and referendum. Article II, Section 1f of the Ohio Constitution states the legislative powers of municipalities:

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.

Section 731.29 of the Ohio Revised Code provides, “Any Ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum...” Further, the City of Waterville’s Charter, Section 9.02, also includes Referendum powers:

Within thirty days after the final passage by Council of any ordinance or resolution ... a petition signed by electors of the Municipality not less in number than twenty percent (20%) of the total electors voting at the last regular municipal election may be filed with Council requesting that the ordinance or resolution be repealed or submitted to a vote of the electors.

The Ohio Supreme Court recognizes that “the constitutional right of citizens to referendum is of paramount importance.” *State ex rel. Ohio General Assembly v. Brunner*, 115 Ohio St. 3d 103. However, not all actions taken by a legislative body are subject to referendum. In clarifying whether a local referendum may be placed on the ballot, the Ohio Supreme Court has stated:

By its terms, Article II, Section 1f, [Ohio Constitution] limits the referendum and initiative power to questions the municipality is ‘authorized by law to control by

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<sup>1</sup> Notably, the Waterville Referendum Petition includes only Ordinance 10-22 and does not reference Ordinance 12-22. I will note that Ordinance 12-22 was passed at the same November 28, 2022 meeting during which Ordinance 10-22 was passed. Moreover, I will also note that Board Members Young and Christen have urged me to look at the Waterville Referendum Petition as a combination of both ordinances. However, as the Waterville Referendum Petition references only Ordinance 10-22, and as I have neither found nor been provided with legal authority permitting me to expand the scope of a referendum petition at this stage, I cannot take any evidence related to Ordinance 12-22 into account when making this decision. Accordingly, my decision is focused solely on the Waterville Referendum Petition as it relates to Ordinance 10-22.

legislative action.’ See *Myers v. Schiering*, 27 Ohio St.2d 11, 271 N.E.2d 864 (1971)... Because citizens of a municipality cannot exercise referendum powers greater than what the Constitution affords, an administrative action is beyond the scope of the referendum power...

*State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St. 3d 487, 491.

Accordingly, while the City of Waterville’s Charter Section 9.02 is slightly different from R.C. § 731.29, it cannot expand the rights of citizens to initiate a referendum against administrative acts. For those actions taken by a legislative body that are administrative in nature, affected citizens who disagree with an administrative action have the right to file an administrative appeal in their local common pleas court in order for their voices to be heard.

### 3. Administrative vs. Legislative Acts

The test for determining whether an action is legislative or administrative is “whether the action taken is one enacting a law, ordinance, or regulation, or executing a law, ordinance, or regulation already in existence.” *Donnelly v. Fairview Park*, 13 Ohio St.2d 1 (1968); See also, [Columbiana County Tie Vote Regarding Protest Against Referendum](#) (2020) (where the Secretary of State was asked to break a tie on a referendum and determined that the matter was administrative in nature and was therefore not subject to referendum). **Thus, city ordinances that adopt final development plans pursuant to preexisting planned community development, without changing the zoning, are administrative acts that are not subject to referendum.** *State ex rel. Comm. for the Referendum of Ordinance No. 3844-02 v. Norris*, 99 Ohio St.3d 336 (2003). In fact, the Supreme Court has made clear that the board of elections is “required to withhold the initiative and referendum from the ballot” in such cases. *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481 (2005) (Because it arises from the same constitutional source, the power of initiative is subject to the same limitation as the power of referendum.).

**Further, the Supreme Court has held that the granting of a conditional use permit is an administrative action in and of itself and is therefore not subject to referendum.** *State ex rel. Marsalek v. S. Euclid City Council*, 111 Ohio St.3d 163 (2005). However, the Ohio Supreme Court has also stated that certain inclusions of conditions that establish new taxes would be considered legislative and may be subject to referendum. See *State ex rel. Langhenry v. Britt*, 151 Ohio St. 3d 227 (2017).

### 4. Ordinance 10-22 is Administrative and Not Subject to Referendum

In the current tie vote, the arguments presented to me revolve around Condition 8 of the Conditional Use Permit. While it may appear that Condition 8 establishes a new Admission Tax, a more careful reading reveals otherwise. The council’s approved permit establishes no timeline for the establishment of a tax and includes no proposed terms of taxation that would allow the council’s action to be considered a legislative rather than administrative action. Put simply, instead of *establishing* an Admission Tax, Condition 8 simply states that the developer will “cooperate” with the City in the establishment of a tax.

By adopting the language in Condition 8, the Waterville City Council did not perform a legislative act but instead set a merely aspirational goal. To confuse matters further, the Waterville City Council established an Admission Tax later in the same meeting under a separate ordinance.

Whether intentional or not, these decisions have real consequences for the citizens of Waterville.

In my role as Ohio's Secretary of State, I have consistently erred on the side of granting citizens ballot access whenever possible. However, when the law is clear on a matter, my sworn duty requires me to uphold and faithfully execute that law. In this case, I believe the law is clear. **Accordingly, it is my view that all evidence provided to my Office indicates that Ordinance 10-22 is administrative in nature and not subject to referendum. As such, I am breaking the tie in favor of the position put forward by Chairman Richard Schoen and Board Member Donald R. Miller against approving the Waterville Referendum Petition to put the matter on the ballot in the November 7, 2023 General Election.**

#### **5. The Current Lucas County Court of Common Pleas Case**

Lastly, I will note that I am aware of the current administrative appeal filed in the Lucas County Court of Common Pleas, Case No. CI-22-4696, with the Honorable Judge Navarre presiding. It is my understanding that the case involves many of the same parties that presented or opposed the Waterville Referendum Petition to the Board and is related to the manner in which the Waterville City Council issued the Conditional Use Permit. As the issuance of a Conditional Use Permit is an administrative matter, the Court of Common Pleas is the appropriate forum for citizens to voice their concerns.

While this pending case did not impact my decision on the Board's tie vote, I will note that the outcome of the administrative appeal may have future implications on this matter. Accordingly, the Board may need to revisit this matter in the future. Should you have any additional questions, please do not hesitate to contact my Office.

Yours in service,



Frank LaRose  
Ohio Secretary of State

cc: Richard Schoen, Chairman of the Lucas County Board of Elections  
Kurt M. Young, Board Member  
Dawn Christen, Board Member  
Donald R. Miller, Board Member