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By Fax and Courier

Mr. John P. Luskin, Esq.
Willoughby Hills Law Director
5252 Meadow Wood Blvd., Suite 121
Cleveland, Ohio 44124

Re: Willoughby Hills Ord. No. 2007-67

Dear Mr. Luskin:

The City of Willoughby Hills passed the above captioned Ordinance on August 16, 2007 asking me to prepare an Advisory Election Ballot Issue. I received the materials relating to the Ordinance, including the Citizen Petition, on August 17, 2007 and immediately began to research the matter. I further met with you and the Mayor on August 23, 2007 and I have had some discussions with Councilman Christopher L. Biro on this matter as well. I have researched the issue in depth and discussed the proposed advisory election with the Lake County Board of Elections.

For the reasons discussed below, it is my opinion that an Advisory Election on this subject, at this time, is not in the best interests of the City of Willoughby Hills or its citizens, including those citizens most heavily impacted by any proposed runway extension. However in the event that the City still determines to put the proposal on the ballot, I have prepared language that I believe is most appropriate for such election.

Advisory Elections in General

Statutory Basis for Advisory Elections

Under the Ohio Revised Code the only measures which are properly presented to the voters are measures which accomplish some legislative purpose, such as that accomplished by the passage of an ordinance. As the Cuyahoga County Court of Appeals held in a similar case, "costly election machinery cannot be used by legislative bodies to determine community attitudes and sentiments on public issues." *State, ex rel. Cleveland City Council v. Cuyahoga Cty. Bd. Of Elections* (1974), 40 Ohio App.2d 299 at 278.¹

In that case the Cleveland City Council sought an election on whether or not there should be city-wide laws requiring the registration of firearms. The court found that such a ballot issue was improper.

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¹ I provided you with copies of all cases cited herein at our meeting on August 22nd.

While statutes do permit petitions to be filed requiring adoption of a specific ordinance, in this case Willoughby Hills and its citizens are really asking for the voters to express their *opinions* on the potential expansion of Cuyahoga County Airport. There is no authority within the statutory framework of Ohio Election Law that would permit such an opinion poll.

Constitutional Basis for Advisory Elections

Ohio's Constitution does contain a provision pertaining to the right of home rule by charter municipalities:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

A 1991 Ohio Supreme Court case, *State ex rel. City of Bedford* (1991), 62 Ohio St.3d 17 did hold that it was proper for a charter municipality, like Willoughby Hills, to put on the ballot the following question:

Should subsequent charter amendments be made for the submission to the voters which change the Charter of the City of Bedford, Ohio to a Mayor-Council form of government from a Manager-Council form of government?

The Ohio Supreme Court decided that it was proper for such a question to be placed upon the ballot as an "advisory election." However a careful reading of that case, and an analysis of the underlying role of advisory elections in the adoption of municipal charters, leads me to believe that it is still a close question as to whether it is meet and proper to hold an advisory election on the subject of the expansion of a county airport that not owned or managed by the municipality. In other words, because the City of Willoughby Hills cannot directly decide what expansion, if any, should occur at the airport, since the airport is controlled by the Cuyahoga County Commissioners, there is simply no basis for the City to adopt any specific legislation that would implement the actual matter submitted.

The review of and comment upon any proposed airport improvements is an administrative matter rather than a legislative matter. While the legislative body can express its concern and opinion by way of resolution, the actual implementation of any such expansion is beyond its control.

This does not mean that individual citizens and the City of Willoughby Hills do not continue to have the power and right to oppose any threatened airport improvement project that may interfere with the rights of the citizens of Willoughby Hills to use and enjoy their property free from interference or nuisance, but only that they lack the legislative power to directly control any such proposed project.

For example, the citizens of the City, and the Council, all have the constitutionally guaranteed right to express their opinions on any matter of public interest. Council could pass a resolution condemning or approving the war in Iraq, and citizens can likewise speak freely on the matter. But it would not be a proper exercise of power by even a charter municipality acting

under the home rule provisions of Ohio's Constitution to put the involvement of the United States in Iraq up for a vote of the citizens of Willoughby Hills.

In my opinion that fundamental bases for the decision in *City of Bedford*, discussed above, were 1) the issue presented involved the adoption of a city charter, and advisory elections are permitted with respect to that type of issue, and 2) the issue was one within the legislative powers of the City as delegated to it by the Ohio Constitution.

It has now been more than 15 years since the decision in *City of Bedford*. While the Ohio Supreme Court continues to uphold the rights of communities to utilize home rule in adopting legislation, in my opinion if the Court were to review this particular issue it is not likely that it would permit the state election machinery to be used for purposes that are outside the authority of the municipality.

Willoughby Hills Charter as Basis for Advisory Elections

The Charter of Willoughby Hills does preserve the rights of its citizens to propose any legislative measures by initiative petition. Article VIII §8.22 Charter of the City of Willoughby Hills. But as pointed out above, the expansion of the airport is beyond control by legislative measures.

Advisory Election on this Specific Issue

From a practical point of view, I also do not believe it is in the best interests of the citizens of Willoughby Hills to subject this matter to comment by the public. The City of Willoughby Hills owes a duty to all of its citizens, even those in a minority. Even if only ten percent of the electorate voted to oppose airport expansion, it would still be the duty and obligation of the Willoughby Hills government to review and comment upon any airport proposals that stood to substantially harm its citizens.

Making the airport expansion a ballot issue could also damage opponents of airport expansion by eliminating the ability of the City to maintain objectivity. If Cuyahoga County decides to continue with a revised Airport Layout Plan (ALP) that calls for runway extensions, there will no doubt be alternatives presented. Some alternatives may cause more harm to Willoughby Hills citizens than other alternatives. It may be in the best interests of the citizens for a particular alternative to be recommended as the lesser of two evils if it is obvious that one of the alternatives will be adopted in spite of opposition. Similarly, the City may lose credibility with the FAA or the Airport Operator if the City is perceived as opposing airport expansion even if the net result is not negative. In other words, the impacts of any proposed expansion must be carefully considered before the City can or should take a particular position. Until and unless a proposed improvement is surfaced and reviewed it is not possible to know, in advance, whether or not the proposal is or is not in the best interests of the citizens.

Therefore it is my opinion that the City best maintains its ability to protect its citizens from the negative impacts of airport expansion by not placing the matter on the ballot for an Advisory Election.

Advisory Election Ballot language

Should the City determine to go ahead with ballot language, I have prepared a menu of language options. Because of the complexities of the issue it is difficult to be precise while still using simple and understandable language. There is a risk of confusion in the electorate. Therefore some compromise between accuracy and comprehension must be made.

1. Are you in favor of planned long term growth of Cuyahoga County Airport? *The implication of this question may be that if growth is planned it will be planned in a proper way to avoid negative impacts. Such an implication may not be justified and may result in some citizens who would otherwise oppose expansion voting in favor of the issue.*
2. Should the City of Willoughby Hills oppose expansion of Cuyahoga County Airport? *Expansion, per se, may result in negative impacts on the citizens and may not implicate runway extension.*
3. Should the City of Willoughby Hills oppose expansion of Cuyahoga County Airport if such expansion will result in increased negative environmental impacts upon residents of WH? *This question is better. But from an airport planning standpoint the FAA always takes the position that any airport improvement projects that cause negative environmental impacts must have mitigation.*
4. Should the City of Willoughby Hills oppose expansion of Cuyahoga County Airport if such expansion will result in unmitigated negative environmental impacts upon residents of WH? *This question addresses mitigation. But mitigation by the FAA standards can still leave citizens with significant impacts. And FAA mitigation only is required to the 65 DNL metric, which can leave many people exposed to excessive noise.*
5. Should the City of Willoughby Hills oppose extension of the runway at Cuyahoga County Airport? *This is nice and simple. But it does not address the issue of airport extensions that do not implicate negative unmitigated environmental impacts. And it could be ambiguous if, for example, the Airport agreed to extend the runway by adding special EMAS material at either end while moving the thresholds to the west, all of which would materially improve things for the citizens of Willoughby Hills.*
6. Should the City of Willoughby Hills oppose extension of the runway at Cuyahoga County Airport if such extension will result in increased negative environmental impacts upon residents of WH? *Same comments as #3 and #5.*
7. Should the City of Willoughby Hills oppose extension of the runway at Cuyahoga County Airport if such extension will result in unmitigated negative environmental impacts upon residents of WH? *Same comments as #4 and #5.*

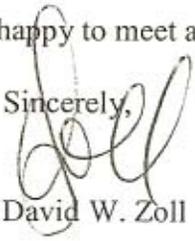
8. Should the City of Willoughby Hills oppose modification of the Cuyahoga County Airport Airport Layout Plan? Same comments as #2.
9. Should the City of Willoughby Hills oppose modification of the Cuyahoga County Airport Airport Layout Plan if such modifications will result in increased environmental impacts upon residents of WH? Same comments as #3.
10. Should the City of Willoughby Hills oppose modification of the Cuyahoga County Airport Airport Layout Plan if such modifications will result in unmitigated environmental impacts upon residents of WH? Same comments as #4.
11. Should the City of Willoughby Hills oppose modification of the Cuyahoga County Airport Airport Layout Plan if such modifications include extending the current useable runway length? This is a pretty good statement because it addresses only extension of useable runway length. But there is still the predicament expressed in the comments to #5. And if the ALP modification is approved, it says nothing about continued opposition to any future efforts to oppose actual construction of the runway.
12. Should the City of Willoughby Hills oppose modification of the Cuyahoga County Airport Airport Layout Plan if such modifications include extending the current useable runway length, if such extensions will result in increased environmental impacts upon residents of WH? Same comments as #3, #5 and #11.
13. Should the City of Willoughby Hills oppose modification of the Cuyahoga County Airport Airport Layout Plan if such modifications include extending the current useable runway length, if such extensions will result in unmitigated environmental impacts upon residents of WH? Same comments as #4, #5 and #11

In my opinion, if the City is determined to go forward with the ballot issue the best language is #5 above. But I think the City maintains its maximum flexibility and power to protect its citizens and preserve the environment by not placing this issue on the ballot.

In discussions with the Lake County Board of Elections it appears that the actual ballot issue must be submitted no later than September 7, 2007.

Should you have any questions I am happy to meet and confer at your convenience.

Sincerely,


David W. Zoll

DWZ:dwz

cc: Mayor Kenneth A. Lorenz

Christopher L. Biro, Chrmn. Ad hoc Committee Against Airport Expansion
Robert M. Weger, Pres. Council