
REPORT TO THE BOARD OF ALDERMEN

TO: MAYOR SANGER; BOARD OF ALDERMEN
FROM: JUNE FRAZIER, CITY CLERK
DATE: FEBRUARY 14, 2017
SUBJECT: FACTS & FINDINGS ON INITIATIVE PETITION

Introduction

Section 5 of Article XII of the Clayton City Charter provides that within 10 days after receipt of a petition for initiative the city clerk shall determine whether each paper of the petition has a proper statement of the circulator and whether the petition is signed by a sufficient number of electors. The Charter also specifies that the city clerk is to determine if a petition is insufficient and, if so, to set forth the particulars in which it is defective. The city clerk is to certify the results to the Board of Aldermen at its next regular meeting. This communication is forwarded to you in compliance with these provisions of the Charter.

I wish to report that on January 31, 2017, I received documents purporting to constitute petitions for an initiated ordinance and submit this report for your meeting of February 14, 2017, which is the first regular meeting of the Board of Aldermen since my receipt of the documents.

Executive Summary.

The petition materials submitted to me contain an adequate number of signatures of electors of the City for submission of an initiative ordinance. But the materials do not contain a sufficient number of signatures of registered qualified electors of the City for submission of a charter amendment.

The petition is insufficient to constitute a valid initiative petition in at least the following respects:

- It is, in fact, a referendum effort and violates the form, timing and subject requirements for referendum under the Clayton Charter.

- The petition also endeavors to amend the Clayton Charter but violates the form and signature requirements for charter amendments.
- The petition does not comply with Article XII, Section 1 of the Clayton Charter governing initiative in that the measure it proposes conflicts with the Charter.
- The petition does not comply with Article XII, Section 1 of the Clayton Charter governing initiative in that the measure it proposes is not exclusively legislative in character.
- The petition does not comply with Article XII, Section 1 of the Clayton Charter governing initiative in that the measure it proposes violates the procedural requirements for such ordinances under the Clayton Charter and Missouri statutes.
- The petition does not comply with Article XII, Section 1 of the Clayton Charter governing initiative in that the measure proposes a voter approval requirement that is unconstitutional.

It is my conclusion that the petition is insufficient to require submission of the measure to the voters of the City of Clayton.

Analysis

Article XII, Section 1 of the City Charter contains the provisions governing the initiative process for adoption of an ordinance by the electors of the City. The first sentence of the cited Section establishes and defines the limits of the initiative power as follows:

"The electors shall have power to propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes, and to adopt or reject the same at the polls, such power to be known as the initiative. Any initiated ordinance may be submitted to the board of aldermen by a petition signed by electors of the city equal in number to at least ten percent of the total number of votes cast for the office of mayor in the last election for mayor."

The initiative petition now presented to the Clayton Board of Aldermen is defective and proposes the enactment of an ordinance that, on its face, violates the U.S. and Missouri Constitution, Missouri Statutes and the Clayton City Charter. For these reasons, applicable law does not allow the Board of Aldermen to enact the measure proposed by this petition. The

electors of the city also lack the authority to enact the measure at an election.

The petition is insufficient in at least the following respects.

1. The petition is, in the express language of the sponsors and in actual fact, a referendum disguised and misrepresented as an initiative.
 - *"Our political action committee was founded by four people: two residents of Clayton who do not live anywhere near **the Centene project**, one who lives in Olivette and one in West County. We are not NIMBYs. We are concerned citizens who want Clayton residents to have the right to vote on **this project**."*

Letter to the Editor by Fred Berger, St. Louis Post-Dispatch, February 8, 2017.

- *"The electors shall have power to approve or reject at the polls any ordinance passed by the board of aldermen, or submitted by the board to a vote of the electors, **except the following: ordinances passed on the day of their introduction** as provided in the second paragraph of Section 8 of Article II of this charter, ordinances levying taxes, and ordinances for the issuance of special tax bills. Such power shall be known as the referendum. **Within fifteen days after the date on which the board of aldermen has adopted an ordinance which is subject to referendum**, a petition signed by electors of the city equal in number to at least ten percent of the total number of votes cast for the office of mayor in the last election for mayor may be filed with the city clerk, requesting that such ordinance be either repealed or submitted to a vote of the electors."*

Article XII, Section 2, Clayton City Charter

. . . every referendum petition shall contain the full title of the ordinance referred . . ."

Article XII, Section 4, Clayton City Charter

The petition now before the Board calls for submission to the voters of prior zoning enactments of the Board of Aldermen and requires voter approval in order for those ordinances to continue in force. Such a

process is in every respect indistinguishable from the referendum process described in the Charter.

The petition is defective in that (a) it was not filed within the time required by the Charter; and (b) it does not contain the titles of any of the prior ordinances to be acted upon by the voters and, (c) it would subject prior ordinances passed on the day of their introduction to voter approval when such enactments are barred from referral by the Clayton Charter.

2. The proposed measure constitutes a *de facto* effort to amend the Clayton Charter without complying with the procedures required for charter amendments under both the Missouri Constitution and the Clayton Charter.

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Article XII, Section 2, Clayton City Charter

*"If a **majority of the electors voting** on a referred ordinance shall vote against the ordinance, it shall thereupon be repealed."*

Article XII, Section 10, Clayton City Charter

- *"The commission shall **hold a public hearing on each application for amendments, modifications, or revisions of the zoning ordinance**, and shall forward such application to the board of aldermen with its recommendations thereon. **For at least seven days immediately prior to the date of the public hearing** on any proposed amendment, modification, or revision, the commission shall cause **public notices to be***

***maintained in at least five public places**, two of which shall be upon the property which would be affected by the proposed change in the zoning ordinance. **At least ten days prior to such hearing**, the commission **shall mail a written notice to the last known place of abode of the owners of all property**, according to current city tax records, **adjacent to or lying within one hundred and eighty-five feet of all boundaries of the property under consideration**. In addition, the commission shall cause **notice of the hearing to be published at least two times in a newspaper** printed or published in the city, or if there be no newspaper printed or published in the city, then in any daily newspaper of general circulation in the city. The first publication shall be at least fifteen days prior to the date of the hearing. All such notices shall describe briefly the proposed amendment, modification, or revision and indicate the time and place of the hearing. In the event of a general revision of the zoning ordinance such notices shall not be required."*

Article IX, Section 3, Clayton City Charter

*"Amendments to this charter may be framed and submitted to the electors . . . by petition of not less than **ten percent of the registered qualified electors** of the city, filed with the city clerk, **setting forth the proposed amendment**."*

Article XIII, Section 16, Clayton City Charter
and
Article VI, Section 20, Missouri Constitution

The petition necessarily amends the Clayton Charter by changing the prescribed process for adopting zoning measures by adding mandatory referral to the electorate, and by eliminating the public notice and hearing requirements that are conditions precedent to revisions to zoning ordinances. It also eliminates the exemption from referral for zoning ordinances passed on the day of introduction and the time limit for seeking referral, and changes the standard for voter approval of referred ordinances.

The petition is defective in that (a) it does not set forth the charter amendments it proposes, and (b) it is not signed by the number of registered qualified electors required by the Missouri Constitution and the Clayton Charter.

3. If the petition is not viewed as proposing submission of amendments to the Clayton Charter, then it is nonetheless insufficient and invalid in that it proposes to accomplish by ordinance what the Clayton Charter and the Missouri Constitution reserve to the exclusive province of the voters: changing the charter (in the particulars described above). If the petition is not an inadequate and insufficient putative charter amendment as discussed above, then the purported "ordinance" it proposes is a nullity and is not an "ordinance" within the meaning of Article XII, Section 1 of the Clayton Charter authorizing enactment of ordinances by initiative because either (a) the Charter cannot be amended by an ordinance, or conversely, (b) it is an inadequate and invalid ordinance because it is in conflict with the Clayton Charter.

4. The measure set out in the petition says:

"the city of Clayton shall not . . . issue any permit . . . building permit or any other permit for development or redevelopment of any building or buildings [having] more than ten stories . . . a height of more than two hundred feet . . . or have more than two hundred thousand square feet, without the approval of the electors . . . equal to or in excess of 51% of the total number of votes cast by registered voters in the city of Clayton in the last United States presidential election."

The voter approval requirement applies to any:

". . . construction projects . . . that have not on or before December 31, 2016, for all phases of the . . . construction received all . . . construction permits, building permits . . . and all other permits required by the city. . . in final form."

There are approximately 40 existing or proposed buildings in Clayton that meet at least one of the three criteria in the proposed measure. They include existing hotels (Ritz Carlton, Sheraton) residential buildings (Clayton on the Park, Maryland Walk, the Plaza in Clayton, The Crescent, 212 S. Meramec, etc.) as well as several office buildings. Obviously, any new "construction projects" proposed at any time in the future in any of those buildings to "redevelop" portions or units within the structure will not have "received . . . all building permits" prior to December 31, 2016.

The proposed measure would require that no building permit, electrical permit, plumbing permit or, indeed, occupancy permit could be issued until and unless the question of each permit is separately

submitted to the electorate and approved by enough voters to equal to 51% of the total votes cast in the City in the most recent presidential election.

Missouri law is that the power of initiative and referendum apply only to ordinances that are legislative in character not administrative. The proposed measure would require referral to the voters of multiple administrative matters as described above. The petition is, therefore, insufficient and invalid in that the purported "ordinance" proposed is a nullity and is not an "ordinance" within the meaning of Article XII, Section 1 of the Clayton Charter authorizing enactment of ordinances by initiative since it is not restricted to legislative matters.

5. Missouri courts have declared that a proposed initiative ordinance that would amend existing zoning ordinances without following the public hearing, published notice and Plan Commission review procedures mandated by state law and local charter is "unlawful and void." The petition presented here would amend numerous existing zoning ordinances of Clayton. None of the pre-adoption procedures required by the Charter and state law are provided for in the measure as presented, and none of them have been satisfied as to the measure itself. The initiative power is no more expansive than the legislative power of the Board of Aldermen. Just as the Board of Aldermen cannot enact an ordinance without complying with mandatory procedures, the people cannot enact the measure described in this petition without fulfilling the conditions precedent to enactment. The petition is, therefore, insufficient and invalid in that the purported "ordinance" proposed is a nullity and is not an "ordinance" within the meaning of Article XII, Section 1 of the Clayton Charter authorizing enactment of ordinances by initiative since the procedures required prior to enactment of an ordinance are not provided for.
6. The initiative violates due process in that it affects vested rights of property owners who have already built or made an investment in the type of buildings described in the proposed enactment and who may want to renovate or make repairs requiring a permit in the future. It also violates due process in that it affects vested development rights of property owners who are now in the process of acting on prior zoning authorizations of the City.

As stated above, the initiative power is no more expansive than the legislative power of the Board of Aldermen. Just as the Board of Aldermen cannot enact an ordinance which violates the Constitution neither can the electorate. The petition is, therefore, insufficient and

invalid in that the purported "ordinance" proposed is a nullity and is not an "ordinance" within the meaning of Article XII, Section 1 of the Clayton Charter authorizing enactment of ordinances by initiative since the proposed measure is not a lawful exercise of the legislative power.

7. The voter approval requirement of the proposed measure quoted above (approval equal in number to 51% of total votes cast for president in the city) violates the constitutional mandate for one-person-one-vote and majority rule. A measure referred to voters will not be approved even if a majority of voters vote for it unless the yes votes reach 51% of the presidential vote. Conversely, under the plain language of the proposal, a measure will be approved even if a majority of voters vote against it so long as the number of yes votes reaches 51% of the total presidential vote.

Establishing an approval standard based on voter turnout in a prior election also results in a constitutional anomaly in that people who do not vote on any given permit approval proposition will be "counted" as effectively voting no.

As noted above, the initiative power is no more expansive than the legislative power of the Board of Aldermen. Just as the Board of Aldermen cannot enact an ordinance which violates the Constitution neither can the electorate. The petition is, therefore, insufficient and invalid in that the purported "ordinance" proposed is a nullity and is not an "ordinance" within the meaning of Article XII, Section 1 of the Clayton Charter authorizing enactment of ordinances by initiative since the proposed measure establishes a voter approval standard which does not take into account the number of votes cast or the will of the majority of participating voters contrary to the U.S. and Missouri Constitutions and the Clayton Charter.

I believe it is unnecessary for me to burden this report with further identification and analysis of the numerous additional deficiencies, inadequacies and illegalities which burden the petition now before the Board of Aldermen.

Despite the invalidity of the petition for initiative purposes I did, as required by Article XII, Section 1, of the City Charter undertake to assess whether the material submitted to me bears an adequate number of signatures. An initiative petition is required to contain signatures by electors of the city equal in number to at least 10% of the total number of votes cast for the office of mayor in the most recent mayoral election. A total of 1,813 votes

were cast for the office of mayor in the most recent mayoral election, April 5, 2016. 10% of that total is 181. Thus, at least 181 signatures of electors of the city are required for an initiative petition to be numerically sufficient.

The Board of Election Commissioners has determined that the petition purporting to submit an initiative ordinance contains 450 valid signatures of Clayton electors.

This petition satisfies the numerical requirement for an initiative petition proposing the adoption of an ordinance by the electors of the City under Article XII, Section 1 of the Clayton Charter.

Records establish that there were 8,767 registered qualified electors in the City of Clayton at the April 2016 election. 10% of that total is 877. Thus, signatures of at least 877 registered qualified electors are required for a valid petition amending the Clayton Charter.

The petition does not satisfy the numerical requirement for a petition proposing amendments to the Clayton City Charter as required by Article XIII, Section 16, Clayton Charter and Article VI, Section 20, of the Missouri Constitution.

Conclusion

The initiated ordinance addressed in the petition filed with my office is not subject to the power of initiative or voter referral. The Clayton City Charter does not require or authorize any further action on the part of the Board of Aldermen with respect to the petition in question.

Respectfully Submitted,

June Frazier, City Clerk