



1851 Center for Constitutional Law

April 4, 2011

Mayor William Duncan
Members of Oakwood City Council
City of Oakwood, Ohio
30 Park Avenue
Dayton, Ohio 45419

Mayor Duncan and Members of City Council:

This letter is to inform you that we will soon request, on behalf of your taxpayers who we represent, that your City Law Director enjoin you from further participation in or application of funds to an ideological effort to maintain the Ohio Estate Tax. If your Law Director fails to take action against you, we will take action in his place.

You *should* look to avoid this action because it will result in further public expenses, which you claim elsewhere you cannot afford to incur, by way of payment of your attorneys fees and ours. And you *can* avoid this action by immediately (1) withdrawing from the “Council/Coalition to Protect Ohio’s Communities;” (“CPOC”) (2) refraining from transmitting any public funds to the CPOC; and (3) recovering all public funds heretofore transmitted to the CPOC.

CPOC is a transparent effort, as demonstrated by the statements of its organizers, to use public funds to advocate against passage of HB 3, which would eliminate the Ohio Estate Tax for all Ohioans. This effort transgresses a number of basis limitations on your authority.

Abuse of “Regional Council of Governments” Authority

CPOC organizers rely upon the authority of R.C. 167, which permits the formation of “Regional Councils.” However, R.C. 167.08 specifically provides, *inter alia*, “contracts [pursuant to R.C. 167] may authorize the council to perform any function or render any service on behalf of such * * * municipalities * * *, which such * * * municipalities * * * may perform or render.”

Because your authority derives from Section 3, Article XVIII of the Ohio Constitution, and because that Section denies you the authority to use public funds to impose continued estate tax liability on Ohioans beyond your borders, the \$150,000 in lobbying agreements that are the centerpieces of CPOC are unlawful.

Abuse of “Home Rule” Authority

Municipalities derive their authority from Section 3, Article XVIII of the Ohio Constitution, which provides: “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.”

In *Beachwood v. Cuyahoga Cty. Bd. of Elections*,¹ the Supreme Court of Ohio explained its test for determining whether municipal legislation is “local in nature” in the following manner:

The power of local self-government granted to municipalities by Article XVIII relates solely to the government and administration of the internal affairs of the municipality * * *. Where a proceeding is such that it affects not only the municipality itself but the surrounding territory beyond its boundaries, such proceeding is no longer one which falls within the sphere of local self-government * * *. To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.

CPOC’s applies public funds to, *inter alia*, maintain R.C. 5731.02(A), which states “a tax is hereby levied on the transfer of the taxable estate, determined as provided in section 5731.14 of the Revised Code, of every person dying on or after July 1, 1968, who at the time of death was a resident of this state * * *.” Clearly these efforts have statewide implications and effects, such, as forcing Ohioans outside of your limits to pay the tax, and forcing political subdivisions outside of yours borders to maintain the tax. This is thus neither a matter of “local self government,” nor an issue confined to “within [Oakwood’s] limits.”

Abuse of “Police Power” Authority

The City of Oakwood’s police power does not permit it to apply public funds toward political efforts to continue the imposition of a controversial tax liability on Ohioans throughout the state. First, Section 3, Article XVIII explicitly forbids cities from exercises their police power beyond their borders (“*adopted and enforced within their limits*”).

However, even holding this internal limit to the side, CPOC operations transgress the external limits of your city’s police power. As the Supreme Court of Ohio has recently remarked, an “overbroad exercise of the city’s police powers” will not be upheld:

“[T]o be a valid exercise of the city's police power, the ordinance ‘must directly promote the general health, safety, welfare or morals and must be reasonable, the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in

¹ *Beachwood v. Cuyahoga Cty. Bd. of Elections* (1958), 167 Ohio St. 369, 370-371, 5 O.O.2d 6, 148 N.E.2d 921

operation, must have a real and substantial relation to such purpose and must not interfere with private rights beyond the necessities of the situation.” Essentially, to avoid violating due process, legislative action must bear a real and substantial relation to public health and welfare, and not be unreasonable or arbitrary.²

CPOC efforts, and yours, are clearly not “impartial,” and are quite clearly “unreasonable” and “arbitrary”: you have dedicated revenue derived from all of your residents towards taking a side in a hot-button political debate on which the two sides fervently disagree. Indeed, many of your own taxpayers, whose dollars you use to fund CPOC, have worked tirelessly to ensure the introduction of House Bill 3 into the Ohio General Assembly, and other Ohio cities and townships oppose your efforts.

Violation of Competitive Bidding Requirements

Your dedication of public funds to \$150,000 in no-bid contracts violates several state statutes and your own city charter. The Ohio Attorney General’s Opinions on this matter demonstrate that the establishment of a regional council of governments may not be used to circumvent competitive bidding requirements.

Compelled Subsidization of Political Speech in Violation of First Amendment

Your use of public funds to engage in ideological speech with which your citizens disagree violates their First Amendment rights.

“The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”³ The Eleventh Circuit Court of Appeals has identified as an unconstitutional infringement on free speech “compulsion of citizens to support candidates, parties, ideologies, or causes that they are against.”⁴

To this end, while federal courts have permitted local governments to speak in support of *their own* policies, they have consistently invalidated local governments’ use of public funds to advocate for or against *statewide* policies.⁵

Oblivious to these principles, you have allocated public funds, which include the tax dollars of those who find the estate tax morally abhorrent and have worked hard to defeat it, to the retention of this controversial statewide tax. This both forces our taxpayer clients to speak in a manner with which they disagree, and uses their own funds to dilute the effect of their political speech against the tax. Thus, you have violated the First Amendment rights of dissenting taxpayers.

² *Hausman v. Dayton* (1995) 73 Ohio St.3d 671, 653 N.E.2d 1190, 1995 -Ohio- 277, citing *Teegardin v. Foley* (1957), 166 Ohio St. 449, 2 O.O.2d 462, 143 N.E.2d 824, paragraph one of the syllabus. *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 28 OBR 346, 503 N.E.2d 717.

³ *Wooley v. Maynard* (1977), 430 U.S. 705, at 715, 97 S.Ct. 1428.

⁴ See *NAACP v. Hunt* (11th Cir. 1990) , 891 F.2d 1555.

⁵ See *Mountain States Legal Foundation v. Denver School District No. 1* (D. Colo. 1978), 459 F.Supp. 357, at 361.

Consequently, to avoid litigation of this dispute, you must (1) recover any public funds transmitted to “Coalition/Council to Protect Ohio’s Communities;” (2) abstain from transmitting further public funds to the same; and (3) withdraw from the same.

In the absence of written correspondence indicating that you will honor your taxpayer’s wishes, as articulated above, we intend to go forward.

Of course, you should look to avoid this litigation because (1) we take our donors’ investments seriously, and have engaged in considerable research prior to reaching the determination that your conduct is in fact unlawful; (2) you will squander your taxpayers’ dollars and resources, which you profess to be protecting, in defense of this unwise and futile conduct; and (3) we will work to enhance public understanding of your conduct for what it truly is: the taxing of your citizens for the offensive purpose of advocating the greater taxing of those same citizens.

Best Regards,

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