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February 19, 2010

Via Certified Mail Return Receipt No. 7007 0710 0004 6876 3297 and Facsimile (706-283-9668)

Judge Susan R. Sexton
Probate Court of Elbert County
Elbert County Government Complex
45 Forest Avenue
Elberton, GA 30635

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ELBERT CO. PROBATE COURT
2010 FEB 23 PM 4:47

Re: Electors' Petition for Special Election

Dear Judge Sexton:

I write this letter to you on behalf of Plant Granite, LLC as an interested party concerning the "Electors' Petition for Special Election" (hereinafter the "Petition") received by the Probate Court on February 8, 2010. The citizens group that initiated this process has widely publicized that it filed the Petition in order to try to prevent Plant Granite, LLC's proposed development of a waste-to-energy facility in Elbert County. I recently submitted an Open Records Request to your office requesting a copy of the Petition. I received a copy on February 16th and I have had the opportunity to review the contents of the Petition. This letter will serve as my client's formal objection to the filing of the Electors' Petition for Special Election.

The Petition seeks to amend an Elbert County ordinance to prohibit the development of this type of facility. As you are already aware, the Georgia Constitution provision in question requires that the "judge of the probate court shall determine the validity of such petition within sixty days of it being filed..." (Ga. Const. Art. IX, Sec. II, Para. I(b)(2)). In view of the legal authorities discussed in this letter, we respectfully submit the Probate Court should determine that the Petition is not legally valid and therefore cannot be certified, for the reason that the petition and referendum procedure in Art. IX, Sect. II, Para. I(b)(2) of the Georgia Constitution as a matter of law is available only to amend or repeal local acts, and not for citizens to seek to amend or repeal a local ordinance adopted by the local governing authority like the local ordinance at issue here, which the Petition identifies as Section 62-51 of the Code of Ordinances of Elbert County. As you know, a "local act" is legislation passed by the Georgia General Assembly to apply to or within a single County. Obviously, a local act is not the same thing as a

local ordinance adopted by the governing authority of a County. See, Mullis Tree Service v. Bibb County, 828 F. Supp. 53 (M.D. Ga. 1993) (a local ordinance is not a "local act" for purposes of Article IX, Sect. II, Para. I(b) of the Georgia Constitution). Further, the plain language of Para. I(b) refers only to amending or repealing "local acts applicable to its governing authority... ."

> The express language of the Georgia Constitution, Art. IX, §II, Para. I(b) states:
>
> Except as provided in subparagraph (c), a county may, as an incident to its home rule power, amend or repeal the local acts applicable to its governing authority by following either of the procedures hereinafter set forth:...(2) Amendments to or repeals of such local acts or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a) hereof may be initiated by a petition filed with the judge of the probate court of the county...

A literal reading of the language in subpart (2) might seem to indicate that the Electors can file a petition with the probate court to seek to amend the local ordinance at issue. However, the Georgia Supreme Court has specifically rejected this interpretation of the same language in the municipal home rule statute, O.C.G.A. §36-35-3, which has in all essentials the same purpose and intent, and the identical language as the constitutional home rule provisions for counties quoted above. The only difference is this statute deals with amending or repealing city charters, which are essentially the equivalent of local acts adopted by the legislature for particular counties. In Kemp v. City of Claxton, 269 Ga. 173 (1998), the Georgia Supreme Court held that the petition and referendum procedure in the Municipal Home Rule statute, O.C.G.A. §36-35-3, is available **only to amend or repeal local city charters, and not to amend a local government ordinance**. For the same reason, the identical language in Georgia Constitution Art. IX, Sect. II, Para. I(b) is available only to amend or repeal a local act applicable to a County, and not to amend a local Elbert County ordinance adopted by the Board of Commissioners as sought in the Petition.

As compared to the operative language in Art. IX, Sect. II, Para. I(b) quoted above in the County home rule provisions, O.C.G.A. §36-35-3(b) states "a municipal corporation may, as an incident of its home rule power, amend its charter by following either of the following procedures," set forth in subdivisions (1) and (2)." "O.C.G.A. §36-35-3(b)(2)(A) provides: Amendments to charters or amendments to or repeals of ordinances, resolutions or regulations adopted pursuant to subsection (a) of this Code section may be initiated by a petition, filed with the governing authority of the municipal corporation, containing, in cases of municipal corporations with a population of 5,000 or less, the signatures of at least 25 percent of the electors registered to vote in the last general election..." Id. at 175.

In Kemp, the mayor and city council adopted a resolution that closed two railroad crossings in interest of public safety. City residents and business owners ("Plaintiffs") sued to enjoin the Defendants from enforcing the closure resolution. The trial court granted a temporary restraining order and set a hearing to determine whether permanent injunctive relief was required. Plaintiffs then submitted petitions to amend by referendum the resolutions that allowed

for the closure of the railroad crossings. The City Clerk refused to accept the petitions or approve the form, contending that O.C.G.A. §36-35-3(b)(2), authorizes a referendum only if it affects the city charter, and because the resolutions enacted by the Mayor and City Council (Defendants) did not affect the city charter, no petition for referendum could lie. Id. at 173. The plaintiffs amended their complaint to allege that O.C.G.A. §36-35-3(b)(2) entitled them to initiate petitions for referendums to amend or repeal these resolutions, moved to add the city clerk as a defendant, and asked the court to issue a writ of mandamus to require the clerk to accept and approve the form of the requested petitions. The trial court, relying on the language quoted above in O.C.G.A. §36-35-3(b)(2)(A) referring to "amendments to or repeals of ordinances, resolutions..." found that the Plaintiffs had a right to pursue the petition for repeal or amendment of the resolution in question.

The Georgia Supreme Court reversed the trial court and held that the petition procedure of O.C.G.A. §36-35-3(b)(2) applies only to amendments to municipal charters themselves, giving controlling effect to the language "amend its charter." Consequently, the Court determined that the trial court erred in granting mandamus and in requiring that the City clerk accept and approve the petitions at issue, because the citizen's petition did not seek to amend the City Charter but instead sought to amend a resolution adopted by the Mayor and Council. Likewise, the citizen's Petition here seeks a referendum not to amend a local act applicable to Elbert County, but instead to amend a local County ordinance adopted by the elected Board of Commissioners of Elbert County in an exercise of their legislative authority granted by the Georgia Constitution. The Supreme Court in Kemp explained it's reasoning as follows:

> 'The cardinal rule of statutory interpretation is to ascertain the legislative intent, keeping in view at all times the old law, the evil, and the remedy.' (citations omitted). A primary purpose of the Municipal Home Rule Act was to authorize municipalities to amend their charters by their own actions. (citation omitted). The Act was passed under the authority of a 1954 amendment to the Constitution of the State of Georgia, which is currently found at Art. IX, Sec. II, Par. II. Prior to the 1954 Amendment and the Home Rule Act of 1965, city charters were amendable only by acts of the General Assembly. (citation omitted). The two procedures of O.C.G.A. §36-35-3(b) were enacted to relieve the General Assembly of its earlier burden of separately amending each and every city charter in the state. Moreover, a statute is to be read as a whole, and the spirit and intent of the legislation prevails over the literal reading of the language. (citations omitted). The legislative intent will be effectuated even if some language must be eliminated. The language upon which the superior court relied is the reference to 'amendments to or repeals of ordinances, resolutions, or regulations,' found in O.C.G.A. §36-35-3(b)(2)(A). All of O.C.G.A. §36-35-3(b) is prefaced by a statement that what follows are the methods by which a municipal corporation may 'amend its charter.' This also shows that the petition and referendum provision is intended to be available only when the proposed amendment is intended to affect a city charter. (emphasis added).

Id. at 175-176.

The Court went on to explain why the home rule powers of local government elected officials would be violated if the municipal home rule provisions in the statute were construed to allow the electorate to petition for a referendum to amend local ordinances. Such a construction which would give the electorate legislative power which the Georgia Constitution grants only to the governing authority itself. The Supreme Court explained:

> Further, when examined in the context of the structure of O.C.G.A. §36-35-3, the very concept of home rule suggests that the provisions of (b)(2) apply only to charter amendments. Municipal corporations are creations of the state, possessing only those powers that have been granted to them and allocations of power from the state are strictly construed. (citation omitted). Municipal home rule power is a delegation of the General Assembly's legislative power to the municipalities. O.C.G.A. §36-35-3(a) specifies that the delegation of legislative power is to the 'governing authority,' which is the Mayor and Council. Under an interpretation of O.C.G.A. §36-35-3(b)(2) that would allow the electorate to petition for a referendum on all ordinances and resolutions, the electorate would be exercising legislative power. As we must construe the grant of legislative power to the governing authority, we must reject plaintiffs' argument that the electorate can directly exercise such general legislative power.
> (emphasis added). Id. at 176.

This same logic necessarily applies to provisions for County home rule authority in Art. IX, Sect. II., Para. I(b) applicable to the citizen's Petition here.

Another case that supports this conclusion was decided by the United States District Court for the Northern District of Georgia in Local 189 International v. Barrett, 524 F.Supp. 760 (N.D. Ga. 1981). Responding to certain state constitutional arguments asserted by the plaintiffs, the federal court held:

> "The provisions of the County Home Rule Statute, incorporated in the Constitution of the State of Georgia of 1976, Ga. Code Ann. §§2-5901 and 2-5903 (1977), apply only when a county attempts to 'amend or repeal the local acts applicable to its governing authority,' Ga. Code Ann. §2-5901(b), and, consequently, do not apply to the facts of this case. Accordingly, the county's failure to comply with the procedural prerequisites of the County Home Rule Statute, if any, is of no consequence with respect to the adoption of this resolution." (emphasis added). Id.

This federal court, like the federal court in the Mullis Tree Service v. Bibb County decision cited above, interpreted these County home rule provisions in the same manner as the Georgia Supreme Court in Kemp.

In light of the decision in Kemp, this court should determine that the Electors' Petition is invalid, for the reason that the Petition and referendum procedure in Art. IX, §II, Para. I(b)(2) of

the Georgia Constitution is available only to amend or repeal a local act through a citizen's petition and referendum, and not to amend a local County ordinance like the one at issue in this case. Of course, the Georgia Supreme Court decision in Kemp is binding on all lower courts in this state. For the court's convenience, I am also enclosing herein for your review a copy of the Kemp decision, along with a copy of the county and municipal home rule provisions discussed herein.

Please advise me of your decision concerning the validity of this Petition in view of this controlling Georgia legal authority. Should you have any questions with regard to this letter, please contact me. Thank you for your consideration of this matter.[1]

Very Truly Yours,

Bob Norman

Robert C. Norman

RCN:lfb
Enclosures
cc: Bill Daughtry, Elbert County Attorney (via facsimile and U.S. Mail)
Elbert County Board of Commissioners, c/o
County Administrator Bob Thomas (via U.S. Mail)

[1] I expect you are already aware of this requirement, but I also note from my research a Georgia Attorney General Opinion construing Art. IX, Sect. II, Para I(b)(2) to require by its plain terms and the definition of "elector" that a person signing a petition pursuant to these provisions must have been both registered to vote in the last general election and the person must be currently registered to vote in Elbert County. 1984 Ga. AG LEXIS 78.