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County Solicitor's Opinion on Shaky Grounds

The drink tax referendum question—the one generated by the petition drive—has apparently passed muster from the Department of Elections as far as the number of signatures required, but it is about to get hung up in what could be a major legal battle based on a County Law Department opinion calling the referendum question illegal.

In that opinion, outlined in a letter to the President Judge of Allegheny County Common Pleas Court on August 25th, the Solicitor's raises two major objections. One is based on language in the state's Home Rule Charter and Optional Plans Law, the other is found in the County's Home Rule Charter.

First, can an ordinance approved by a referendum vote tell Council to reduce a specific tax? The Law Department says no. Language from the Home Rule Charter and Optional Plans Law (Section 2962b) states "the governing body shall not be subject to any limitation on the rates of taxation imposed on residents". In other words, the drink tax referendum can't tell Council to cut the tax and leave it at a specific level since that would run afoul of the statutory language. "You can't tell the governing body through the home rule process that your taxes should be limited a certain amount. That's left to the discretion of the governing body," said the Solicitor in a newspaper article.

But here's the Solicitor's problem. Article II of the Allegheny County Home Rule Charter, a charter created in accordance with the Commonwealth home rule law, is titled "Tax Limitations". That section says real estate tax rates can't exceed limitations for counties of the second class as of May 20, 1997 (we estimate this limit is about 10 mills based on the current assessment ratio) and the rates of the hotel tax (7%) and the RAD tax (1%) cannot exceed the limitations fixed by law. Those are limitations not subject to the discretion of the Council. Those limitations written into the Charter itself and were adopted and imposed by a vote of the electorate, so why is that same electorate not permitted by referendum to limit the drink tax? If the Solicitor is correct in his interpretation of 2962b, then he would have to hold the Charter itself in violation of that law.

The clear and long understood intent of the language of 2962b in the home rule law is to allow a community adopting home rule to be free of the tax limiting constraints the Commonwealth sets for their class of municipality not in home rule. Home rule

communities cannot create new subjects of taxation—the state has to do that—but they can raise rates on allowable taxes as they see fit. Unless the limits are imposed by the Charter, which is approved by the electorate.

Under the Constitution and the Home Rule Law there are two Pennsylvania powers greater than the Council; the state government and the County's electorate. The electorate under state law created the Council and can, by voter initiative and referendum, change the Council. Indeed, it has the power to change the whole government. Thus, home rule under the Pennsylvania Constitution clearly and absolutely recognizes that ultimate sovereignty resides with the people of a community and confers it upon them. It does not reside with the Council as the Solicitor would have us believe. If the electorate cannot impose its will on Council with respect to taxes through a referendum, their sovereignty has been nullified in direct contravention of the Constitution. The argument that the people are too stupid to understand the consequences of their vote, as some Council members keep trying to tell us, will have no force in the courts.

Obviously, what we have is a misinterpretation of legislation language in the context of the home rule concept. Either the language of Article II is in violation of the home rule law and needs to be tossed or the opinion of the Solicitor is incorrect: They are not compatible. If the people cannot limit their taxes through referendum, there is no control for an irresponsible Council's spending.

On the Solicitor's second objection: Will the approval of the drink tax referendum cause an unbalanced budget, and, if so, does it matter? The Solicitor opines that an approval of the referendum question would cause an unbalanced budget and is therefore a clear violation of the Charter and "should not be allowed on the ballot in November because [it] does not offer an alternative source of revenue if the drink tax is reduced." In his written opinion he states "the proposed ordinance would result in an unbalanced budget because it removes an entire revenue stream from the County budget. In order to balance the budget, Council would have to increase property taxes, reimpose a tax on the sale of taxable beverages within the limit proscribed by the proposed ordinance, undertake some other remedial action, or engage in a combination of all the above".

Pardon us, but is that not the point? If voters approve a cut in the drink tax, it has already been made known that Council will be forced to increase property taxes to fill the shortfall. In fact, Council gave itself a new power by declaring itself able to place non-Charter related referenda on the ballot, and their first question under that power asks if voters want a lower drink tax or higher property taxes.

Council can already increase property taxes by a 2/3 vote. Why don't they just do it if the referendum question passes? Because evidently they are so frightened of having to make the property tax vote they want the electorate to force them to take the action through another referendum so as to absolve themselves from doing their duty.

The bigger point is that the unbalanced budget argument is a non-issue for the 2008 fiscal year. By the time of the referendum, the drink tax collections will have already brought

in enough to satisfy 2008 budget revenue projections. What's more, the County is not spending the money but rather holding it in escrow until the Port Authority satisfies the Executive's contract demands. The 2009 budget is a new budget that must be hammered out from scratch. Decisions about spending and taxes can be raised at that point.

The next step for the legality of the referendum question lies with an elections panel and, depending on their ruling, the courts. There might also be issues related to the exact filing of the document as per the Administrative Code requirements on uniform size and whether the proposed ordinance contained the full text of the ordinance. Who knows what else will come up? It is safe to say this will be a major test of home rule in Allegheny County, with the faith of the citizens in home rule hanging in the balance.

Eric Montarti, Policy Analyst

Jake Haulk, Ph.D., President

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<p>Allegheny Institute for Public Policy 305 Mt. Lebanon Blvd. * Suite 208* Pittsburgh PA 15234 Phone (412) 440-0079 * Fax (412) 440-0085 E-mail: aipp@alleghenyinstitute.org</p>
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