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COMMENTS FROM KEVIN BUTLER TO LAKEWOOD CITY COUNCIL, FEBRUARY 11, 2016

Councilmembers, the question that is before you, and the question that would be before Lakewood's citizens if this matter were put to a popular vote, is this: Should the ordinance that was adopted and signed into law on December 21 stand?

We can imagine all sorts of ramifications that are tied to the outcome of that question. I'm inclined in my unique role on behalf of the city government to encourage you to understand the legal ramifications. To do so properly, we must first look at what the December 21 ordinance does.

Ordinance 49-15, as far as legislation goes, is pretty simple. It authorizes the mayor to enter into a contract. We know that contract as the "Master Agreement." The master agreement may involve a great many moving parts we've heard about this evening—the closure of the inpatient hospital, the amendment of the lease, the transfer of real estate, the payment of moneys, the creation of a foundation—but the ordinance itself is merely an act giving the city permission to enter into a contract.

By now, the moving parts of the contract approved by Ordinance 49-15 are certainly moving. The contract was signed. The inpatient hospital is now closed. The employees have been largely moved to other facilities or found other work. The overnight patients are gone. The doctors serving those patients are gone. The Clinic operates what is now a standalone emergency department. LHA's property at 850 Columbia Road is now the Cleveland Clinic's property, and the city is currently $6.8 million flusher than it was before December 21. EMS protocols governing emergency transports may have slightly changed. The community health building and a number of homes are now back under control of the city, which has in turn contracted the management of those properties to an outside entity. Additional properties—the family health center site, the Curtis Block building and a few remaining residential properties—have been prepared for transfer to various parties, and those transfers should occur soon.

In other words, the contract authorized by Ordinance 49-15 is not latent. It's not awaiting the approval or rejection by you or by Lakewood's citizens. Instead, it's actively being performed by all three parties to it, and it's binding on all of them.

(*continued*)

These are the same circumstances the Ohio Supreme Court considered when it decided a case out of Middletown, Ohio, in 1986. In that case, the city of Middletown entered into a contract with the Ohio Department of Transportation for road improvements. Citizens who disagreed with the ordinance authorizing that contract gathered signatures and caused a measure to be placed on the popular ballot that, if adopted, would have repealed any and all legislation enabling the road project. An election occurred, and the Middletown residents ultimately voted to repeal the legislation.

In that case, which is called *Middletown v. Ferguson*, the Ohio Supreme Court held that notwithstanding the popular vote to repeal that ordinance, the contract authorized by the Middletown ordinance remained legally binding. The court wrote that neither a legislature nor an electorate is free to impair a city's ability to perform its obligations under a binding contract, because to do so would amount to a violation of what's known as the contract clause, Article I, Section 10, of the United States Constitution.

The contract clause of the Constitution mandates that "[n]o State shall … pass any … Law impairing the Obligation of Contracts." This prohibition reaches any form of legislative action—including direct action by the people. In other words, as the Supreme Court in *Middletown v. Ferguson* wrote, "Once having granted certain powers to a [city], which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature (or here, the electorate) is not free to alter the [city]'s ability to perform."

The Supreme Court found meaningful in this case a few important facts that are significant and that are similar to our circumstances: The road construction had begun; it was well underway by the time the popular vote to repeal the legislation occurred; and the city had by then obligated itself to pay for its share of the costs. In the *Middletown* case, as in our situation, the legislation sought to be repealed authorized the city's entry into a contract—a contract that, like the master agreement authorized by Council in December—was by the time of the popular vote actively being performed by the parties to it, well underway, with monies having changed hands and work undertaken pursuant to its terms, and was binding on all of them.

The *Middletown* case remains the law of Ohio to this day. And what its precedent means to me—someone who concerns himself with the legal ramifications of this referendum effort—is this: No matter when it occurs, this vote—an effort driven by well-meaning, hardworking people—means nothing to the legal effectiveness of the master agreement. If you or the voters vote to uphold this legislation, the master agreement will live on despite that vote. If you or the voters vote to repeal this legislation, the master agreement will live on despite that vote. This is the city's legal position, and it's worthwhile to share it now, before campaigns get underway and votes occur.

I would be pleased to continue to discuss my position with you at any time in the near or long term. ■