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Subject: *** Attorney/Client Privilege*** Opinion of the Department of Law re the Council's Submission of a Question on the Repeal of the APSTC Lease Ordinance to the Voters *** Attorney/Client Privilege ***

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Good evening, Council President Shipman and members of the Atlanta City Council

The City of Atlanta Department of Law has been asked to examine whether pursuant to proposed legislation, the Atlanta City Council could "submit the following question concerning the repeal of the ordinance authorizing the ground lease of land to the Atlanta Police Foundation to an election of the qualified voters of the City of Atlanta for approval or rejection:

> *"Shall the City of Atlanta Ordinance 21-O-0367 authorizing the ground lease of 381 acres of forested land to the Atlanta Police Foundation for the construction of a $90 million police training facility located in the South River Forest area of DeKalb County be terminated with plans and construction relocated to an alternative parcel(s) within Atlanta City limits." "*

As discussed in detail below, it is our opinion that the constitution of the state of Georgia prohibits municipalities and local governments from placing straw or opinion poll questions on

ballots unless there is specific statutory authority from the General Assembly to do so. Here, as there is no statutory authority for a municipality to place a question before the voters, the Atlanta City Council is preempted from placing a question before the voters as is proposed here, and the City of Atlanta may not expend public funds to do so.

Additionally, it is our opinion that pursuant to the Georgia Constitution's specific prohibitions against ex post facto laws or laws impairing the obligation of contract, any ordinance to repeal the 2021 ordinance authorizing the mayor to enter into the lease agreement with the Atlanta Police Foundation, whether adopted by the Atlanta City Council or the via approval of the voters, would be unconstitutional.

Discussion:

The City of Atlanta may not put questions of local importance before the voters:

Section 2-501(b) of the City of Atlanta Charter provides the authority for the City Council to submit an ordinance or resolution before the qualified voters of the city. The Charter provides that such an ordinance or resolution presented to the voters would be adopted by the Council should a majority of the voters vote for this ordinance or resolution. Specifically, Section 2-501(b) of the Charter provides as follows:

> *The council shall be authorized to submit to the qualified voters of the city at any election not called only for the purpose of putting said ordinance or resolution before the voters any ordinance or resolution which it may deem proper; and in the event a majority of voters shall vote for this ordinance or resolution, it shall be adopted. If a majority of the votes so cast are against the resolution or ordinance, it shall be defeated and shall not thereafter be adopted by the council until resubmitted to and adopted by the qualified voters of the city. If it receives a majority vote of the people and becomes effective, then it can only be repealed by a majority vote of the qualified voters voting at an election for such purpose.*

This authority is also described in Section 66-37(c) of the City of Atlanta Code of Ordinances. Section 66-37(c) provides as follows:

> *The council shall be authorized to submit to the qualified voters of the city at any election any ordinance or resolution which it may deem proper. If a majority of voters shall vote for this ordinance or resolution, it shall be adopted. If a majority of the votes so cast are against the resolution or ordinance, it shall be defeated and shall not thereafter be adopted by the council until resubmitted to and adopted by the qualified voters of the city. If it receives a majority vote of the people and becomes effective, it can only be repealed by a majority vote of the qualified voters at a special election.*

In accordance with the authority granted in the City's Charter and Code, the Atlanta City Council may place a specifically drafted ordinance or resolution to the voters of the City and ask them to approve or reject the same. In doing so the Council would be asking the voters to stand in the shoes of the Atlanta City Council to either adopt or reject a specific ordinance or resolution. However, the authority in the Charter and the Code does not permit the Atlanta City Council to put questions to the people to be voted upon, as to do so is prohibited by state law.

Specifically, the Georgia Constitution prohibits municipalities and local governments from placing straw or opinion poll questions on ballots unless there is specific statutory authority from the General Assembly to do so. Here, there is no statutory authority for a municipality to place a question before the voters, and accordingly the Atlanta City Council is preempted from placing a question before the voters as is proposed here. Additionally, pursuant to opinions of the Georgia Attorney General, the City of Atlanta may no expend public funds to do so.

State statutes generally control over local ordinances on the same subject. See *City of Buford v. Georgia Power Co.,* 276 Ga. 590, 590, 581 S.E.2d 16 (2003); *Franklin County v. Fieldale Farms Corp.,* 270 Ga. 272, 273, 507 S.E.2d 460 (1998). This doctrine, known as state preemption, is rooted primarily in the Georgia Constitution's Uniformity Clause, which now reads:

> *Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.*

Ga. Const. of 1983, Art. III, Sec. VI, Par. IV(a). See *Gebrekidan v. City of Clarkston*, 298 Ga. 651, 653, 784 S.E.2d 373, 376 (2016); see also *Fieldale Farms,* 270 Ga. at 273–275, 507 S.E.2d 460 (reviewing the historical development of the state preemption doctrine in Georgia).

Under the first part of the Uniformity Clause, which carried forward language similar to that of previous Constitutions, the General Assembly may preempt local ordinances on the same subject as a general law either expressly or by implication. See *Fieldale Farms,* 270 Ga. at 275, 507 S.E.2d 460; *Gebrekidan v. City of Clarkston*, 298 Ga. 651, 653–54, 784 S.E.2d 373, 376 (2016). In express preemption, the statutory text speaks to the need for statewide uniformity on the subject in question or to the lack of local authority to regulate the subject of the general law. *Gebrekidan v. City of Clarkston*, 298 Ga. 651, 654, 784 S.E.2d 373, 376 (2016). In implied preemption, the intent of the General Assembly to preempt local regulation on the same subject as the general law is inferred from the comprehensive nature of the statutory scheme. In this context, the General Assembly speaks through its silence as well as its words; the broad scope and reticulated nature of the statutory scheme indicate that the legislature meant not only to preclude local regulation of the various particular matters to which the general law directly speaks, but also to leave unregulated by local law the matters left unregulated in the interstices of the general law. *Gebrekidan v. City of Clarkston*, 298 Ga. 651, 654, 784 S.E.2d 373, 376–77 (2016).

Here, throughout the Official Code of Georgia, the General Assembly has provided specific authority for certain entities, including municipalities in some instances, to place questions to the people to be voted upon. For example, the General Assembly has provided statutory authority permitting political parties to include matters or questions to their members to be voted on during their primary elections. OCGA Sec. 21-2-284(d). Additionally, the General Assembly has provided statutory for municipalities to put a question before the voters of whether bonds shall be issued by the municipality; and has provided specific authority for municipalities to place various questions concerning Sunday alcohol sales to the voters. See OCGA Secs. 36-82-1, 3-3-7. However, the General Assembly has provided no general authority for municipalities to put questions of local importance before the voters of such

municipalities, in the same manner as it has provided that political parties may put such questions to their members during primary elections. Accordingly, without such authority, the City of Atlanta is implicitly preempted from doing so as is proposed here.

I believe this opinion would likely be supported by the Georgia Secretary of State. As recently as 2019, when the Atlanta City Council last considered putting a question before the voters absent specific statutory authority from the General Assembly, the City of Atlanta was directly contacted by the Deputy Elections Director and Deputy General Counsel of the Georgia Secretary of State's Office. In the correspondence from the Secretary of State's office, the City was advised that it was the position of their office that municipalities and local governments may not place straw poll questions on ballots unless there is specific statutory authority from the General Assembly to do so. Specifically, the Secretary of State's office advised that absent statutory authority, their office will not place straw poll questions on ballots. In support of their opinion, the Secretary of State's office provided the City with the attached Attorney General Opinions which provide that both counties and municipalities may not place such public opinion questions before the voters absent specific statutory authority granted by the General Assembly, and that it is not lawful to expend public funds to do so. See Op. Att'y Gen. 68-70; Op. Att'y Gen. 81-72; and Op. Att'y Gen 90-20.

An ordinance to repeal Ordinance 21-O-0367 would be unconstitutional:

The Constitution of the State of Georgia provides that "[n]o bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed." Ga. Const. of 1983 Art. I, § 1, Par. X. In accordance with this provision, "[l]aws prescribe only for the future; they cannot impair the obligation of contracts, nor generally have a retrospective operation." *Chason v. O'Neal*, 158 Ga. 725, 124 S.E. 519, 523 (1924).

Pursuant to the Georgia Constitution's specific prohibitions against ex post facto laws or laws impairing the obligation of contract, any ordinance to repeal the 2021 ordinance authorizing the mayor to enter into the lease agreement with the Atlanta Police Foundation for the construction of the Atlanta Public Safety Training Center, namely Ordinance 21-O-0367 ("Lease Ordinance"), whether adopted by the Atlanta City Council or the via approval of the voters, would be unconstitutional.

Whether or not contract terms are memorialized in an ordinance, a "municipal corporation … cannot abrogate any contract which it has the right to make under its charter." *Jonesboro Area Athletic Ass'n*, 227 Ga. at 520 (quotation omitted). Under the authority granted by the Lease Ordinance, the mayor signed the lease for the public safety training center in 2021. That lease remains in effect today. Were the ordinance which permitted the mayor to enter into the lease to be repealed (either by the Atlanta City Council, directly or by the voters of the City of Atlanta), it could not retroactively make the mayor's act of signing the lease in 2021 unlawful or otherwise ineffective pursuant to the constitutional prohibitions against ex post facto legislation.

In short, repeal of the Lease Ordinance, two years after it was fully executed and the authority it granted was exercised by the mayor, could not have any effect on the lease agreement with the Atlanta Police Foundation or the construction of the public safety training center in accordance with the constitutional prohibition against ex post facto laws. Further, in light of the presumably substantial sums of money expended by the Atlanta Police Foundation and

their contractors, there would be significant liability associated with the unlawful interruption or cancellation of the current construction. See also U.S. Const. Art. I, § 10, cl. 1; Ga. Const. Art. I, § I, Par. X; *Jonesboro Area Athletic Ass'n v. Dickson*, 227 Ga. 513 (Ga. 1971) (city bound by lease and cannot unilaterally cancel it by resolution).

This is not at all to say that the City of Atlanta itself could not take lawful action to cancel a contract or lease in which it no longer wished to participate. All contracts, agreements, leases, etc. are subject to termination, but they may only be terminated in accordance with the terms of such agreements, by those authorized to execute the contract, i.e.: the executive branch of City government. Here, the lease agreement with the Atlanta Police Foundation may be terminated by the City of Atlanta, but it cannot be terminated by legislative action, either by the Atlanta City Council or the voters of the city.

I hope this has been helpful. Please do not hesitate to contact us if we can be of any further assistance.

Thank you,

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