

Case No. 13-1192

ORIGINAL

**Supreme Court
of the State of Ohio**

LISA McQUEEN, *et al.*,

Plaintiffs-Appellants,

and

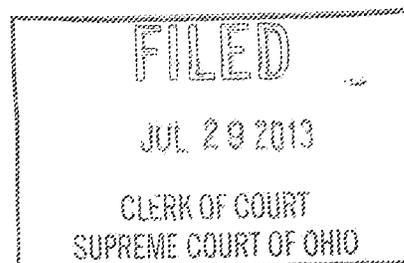
CITY OF CINCINNATI *ex rel.* LISA McQUEEN, *et al.*,

Relators-Appellants,

v.

MILTON R. DOHONEY, JR., *et al.*,

Respondents-Appellees.



**MEMORANDUM IN SUPPORT OF JURISDICTION
TENDERED BY PLAINTIFFS-RELATORS-APPELLANTS**

**-----
ELECTION-RELATED MATTER**

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
EXPLANATION OF PUBLIC OR GREAT GENERAL INTERESTS	1
STATEMENT OF THE CASE	4
Procedural Posture	4
Statement of the Facts	5
PROPOSITIONS OF LAW TO BE ARGUED IF APPEAL IS GRANTED	7
FIRST PROPOSITION OF LAW	
Where the language of a charter is reasonably subject to two or more reasonable interpretations, then such language is, by definition, ambiguous	7
SECOND PROPOSITION OF LAW	
Courts may resort to rules of statutory construction only if the terms of the statute or charter provision are ambiguous or in doubt	7
THIRD PROPOSITION OF LAW	
It is the duty of the courts to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained	10
FOURTH PROPOSITION OF LAW	
‘All’ means all	11
CONCLUSION	12
Certificate of Service	13
Appendix	14
Trial Court’s Decision/Entry, March 28, 2013	
First District’s Decision, June 12, 2013	

TABLE OF AUTHORITIES

	Page
<i>Caselaw</i>	
<i>Awuah v. Coverall North America, Inc.</i> , 703 F.3d 36 (1st Cir. 2012)	11
<i>Buckeye Community Hope Foundation v. City of Cuyahoga Falls</i> , 81 Ohio St.3d 559, 692 N.E.2d 997, 1998-Ohio-189 (1998)	11
<i>Cline v. Ohio Bur. of Motor Vehicles</i> , 61 Ohio St.3d 93, 573 N.E.2d 77 (1991)	8
<i>Eastlake v. Forest City Ents., Inc.</i> , 426 U.S. 668 (1976)	1
<i>McAtee v. Ottawa Cty. Dept. of Human Serv.</i> , 111 Ohio App.3d 812, 677 N.E.2d 395 (6th Dist. 1996)	9
<i>McQueen v. Dohoney</i> , 2013-Ohio-2424 (1st Dist. 2013)	9
<i>National Steel & Shipbuilding Co. v. United States</i> , 419 F.2d 863 (Fed. Cir. 1969)	11
<i>Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.</i> , 21 Ohio St.3d 21, 23, 487 N.E.2d 301 (1986)	8
<i>Pierce Point Cinema 10, LLC v. Perin-Tyler Family Foundation LLC</i> , 2012-Ohio-5008 (12th Dist. 2012)	7-8
<i>Sears v. Weimer</i> , 143 Ohio St. 312, 55 N.E.2d 413 (1944)	8
<i>State ex rel. Bramblette v. Yordy</i> , 24 Ohio St.2d 147, 265 N.E.2d 273 (1970)	12
<i>State ex rel. Cater v. N. Olmsted</i> , 69 Ohio St.3d 315, 631 N.E.2d 1048 (1994)	3
<i>State ex rel. Corrigan v. Perk</i> , 19 Ohio St.2d 1, 10, 249 N.E.2d 525 (1969)	1
<i>State ex rel. Julnes v. S. Euclid City Council</i> , 130 Ohio St.3d 6, 955 N.E.2d 363, 2011-Ohio-4485 (2011)	3, 10
<i>State ex rel. Laughlin v. James</i> , 115 Ohio St.3d 231, 874 N.E.2d 1145, 2007-Ohio-4811 (2007)	10
<i>State ex rel. Nolan v. ClenDening</i> , 93 Ohio.St. 264, 277-278, 112 N.E. 1029 (1915)	1, 4
<i>State ex rel. Ohio Gen. Assembly v. Brunner</i> , 15 Ohio.St.3d 103, 873 N.E.2d 1232, 2007-Ohio-4460 (2007)	1

<i>State ex rel. Oster v. Lorain Cty. Bd. of Elections,</i> 93 Ohio St.3d 480, 756 N.E.2d 649, 2001-Ohio-1605 (2001)	4
<i>State ex rel. Pawlowicz v. Edy,</i> 134 Ohio St. 389, 391, 17 N.E.2d 638 (1938)	3
<i>State ex rel. Potts v. Comm. on Continuing Legal Ed.,</i> 93 Ohio St.3d 452, 755 N.E.2d 886, 2001-Ohio-1586 (2001)	9
<i>State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Ed.,</i> 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996)	8
<i>State ex rel. Sharpe v. Hitt,</i> 155 Ohio St. 529, 99 N.E.2d 659 (1951)	3, 10
<i>Wells v. American Elec. Power Co.,</i> 48 Ohio App.3d 95, 548 N.E.2d 995 (4th Dist. 1988)	11
<i>Zumwalde v. Madeira and Indian Hill Joint Fire Dist.,</i> 128 Ohio St.3d 492, 946 N.E.2d 748, 2011-Ohio-1603 (2011)	9

Statutes

Article II, Section 3, Cincinnati City Charter	<i>passim</i>
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Reports

Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1912	1
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EXPLANATION OF PUBLIC OR GREAT GENERAL INTERESTS

In the State of Ohio, “[t]he constitutional right of citizens to referendum is of paramount importance.” *State ex rel. Ohio Gen. Assembly v. Brunner*, 115 Ohio.St.3d 103, 873 N.E.2d 1232, 2007-Ohio-4460 ¶8. “The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to ‘give citizens a voice on questions of public policy.’” *Eastlake v. Forest City Ents., Inc.*, 426 U.S. 668, 673 (1976)(quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)). Thus, this Court aptly described “the people’s right to the use of the initiative and referendum” as being “one of the most essential safeguards to representative government.” *State ex rel. Nolan v. Clendenning*, 93 Ohio.St. 264, 277-278, 112 N.E. 1029 (1915); see *State ex rel. Corrigan v. Perk*, 19 Ohio St.2d 1, 10, 249 N.E.2d 525 (1969)(Duncan, J., dissenting)(“[t]he power to petition, for referendum, which is reserved to the people under our Constitution, is a basic and fundamental right, and is a basic part of the elective franchise”).

Speaking before the 1912 Ohio Constitutional Convention, William Jennings Bryan spoke of the importance of the referendum and its companion, the initiative:

The initiative and referendum do not overthrow representative government – they have not come to destroy but to fulfill. The purpose of representative government is to represent, and that purpose fails when representatives misrepresent their constituents. Experience has shown that the defects of our government are not in the people themselves, but in those who, acting as representatives of the people, embezzle power and turn to their own advantage the authority given them for the advancement of the public welfare. It has cost centuries to secure popular government; the blood of millions of the best and the bravest has been poured out to establish the doctrine that governments derive their just powers from the consent of the governed.

All this struggle, all this sacrifice, has been in vain if, when we secure a representative government, the people’s representatives can betray them with impunity and mock their constituents while they draw salaries from the public treasury.

Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1912 (March 12, 1912), at 664. And as a result of that Constitution Convention, the delegates proposed and the voters ratified amendments to the Ohio Constitution providing for referendum at both the state level and at the municipal level. This latter provision is found in Article II, Section 1f of the Ohio Constitution: “The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action.”

This case raises the significant public issue of whether the people of any municipality still retain the power of referendum, especially in light of the near epidemic abuse of emergency ordinances by which city councils attempt to take the power of the referendum away from the people in direct disregard of the city charters. For in this case, the people of the City of Cincinnati, in adopting the Cincinnati City Charter, declared clearly and *without any exception whatsoever* that “[t]he initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.” Cincinnati City Charter, Article II, Section 3. This charter language is explicitly clear that “all” ordinances are subject to referendum and there is no language anywhere within the Charter itself that exempts any legislative action of the city council from being subject to referendum. While the Charter does address emergency ordinances, it does so only in the context of addressing the requirements necessary for the adoption of such ordinances, *e.g.*, the number of votes required; but the Charter noticeably does not specify that such ordinances are exempt from the referendum power of the people which, as noted above, is expressly declared in the Charter to be “reserved to the people of the city” on “all questions which the council is authorized to control by legislative action.”

This Court has repeatedly given supremacy to the initiative and referendum powers of the people. As stated recently by this Court in *State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, 955 N.E.2d 363, 2011-Ohio-4485 (2011):

[it is the duty of the courts] to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained.

Id. ¶28; accord *State ex rel. Sharpe v. Hitt*, 155 Ohio St. 529, 535, 99 N.E.2d 659 (1951) (“[t]his and other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed”).

“Within the limitations imposed by the Constitution, a charter of a home rule city is to be considered the supreme law of a municipality.” *State ex rel. Pawlowicz v. Edy*, 134 Ohio St. 389, 391, 17 N.E.2d 638 (1938). And recognizing the public’s interest to enforce compliance of a city charter, this Court declared that “[i]f the members of a legislative body can ignore, with impunity, the mandates of a constitution or a city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely.” *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.3d 315, 323, 631 N.E.2d 1048 (1994)(quoting *Cleveland ex rel. Neelon v. Locher*, 25 Ohio St.2d 49, 52, 266 N.E.2d 831 (1971)). This case calls into question whether the members of the City of Cincinnati can ignore the mandates of its city charter by which the people reserved unto themselves, and without exception, the power of referendum on “all questions which the council is authorized to control by legislative action.”

As developed below, over 12,400 registered voters of the City of Cincinnati have signed a petition to exercise the power they reserved unto themselves and without exception in their city

charter – the right to referendum “all questions which the council is authorized to control by legislative action.” Without the immediate intervention of this Court, the people of the City of Cincinnati (including those who signed the petition) will be frustrated in their ability to function as “one of the most essential safeguards to representative government,” *Nolan*, 93 Ohio.St. at 277-278, and their First Amendment rights will be stifled. *See State ex rel. Oster v. Lorain Cty. Bd. of Elections*, 93 Ohio St.3d 480, 487 756 N.E.2d 649, 2001-Ohio-1605 (2001)(“where the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment applied to the States through the Fourteenth Amendment’ and [] a state ‘may not impermissibly burden the exercise of the right to petition the government by initiative or referendum’” (quoting *Stone v. Prescott* , 173 F.3d 1172, 1175 (9th Cir. 1999))).

STATEMENT OF THE CASE AND FACTS

Procedural Posture

On the same day that the Cincinnati City Council adopted Ordinance No. 56-2013 (the “Ordinance”), *i.e.*, on March 6, 2013, Plaintiffs-Appellants commenced this lawsuit challenging the effort of the city council to deny the voters of the City the right to subject the Ordinance to referendum. Plaintiffs sought the issuance of injunctive relief and a declaratory judgment, to which the City Defendants filed a memorandum in opposition.

Subsequently and pursuant to Ohio R. Civ. P. 65(B)(2), the trial of the action on the merits was advanced and consolidated with the hearing of the application for injunctive relief. In advance thereof, the parties tendered written stipulations which were supplemented with an additional oral stipulation in advance of the oral argument held before the trial court on March 15, 2013.

Ultimately, on March 28, 2013, the trial court granted the Plaintiffs' motion in a decision and entry, which specifically enjoined the City Defendants from taking "further action to implement Ordinance 56-2013" or from "execut[ing] or perform[ing] under the Long-Term Lease and Modernization Agreement for the City of Cincinnati Parking System." The following day, the City Defendants appealed to the First District Court of Appeals.

Following expedited briefing and oral argument, the First District Court of Appeals, in a 2-1 decision with all three judge writing separate opinions, reversed the judgment of the trial court. As a result of the mandate, the trial court has vacated its previously entered injunction.

Statement of the Facts

In October 2012, the City of Cincinnati put out a Request for Proposal (RFP) relative to the management of the City's parking services and facilities. The purpose of the RFP was to advance the City administrations interest "in transitioning the management of [the City's] parking services function" and "exploring the possibility of entering into a partnership for the operations of the City's parking system."

Currently, the City of Cincinnati manages its parking assets through the Parking Facilities Division of the Department of Enterprise Services. But this proposed transition would result in the entity selected from the RFP "operat[ing] and maintain[ing] the City's garages, surface lots, and on-street meters." And such operations would include taking over "enforcement and adjudication related to on-street parking meters." And such a transition would affect current employees of the City, but the entity selected to take over the parking operations would be required to "interview the current [City] employees of the parking system for positions in their company." As the foregoing demonstrates, as well as the City Manager acknowledged, the effort

being undertaken will result in “a significant change in the way the City has historically operated and maintained parking.”

Ultimately, the Cincinnati City Council adopted Ordinance No. 56-2013 whereby it authorized the City Manager to execute a Long-Term Lease and Modernization Agreement for the City of Cincinnati Parking System. This Lease would be with the Port of Greater Cincinnati Development Authority which, in turn, would contract with private entities to operate and maintain the City’s parking system generally consistent with the RFP. Included in the ordinance presented to the city council was a section declaring it was “an emergency measure necessary for the preservation of the public peace, health, safety and general welfare The reasons for the emergency is the immediate need to implement the budgetary measure contemplated during the December 2012 City of Cincinnati budget determinations in order to avoid significant personnel layoffs and budget cuts and resulting reductions in City services to Cincinnati residents related to the City’s General Fund, which administrative actions would be needed to balance the City’s FY 2013 and 2014 budgets in the absence of revenue generated by implementation of the modernizations of the City of Cincinnati parking system as described herein.”¹

Ordinance No. 56-2013 was adopted by the city council on March 6, 2013, on a vote of 5-to-4. Even though the ordinance had already been adopted, the mayor, as the presiding officer of council, subsequently posited the question to council of whether the emergency clause should be retained; on this question, the vote of council was 6-to-3. Two days later, *i.e.*, on March 8, 2013, Plaintiff-Appellant Peter Witte along with other members of the petitioning committee filed a referendum petition and a certified copy of Ordinance No. 56-2013 with the clerk of the Cincinnati City Council and the City Finance Director, thus commencing the referendum effort.

¹ It should be noted, though, that the City’s budget was balanced without the revenues resulting from the Lease authorized by Ordinance No. 56-2013.

Under Ohio law, the referendum effort then had a period of 28 remaining days to obtain signatures from 10% of the electors in the City who had voted in the prior gubernatorial election, which, in this instance, necessitated obtaining 8,729 valid signatures from voters within the City of Cincinnati during that 28-day period. In a massive and widespread outpouring of support from the community, on April 4, 2013, the committee seeking to submit Ordinance No. 56-2013 to referendum filed 19,803 signatures which had been gathered from 315 different petition circulators, including residents of all of Cincinnati's 52 neighborhoods. On April 22, 2013, the Hamilton County Board of Elections announced that petitioners had gathered some 12,446 valid signatures, nearly 4,000 more signature than which was required. However, in light of the decision of the court below, the referendum will not proceed to the ballot and the basic and fundamental constitutional right of the people as the ultimate sovereign, together with their First Amendment rights, will be silenced.

PROPOSITIONS OF LAW TO BE ARGUED IF APPEAL IS GRANTED

FIRST PROPOSITION OF LAW

Where the language of a charter is reasonably subject to two or more reasonable interpretations, then such language is, by definition, ambiguous.

SECOND PROPOSITION OF LAW

Courts may resort to rules of statutory construction only if the terms of the statute or charter provision are ambiguous or in doubt.

The core of this case involves ascertaining what the citizens of Cincinnati meant and intended when they adopted the provision of their city charter that declared "[t]he initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law." An ambiguity exists were the meaning cannot be determined within the four corners of the document or the

language utilized is susceptible to two or more reasonable constructions. *See Pierce Point Cinema 10, LLC v. Perin-Tyler Family Foundation LLC*, 2012-Ohio-5008 ¶12 (12th Dist. 2012). Thus far, two judges who have considered the foregoing provision of the city charter concluded that such provision was ambiguous; two other judges have declared the provision was not ambiguous and that, notwithstanding the explicit charter language that “all” ordinances are subject to referendum, emergency ordinances were somehow not subject to referendum.

Yet, in this case, the methodology of the plurality of the court of appeals, *i.e.*, the two judges who found the charter provision to be unambiguous, actually demonstrates that all four judges who have considered the matter considered or treated the charter provision as being ambiguous. For “[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation. . . . However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent.” *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 96, 573 N.E.2d 77, 80; *accord State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Ed.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996)(“[i]f the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary”); *Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.*, 21 Ohio St.3d 21, 23, 487 N.E.2d 301 (1986)(“[a]bsent ambiguity, a statute is to be construed without resort to a process of statutory construction”). Thus, if one must apply the rules of statutory construction in order to arrive at the meaning or intent of the language of a statute (or a city charter), then *a fortiori* the statute (or city charter) is ambiguous. For “[a]n unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944)(syllabus ¶5). As this Court has repeated recognized:

the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

Zumwalde v. Madeira and Indian Hill Joint Fire Dist., 128 Ohio St.3d 492, 946 N.E.2d 748, 2011-Ohio-1603 ¶22 (2011)(quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus ¶2)).

Yet, both of the judges who declared the charter provision to not be ambiguous actually acknowledged the necessity to apply rules of statutory construction and to resort to other means of interpretation in order to reach such a conclusion, as well as its ultimate disposition of the meaning of the charter provision. *McQueen v. Dohoney*, 2013-Ohio-2424 ¶42 (Cunningham, J.) (“[i]n construing the Charter, we apply the general rules of statutory construction”); *McQueen v. Dohoney*, 2013-Ohio-2424 (DeWine, J.) ¶78 (acknowledging conclusion was arrived at by, *inter alia*, “the familiar rule of statutory construction”); *see also McQueen v. Dohoney*, 2013-Ohio-2424 (DeWine, J.) ¶86 (“[t]he only way [to address emergency ordinances] *is to assume* that the Charter adopts provisions of state law” (emphasis added)). But, as noted above, courts “may resort to rules of construction . . . only if the terms of the [charter] are ambiguous or in doubt.” *State ex rel. Potts v. Comm. on Continuing Legal Ed.*, 93 Ohio St.3d 452, 456, 755 N.E.2d 886, 2001-Ohio-1586 (2001); *accord McAtee v. Ottawa Cty. Dept. of Human Serv.*, 111 Ohio App.3d 812, 817, 677 N.E.2d 395 (6th Dist. 1996)(“[t]he rules of statutory construction cannot be applied when the meaning of a statute is plain and unambiguous on its face”). Thus, because even the plurality on the court of appeals had to refer to rules of statutory construction and make certain assumptions in order to resolve the meaning of the charter provision at issue, it was a *non*

sequitur to then declare the charter provision to be unambiguous. Stated otherwise, there was, in fact, unanimity from the courts below that the charter provision at issue is ambiguous.

THIRD PROPOSITION OF LAW

It is the duty of the courts to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained.

As Article II, Section 3 of the Cincinnati City Charter is ambiguous with respect to the scope and breadth of the right of referendum, the resolution of whether Ordinance No. 56-2013 can be subject to a referendum must be resolved by this Court's well-established pronouncement:

[t]his and other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed

State ex rel. Sharpe v. Hitt, 155 Ohio St. 529, 535, 99 N.E.2d 659 (1951); accord *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 874 N.E.2d 1145, 2007-Ohio-4811 ¶25 (2007) (“courts liberally construe municipal referendum powers so as to permit rather than to preclude their exercise by the people”). Thus, as this Court just recently reaffirmed:

[it is the duty of the courts] to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained.

Julnes, 130 Ohio St.3d 6, 955 N.E.2d 363, 2011-Ohio-4485 ¶28; *id.* ¶43 (noting that in light of the “oft-cited mandate to liberally construe municipal referendum provisions in favor of the power reserved to the people,” any ambiguity in charter language must be construed “to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained”).

For if there is a problem with the ambiguity in the language of a city charter concerning the scope of the referendum power which the people expressly reserved unto themselves, the remedy is not to be brought about through judicial fiat. For if liberally construing such ambiguity in favor of referendum “is not in accord with the intent and purpose of the electors[,] the remedy is by amendment of the charter.” *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 569. 692 N.E.2d 997, 1998-Ohio-189 (1998)

In this case, as there is unanimity on the ambiguity of the provision of the Cincinnati City Charter relating to the people reserving the power of referendum unto themselves on “all” ordinances and how such reservation relates to emergency ordinances, such ambiguity must be resolved in favor of allowing the referendum.

FOURTH PROPOSITION OF LAW **‘All’ means all.**

“‘All’ means ‘all,’ or if that is not clear, all, when used before a plural noun . . . means ‘[t]he entire or unabated amount or quantity of, the whole extent, substance, or compass of, the whole.’” *Awuah v. Coverall North America, Inc.*, 703 F.3d 36, 43 (1st Cir. 2012)(quoting *Instrument Indus. Trust ex rel. Roach v. Danaher Corp.*, 2005 WL 3670416, at *6 (Mass. Super. Nov. 28, 2005) (quoting *Hollinger, Inc. v. Hollinger Int’l, Inc.*, 858 A.2d 342, 377 (Del. Ch. 2004))); accord *Wells v. American Elec. Power Co.*, 48 Ohio App.3d 95, 548 N.E.2d 995 (4th Dist. 1988)(syllabus ¶3)(“‘All’ means all”). “‘All’ is often used in writing intended to have legal effect . . . Its purpose is to underscore that intended breadth is not to be narrowed. ‘All’ means the whole of that which it defines – not less than the entirety. ‘All’ means all and not substantially all.” *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Fed. Cir. 1969).

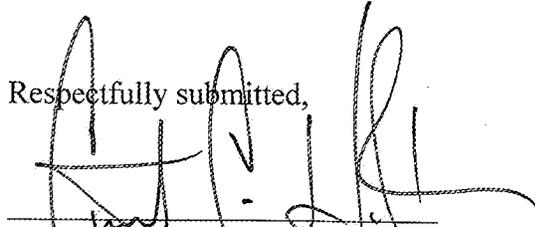
Thus, in liberally construing the provisions of the Cincinnati City Charter as it relates to the power of referendum, due appreciation and respect must be given to the explicit charter language that reserves that power on “all” ordinances without exception or reservation. For it is only through ignoring the explicit charter language that reserves the power of referendum on “all” ordinances and then ascribing some special status to “emergency ordinances” (though without citing to any specific language in the Charter) can those who desire to stifle the voice of the people be successful. But “a municipal charter is not restricted to the adoption of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as [is] the Charter of the city of Toledo which authorized referendum on all ordinances.” *State ex rel. Bramlette v. Yordy*, 24 Ohio St.2d 147, 150, 265 N.E.2d 273 (1970). So in the first instance, it does not matter whether Ordinance No. 56-2013 was properly passed as an emergency ordinance; for regardless of whether the ordinance is or is not a properly adopted emergency ordinance, the Cincinnati City Charter expressly reserves the right of referendum to the people of “all” ordinances without exception and any ambiguity relating thereto must be resolved in further support of the people and the power of referendum.

CONCLUSION

As developed above, this appeal goes to the heart of the referendum power and the vitality of the doctrine that governments derive their just powers from the consent of the governed. Over 12,400 registered voters in the City of Cincinnati have signed a petition in order to exercise which the people expressly and without exception reserved unto themselves in the Cincinnati City Charter, *i.e.*, the power to referendum “all questions which the council is authorized to control by legislative action.” As this appeal goes to the basic and fundamental constitutional right of the people to referendum, as well as their First Amendment rights, this

appeal involves a matter of sufficient public or great general interests such that this Court should accept jurisdiction.

Respectfully submitted,



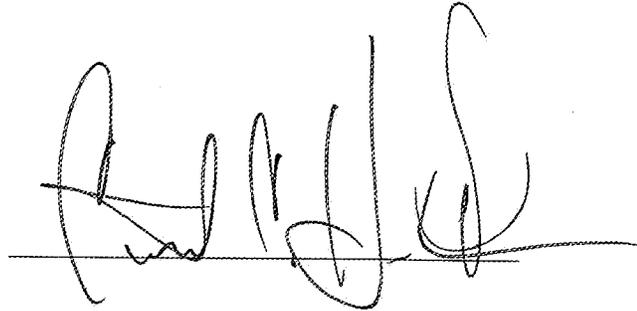
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon the following via regular mail, postage prepaid, on the 29th day of July 2013:

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APPENDIX

Trial Court's Decision/Entry, March 28, 2013

First District's Decision, June 12, 2013

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MAR 28 2013
ROBERT C. WINKLER

LISA McQUEEN, *et al.* : Case No. A1301595
Plaintiffs, :
and : Judge Robert C. Winkler
CITY OF CINCINNATI *ex rel.* :
LISA McQUEEN, *et al.* :
Relators, :
v. :
MILTON R. DOHONEY, JR., *et al.* :
Defendants-Respondents. :

ENTERED
MAR 28 2013

ORDER AND ENTRY GRANTING
MOTION FOR DECLARATORY
JUDGMENT AND PERMANENT
INJUNCTION



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S.C. Line #: 6

INTRODUCTION

On March 6, 2013, Cincinnati City Council passed and Mayor Mark Mallory signed Ordinance No. 56-2013, authorizing City Manager Milton Dohoney, Jr. to enter into an agreement under which the City would lease its on-street parking meters and City-owned parking lots and garages to the Port of Greater Cincinnati Development Authority. The Port Authority, in turn, would contract with private entities to operate and maintain those parking assets throughout the City and to enforce compliance with the City's parking ordinances and regulations. The Ordinance passed by a vote of 5 to 4; however, a provision declaring it to be an emergency measure passed by a 6 - 3 vote.

Immediately after Ordinance No. 56-2013 was adopted, Plaintiffs/Relators sought a Temporary Restraining Order prohibiting the City from taking any action to implement it. This Court granted the Temporary Restraining Order and set the matter for hearing on Plaintiffs/Relators' Motion for Declaratory Judgment and Permanent

Injunction on March 15, 2013. At the conclusion of the hearing, the matter was taken under submission for decision by this Court.

Plaintiffs/Relators contend – and Defendants/Respondents do not seriously dispute – that the emergency declaration was included to give the Ordinance immediate effect and thereby preclude any citizen-initiated referendum on it.

The essential issue in this case is whether the City's declaration of emergency in Ordinance No. 56-2013 precludes a referendum on the Ordinance. For the reasons that follow, the Court concludes that it does not, and so grants the request for declaratory judgment and permanent injunction prohibiting the City from taking any action to implement the Ordinance pending the outcome of any such referendum.

FACTS AND PROCEDURAL HISTORY

On October 26, 2012, the City of Cincinnati issued a Request for Proposals (“RFP”) with respect to a Concession Lease Agreement for Selected City-Owned Parking Assets. On November 26, 2012, the City received nine proposals in response to the RFP. After reviewing the proposals, the City invited three teams to Cincinnati for interviews and the City started negotiations with two teams.

As a result of these negotiations, the City selection team recommended a public/private partnership structure with the Port of Greater Cincinnati Development Authority (“Port Authority”) as lessee and a private entity to be known as “ParkCincy” serving as operator, asset manager, and underwriter. ParkCincy is a team made up of Guggenheim Securities LLC, (the underwriter for the issuance of bonds), AEW Capital Management, L.P. (the asset manager), Xerox State & Local Solutions (the on-street operator), Denison Parking, Inc. (the off-street operator), and its various subcontractors and vendors.

On February 27, 2013, City Manager Dohoney transmitted to the Mayor and members of the City Council a draft ordinance relating to a Parking Lease & Modernization Agreement. On March 4, 2013, the Budget and Finance Committee of the Cincinnati City Council considered the draft ordinance and directed that it be separated into two ordinances.

On March 6, 2013, City Manager Dohoney transmitted to the Mayor and members of the City Council a draft ordinance relating to a Long Term Lease & Modernization Agreement for City Parking System — B Version. The ordinance transmitted with the City Manager's memorandum was ultimately adopted by the City Council and was designated as Ordinance No. 56-2013. The City Council voted to adopt Ordinance No. 56-2013 by a vote of 5-to-4.

The Ordinance authorizes the City Manager to execute a lease with the Port Authority of Greater Cincinnati. The City would lease certain parking lots and garages and grant the Port Authority a franchise to operate the City's parking meters. In exchange, the Port Authority would pay the City approximately \$92 million up front and would make annual payments of approximately \$3 million for thirty years.

The City asserts that the Ordinance is necessary to balance the fiscal year 2014 budget, which begins in July, 2013. It explains that during the budget planning process, Council chose to use \$4.8 million from anticipated parking franchise revenues instead of eliminating income tax reciprocity for City residents. The City claims that if the parking franchise revenues are not available, its deficit will grow by that \$4.8 million. Additionally, the fiscal year 2013 budget has an \$11.2 million deficit, and the City posits that it will have to immediately begin cutting the budget by, *inter alia*, cutting 344 employees (269 of whom are police and fire department employees), reducing services,

and eliminating programs. Without the revenue generated by the parking arrangement, the City claims that it would need to close three recreation centers and six swimming pools, eliminate \$1.7 million in funding for human services organizations, \$494,000 in funding for the Neighborhood Support Fund and the Neighborhood Business District Fund, and \$50,000 for arts funding. The City claims that "it also would be deprived of the economic development and community improvement projects that the City intends to fund with lease revenue. The City plans to use the revenue to increase its contribution to the Cincinnati Retirement System, construct the Wasson Way bike trail, open the MLK interchange on I-75, and spur development of a 30-story mixed use building in downtown featuring a grocery store, among other items."¹

Subsequent to adopting Ordinance No. 56-2013, the City Council voted to include an emergency declaration by a vote of 6-to-3. The emergency clause states:

That this ordinance shall be an emergency measure necessary for the preservation of the public peace, health, safety and general welfare and shall, subject to the terms of Article II, Section 6 of the Charter, be effective immediately. The reason for the emergency is the immediate need to implement the budgetary measures contemplated during the December 2012 City of Cincinnati budget determinations in order to avoid significant personnel layoffs and budget cuts and resulting reductions in City services to Cincinnati residents related to the City's General Fund, which administrative actions would be needed to balance the City's FY 2013 and 2014 budgets in the absence of revenue generated by implementation of the modernization of the City of Cincinnati parking system as described herein.

On March 8, 2013, a certified copy of a referendum petition regarding Ordinance No. 56-2013 was filed with Reginald Zeno, the Finance Director for the City of Cincinnati. Plaintiffs are all either residents, voters or taxpayers within the City of Cincinnati. Some of the Plaintiffs are actively involved in circulating the referendum

¹ Defendants' Memorandum in Opposition, pp. 13-14.

petition. Plaintiff Pete Witte is one of the four members of the committee designated on the petition.

In addition to their efforts to subject Ordinance No. 56-2013 to referendum, Plaintiffs also utilize the on-street and off-street parking facilities of the City and, in light of the changes to the City's parking system to be brought about through implementation of Ordinance No. 56-2013, Plaintiffs would be directly impacted by any change in the rates, hours and enforcement of the parking system.

Additionally, Plaintiff Pete Witte is a business owner some of whose patrons utilize the on-street or off-street parking facilities of the City. As a result of the changes to the City's parking system to be brought about by implementation of Ordinance No. 56-2013, those patrons and Mr. Witte's business would be directly impacted by any change in the rates, hours and enforcement of the parking system.

Through the petition effort, Plaintiffs are claiming the right to enforce and vindicate their alleged public right to referendum, notwithstanding the City's contention that Ordinance No. 56-2013 is not subject to referendum.

Immediately after Ordinance No. 56-2013 was adopted by the City Council, Plaintiffs sought and this Court issued a Temporary Restraining Order prohibiting the City from taking any action to implement it. The Court subsequently ordered that the hearing on the motion for preliminary injunction be consolidated with the trial on the merits of the case pursuant to ORCP 65(B)(2). At the conclusion of the March 15, 2013 hearing, the matter was taken under submission; on March 20, 2013, the Temporary Restraining Order was extended pending the Court's decision on the merits.

ISSUES

Plaintiffs/Relators have raised several issues in their First Amended Complaint and their Motion for Declaratory Judgment and Permanent Injunction. Their foremost claim is the request for a declaration from the Court that Ordinance 56-2013 is subject to referendum as provided by the Cincinnati City Charter. In its Answer and Memorandum in Opposition to Plaintiffs/Relators' Motion for Declaratory Judgment, the City of Cincinnati addresses those issues and raises the matter of Plaintiffs/Relators' standing to pursue their claims as alleged in the First Amended Complaint. In view of the dispositive nature of the Court's decision concerning Plaintiffs/Relators' right to a referendum in relation to Ordinance 56-2013, the remaining issues need not be addressed.

DISCUSSION

The standard for injunctive relief is well settled in Ohio law:

A party seeking a TRO or preliminary injunctive relief must show, by clear and convincing evidence, (1) a substantial likelihood that the party will prevail on the merits, (2) the party will suffer irreparable injury or harm if the requested injunctive relief is denied, (3) no unjustifiable harm to third parties will occur if the injunctive relief is granted, and (4) the injunctive relief requested will serve the public interest. *Cincinnati v. Harrison*, 1st Dist. No. C-090702, 2010-Ohio-3430, ¶18, citing *The Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist. 2000). A court must balance all four factors in determining whether to grant or deny injunctive relief, and no one factor is determinative. *Toledo Police Patrolman's Assn., Local 10, IUPA, AFL-CIO-CLC, v. Toledo*, 127 Ohio App.3d 450, 469, 713 N.E.2d 78 (6th Dist.1998).

Brookville Equipment Corp. v. Cincinnati, 2012-Ohio-3648 (1st App. Dist.), at ¶11.

"The test for the granting or denial of a permanent injunction is substantially the same as that for a preliminary injunction, except instead of the plaintiff proving a 'substantial likelihood' of prevailing on the merits, the plaintiff must prove that he *has*

prevailed on the merits.” *Miller v. Miller*, 2005-Ohio-5120 (11th App. Dist.), ¶10-11, citing *Ellinos, Inc. v. Austintown Twp.*, 203 F.Supp.2d 875, 886 (N.D. Ohio 2002); *Edinburg Restaurant, Inc. v. Edinburg Twp.*, 203 F.Supp.2d 865, 873 (N.D. Ohio 2002).

“Irreparable injury means a harm for which no plain, adequate, or complete remedy at law exists. *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14, 684 N.E.2d 343 (8th Dist. 1996). A party does not have to demonstrate actual harm — threatened harm is sufficient. *Convergys Corp. v. Tackman*, 169 Ohio App.3d 665, 2006-Ohio-6616, 864 N.E.2d 145, ¶ 9 (1st Dist.).” *Brookville Equipment Corp. v. Cincinnati*, *supra*, at ¶23.

STANDING

The City of Cincinnati challenges Plaintiffs/Relators’ standing to pursue the claims in their Amended Complaint both individually and in their capacity as statutory taxpayers. The City argues that Plaintiffs/Relators lack standing to bring an action for declaratory judgment because there is no justiciable controversy. The City further asserts that Plaintiffs/Relators have failed to adhere to the specific statutory requirements required to maintain a taxpayer suit. For the reasons that follow, the Court finds that Plaintiffs/Relators have sufficiently demonstrated standing to pursue their claims individually and in a taxpayer suit.

The City of Cincinnati correctly states the law of standing in relation to declaratory judgment actions as summarized in *Mallory v. Cincinnati*, 2012-Ohio-2861 (1st Dist. App.). In *Mallory*, the First District Court of Appeals analyzed the issue of standing as it relates to actions for declaratory judgment. The Court stated:

The Ohio Constitution, Article IV, Section 4(B), limits the subject matter jurisdiction of common pleas courts to “justiciable matters,” which the Ohio Supreme Court has interpreted to mean an actual controversy between the parties. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St. 3d 536, 542, 660 N.E.2d 458 (1996). This is true even in an action for a declaratory judgment. *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St. 3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9. “A ‘controversy’ exists for purposes of a declaratory judgment when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Wagner v. Cleveland*, 62 Ohio App. 3d 8, 13, 574 N.E.2d 533 (8th Dist.1988), citing *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973); see also *Kincaid v. Erie Ins. Co.*, 128 Ohio St. 3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶10 (internal citations omitted) (an actual controversy is “more than a disagreement; the parties must have adverse legal interests.”). In other words, the plaintiff must seek the “protection of the law” from the “adverse conduct or adverse property interest” of a party. *State ex rel. Barclays Bank PLC* at 542.

Ohio’s Declaratory Judgment Act is a statutory scheme created in derogation of the common law; the existence of jurisdiction in a declaratory judgment action must be evident from the allegations in the complaint. See *Van Stone v. Van Stone*, 95 Ohio App. 406, 411, 120 N.E.2d 154 (6th Dist. 1952). If the complaint fails to show the existence of a real, present dispute, then any opinion by a court would be merely advisory — and it is a well-established principle of law that courts should not issue advisory opinions. See *Scott v. Houk*, 127 Ohio St. 3d 317, 2010-Ohio-5805, ¶22, 939 N.E.2d 835.

Thus, the Court must determine whether Plaintiffs/Relators have demonstrated an actual controversy between themselves and the City of Cincinnati. The City premises its argument, among other things, on the speculative nature of Plaintiffs/Relators’ claim that the City’s signing the Parking System Lease might impair Plaintiffs/Relators’ ability to seek a referendum on Ordinance 56-2013. The City suggests that if it were to sign the

Parking System Lease, it could not prevent a referendum on the ordinance if one were required by Ohio law, but rather would be proceeding at its own risk.

Relying on *Middletown v. Ferguson*, 25 Ohio St. 3d 71, 76, 495 N.E.2d 280 (1986), Plaintiffs/Relators assert that the signing of the Parking System Lease would destroy any meaningful relief by means of a referendum on the Ordinance. In *Middletown*, the City Council passed an emergency ordinance directing the city manager to enter into contracts with the Ohio Department of Transportation for certain road improvements. ODOT accepted bids for the improvements and awarded a contract for the construction project, and construction began shortly thereafter. Just three days prior to the contract being awarded, the Board of Elections validated sufficient signatures to have an initiative placed on the November ballot. The voters approved the initiative ordinance repealing the enabling legislation and all commitments for the road project. At the time the initiative passed, construction was nearly sixty percent complete. The effect of the initiative would have halted the completion of the project.

The City of Middletown believed the initiative to be an unconstitutional impairment of a contract and allowed the project to continue to the point of completion. The Ohio Supreme Court agreed that the initiative as passed impaired the obligations of the contract between the City and ODOT in violation of Article I, Section 10 of the United States Constitution and therefore, the initiative ordinance was void *ab initio*. *Id.*, 25 Ohio St. 3d at 383. The Court went on to state that “once having granted certain powers to a municipal corporation, 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 corporation’s ability to perform.” *Id.* at 385 [quoting *Continental Illinois Nat’l Bank v. Washington*, 696 F.2d 692, 700 (9th Cir.

1983)]. The Court explained that “had the initiative had been brought at an earlier time, *before there was an executed contract*, and before construction had begun, this controversy likely would not be before us today.” *Id.* at 383 (emphasis added).

The City’s argument that it would be proceeding at its own risk if it were to sign the Parking System Lease misses the mark. Had Plaintiffs/Relators not obtained a temporary restraining order in this matter, this case would likely be at an end. The City has it backwards. If the City had signed the Parking System Lease, it would have been at Plaintiffs/Relators’ “risk.” Plaintiffs/Relators would be deprived of any meaningful relief even if they were to succeed with the referendum on Ordinance 56-2013.

Based on the foregoing, Plaintiffs/Relators have sufficiently demonstrated an actual controversy between themselves and the City of Cincinnati. Accordingly, Plaintiffs/Relators have standing to proceed with their action for declaratory judgment.

The City also challenges Plaintiffs/Relators’ standing to pursue their taxpayer claims under R.C. 733.59 for declaratory judgment. The Ohio Legislature has conferred standing upon municipal taxpayers to vindicate a public right when a city or its officials refuse to apply for an injunction or to restrain an abuse of corporate power. A taxpayer demand letter is a jurisdictional prerequisite to a statutory taxpayer action and the failure to send the required demand is fatal to statutory taxpayer standing. As of the date of the hearing on Plaintiffs/Relators’ Motion for Declaratory Judgment and Permanent Injunction, a demand letter as described in R.C. 733.59 had not been served upon Cincinnati City Solicitor John P. Curp.

The City has directed the Court’s attention to *Fisher v. Cleveland*, 109 Ohio St. 3d 33, 2006-Ohio-1827, wherein the Ohio Supreme Court stated that a “jurisdictional analysis of a statutory taxpayer action begins with R.C. 733.56, which requires a city law

director to apply in the city's name 'to a court of competent jurisdiction for an order of injunction to restrain the abuse of corporate powers.'”

Plaintiffs/Relators argue that the demand letter required by R.C. 733.59 would have been a futile or vain act, given that Mr. Curp, in fulfilling his obligations as City Solicitor and chief legal counsel for the City of Cincinnati, advised the City Council that the emergency language contained in Ordinance 56-2013 would prohibit a referendum on the Ordinance. Under R.C. 733.59, Mr. Curp would be placed in the untenable position of having advised the City Council on how to make the Ordinance referendum-proof, and then, at the request of a taxpayer, applying to a court for an injunction or declaration as to the taxpayers' right to a referendum on that same Ordinance. In determining whether or not a taxpayer demand letter would be a vain act, “the substantial question comes down to this: Did the circumstances here show that it would have been unavailing to have made a request upon the solicitor.” *State ex rel. White v. Cleveland*, 34 Ohio St. 2d 37 (1973). In this instance, given Mr. Curp's advice to City Council and his close involvement with the process which ultimately led to the passage of Ordinance 56-2013 as emergency legislation, the statutory demand letter would have been in vain and to no avail. Thus, despite the lack of a statutory demand letter, Plaintiffs/Relators have demonstrated sufficient standing to proceed in a statutory taxpayer action.

EMERGENCY LEGISLATION

The Cincinnati City Council adopted Ordinance 56-2013 as emergency legislation in accordance with the City Charter. The City argues that Article II, Section 3 of its Charter provides that such emergency legislation goes in to effect immediately and therefore is not subject to referendum. The significance of designating an ordinance as

emergency legislation and whether such emergency legislation is subject to referendum is not specifically addressed in the Charter.

The City urges the Court to give all the words contained in the Charter their plain and ordinary meaning, and in so doing, conclude that emergency Ordinance 56-2013 is not subject to referendum.

Plaintiffs/Relators interpret Article II, Section 3 of the Charter to allow for referendum on all ordinances passed by the City Council, and the reference in that Section to the laws of the State of Ohio relates solely to the mechanics or procedures of the referendum process itself (i.e., gathering signatures, circulating petitions, filing requirements, deadlines, etc).

As a matter of statutory construction, the Court is not permitted to add language exempting emergency legislation from referendum where no such language exists in the Charter provision. The First District Court of Appeals recently so held in *Brookville Equipment Corp. v. Cincinnati*, 2012-Ohio-3648, at ¶ 20:

Because council chose not to include language in the ordinance, a court will not add that language when undertaking an interpretation of such ordinance. See, e.g., *State ex rel. Lorain v. Stewart*, 119 Ohio St. 3d 222, 2008-Ohio-4062, 893 N.E.2d 184 (refusing to add language to a statute when engaging in statutory interpretation).

The Ohio Supreme Court has for many years instructed the lower courts that when interpreting provisions for municipal initiative or referendum, those provisions are to be liberally construed so as to permit rather than preclude the exercise of the powers of referendum and initiative:

This conclusion is consistent with our duty to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained.

State ex rel. Julnes v. S. Euclid City Council, 130 Ohio St. 3d 6, 2011-Ohio-4485, ¶ 28 (citing *State ex rel. Oster v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St.3d 480, 486, 756 N.E.2d 649).

It is generally presumed in Ohio that emergency legislation is not subject to referendum. To be sure, in cases where the Ohio Revised Code's referendum provisions apply – with respect to non-charter municipalities, for example -- R.C. 731.29 -30 make clear that emergency legislation is not subject to referendum. R.C. 731.29 states, in pertinent part, "Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code." R.C. 731.30 refers to emergency ordinances, appropriations for current expenses and street improvements. See *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145 (non-charter village council ordinance not subject to referendum due to emergency declaration). However, the Ohio Supreme Court recently found an emergency ordinance subject to referendum where the city charter provided for referendum on emergency ordinances. *State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St. 3d 6, 2011-Ohio-4485.

The City of Cincinnati derives its powers as a home rule city from the Ohio Constitution. The First District Court of Appeals recently reaffirmed that view. In *State ex rel. Phillips Supply Co. v. Cincinnati*, 2012-Ohio-6096, ¶53, the Court stated, "The city of Cincinnati is a charter municipality which derives its powers of local self-government from Ohio Constitution, Article XVIII, Section 3. Thus, the City's power to enact legislation is conferred by the City Charter, not the Ohio Revised Code."

The City of Cincinnati as a charter municipality may enact legislation as provided by its Charter. Article II, Section 3 of the City Charter, which governs citizens'

referendum powers, was adopted as a charter amendment in 1994 by the voters of Cincinnati.

The City of Cincinnati's Charter provides:

Article II, Section 1: All legislative powers of the city shall be vested, subject to the terms of this charter and of the constitution of the state of Ohio, in the council. The laws of the state of Ohio not inconsistent with this charter, except those declared inoperative by ordinance of the council, shall have the same force and effect of ordinances of the city of Cincinnati; but in the event of conflict between any such law and any municipal ordinance or resolution the provisions of the ordinance or resolution shall prevail and control.

Article II, Section 2: All ordinances and resolutions in force at the time this charter takes effect, not inconsistent with its provisions, shall continue in force until amended or repealed by the council.

Article II, Section 3: The initiative and referendum powers are reserved to the *people* of the city on *all* questions which the council is authorized to control by legislative action; such powers shall be *exercised* in the *manner* provided by the laws of the state of Ohio. Emergency ordinances upon a yea and nay vote must receive the vote of a majority of the members elected to the council, and the declaration of an emergency and the reasons for the necessity of declaring said ordinances to be emergency measures shall be set forth in one section of the ordinance, which section shall be passed only upon a yea and nay vote of two-thirds of the members elected to the council upon a separate roll call thereon. If the emergency section fails of passage, the clerk shall strike it from the ordinance and the ordinance shall take effect at the earliest time allowed by law.

(Emphasis added.)

The citizens of Cincinnati have reserved the initiative and referendum power to themselves on all questions which the Council is authorized to control by legislative action. Those powers shall be *exercised* in the *manner* provided by the laws of the state of Ohio. The question is whether the initiative and referendum powers reserved to the people in the first clause of Article II, Section 3 are somehow diminished by the second clause which provides that those powers are to be exercised in the manner provided by Ohio law. The Court must decide if the citizens of Cincinnati chose to limit

their referendum rights in those instances where the City Council passes emergency legislation.

The City Charter does not specifically exempt emergency legislation from the powers reserved to the people. The Charter language is clear that it refers to all legislation passed by City Council with no exceptions. If the people of Cincinnati had intended to exempt emergency legislation from their referendum powers, they could have done so when adopting Article II, Section 3 of the City Charter.

Turning to the second clause of Article II, Section 3, the question of how those powers are to be exercised must be answered. The referendum powers are to be exercised in the manner provided by the laws of Ohio. This refers to the procedures to be employed when seeking a referendum, not to any limit on the right of referendum itself. Cincinnati's Charter does not provide any procedural mechanism for the conduct of initiative or referendum proceedings, but rather defaults to state law. Without the reference to Ohio law, the citizens of Cincinnati would have the right to referendum but no procedural method to implement the right. See *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 477, 2002-Ohio-997, 764 N.E.2d 971:

The statutory procedure governing municipal initiative and referendum in R.C. 731.28 through 731.41 applies to municipalities where the charter incorporates general law by reference, except where the statutory procedure conflicts with other charter provisions.

The City Charter's reference to Ohio law applies the procedures to be followed in **exercising** the people's right to initiative and referendum; it places no restraint or limitation on that right.

To be sure, the City Charter provisions at issue here are by no means free from ambiguity. However, the Supreme Court of Ohio has set forth the course to be followed

when a city charter provides its citizens with an unrestricted right to referendum followed by a reference to state law for the manner of its exercise:

Given the ambiguity of the charter language as well as our oft-cited mandate to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained, we will not do so.

State ex rel. Julnes v. S. Euclid City Council, 130 Ohio St. 3d 6, 2011-Ohio-4485, ¶ 43 (citing *State ex rel. Oster v. Lorain County Bd. of Education* (2001), 93 Ohio St. 3d 480, 486, 756 N.E.2d 649. Neither will this Court do so.

CONCLUSION

The Court has considered the arguments of counsel, the law of Ohio, exhibits, precedent, and the rules of statutory construction, and has weighed the relevant factors required of Plaintiff/Relators in order for them to prevail on their claim for injunctive relief. For the reasons stated herein, the Court hereby grants Plaintiffs/Relators' Motion for Declaratory Judgment and Permanent Injunction.

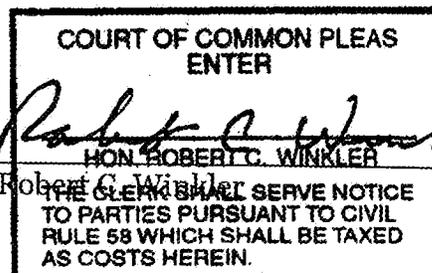
Therefore, it is hereby ORDERED that, pending the outcome of the referendum process on Ordinance 56-2013, Defendants Milton Dohoney and the City of Cincinnati shall take no further action to implement Ordinance 56-2013, nor shall they execute or perform under the Long-Term Lease and Modernization Agreement for the City of Cincinnati Parking System. This is a final appealable order. There is no just cause for delay.

SO ORDERED.

Date

3/28/13

Judge Robert C. Winkler



Copies to be sent via ordinary U.S. mail to:

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Assistant City Solicitor
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Deputy City Solicitor
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Cincinnati, OH 45202

ENTERED
JUN 12 2013

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LISA MCQUEEN, : APPEAL NO. C-130196
SHIRLENE BRITTON, : TRIAL NO. A-1301595
PETE WITTE, : JUDGMENT ENTRY.
EDWARD D. HYDE, :
JOHN BRANNOCK, :
and :
DOUGLAS B. ROBINSON, JR., :
Plaintiffs-Appellees, :
and :
CITY OF CINCINNATI EX REL. LISA :
MCQUEEN, SHIRLENE BRITTON, :
PETE WITTE, EDWARD D. HYDE, :
JOHN BRANNOCK, and DOUGLAS B. :
ROBINSON, JR., :
Relators-Appellees, :
vs. :
MILTON R. DOHONEY, JR., :
CITY MANAGER, :
and :
THE CITY OF CINCINNATI, :
Defendants-Respondents- :
Appellants. :



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

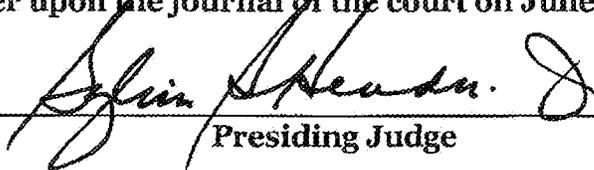
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on June 12, 2013 per order of the court.

By:


Presiding Judge

ENTERED
JUN 12 2013

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LISA MCQUEEN, :
SHIRLENE BRITTON, :
PETE WITTE, :
EDWARD D. HYDE, :
JOHN BRANNOCK, :
and :
DOUGLAS B. ROBINSON, JR., :
Plaintiffs-Appellees, :
and :
CITY OF CINCINNATI EX REL. LISA :
MCQUEEN, SHIRLENE BRITTON, :
PETE WITTE, EDWARD D. HYDE, :
JOHN BRANNOCK, and DOUGLAS B. :
ROBINSON, JR., :
Relators-Appellees, :
vs. :
MILTON R. DOHONEY, JR., :
CITY MANAGER, :
and :
THE CITY OF CINCINNATI, :
Defendants-Respondents- :
Appellants. :

APPEAL NO. C-130196
TRIAL NO. A-1301595

OPINION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

JUN 12 2013

COURT OF APPEALS

ENTERED

JUN 12 2013

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded with Instructions

Date of Judgment Entry on Appeal: June 12, 2013

The Law Firm of Curt C. Hartman and Curt C. Hartman, and Finney, Stagnaro, Saba & Patterson and Christopher P. Finney, for Plaintiffs-Relators-Appellees,

John P. Curp, City Solicitor, and Terrance A. Nestor, Assistant City Solicitor, for Defendants-Respondents-Appellants,

Squire Sanders LLP, Scott A. Kane, Pierre H. Bergeron and Colter L. Paulson, for Amici Curiae Cincinnati Center City Development Corp., Port of Greater Cincinnati Development Authority, and Uptown Consortium, Inc.,

Taft Stettinius & Hollister, LLP, W. Stuart Dornette and John B. Nalbandian, for Amici Curiae Al Neyer, Associated Builders and Contractors, Flaherty & Collins Properties, JDL Warm Construction LLC, Messer Construction Co., Miller-Valentine Group, NorthPointe Group, Oswald Company, and Towne Properties,

Katz Teller Brandt & Hild, Robert A. Pitcairn and Mark J. Jahnke, for Amicus Curiae Cincinnati USA Regional Chamber.

Note: we have removed this case from the accelerated calendar.

ENTERED

JUN 12 2013

CUNNINGHAM, Presiding Judge.

{¶1} The city of Cincinnati and its city manager, Milton R. Dohoney, Jr., (“the city”) appeal the judgment of the Hamilton County Court of Common Pleas declaring that emergency Ordinance No. 56-2013 is subject to the referendum power of the citizens of Cincinnati, and enjoining the city from acting under that ordinance pending the outcome of the referendum process. Because we hold that, as a matter of law, the city’s charter exempts the validly enacted emergency Ordinance No. 56-2013 from the referendum power of the citizenry, we reverse the common pleas court’s judgment, and remand the case for the trial court to enter judgment in favor of the city.

I. Background Facts and Procedure

{¶2} On March 6, 2013, Cincinnati’s city council passed Ordinance No. 56-2013, which relates to, and authorizes the city manager to execute an agreement for the long-term leasing of the city’s parking system. The lease is captioned “Long-Term Lease and Modernization Agreement for the City of Cincinnati Parking System with the Port of Greater Cincinnati Development Authority.” And under its anticipated terms, the city will receive immediate substantial compensation, yearly lease payments, and a technological upgrade to the parking meter hardware, in exchange for giving up control over some aspects of the identified parking system. The city manager proposed the lease as a solution to meet a significant budget shortfall beginning with the fiscal year commencing on July 1, 2013.

{¶3} Section 5 of Ordinance No. 56-2013 is an “emergency clause” that the city’s administrators, including the city solicitor’s office, “presented” to city council for its consideration. And at city council’s special session held on March 5, 2013, the city solicitor, John Curp, told council that the emergency clause would exempt the

ENTERED

JUN 12 2013

ordinance from a referendum. On March 6, 2013, city council voted to adopt the ordinance by a vote of 5-4 and voted to retain the emergency clause by a vote of 6-3.

{¶4} Subsequently, a group of people, stipulated to be city residents, voters, and taxpayers (“plaintiffs-relators”), filed with the Hamilton County Court of Common Pleas a verified complaint seeking an ex parte temporary order restraining the city manager from executing the parking lease agreement and enjoining the city and the city manager from taking any action in furtherance of the ordinance. The plaintiffs-relators also sought declaratory and injunctive relief, and requested attorney fees based on a claim under 42 U.S.C. 1983. The plaintiffs-relators claimed to have a legal right to referendum on the issue that would be lost if the city were permitted to act upon the newly enacted ordinance.

{¶5} The common pleas court granted the temporary restraining order. Several days later, a committee of petitioners, including some of the plaintiffs-relators, filed a copy of a referendum petition regarding Ordinance No. 56-2013 with the city’s finance director, in accordance with R.C. 731.32.

{¶6} Because it contained a 42 U.S.C. 1983 claim, the city moved the case to the federal district court. The plaintiffs-relators dismissed their federal claim and amended the complaint to assert a claim, and statutory taxpayer standing, under R.C. 733.59. The district court remanded the action back to the Hamilton County common pleas court.

{¶7} On remand, the common pleas court ordered a consolidated hearing on the preliminary-injunction, the permanent-injunction, and the declaratory-judgment claims.

{¶8} The plaintiffs-relators asked the court to declare that Ordinance No. 56-2013 is subject to a referendum and to enjoin the implementation of the ordinance. In support, they restated allegations set forth in the amended complaint: that Ordinance No. 56-2013 did not pass with the requisite number of votes needed for emergency legislation under R.C. 731.30; that city council did not strictly comply with statutory requirements to designate an ordinance as emergency legislation; and that city council did not obtain the number of votes mandated by Cincinnati's charter ("the city's charter" or "the Charter") to decrease or abolish the powers of any department or division of the city. Additionally, they argued for the first time that the Charter provides for a referendum on all legislative acts, without any exception for emergency legislation.

{¶9} On March 15, 2013, the common pleas court held a hearing on the claims and accepted into evidence joint exhibits, including six pages of stipulated facts. The court found an ambiguity in the Charter and construed the Charter liberally to provide citizens with an unrestricted right of referendum. In doing so, the court rejected the city's argument that the substantive restrictions on the power of municipal referendum set forth in the Ohio Revised Code—including an exception for emergency ordinances—were incorporated into the Charter.

{¶10} Ultimately, the common pleas court declared that Ordinance No. 56-2013 was subject to referendum, and granted injunctive relief prohibiting the city from taking any action to implement the ordinance pending the outcome of any referendum. The common pleas court did not address the plaintiffs-relators' other arguments in support of referendum because it found the issue that it had determined to be dispositive.

{¶11} The city now appeals, asserting in two assignments of error that the court of common pleas erred in granting declaratory and injunctive relief to the plaintiffs-relators. The city asks this court to reverse the common pleas court's order and enter judgment declaring that Ordinance No. 56-2013 is a validly enacted emergency ordinance that is immediately effective and not subject to referendum. Amici, a group of private developers and membership organizations for area businesses, also urge us to reverse.

II. Jurisdiction and Standing

{¶12} In its first assignment of error, the city raises the issues of jurisdiction and standing. We address these issues in turn.

A. Justiciability Requirement for a Declaratory-Judgment Action

{¶13} By force of the Ohio Constitution, the subject-matter jurisdiction of the common pleas courts is limited to "justiciable matters." Ohio Constitution, Article IV, Section 4(B). Thus, in all actions, there must be an "actual controvers[y] between parties legitimately affected by specific facts," such that the court can "render [a] judgment[] which can be carried into effect." *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). The "actual controversy" requirement applies to actions for declaratory judgment. *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9, cited in *Mallory v. Cincinnati*, 1st Dist. No. C-110563, 2012-Ohio-2861, ¶ 10.

{¶14} Here, the city argues that the plaintiffs-relators' declaratory-judgment claim did not present an actual controversy. The city contends that when the amended complaint was filed, the claim was hypothetical, because sufficient

ENTERED

JUN 12 2013

signatures to place the referendum on the ballot had not yet been collected, and the city had not refused to put the referendum on the ballot.

{¶15} The common pleas court rejected the city's argument that the declaratory-judgment claim was speculative. The court found that the case presented a real and substantial controversy, upon which the plaintiffs-relators and the city had assumed adversarial positions, concerning the right to subject the emergency ordinance to referendum. And the court found that the right to referendum or any meaningful relief would be impaired if the plaintiffs-relators could not proceed before the city implemented the agreement authorized by the ordinance.

{¶16} We review the lower court's decision with respect to justiciability under an abuse of discretion standard. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13, clarifying *Mid-American Fire & Cas.*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142. An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *AAAA Ent., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). An "unreasonable" decision is one that is not supported by a "sound reasoning process." *Id.*

{¶17} In making its "justiciability" determination, the court approached the issue pragmatically, considering both the positions taken by the parties and the inadequacy of a remedy resulting from a delay in challenging the ordinance, which became effective immediately. We hold that the common pleas court engaged in a sound reasoning process and did not abuse its discretion in determining that the plaintiffs-relators' claim was justiciable.

B. Jurisdiction for a Statutory Taxpayer Action

{¶18} Generally, R.C. 733.59 authorizes a taxpayer of a municipality to bring an action in his own name, on behalf of the municipal corporation, to vindicate a public right when a city or its officials refuse to do so. *See* R.C. 733.59. A taxpayer with “good cause” may be allowed his costs, and for a prevailing taxpayer, those costs may include his attorney fees.¹ R.C. 733.61.

{¶19} But R.C. 733.59 prevents a court from entertaining this derivative action unless the city’s law director has rejected the taxpayer’s written demand on the city’s law director to pursue the action, and the taxpayer has provided security for the costs of the proceedings. Typically, these requirements are jurisdictional prerequisites. *See State ex rel. Fisher v. City of Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, 845 N.E.2d 500, ¶ 11.

{¶20} The city argues that the cause was not properly brought as a statutory taxpayer’s action because the plaintiffs-relators had failed to comply with the security and demand requirements of R.C. 733.59. Because we agree that the plaintiffs-relators failed to comply with the security requirement of R.C. 733.59, we do not address whether the demand requirement was met.

{¶21} The record demonstrates that after adding the statutory taxpayer claim, the plaintiffs-relators represented to the court by motion that they had deposited \$325 with the Hamilton County Clerk of Courts as security for costs in accordance with the schedule set forth by the local rule. The plaintiffs-relators then asked the court to accept the \$325 deposit as sufficient security to meet the requirement of R.C. 733.59. The common pleas court did so. But the clerk’s notation

¹ The common pleas court did not address the issue of costs in its order but certified that there “[w]as no just cause for delay.”

ENTERED

JUN 12 2013

on the appearance docket demonstrates that plaintiffs-relators failed to deposit the promised funds or any funds with the clerk. Thus, they failed to satisfy the jurisdictional requirement of R.C. 733.59.

{¶22} The plaintiffs-relators argue that the city waived this issue because it failed to raise it in the court below. But even if we were to hold that another party could waive this jurisdictional prerequisite, we could not find a waiver in this case because the city raised the failure to post security as an affirmative defense in its amended answer, and the plaintiffs-relators represented to the court that they had paid the deposit.

{¶23} The plaintiffs-relators intimate that they cured the deficiency by paying the \$325 deposit after the common pleas court had entered its judgment. But the record certified on appeal does not demonstrate that any deposit was made. Therefore, we do not reach the issue of whether the plaintiffs-relators could have corrected the defect in that manner.

{¶24} Because the plaintiffs-relators failed to satisfy the security requirement of R.C. 733.59, we hold that the action was not properly brought under that statute. *See State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 54, 572 N.E.2d 649 (1991). Accordingly, the statutory provision authorizing an award of costs for a R.C. 733.59 action is inapplicable.

C. Vindication of a Public Right

{¶25} Finally, the city argues that the plaintiffs-realtors lacked standing to bring their taxpayer claim for injunctive relief under R.C. 733.59 or the common law because they did not seek to vindicate a public right, but merely sought to benefit themselves.

ENTERED

JUN 12 2013

{¶26} To have standing to pursue relief for all taxpayers, the party must demonstrate that he is volunteering “to enforce a right of action on behalf of and for the benefit of the public.” *State ex rel. Nimon v. Springdale*, 6 Ohio St.2d 1, 215 N.E.2d 592 (1966), paragraph two of the syllabus; *State ex rel. Phillips Supply Co. v. City of Cincinnati*, 2012-Ohio-6096, 985 N.E.3d 257, ¶ 17 (1st Dist.); *Trustees of Prairie Twp. v. Garver*, 41 Ohio App. 232, 238, 180 N.E. 747 (5th Dist.1931). Here, the plaintiffs-relators argued that the public’s right to a referendum would be negatively affected if the city was not enjoined from acting upon Ordinance No. 56-2013.

{¶27} We agree that the right to referendum is a public right and that the remedy requested, which will allow for an election on the issue, will benefit a public interest. *See Nimon* at 4. Therefore, the plaintiffs-relators have common law taxpayer standing because they seek injunctive relief to protect the public’s right to referendum.

{¶28} In conclusion, we sustain the first assignment of error in part, because the common pleas court erred by allowing the action to proceed as a statutory taxpayer action, instead of a common law action, when the plaintiffs-relators failed to give security for the costs of the case.

III. Is Ordinance No. 56-2013 Subject to Referendum?

{¶29} In its second assignment of error, the city argues that the common pleas court erred in finding that the validly enacted emergency ordinance is subject to referendum under the Charter. It maintains that the Charter incorporates state-

law provisions that exempt emergency municipal legislation from referendum.²

A. Municipal Referendum under State Law

{¶30} The Ohio Constitution, by amendment in 1912, expressly “reserves” to the citizens of each municipality in the state the powers of initiative and referendum.

Ohio Constitution, Article II, Section 1f, provides:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; *such powers shall be exercised in the manner now or hereafter provided by law.* (Emphasis added.)

{¶31} The constitution limits the reserved powers to legislative action, but it does not otherwise explicitly define the substantive or procedural aspects of these reserved powers that will allow the citizens of municipalities to carry the powers into effect. *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 543-544, 697 N.E.2d 181 (1998). Instead, through the use of the emphasized language, it leaves that responsibility to other sources of “law,” including state statutes or municipal charters. *See State ex rel. Bramlette v. Yordy*, 24 Ohio St.2d 147, 148-149, 265 N.E.2d 273 (1970); *Dubyak v. Kovach*, 164 Ohio St. 247, 249, 129 N.E.2d 809 (1955); *Dillon v. Cleveland*, 117 Ohio St. 258, 276, 158 N.E. 606 (1927); *Shyrock v. Zanesville*, 92 Ohio St. 375, 384, 110 N.E. 937 (1915).

{¶32} Ohio has statutes on municipal initiatives and referenda to carry into effect the constitutional provision. *See Yordy* at 149; *Dubyak* at 249-250. Generally,

² The plaintiffs-relators first raised the argument that the Charter subjected all municipal legislation to referendum, including valid emergency ordinances, after filing the amended complaint. The parties and the trial court proceeded as though the complaint had been constructively amended to include this claim for declaratory relief. We proceed accordingly.

these provisions apply by default if a municipality has no charter or no charter provisions on the matter. Only the power of municipal referendum—the process of allowing electors to accept or reject legislation—is at issue in this appeal.

{¶33} R.C. 731.29 in pertinent part states:

Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code. No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village, except as provided by such section.

{¶34} R.C. 731.30 in pertinent part reads:

* * * [E]mergency ordinances or measures necessary for the immediate preservation of the public peace, health, or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea or nay vote, receive a two-thirds vote of all the members elected to the legislative authority, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure.

{¶35} These statutes provide, as the common pleas court recognized in its decision, that a validly enacted emergency municipal ordinance is not subject to referendum.³ Instead, it is immediately effective. See R.C. 731.29 and 731.30; *State ex rel. Webb v. Bliss*, 99 Ohio St.3d 166, 168-169, 2003-Ohio-3049, 789 N.E.2d 1102

³ R.C. 731.30 additionally exempts from the operation of the referendum ordinances or measures providing for appropriation for current expenses and certain ordinances or measures for street improvements.

("R.C. 731.30 provides that emergency ordinances 'shall go into immediate effect,' thereby exempting them from referendum."). Conversely, under the statute, a municipal ordinance that is subject to referendum has a delayed effective date, which allows for the exercise of the power of referendum. See R.C. 731.29.

B. Cincinnati's Charter

{¶36} The citizens of Cincinnati have adopted a charter form of government, as authorized by the Ohio Constitution, Article XVIII, Section 7 ("Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."). Section 3 of the same Article provides as follow: "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 the general laws."

{¶37} Charter municipalities such as Cincinnati have the power to adopt referendum provisions that differ from the state law provisions, and these provisions will be enforced if they do not conflict with Ohio's Constitution. See *Dillon*, 117 Ohio St. 258, 158 N.E. 606, at paragraph three of the syllabus; *Buckeye Community Hope Found.*, 82 Ohio St.3d at 543-544, 697 N.E.2d 181; see also R.C 731.41. This includes the power to provide for referendum on emergency legislation. See *State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, 2011-Ohio-4485, 955 N.E.2d 363, ¶ 42; *State ex rel. Snyder v. Bd. of Elections*, 78 Ohio App. 194, 201, 69 N.E.2d 634 (6th Dist.1946).

ENTERED

JUN 12 2013

1. Express Adoption of State Law on Referendum and No Express Provision for Referendum on Emergency Ordinances

{¶38} Cincinnati's charter does not contain comprehensive provisions on initiative and referendum. But the Charter provides in Article II, Section 3 as follows:

The initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner provided by the laws of the state of Ohio. Emergency ordinances upon a yea and nay vote must receive the vote of the majority of the members elected to the council, and the declaration of an emergency and the reasons for the necessity of declaring said ordinances to be emergency measures shall be set forth in one section of the ordinance, which section shall be passed only upon a yea and nay vote of two-thirds of the members elected to the council upon a separate roll call thereon. If the emergency section fails of passage, the clerk shall strike it from the ordinance and the ordinance shall take effect at the earliest time allowed by law.

{¶39} The plaintiffs-relators argue that the first sentence of Article II, Section 3 should be read to provide for referendum on emergency legislation. They contend that the sentence contains "two separate and distinct provision[s]," separated by a semicolon. Thus, they read the first clause as declaring the right of referendum on "all" municipal legislation, without any exceptions. The second clause, they contend, indicates deference to state law for "the manner" in which that reserved right or power is to be exercised, but this deference only includes the

procedural state law provisions pertaining to the exercise of the power, and not the substantive provisions that provide the exceptions to referendum.

{¶40} The common pleas court concluded that because the Charter referred to “all” legislation and did not expressly exempt from referendum emergency ordinances, the Charter created a right of referendum as to an emergency ordinance. The court also read the language after the semicolon—“exercised in the manner provided by the laws of Ohio”—as merely incorporating the procedural methods set forth in state law for seeking a referendum. After stating that the provision was “by no means free from ambiguity,” the court construed the ambiguity liberally to permit the exercise of the referendum power.

2. The Scope of the Power of Referendum in Cincinnati

{¶41} The interpretation of a city’s charter is an issue of law. *State ex rel. Paluf v. Feneli*, 69 Ohio St.3d 138, 142, 630 N.E.2d 708 (1994). We review issues of law de novo, without deference to the trial court’s decision. *See Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342, ¶ 8.

{¶42} In construing the Charter, we apply the general rules of statutory construction, as the charter does not require otherwise with respect to the issue in this case. *See, e.g., State ex rel. Comm. For the Charter Amendment v. City of Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, 776 N.E.2d 1041, ¶ 28. We are mindful that “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a * * * particular meaning * * * shall be construed accordingly.” R.C. 1.42. As a result, we must construe the charter section as a whole and give effect to every part and sentence. *See Cincinnati v. Ohio*, 1st Dist. No. C-110680, 2012-Ohio-3162, ¶ 9.

ENTERED

JUN 12 2013

{¶43} Further, we are directed by the case law that has developed specifically on interpreting charter initiative and referendum provisions. Generally, where a charter specifically adopts state-law initiative and referendum provisions and does not set forth conflicting provisions on the same matter, the state law controls. *See Nimon*, 6 Ohio St.2d 1, 215 N.E.2d 592, at paragraph five of the syllabus; *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 477, 764 N.E.2d 971 (2002); *Citizens for a Better Beachwood v. Cuyahoga Cty. Bd. of Elections*, 62 Ohio St.3d 167, 580 N.E.2d 1063 (1991). *See also* R.C. 731.41.

{¶44} Where a charter is ambiguous concerning the right of referendum, it must be read in favor of the right of referendum. *Julnes*, 130 Ohio St.3d 6, 2011-Ohio-4485, 955 N.E.2d 363, at ¶ 43; *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145, ¶ 25. But there is no need to construe a charter provision on referendum liberally where the provision's meaning is clear. *See Ditmars* at 476.

3. Cincinnati's Charter is not Ambiguous

{¶45} In *Julnes*, the Ohio Supreme Court found that the charter for the city of South Euclid contained an ambiguity with respect to the citizens' right of referendum on emergency ordinances. Citing the rule that municipal referendum provisions must be liberally construed in favor of referendum, the Supreme Court determined that the emergency legislation was not excepted from the referendum requirement. *Id.* at ¶ 43. The South Euclid charter language found ambiguous in *Julnes* provided as follows:

Ordinances providing for a tax levy or for improvements
petitioned for by the owners of a majority of the feet front of the

ENTERED
JUN 12 2013

property benefited and to be specially assessed therefore, and appropriation ordinances limited to the subject of appropriations shall not be subject to referendum, but except as otherwise provided by the Constitution or general laws of the State of Ohio, all other ordinances and resolutions, including, but not limited to, *emergency ordinances and resolutions shall be subject to referendum*; provided, however, that emergency ordinances and resolutions shall go into effect at the time indicated therein.

(Emphasis added.)

Julnes at ¶ 38. In determining that an ambiguity existed, the court was persuaded by the fact that the charter contained a provision specifically subjecting emergency legislation to referendum, and that that provision would be rendered meaningless if the general provisions of R.C. 731.29 and 731.30, exempting emergency municipal legislation from referendum, were read into the charter provisions. *Id.* at ¶ 43.

{¶46} Unlike the charter in *Julnes*, Cincinnati's charter does not contain a specific provision subjecting emergency municipal legislation to referendum. Instead, Cincinnati's charter, consistent with the constitutional provision on the same subject, sets forth the reservation of the power of referendum and then references "state law" for the "manner to exercise" the power.⁴

{¶47} A charter is a governing instrument, like a constitution. When introducing the initiative and referendum powers of its citizenry, Cincinnati's charter uses the same sentence construction and almost the same phraseology as Ohio

⁴ The Charter also includes a general provision that provides for the application of state laws that are not inconsistent with the Charter and not declared inoperative by ordinance of city council. Charter of the City of Cincinnati, Article II, Section 1.

Constitution, Article II, Section 1f. And at the time Cincinnati adopted its charter, the Ohio Supreme Court in *Shyrock v. Zanesville* had read the phrase “such powers shall be exercised in the manner,” as found in Ohio Constitution, Article II, Section 1f, to encompass both substantive and procedural limitations on the power of municipal referendum, where those limitations were provided by law. (Emphasis added.) *Shyrock*, 92 Ohio St. at 384, 110 N.E. 937. The *Shyrock* court held this notwithstanding that the phrase was part of a clause in a compound sentence that was preceded by a clause reserving the initiative and referendum powers “on all questions” of municipal “legislative action.” *Id.* The Supreme Court continues to read the compound sentence in this way. See *Taylor v. City of London*, 88 Ohio St.3d 137, 143, 723 N.E.2d 1089 (2000); *Yordy*, 24 Ohio St.2d at 148-149, 265 N.E.2d 273.

4. Charter Provisions Must Be Read As A Whole and in Context

{¶48} Importantly, charter provisions, like statutes and constitutions, must be read as a whole and in context. See *MacDonald v. Bernard*, 1 Ohio St.3d 85, 88-89, 438 N.E.2d 410 (1982). We are not permitted—as the common pleas court did, and Judge Dinkelacker’s dissent does—to look at the first sentence and disassociate it from the context of the entire section.

{¶49} The first sentence of Article II, Section 3 of the Charter provides that “The initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner provided by the laws of the state of Ohio.” The remaining provisions of Article II, Section 3 of the Charter set forth the specific requirements for the passage of “emergency ordinances” in Cincinnati. These provisions alter the statutory procedures.

ENTERED

JUN 12 2013

{¶50} The placement of these provisions immediately after the sentence allowing the exercise of the right of referendum in the manner provided by state law is a confirmation that the state-law exception for emergency legislation applies and validly enacted emergency ordinances are not subject to referendum in Cincinnati.

{¶51} Language in Article II, Section 6 of the Charter also supports our conclusion that not all municipal legislation is subject to referendum in Cincinnati. That section addresses the procedure to be followed if the mayor vetoes legislation, and it provides in relevant part as follows:

If six members of the council vote affirmatively to override the veto and enact the legislation, it becomes law notwithstanding the mayoral veto. It shall be effective according to its terms upon the affirmative vote and, *if otherwise subject to referendum*, the time for referendum on the legislation shall begin to run again from that date. (Emphasis added.)

Charter of the City of Cincinnati, Article II, Section 6.

{¶52} We must interpret the Charter within the framework of established rules of construction and to avoid an absurd result. To that end, the only reasonable conclusion at which we can arrive, after reviewing the Charter, is that the state-law provisions on referendum are to be followed, except where the Charter sets forth specific charter provisions that otherwise control. Because the Charter does not specifically provide for referendum on emergency legislation, the state-law provisions that preclude emergency municipal legislation from referendum apply.

{¶53} Thus, the facts of this case are wholly distinguishable from the facts in *Julnes*. The general rule providing for the liberal construction of municipal

referendum provisions does not apply in this case because the Charter's meaning is unequivocal and definite.⁵ See *Ditmars*, 94 Ohio St.3d at 476, 764 N.E.2d 971 (holding that there is no need to construe charter provision on initiative liberally where meaning is "unequivocal.").

5. 90 Years of Exempting Emergency Municipal Legislation from Referendum

{¶54} Our reading of Article II, Section 3 of the Charter is supported by the case law in this district. For almost 90 years, Hamilton County courts ruling on issues related to Article II, Section 3 of the Charter have interpreted that provision consistent with the city's position that the citizens of Cincinnati did not reserve the power to approve or reject emergency municipal legislation by popular vote. In *Walsh v. Cincinnati City Council*, 54 Ohio App.2d 107, 108-109, 375 N.E.2d 811 (1st Dist.1977), we recognized that the Charter precluded the right of referendum on a valid emergency ordinance, although we held that the ordinance "lack[ed] validity as an emergency enactment." *Id.* at 112.

{¶55} The common pleas court made a similar observation in *Schultz v. Cincinnati*, 13 Ohio Op. 186, 28 Ohio Law Abs. 29, 1938 Ohio Misc. LEXIS 906, *7 (C.P.1938) ("By the adoption of [section] 2 of the ordinance [, which contains an emergency clause,] the people of the City of Cincinnati are denied the right to express their views concerning this ordinance by the referendum, for by operation of [section] 2 of the ordinance[,] it becomes immediately effective."). See also *Sentinel*

⁵ The city attached to its appellate brief a document captioned "Report of Charter Amendment Commission." The plaintiffs-relators contend that the city is impermissibly attempting to add to the record before the trial court. See, e.g., *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500, (1978), syllabus; *Steinriede v. City of Cincinnati*, 1st Dist. No. C-100289, 2011-Ohio-1480, ¶ 10. Because we find no ambiguity in the Charter language, we may not consider the "history" of the Charter. See R.C. 1.49. Therefore, we need not determine whether that document is properly before this court.

Police Assn. v. Cincinnati, 1st Dist. No. C-940610, 1996 Ohio App. LEXIS 1512, *12 (Apr. 17, 1996) (citing R.C. 731.30 for the proposition that valid emergency ordinances passed by Cincinnati's city council become effective immediately); *Cincinnati ex rel. Newberry v. Brush*, 1st Dist. No. C-830674, 1984 Ohio App. LEXIS 8835, *5 (Jan. 11, 1984) (stating that where city council passes an emergency ordinance, but "there was in fact no emergency or if the reasons given for such necessity are not valid reasons, the voters have an opportunity to take appropriate action in the subsequent election of their representatives.").

{¶56} We are not persuaded that Cincinnati's Charter should be read otherwise.

C. Is Ordinance 56-2013 a Valid Emergency Ordinance?

{¶57} Having determined that the Charter excludes valid emergency ordinances from referendum, we must address the plaintiffs-relators' claim that Ordinance 56-2013 is not a valid emergency ordinance.

{¶58} Generally, judicial review concerning the validity of emergency ordinances is limited to issues such as whether the legislation received the necessary votes for passage and whether the legislation contained an emergency clause that set forth the reasons for the emergency legislation. *See State ex rel. Emrick v. Wasson*, 62 Ohio App.3d 498, 505-506, 576 N.E.2d 814 (2d Dist.1990).

{¶59} If validly enacted, "the existence of an emergency or the soundness of [the] reasons" presented for "declaring the emergency" is not within the purview of a reviewing court. *State ex rel. Fostoria v. King*, 154 Ohio St. 213, 221, 94 N.E.2d 697 (1950). Rather, those issues are "subject to review only by the voters at such a subsequent election of their representatives." *Id.*; *Bliss*, 99 Ohio St.3d 166, 2003-

ENTERED

JUN 12 2013

Ohio-3049, 789 N.E.2d 1102, at ¶ 12, citing *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 519 N.E.2d 347 (1988), paragraph three of the syllabus; *Brush*, 1st Dist. No. C-830674, 1984 Ohio App. LEXIS 8835, at *4-5.

1. Did the Emergency Ordinance Pass with Sufficient Votes?

{¶60} The ordinance at issue first passed with a simple majority, by a vote of 5 to 4. At that time, it did not contain an emergency clause. Council then voted on whether to include an emergency clause in the ordinance, and that section, which passed by a vote of 6 to 3, received two-thirds of the vote.

{¶61} The plaintiffs-relators contend that council's method of passing the legislation did not comply with the requirement in R.C. 731.30 that "emergency ordinances or measures must * * * receive a two-thirds vote" because it is the entire ordinance, not just the emergency clause, that must receive the two-thirds vote. The city counters that the Charter was amended in 1994 to provide for the procedure used by council.

{¶62} Contrary to R.C. 731.30, the Charter, in Article II, Section 3, provides the following:

Emergency ordinances upon a yea and nay vote must receive the vote of a majority of the members elected to council, and the declaration of an emergency and the reasons for the necessity of declaring said ordinances to be emergency measures shall be set forth in one section of the ordinance, which section shall be passed only upon a yea and nay vote of two-thirds of the members elected to the council upon a separate roll call thereon.

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As we have previously held, the Charter alters in part the statutory procedures for passing emergency ordinances by allowing for a separate roll-call vote on the emergency clause. A 1994 amendment to the Charter brought additional changes. This amendment provides that emergency ordinances must pass by a majority of council, and that the separate roll-call vote on the emergency clause must produce affirmative votes from two-thirds of council members.

{¶63} We hold that city council validly enacted Ordinance 56-2013 when five members voted in favor of the ordinance and six members voted in favor of the emergency clause. Accordingly, we reject the plaintiffs-relators' claim that the emergency ordinance is invalid for this reason.

2. Is the Language used in the Emergency Section Defective?

{¶64} The plaintiffs-relators also challenged the validity of the ordinance as emergency legislation on the grounds that the emergency clause does not contain language identical to the language in R.C. 731.30, which limits emergency ordinances to those that are "necessary for the immediate preservation of the public peace, health, or safety in [the] municipal corporation."

{¶65} The emergency clause at issue, found in section 5 of the ordinance, provides the following:

That this ordinance shall be an emergency measure necessary for the preservation of the public peace, health, safety and general welfare and shall, subject to the terms of Article II, Section 6 of the Charter, be effective immediately. The reason for the emergency is the immediate need to implement the budgetary measures contemplated during the December 2012 City of Cincinnati budget

determinations in order to avoid significant personnel layoffs and budget cuts and resulting reductions in City services to Cincinnati residents related to the City's General Fund, which administrative actions would be needed to balance the City's FY 2013 and 2014 budgets in the absence of revenue generated by implementation of the modernization of the City of Cincinnati parking system as described herein.

{¶66} The city again argues that the Charter, which sets forth specific requirements for the content of the emergency clause that are different from those in R.C. 731.30, controls. Article II, Section 3 of the Charter requires only that "the declaration of an emergency and the reasons for the necessity of declaring said ordinances to be emergency measures shall be set forth in one section of the ordinance." The city further contends that the plaintiffs-relators' challenge is unfounded, because even when applying R.C. 731.30, courts have invalidated emergency clauses only where the language providing the reason for the emergency is purely illusory, conclusory, or tautological. *See Laughlin*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145, at ¶ 28. And the Ohio Supreme Court has held an emergency clause is not invalid merely because it does not include a conclusory statement that its enactment is an "immediate" necessity, *id.* at ¶ 32, or because council has used it with the intent to avoid a referendum on the issue. *Id.* at ¶ 37.

{¶67} Where city council included the reason for declaring the emergency in a separate section of the ordinance, our review is limited to whether council's reason for the emergency, as set forth in the ordinance, is merely conclusory, tautological, or illusory. *Laughlin* at ¶ 42. Section 5 of the ordinance contains a description of

specific, concrete, and significant consequences that will flow from the inability to immediately implement the ordinance. The plaintiffs-relators do not argue that the reason for the necessity is conclusory, tautological, or illusory, and in light of the reason given, we are unable to determine that it is.

{¶68} Therefore, we hold that city council satisfied the requirement of setting forth a real, detailed reason to justify the need for the emergency action in accordance with the Charter, and we reject the plaintiffs-relators' argument challenging the clause as insufficient.

D. Does the Ordinance Violate Article II, Section 7?

{¶69} The plaintiffs-relators' final argument, presented in support of declaratory and injunctive relief, centered on Article II, Section 7 of the Charter. This provision in its entirety provides as follows:

The existing departments, divisions and boards of the city government are continued unless changed by the provisions of this charter or by ordinance of the council. Within six months after the adoption of this charter, the council shall by ordinance adopt an administrative code providing for a complete plan of administrative organization of the city government. Thereafter, except as established by the provisions of this charter, the council may change, abolish, combine and re-arrange the departments, divisions and boards of the city government provided for in said administrative code, but an ordinance creating, combining, abolishing or decreasing the powers of any department, division or

board, shall require a vote of three-fourths of the members elected to council, except the ordinance adopting an administrative code.

{¶70} According to the plaintiffs-relators, the three-fourths vote requirement of Article II, Section 7 applied because the ordinance has the effect of abolishing or decreasing the powers of the parking-facilities division of the Department of Enterprise Services. Because city council did not approve Ordinance No. 56-2013 with the seven votes that Article II, Section 7 required, plaintiffs-relators argue that the ordinance was void.

{¶71} The city argued below that the voting requirement of Article II, Section 7, applied only to ordinances affecting “departments, divisions and boards of the city provided for in the administrative code.” The section did not apply to Ordinance No. 56-2013 because the city’s parking operations were not in the city’s administrative code, as demonstrated by exhibit B of the stipulated exhibits submitted to the common pleas court. We agree.

{¶72} Because the city’s parking operations were not a part of the “departments, divisions, [or] boards” arranged in the city’s administrative code, the requirements of Article II, Section 7 did not apply as a matter of law. Accordingly, the ordinance was not “void in its entirety” for failure to meet the vote requirements of that section of the Charter.

{¶73} Consequently, we sustain the city’s second assignment of error.

IV. Conclusion

{¶74} We reverse the trial court’s judgment in favor of the plaintiffs-relators. We remand the matter to the trial court with instructions to enter judgment in favor of the city, in accordance with the law and this opinion.

Judgment accordingly.

DEWINE, J., concurs in part and dissents in part.

DINKELACKER, J., concurs in part and dissents in part.

DEWINE, J., concurring in part and dissenting in part.

{¶75} I join in parts II.A, II.C, III.B and III.C, and with the result reached in Part III. I write separately because I employ a somewhat different analysis to reach the conclusion that the Cincinnati City Charter incorporates provisions of state law that provide that emergency ordinances are not subject to referendum. I respectfully dissent from the majority's conclusion in II.B.

I. Interpretation of the Charter

{¶76} We are tasked with interpreting a single sentence of the Cincinnati Charter:

The initiative and referendum powers are hereby reserved to the people of the City on all questions which the City is authorized to control by legislative action; such powers shall be exercised in the manner hereafter provided by law.

Charter of the City of Cincinnati, Article II, Section 3.

{¶77} The question before us is, does "all" in the first clause include emergency legislation; or does the second clause incorporate provisions of state law removing the right to referendum where legislation is passed as an emergency?

{¶78} If we were to interpret this sentence in a vacuum, it would be an easy enough matter to determine that "all" means all and that the right to referendum is absolute. We do not interpret in a vacuum, however. To the contrary, we are constrained to interpret against a backdrop of precedent that suggests that city

council may indeed thwart the citizens' right to referendum by appending an "emergency" clause to a piece of legislation. This conclusion, I believe, is mandated by the interpretation of nearly-identical language in the Ohio Constitution provided by the Ohio Supreme Court, by the consistent reading given to the city Charter since its inception, and by the familiar rule of statutory construction that requires us to give effect to all of the Charter's provisions.

A. *Shyroek* and a Backdrop of Ohio Supreme Court Precedent Interpreting a Parallel Provision of the Ohio Constitution

{¶79} The Ohio Supreme Court interpreted a nearly-identical provision of the Ohio Constitution in *Shyroek v. Zanesville*, 92 Ohio St. 375, 110 N.E. 937 (1915). That provision provided:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Id. at 380, citing Ohio Constitution, Article II, Section 1f.

{¶80} The *Shyroek* court found that despite the seemingly absolute reservation of the referendum power on "all" questions, the second clause limited that power in the case of emergency legislation. *Id.* at 384-385. The phrase "now or hereafter provided by law," the court concluded, incorporated a precursor to R.C. 731.30, which provided that emergency ordinances go into immediate effect. *Id.* at 385. Thus, *Shyroek* tells us that even though a governing document says that it reserves the referendum power on "all questions," the power may still be limited in the case of emergency ordinances. It also tells us that the phrase "shall be exercised

in the manner provided by law” is not merely procedural, but encompasses substantive limitations, including those providing for the immediate effect of emergency legislation. *Id.*

{¶81} As Judge Dinkelacker’s dissent points out, *Shyrock* dealt with the construction of the Ohio constitution, while our case deals with the city Charter. But there is nothing about the two different documents that would suggest that the same words mean one thing in the Ohio Constitution and something altogether different in the Charter. To the contrary, the Charter provision was enacted barely a decade after the decision in *Shyrock*, and we must presume that the language chosen by the drafters of the Charter was informed by the understanding expressed in *Shyrock*.

{¶82} Further, the Ohio Supreme Court has not backed away from its limiting interpretation:

A superficial examination of that [Ohio Constitution, Article II, Section 1f] might lead to the conclusion that referendum may not be denied as to any municipal legislative action, the section reserving to the people such power on ‘all questions which such municipalities may * * * control by legislative action * * *.’ Such a conclusion, however, uniformly has been rejected by this court.

State ex rel. Bramlette v. Yordy, 24 Ohio St.2d 147, 149, 265 N.E.2d 273 (1970), citing *Shyrock, supra*.

{¶83} As recently as *Taylor v. London*, 88 Ohio St.3d 137, 143, 723 N.E.2d 1089 (2000), the Supreme Court reaffirmed that R.C. 721.29 and 731.30, which preclude referendum on validly enacted emergency legislation, do not contravene the right of referendum on “all questions” provided by the Ohio Constitution.

{¶84} Thus, while plaintiffs advance an alluring argument, their reading of the Charter language is impossible to reconcile with the Ohio Supreme Court's decisions in cases such as *Shyroch and Taylor*.

B. The Charter Provision Must Be Read as Whole

{¶85} As the lead opinion points out, the reading advanced by plaintiffs and Judge Dinkelacker's dissent would require us to ignore swaths of the city Charter. The last two sentences of Article II, Section 3 of the Charter provide for a separate vote on an emergency clause, and provide that if the emergency clause fails, the legislation shall go into effect "at the earliest time allowed for by law." Such a provision only makes sense if emergency legislation goes into effect immediately. A referendum suspends a legislative action before it goes into effect. *See Ohio Valley Elec. Ry. Co. v. Hagerty*, 14 Ohio App. 398 (4th Dist.1921). Once the legislation is in effect, there can be no referendum. Thus, by recognizing that council may pass emergency legislation that has immediate effect, the Charter recognizes that council may pass emergency legislation that is not subject to referendum.

{¶86} The interpretation advanced by Judge Dinkelacker's dissent would read these last two sentences of Article II, Section 3 out of the City Charter. We are bound, however, to interpret the Charter if at all possible to give effect to all of its provisions, or in the Latin, "*verba cum effectu accipienda*." Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, 174-179 (2012). The only way to do so is to assume that the Charter adopts provisions of state law allowing a municipality to adopt emergency legislation that is not subject to referendum.

C. Consistent Understanding of the Charter Language

{¶87} It is also relevant to the analysis that it has been understood for nearly 90 years that the Charter language allows council to pass emergency legislation that is not subject to referendum.

{¶88} This was certainly the understanding of the drafters of the Charter. The Report of the Charter Amendment Commission, submitted just two weeks before council placed the Charter on the ballot, specifically noted that the language of Article II, Section 3 tracked the parallel provisions of the State Constitution. The provision “is practically an adaption of the [Ohio] constitutional provision preserving the initiative and referendum,” explained the Commission. Report of Charter Amendment Commission, August 2, 1926.⁶

{¶89} Further, as the lead opinion points out, Hamilton County courts have assumed for nearly 90 years that council, may, in fact, pass emergency legislation that is not subject to referendum. Judge Dinkelacker’s dissent notes that none of the string of cases cited confronted the issue directly, but rather simply assumed the existence of a power to pass emergency legislation that was not subject to referendum. But, the failure of litigants to raise the issue says something too; it suggests that the understanding that council possessed the power to enact emergency legislation was so broadly held that even litigants challenging council’s decision to pass emergency legislation not subject to referendum did not bother to attack council’s power to do

⁶ Reference to the Report of the Commission is appropriate not because the Charter provision is ambiguous but because it demonstrates the contemporaneous understanding of the Charter language at the time it was adopted. See *District of Columbia v. Heller*, 554 U.S. 570, 577-610, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); see also Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 Tex. Tech. L. Rev. 1173 (2009).

so. Quite simply, until this case, council's power to pass emergency legislation that is not subject to referendum has been assumed.

{¶90} This long held understanding is not dispositive, but it does inform our construction of the Charter provision. We are cautioned that "a fundamental consideration[] of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated." Singer, *Statutes and Statutory Construction*, Section 41:5 at 417 (6th Ed.2001). Here, *settled expectations support the construction advanced by the city.*

D. Other Considerations

{¶91} Of course, where a charter provision is ambiguous, we construe the provision liberally in favor of a referendum. But *Shyroek* and its progeny tell us the words at issue here are not ambiguous; rather they tell us exactly what the pertinent words mean. And plainly, *Julnes*, which dealt with a charter provision that expressly provided for a right to referendum on emergency legislation, has no application to the case at bar where the Charter is silent on referendum of emergency legislation and adopts state law. Thus I believe that we are constrained to reverse the trial court.

{¶92} Our decision today is not an endorsement of a process that allows six members of council to avoid the referendum power on even the most important of questions by labeling a piece of legislation as an emergency. It is simply a straightforward application of the language of the Charter based upon the precedent we must follow. If the citizens of Cincinnati wish to restrict use of the emergency label to avoid referendum, the remedy is to either amend the Charter to strengthen the referendum power or to elect councilmembers less willing to append "emergency" clauses to legislation.

II. Statutory Taxpayer Action

{¶93} The majority concludes that this action could not be properly maintained as a statutory taxpayer action because plaintiffs failed to pay a \$325 filing fee that the court said could serve as security, and that, therefore, the court lacked jurisdiction over the statutory taxpayer claim.

{¶94} It is not clear from my reading of the record, however, that the filing fee was not paid, and the issue was not litigated below. We need not reach the issue because of our disposition of the other issues in the case. But if we had decided the merits of this case differently, and did need to reach the issue, I would remand the issue to the trial court. Rather than this court find that this action could not be maintained as a statutory taxpayer action based upon an incomplete record, I would allow the trial court to determine in the first instance whether plaintiffs complied with the trial court's order regarding the posting of security.

DINKELACKER, J., concurring in part and dissenting in part.

{¶95} While I agree with the lead opinion on all aspects of the issues of jurisdiction and standing, I respectfully dissent from its interpretation of Article II, Section 3 of the city charter. In my view, the charter language is ambiguous and, therefore, we must liberally construe it in favor of permitting the people of Cincinnati to exercise their power of referendum.

{¶96} The constitutional right of citizens to referendum is "of paramount importance." Courts must "liberally construe municipal referendum powers so as to permit rather than preclude their exercise by the people." *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145, ¶ 25. Those powers

should be promoted rather than prevented or obstructed. *State ex rel. King v. Portsmouth*, 27 Ohio St.3d 1, 4, 497 N.E.2d 1126 (1986).

{¶197} The lead opinion, in holding that the emergency legislation is exempt from the power of referendum, relies upon several Ohio Supreme Court cases that I do not believe apply in this case, primarily because they rely heavily upon state law, rather than the language of a city charter. *See, e.g., Taylor v. London*, 88 Ohio St.3d 137, 723 N.E.2d 1089 (2000); *State ex rel. Bramlette v. Yordy*, 24 Ohio St.2d 147, 265 N.E.2d 273 (1970); *Shyrock v. Zanesville*, 92 Ohio St. 375, 110 N.E. 937 (1915). Instead, I find more the recent case of *State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, 2011-Ohio-4485, 955 N.E.2d 363, to be persuasive.

{¶198} In that case, a South Euclid ordinance stated that certain ordinances were not subject to referendum, “but except as otherwise provided by the Constitution or general laws of the State of Ohio, all other ordinances and resolutions, including but not limited to, emergency ordinances and resolutions shall be subject to referendum; provided however that emergency ordinances and resolutions shall go into effect at the time indicated therein.” *Id.* at ¶ 38. The Supreme Court stated that “the general rule in South Euclid that emergency legislation is subject to referendum does not apply when ‘otherwise provided by the Constitution or general laws of the State of Ohio.’” *Id.* at ¶ 39.

{¶199} The court went on to state that pursuant to R.C. 731.41, the provisions of R.C. 731.28 through 731.41 do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and legislative measures. It noted that South Euclid had adopted its own charter, which expressly provided that, with a few specified exceptions, all other ordinances, resolutions, including but not limited to, emergency ordinances

and resolutions shall be subject to referendum. *Id.* at ¶ 42. Therefore, R.C. 731.29 and 731.30 did not exempt the ordinances in question from referendum, in light of the specific charter provision subjecting it to referendum.

{¶100} Though the language in South Euclid's charter differs somewhat from the language of Cincinnati's Charter, I do not find that difference to be dispositive. The lead opinion relies heavily on R.C. 731.29 and 731.30. But as the Supreme Court held in *Julnes*, R.C. 731.41 specifically provides that those sections "do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures." The plain language of R.C. 731.41 unequivocally applies here. R.C. 731.29 and 731.30 are not applicable in this case.

{¶101} The city of Cincinnati is a charter municipality that derives its powers of local self-government from the Ohio Constitution. Its power to enact legislation is conferred by the city Charter, not the Ohio Revised Code. *State ex rel. Phillips Supply Co. v. Cincinnati*, 1st Dist. No. C-120168, 2012-Ohio-6096, ¶ 53. "[A] municipality which has adopted a comprehensive charter is governed by the terms of the charter, and statutory provisions relating to subjects covered by the charter are inapplicable." *State ex rel. Davis Invest. Co. v. Columbus*, 175 Ohio St. 337, 341, 194 N.E.2d 859 (1963).

{¶102} As noted by the common pleas court, in Article II, Section 3 of the charter, "the citizens of Cincinnati have reserved the initiative and referendum power to themselves on all questions which the Council is authorized to control by legislative action. Those powers shall be *exercised* in the *manner* provided by the laws of the state of Ohio." (Emphasis sic.) The remaining language in that section

does not clearly and unambiguously indicate that the citizens of Cincinnati chose to limit their referendum rights in the case of emergency ordinances.

{¶103} In regard to the first sentence of Article II, Section 3, I agree with the common pleas court when it stated:

The City Charter does not specifically exempt emergency legislation from the powers reserved to the people. The Charter language is clear that it refers to all legislation passed by City Council with no exceptions. If the people of Cincinnati had intended to exempt emergency legislation from their referendum powers, they could have done so when adopting Article II, Section 3 of the City Charter.

{¶104} The second sentence of Article II, Section 3 provides that the referendum powers are to be exercised in the manner provided by the state of Ohio. It is this sentence that causes ambiguity. Since it is ambiguous, it must be interpreted in favor of allowing the people to exercise their power of referendum. The common pleas court's interpretation does just that, while still giving meaning to the provision as a whole. *See Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 20-21; *Cincinnati v. Ohio*, 1st Dist. No. C-110681, 2012-Ohio-3162, ¶ 9.

{¶105} The lead opinion's interpretation does not give effect to the whole and is somewhat contradictory. In one paragraph, it states that "the Charter does not specifically provide for referendum on emergency legislation." In the next, it states that "the Charter's meaning is unequivocal and definite." It cannot be both. I agree with the trial court when it stated that "[t]he City Charter's reference to Ohio

law applies [to] the procedures to be followed in *exercising* the people's right to initiative and referendum; it places no restraint or limitation on that right."

{¶106} If the city had intended for emergency legislation to be a limit of the people's unfettered right to referendum, it could simply have said so in the Charter. It clearly did not. Courts have a duty to give effect to all of the words used in a statute but they should not insert words that are not used. *Bernardini v. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979); *Cincinnati* at ¶ 9.

{¶107} Consequently, as the common pleas court stated: "As a matter of statutory construction, the Court is not permitted to add language exempting emergency legislation from referendum where no such language exists in the Charter provision." As this court very recently held in *Brookville Equip. Corp. v. Cincinnati*, 1st Dist. No. C-120434, 2012-Ohio-3648, ¶ 20: "Because council chose not to include language in the ordinance, a court will not add that language when undertaking an interpretation of such ordinance." The same rules of construction apply to the city Charter.

{¶108} I do not find persuasive the city's argument that historically courts, including this one, have interpreted Article II, Section 3 as providing that the power of referendum does not apply to emergency ordinances. None of those cases addressed the specific issue raised in this case, and this court never discussed it directly in those cases.

{¶109} In this case, the city freely admits that it is trying to circumvent its citizens' constitutional right to exercise the power of referendum. But, without a clear directive from the city Charter, that it cannot do. If we adopt the city's interpretation and add the language that would obviate any ambiguity, then this court, i.e., the judicial branch of government, would be performing the function of

the legislative branch and legislating by judicial fiat. The Ohio Constitution vests legislative bodies, “not the courts, with legislative powers of government. Our role, in the exercise of the judicial power granted to us by the Constitution is to interpret and apply the law enacted by the [legislature], not to rewrite it.” *Houdek v. Thyssenkrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 29. Consequently, I would affirm the common pleas court’s decision granting a permanent injunction enjoining the city from implementing Ordinance No. 56-2013.

Please note:

The court has rendered its own entry on the date of the release of this opinion.