

Case No. 2013-1192

**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.

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

ELECTION-RELATED MATTER

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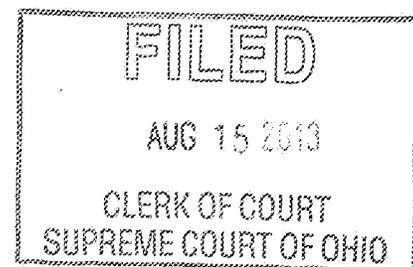


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**REPLY MEMORANDUM IN SUPPORT OF
EXPLANATION OF PUBLIC OR GREAT GENERAL INTERESTS**

“[T]he sole issue for determination at [this stage] is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties” by which this Court will accept jurisdiction of this appeal. *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). This appeal clearly meets the standard by which this Court should accept jurisdiction of this appeal.

In opposing this Court even accepting jurisdiction, the City conveniently ignores that this appeal goes to the basic and fundamental constitutional right of the people to referendum, as well as their First Amendment rights, such that it involves a matter of sufficient public or great general interests. And it is not only the fundamental rights of the parties to this appeal that are at stake herein; for 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.” Thus, without the immediate intervention of this Court, the people of the City of Cincinnati (including the 12,400-plus registered voters who signed the referendum petition) will be frustrated in their ability to function as one of the most essential safeguards of representative government.

In order to subject an ordinance to referendum, the proponents of such referendum had to obtain, within a 30-day period, the signatures of 10% of the electors in the City who had voted in the prior gubernatorial election. According to the Hamilton County Board of Elections, this calculation resulted in the proponents of any referendum effort needing to obtain 8,522 valid

signatures of registered voters from the City of Cincinnati.¹ Amazingly, in the four weeks following the passage of Ordinance No. 56-2013, those who sought to subject that ordinance to referendum obtained over 19,688 signatures of which 12,446 were confirmed by the Board of Elections to be registered voters in the City of Cincinnati. This figure represents over 14.6% of the registered voters in the City who voted in the last gubernatorial election.

But instead of addressing the issue at this stage of the proceedings, *i.e.*, whether the appeal presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties, the City attempts to move to the merits of the appeal together with its slanted and jaundice view thereof, if not outright misrepresentations. While those issues can and should be resolved at the merit stage of the appeal, certain misstatements by the City need to be corrected.

Most notable of the City's misstatements to this Court is how the City conveniently paraphrases (as opposed to directly quoting) the provision of the Cincinnati City Charter at issue when it erroneously declares that the provisions "states that Cincinnatians retain the power of referendum over non-emergency legislation, which they can exercise according to state law." (City Memo., at 2.) But the Charter does not so limit the power of referendum. The actual language (and not a convenient paraphrase) confirms that 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

¹ In the initial memorandum, Appellants indicated that the requisite number of signatures was 8,729 valid signatures from voters within the City of Cincinnati. However, since that time, Appellants have obtained the certification letter dated April 22, 2013, from the Hamilton County Board of Election to the City of Cincinnati wherein the Board reported the actual numbers of submitted, valid and required number of signatures. Thus, the correction contained herein.

the manner now or hereafter provided by law.” That is the actual language from Article II, Section 3 of the Cincinnati City Charter; no express exceptions whatsoever are stated.

And proceeding from its mis-paraphrasing of the charter provision at issue, the City then challenges as “contrary to long-established Ohio law” the proposition that, 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. (City Memo., at 3-4.) However, the argument posited by Appellants, *i.e.*, reliance by all of the judges below upon rules of statutory construction establishes *ipso facto* that the charter provision is ambiguous, constitutes the well-established law in Ohio (and universally elsewhere):

- *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944)(syllabus ¶5): “(w)here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for . . . [resort] to rules of statutory interpretation”;
- *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”;
- *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77, 80 (1991): “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”;
- *State ex rel. Potts v. Comm. on Continuing Legal Edn.*, 2001-Ohio-1586, 93 Ohio St.3d 452, 456, 755 N.E.2d 886 (2001)(“[w]e may resort to rules of construction to interpret Gov.Bar R. X(3)(B)(2) only if the terms of the rule are ambiguous or in doubt”);
- *McAtee v. Ottawa Cty. Dep’t 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”);

- *State ex rel. Jones v. Conrad*, 2001-Ohio-207, 92 Ohio St.3d 389, 392, 750 N.E.2d 583 (2001) (“[t]he rule is that when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation”).

Yet, notwithstanding all of the foregoing declarations (as well as similar such declarations), the City continues to maintain that the foregoing legal propositions are “contrary to long-established Ohio law”. To support such a contention, the City relies exclusively upon a single case, *State v. Porterfield*, 106 Ohio St.3d 5, 829 N.E.2d 690, 2005-Ohio-3095 (2005). (City Memo., at 3-4 & 10.) Yet, *Porterfield* did not concern itself with the proper use of the rules of statutory construction, let alone address the well-established principle set forth above. Thus, despite the City’s claim that the proposition of the Appellants is “contrary to long-established Ohio law,” the City has offered no legal authority to support its *ipse dixit* contention; and, in fact, it is Appellants who accurately posited the well-established legal principle that only if a statute (or charter provision) is ambiguous can resort be made to the rules of statutory construction. And 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.

And in their continual effort to posit red herrings in an effort to dissuade this Court from accepting jurisdiction over this appeal, the City next wrongfully claims the case is now moot. (City Memo., at 9.) The City represents to the Court that the Long-Term Lease and Modernization Agreement for the City of Cincinnati Parking System between the City and the Port Authority has been signed and, thus, according to the City, automatically moots the entire case. Firstly, that Agreement, *i.e.*, the agreement that the Cincinnati City Council authorized to be executed via adoption of Ordinance No. 56-2013, has never been signed. Instead, in a clear

ultra vires act, the Cincinnati City Manager signed an agreement with the Port Authority that was materially and substantively different than that which the City Council authorized to be signed. The referendum effort concerns the former, *i.e.*, Ordinance No. 56-2013 and the agreement authorized thereunder, not the latter, *i.e.*, the agreement actually signed by the City Manager though without legal authority to do so. Furthermore, “[u]nder the doctrine of *ultra vires* as applied to the acts of corporations generally, any attempted exercise of power to contract by a municipality which transcends the limits expressed or necessarily implied from the language of the instrument by which its powers are conferred is null and void.” *Village of Moscow v. Moscow Village Council*, 29 Ohio Misc.2d 15, 19, 504 N.E.2d 1227 (Clermont Cty. C.P. 1984).² Thus, what the City Manager has signed is a nullity; and Ordinance No. 56-2013 and its associated agreement are still viable and properly subject to referendum.

Furthermore, even if, *arguendo*, this case is somehow moot, this Court may still properly accept jurisdiction and decide the case. For a well-established exception recognized by this Court to the mootness doctrine is when the matters complained of are of great public or general interest, *i.e.*, the same legal standard by which this Court accepts jurisdiction over an appeal in the first place. *E.g., In re Suspension of Huffer from Circleville High School*, 47 Ohio St.3d 12, 14, 546 N.E.2d 1308 (1989)(“if a case involves a matter of public or great general interest, the court is vested with the jurisdiction to hear the appeal, even though the case is moot”); *Tschantz*

² On July 17, 2013, a taxpayer-demand letter was tendered to the Cincinnati City Solicitor pursuant to R.C. § 733.56 *et seq.* The gist of such taxpayer-demand letter was that, because the agreement which the City Cincinnati Manager signed with the Port Authority was not authorized by the Cincinnati City Council, such agreement constitutes an abuse of corporate power and/or the execution or performance of a contract made in behalf of the municipal corporation in contravention of the laws and ordinances governing it. Pursuant to R.C. § 733.59, a prerequisite before a taxpayer may bring an action challenging such an agreement is that a written demand be tendered upon the municipal law director or solicitor. To date, the Cincinnati City Solicitor has yet to respond to the previously tendered taxpayer-demand letter.

v. Ferguson, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991)(“Appellant accurately represents that Ohio recognizes an exception to the mootness doctrine for cases which present a debatable constitutional question or a matter of great public or general interest”); *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 31, 505 N.E.2d 966 (1987)(“we believe that the cause *sub judice* involves matters of great public interest, thereby vesting this court with jurisdiction to entertain this appeal, even though the controversy is moot with respect to the plaintiffs”); *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 1995-Ohio-301, 73 Ohio St.3d 590, 598, 653 N.E.2d 646 (1995)(“even where appeals to this court might be deemed technically moot, this court may nevertheless hear them where, as here, the appeal contains issues of great public or general interest”). And as Appellants noted previously, this Court has described the issue in this case, *i.e.*, the constitutional right of citizens to referendum, as being “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; *accord State ex rel. Nolan v. Clendenning*, 93 Ohio.St. 264, 277-278, 112 N.E. 1029 (1915)(“the people’s right to the use of the initiative and referendum” as being “one of the most essential safeguards to representative government”). Thus, regardless of whether the case is moot, the issue in this case involves a matter of public or great general interest. 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, this issue will certainly arise again as the people of the City of Cincinnati attempt to exercise the power they expressly reserved unto themselves – “[t]he initiative and referendum powers . . . on all questions which the council is authorized to control by legislative action.”

CONCLUSION

The City has clearly failed to appreciate that “the sole issue for determination at [this procedural stage] is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties” by which this Court will accept jurisdiction of this appeal. *Williamson*, 171 Ohio St. at 254. And this case is not brought solely for the personal interest of the parties; instead, the issue raised in this case concerns whether and to what extent all of the voters of the City of Cincinnati retain the right to referendum ordinances passed by the city council.

“Ultimate sovereignty, as far as the [municipality] is concerned, rests in its people, and as long as the government established by them exists, that sovereignty remains with them, except insofar as they have expressly surrendered it to a higher sovereignty.” *Williams v. City of Columbus*, 33 Ohio St.2d 75, 85, 294 N.E.2d 891 (1973). This appeal goes straight to that fundamental principle – whether the people of the City of Cincinnati expressly surrendered their sovereign right to referendum ordinances passed by the city council when they included within the Cincinnati City Charter the express declaration “[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.” That question and issue is most certainly is of a sufficient public or great general interest such that this Court should accept jurisdiction of this appeal.

Respectfully submitted,

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8-15-13*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon the following via regular mail, postage prepaid, on the 15th day of August 2013:

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Terrance A. Nestor
Aaron M. Herzig
Office of the City Solicitor
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Cincinnati, OH 45202

Curt Hartman by Christopher Burch
*by email authority
8-15-13*