

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Brian Ebersole, et al.,	:	
	:	
Relators,	:	Case No. 14-1469
	:	
v.	:	Original Action in Mandamus
	:	
City Council of Powell, Ohio, et al.,	:	Expedited Elections Action
	:	
Respondents.	:	

**MERIT BRIEF OF RESPONDENTS CITY COUNCIL OF POWELL, OHIO
AND SUE ROSS, CITY CLERK OF POWELL, OHIO**

Christopher B. Burch (0087852)
 COUNSEL OF RECORD
 Callender Law Group
 20 South Third Street, Suite 261
 Columbus, Ohio 43215
 (614) 300-5300
 (614) 324-3204 (Fax)
chris@callenderlawgroup.com
Counsel for Relators
Brian Ebersole, Sharon
Valvona and Thomas Happensack

Eugene L. Hollins (00440355)
 Law Director City of Powell
 COUNSEL OF RECORD
 Jennifer B. Croghan (0078800)
 Frost Brown Todd LLC
 One Columbus
 Ten West Broad Street, Suite 2300
 Columbus, Ohio 43215
 (614) 464-1211
 (614) 464-1737 (Fax)
ghollins@fbtlaw.com
jcroghan@fbtlaw.com
Counsel for Respondents The City Council Of
Powell Ohio and Sue Ross City Clerk Powell

Bruce L. Ingram (00188008)
 COUNSEL OF RECORD
 Joseph R. Miller(0068463)
 Christopher L. Ingram(0086325)
 Vorys, Sater, Seymour and Pease LLP
 52 East Gay Street, P.O. Box 1008
 Columbus, Ohio 43216-1008
 (614) 464-6400
 (614) 464-6350 (Fax)
blingram@vorys.com
jrmiller@vorys.com
clingram@vorys.com
Counsel for Intervenors The Center for
Powell Crossing LLC, Donald R. Kenney, Jr.

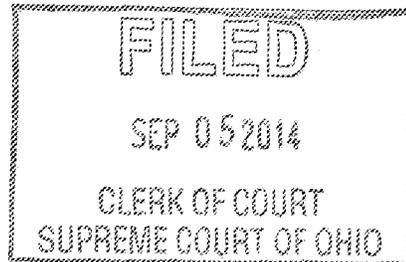


TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. ARGUMENT 4

 A. PROPOSITION OF LAW NO. 1: A PROPOSED CHARTER AMENDMENT WHICH DELEGATES LEGISLATIVE AUTHORITY TO A VERY SMALL PRIVATE COMPONENT OF A COMMUNITY IS UNLAWFUL ON ITS FACE..... 9

 B. PROPOSITION OF LAW NO. 2: THE CITY OF POWELL DETERMINED THE SUFFICIENTLY AND VALIDITY OF THE PROPOSED CHARTER AMENDMENT IN ACCORDANCE WITH THE OHIO CONSTITUTION AND POWELL CITY CHARTER..... 13

 C. PROPOSITION OF LAW NO. 3: THE COUNCIL CLERK DID NOT HAVE A DUTY TO SUBMIT THE PROPOSED CHARTER AMENDMENT 15

 D. PROPOSITION OF LAW NO. 4: THE FORM OF THE PART PETITIONS IS NOT VALID. 15

IV. CONCLUSION..... 16

 CERTIFICATE OF SERVICE 18

APPENDIX

APPDX PAGE

Ohio Constitution Article XVIII, Section 7 1

Ohio Constitution Article XVIII, Section 8 2

Ohio Constitution Article XVIII, Section 9 3

R.C. 713.25 4

R.C. 731.28 5

R.C. 731.29 6

Powell City Charter Article IV 7

Powell City Charter Article V 10

Powell City Charter Article VI 13

Powell City Charter Article XII 17

TABLE OF AUTHORITIES

Cases

City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976)..... 10, 11,13

Eubank v. Richmond, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912)..... 11

Hunter v. Erickson, 393 U.S. 385, 392, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969)..... 11

Mihocka v. Ziegler, 28 Ohio Misc. 105, 274 N.E.2d 583 (C.P. 1971) 5

Morris v. City Council of Macedonia, et al., 71 Ohio St.3d 52, 641 N.E.2d 1075 (1994)..... 6, 7, 12, 13

Odita v. Ohio Dept. of Human Serv., 88 Ohio App.3d 82, 623 N.E.2d 140 (10th Dist. 1993) 5

Rispo Investment Co. v. City of Seven Hills, 90 Ohio App.3d 245, 629 N.E.2d 3 (8th Dist. 1993)..... 11, 13

State ex rel. Sinay v. Soddors, 80 Ohio St.3d 224, 685 N.E.2d 754 7

State ex rel Abrams v. Bachrach, 175 Ohio St. 257, 193 N.E.2d 517 (1963) 7

State ex rel Hinchliffe v. Gibbons, 116 Ohio St. 390, 156 N.E. 455 (1927)..... 7

State ex rel Waltz v. Michell, 124 Ohio St. 161, 177 N.E. 214 (1931) 7

State ex rel. Armstrong v. Davey, 130 Ohio St. 160, 198 N.E. 180 (1935)..... 5

State ex rel. Blackwell v. Bachrach, 166 Ohio St. 301, 143 N.E.2d 127 (1957)..... 7

State ex rel. Citizens for a Better Portsmouth v. Sydnor, 61 Ohio St.3d 49, 572 N.E.2d 649 (1991) 6, 13, 17

State ex rel. Comm. For the Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections, 96 Ohio St.3d 308, 2002-Ohio-4194, 774 N.E.2d 229 16

State ex rel. Doner v. Zody, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235 4

State ex rel. Esch v. Lake Cty. Bd. of Elections, 61 Ohio St.3d. 595 N.E.2d 835 (1991)..... 16

State ex rel. Grendell v. Davidson, 86 Ohio St.3d 629, 716 N.E.2d 704 (1999)..... 5

State ex rel. Jurcisin v. Cotner, 10 Ohio St.3d 171, 462 N.E.2d 381 (1984) 13

<i>State ex rel. North Main Street Coalition v. Webb</i> , 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222 (2005)	12
<i>State ex rel. Orange Twp. Bd. Of Trustees v. Delaware Co. Bd. of Elections</i> , 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441, ¶ 14	4
<i>State ex rel. Patrick v. Baldine</i> , 91 Ohio App. 284, 108 N.E.2d 107 (7 th Dist. 1951)	5
<i>State ex rel. Phillips v. Lorain Cty. Bd. of Elections</i> , 93 Ohio St.3d 535, 757 N.E.2d 319 (2001)	16
<i>State ex rel. Polcyn v. Burkhart</i> , 33 Ohio St.2d 7, 292 N.Ed.2d 883 (1973).....	6, 12
<i>State ex rel. Semik v. Cuyahoga Cty. Bd. of Elections</i> , 67 Ohio St. 3d 334, 617 N.E.2d 1120 (1993)	6, 7
<i>State ex rel. Spadafora v. Toledo City Council</i> , 71 Ohio St. 3d 546, 644 N.E.2d 393 (1994).....	7
<i>State ex rel. Standard Oil Co. v. Combs</i> , 129 Ohio St. 251, 194 N.E. 875 (1935).....	11
<i>State ex rel. Waters v. Spaeth</i> , 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 13.....	4
<i>State ex rel. Watkins v. Quirk</i> , 59 Ohio App.2d 175, 392 N.E.2d 1302 (9 th Dist. 1978).....	6
<i>State ex. rel. Kahle v. Rupert</i> , 99 Ohio St. 17, 122 N.E. 39 (1918).....	7
<i>W.U. Tel. Co. v. Tax Commission of Ohio</i> , 21 F.2d 355 (S.D. Ohio 1927).....	5
<i>Washington ex rel. Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116, 49 S.Ct. 59, 73 L.Ed. 210 (1928).....	11, 12, 13
Statutes	
R.C. 713.25	10
R.C. 731.28	8
R.C. 731.29	8

Other Authorities

67 Ohio Jurisprudence 3d. Mandamus, Etc. Section 53 (2014)..... 5

67 Ohio Jurisprudence 3d. Mandamus, Etc. Section 54 (2014)..... 5

Baldwin, *Ohio Handbook Series Ohio Planning & Zoning Law*, Section 4:29
(2014 Ed.) 10

City of Powell Charter 12.01 6

City of Powell Charter 4.07 9

City of Powell Charter 6.02 15

City of Powell Charter Article VI (Sections 6.01 through 6.06) 9

Gotherman and Babbit, *Ohio Municipal Law*, 119 Section T 7.37(B) (1992) 7

Constitutional Provisions

Ohio Constitution Article XVIII, Section 7 6

Ohio Constitution Article XVIII, Section 8 2, 7, 9, 14

Ohio Constitution Article XVIII, Section 9 2, 7, 8, 9

I. INTRODUCTION

This case involves a request by the Relators for this Court to issue an extraordinary writ to compel Council for the City of Powell, Ohio to submit a proposed charter amendment to its electors. Relators mistakenly believe their clear legal right is evident and the standard for this court is abuse of discretion. However, the extraordinary act of issuing a writ to override a legislative body's discretion raises the standard of review. The Court must clearly and affirmatively find that Powell City Council's finding resulted from fraud, corruption, or a gross abuse of discretion.

Powell City Council did not grossly abuse its discretion in finding the Relators proposed charter amendment not sufficient and valid on its face. A charter is the central governing document for the City of Powell and affects the City's ability to carry out functions on a daily basis. The Charter is a grant of power by the people and the people have the ability to reclaim any delegated power. However, the Relators proposed charter amendment is not a case of the people taking back power delegated to the legislature. The proposed charter amendment removes the legislative authority of Powell City Council and delegates it to the special interests of five homeowners association presidents (or designees) to decide the future planning for the entire city. This delegation of power cannot stand.

This Court's role in deciding this mandamus action is not to substitute the Court's judgment for that of Powell City Council. Instead, the Court must apply the mandamus standard, clear legal duty, subject to review by a court for gross abuse of discretion. In doing so, the Court will find Powell City Council did not grossly abuse its discretion in determining the proposed charter amendment submitted by Relators does not pass sufficiency and validity on the face of the petition.

II. STATEMENT OF FACTS

On July 17, 2014, Relators submitted to Sue Ross, Powell City Council Clerk (hereinafter “Respondent Ross”), petitions with a proposed charter amendment (hereinafter “proposed charter amendment”) (Compl. ¶ 21). The proposed charter amendment would remove Council’s legislative authority to create a comprehensive plan for the entire City and delegate it to the special interests of the presidents of five homeowners associations (or their designees) (Compl. ¶ 13, Ex. 2T¹). The proposed charter amendment also requires Council to adopt the plan recommended by the commission (Ex. 2T).

In accordance with Article XVIII, Sections 8 and 9 of the Ohio Constitution, Respondent Ross, accepted the proposed charter amendment petitions, held the petitions for 11 days and then forwarded the petitions to the Delaware County Board of Elections (Compl. ¶ 24). On August 1, 2014, the Delaware County Board of Elections met and determined that a minimum of 238 valid signatures were needed to satisfy the requirements of the Powell City Charter and forwarded a statement that the proposed charter amendment contained 378 valid signatures (Compl. ¶¶ 34, 36; Ex. 2C). Upon receipt of the statement from the Delaware County Board of Elections, an Ordinance was drafted (Ordinance 2014-41) to submit the proposed charter amendment to the electors on November 4, 2014, pursuant to Article XVIII, Section 8 of the Ohio Constitution (Council “provide[s] by ordinance for submission to the electors”) (Ex. 2F).

Intervenors, the Center at Powell Crossing, LLC and Donald R. Kenney, Jr. (hereinafter “Developers”) filed a Notice of Protest with Respondent Powell City Council (hereinafter “Powell Council”) on August 1, 2014 (Compl. ¶ 41; Ex.2P). Relators filed a brief with Powell

¹ Unless otherwise noted, all Exhibits are from the Joint Evidence of Respondents and Intervening Respondent.

Council on the morning of the Powell Council meeting, August 5, 2014 (Compl. ¶ 47). On August 5, 2014, Powell Council held its regular meeting (Compl. ¶ 48; Ex. 2F). Council did not take action on August 5, 2014 (Ex. 2F). Instead, Council did the first of two readings required of Ordinance 2014-41 and indicated that second reading of the ordinance, and the attendant determination of the sufficiency and validity of the proposed charter amendment petition, would occur at its next regular meeting on August 19, 2014 (Ex. 2F). The additional time also permitted further public notice of the proposed charter amendment and gave Powell Council the time needed to review Relators' brief (Ex. 2F).

Developers submitted a Reply Brief to Powell Council on August 15, 2014 in support of their Notice of Protest (Compl. ¶ 67; Ex. 2Q). Powell Council held its next regular meeting on August 19, 2014 (Compl. ¶ 68, Exs. 2G, 2S). Public comments were taken from residents and Relators, and statements were given by Counsel for the Relators and the Developer (Exs. 2G, 2S). Powell Council determined the proposed charter amendment petitions were sufficient as to form, but not valid as the face of the petition contained an unlawful and unconstitutional delegation of legislative power to a narrow group of the community (Exs. 2G, 2S). As a result of their determination, Powell Council unanimously rejected Ordinance 2014-41, effectively deciding not to submit the proposed charter amendment to the electors of the City of Powell (Compl. ¶ 71, Exs. 2G, 2S).

On August 22, 2014, Relators filed this original action in mandamus.

III. ARGUMENT

This is not an appeal. It is a mandamus action to compel Respondents to place an issue on the November 4, 2014 ballot. It is a request for this Court to issue an extraordinary writ to compel a legislative body, Powell City Council, to take a discretionary action. This matter concerns the separation of powers. Respondents respectfully submit: this changes everything.

Relators make only a passing reference to the demanding standard for the issuance of a writ of mandamus. In order to prevail, Relators must establish (1) a clear legal right to have the question placed on the ballot, (2) a corresponding duty on the Respondents to place the issue on the ballot, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Orange Twp. Bd. Of Trustees v. Delaware Co. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441, ¶ 14. Furthermore, Relators must prove these requirements by clear and convincing evidence. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 13, quoting *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, paragraph three of the syllabus (“Relators in mandamus cases must prove their entitlement to the writ by clear and convincing evidence.”). In their 46-page brief, it is interesting and instructive that nowhere do Relators prominently address the mandamus standard that will guide this Court’s deliberation.

As this Court is undoubtedly aware, this three-prong test is geared specifically to identify -- and only identify -- those actions of a separate branch of the government that are so black-and-white and nondiscretionary that the governmental actor should be the subject of judicial intervention to force the actor into action. With that in mind, it is not surprising that courts generally have been reluctant to grant a writ of mandamus where a legislative body is involved because of the doctrine of separation of powers. The checks and balances of our system of government require the courts not to bridle the legislature's discretion or substitute the court's

judgment for that of the legislature. Where the courts have granted the writ, the duty has been one imposed by the constitution, state statute, or city charter. *Mihocka v. Ziegler*, 28 Ohio Misc. 105, 274 N.E.2d 583 (C.P. 1971). A writ of mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control; the constitutional principle of separation of powers protects legislative bodies from such infringement. *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 716 N.E.2d 704 (1999). *See generally*, 67 Ohio Jurisprudence 3d, Mandamus, Etc. Section 53 (2014).

By contrast, mandamus will lie to compel the performance of a duty that is ministerial in nature and does not require the exercise of official judgment and discretion by executive officers. *State ex rel. Armstrong v. Davey*, 130 Ohio St. 160, 198 N.E. 180 (1935) ; *Odita v. Ohio Dept. of Human Serv.*, 88 Ohio App.3d 82, 623 N.E.2d 140 (10th Dist. 1993) . But what is true with legislative bodies is equally true with administrative officials: mandamus cannot be used to control discretionary power. *W.U. Tel. Co. v. Tax Commission of Ohio*, 21 F.2d 355 (S.D. Ohio 1927); *State ex rel. Patrick v. Baldine*, 91 Ohio App. 284, 108 N.E.2d 107 (7th Dist. 1951). *See generally*, 67 Ohio Jurisprudence 3d. Mandamus, Etc. Section 54 (2014).

This fundamental understanding of the extraordinary limited nature of a writ of mandamus should be juxtaposed with the precise governmental actor and act at issue in a particular matter. This case involves the determination by a city council of whether to submit a proposed Charter amendment to the electors. *Is this an act by such a legislative body that it can rightly be said to be ministerial in nature and not requiring exercise of official judgment and discretion?*

To answer the question, an examination of the legal backdrop in Ohio of how a Council reviews a proposed charter amendment is in order. Ohio Constitution, Article XVIII, Section 7 of the Ohio Constitution authorizes municipal corporations to adopt and amend a home rule charter, and Sections 8 and 9 of Article XVIII prescribe the procedures for adopting and amending a charter. *Morris v. City Council of Macedonia, et al.*, 71 Ohio St.3d 52, 54, 641 N.E.2d 1075 (1994) quoting *State ex rel. Semik v. Cuyahoga Cty. Bd. of Elections*, 67 Ohio St.3d 334, 336, 617 N.E.2d 1120 (1993). Powell City Charter 12.01 likewise provides that the charter “may be amended as provided in Article XVIII, Section 9 of the Ohio Constitution, by the submission of the proposed amendment or amendments to the electors of the City.”

This Court has had the opportunity to interpret and apply these sections of Article XVIII on several occasions. Generally, this Court has stated that a city council’s constitutional authority to review the sufficiency of petitions is limited to matters of form, not substance. *Morris* at 55 citing *State ex rel. Polcyn v. Burkhardt*, 33 Ohio St.2d 7, 10-11, 292 N.E.2d 883 (1973). This general rule is cited frequently by Relators, but what is its meaning? In this context, this Court has explained that it means that council’s authority to determine if all applicable statutory requirements have been met is more restricted than that of a board of elections. *Id.* citing *State ex rel. Watkins v. Quirk*, 59 Ohio App.2d 175, 392 N.E.2d 1302 (9th Dist. 1978). As such, a city council may not engage in judicial or quasi-judicial “fact-finding” determinations. *Id.* citing *Polcyn* and *State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 52, 572 N.E.2d 649 (1991). In other words, council cannot inquire to questions not apparent on the face of the petitions or which require the aid of witnesses to determine. *Id.*

It is equally clear that Article XVIII, Section 9 of the Ohio Constitution places the responsibility for determining the sufficiency and validity of an initiative petition proposing a

charter amendment with the legislative authority of the municipality. As this Court stated in *State ex rel. Blackwell v. Bachrach*, 166 Ohio St. 301, 306, 143 N.E.2d 127 (1957), “The very plain wording of Section 9, Article XVII, places the duty to submit a proposed amendment to the electors upon the council and council alone.” A city council need not submit to the electors a charter amendment proposed by initiative petition unless satisfied as to the sufficiency of the petition and that all legal requirements have been met. *State ex rel Hinchliffe v. Gibbons*, 116 Ohio St. 390, 395, 156 N.E. 455 (1927) (The city council, not the board of elections, has the responsibility to determine the sufficiency of the petition.); *State ex. rel. Kahle v. Rupert*, 99 Ohio St. 17, 122 N.E. 39 (1918) (Council’s determination of the sufficiency and validity of the proposed charter amendment requires council to exercise an intelligent discretion in the performance of their official duty.); *State ex rel Waltz v. Michell*, 124 Ohio St. 161, 164, 177 N.E. 214 (1931) (“It is quite clear that the duty and responsibility of determining the sufficiency of such petitions are conferred upon the city council, and that upon the finding of insufficiency of such petitions, the court will not issue a writ of mandamus requiring a submission of the proposed amendment to the electors, unless it clearly and affirmatively appears that the finding of council in that respect had resulted from fraud, corruption, or a gross abuse of discretion.”); *State ex rel Abrams v. Bachrach*, 175 Ohio St. 257, 258, 193 N.E.2d 517 (1963); *State ex rel. Semik v. Cuyahoga Cty. Bd. of Elections*, 67 Ohio St. 3d 334, 337, 617 N.E.2d 1120 (1993); and *State ex rel. Spadafora v. Toledo City Council*, 71 Ohio St. 3d 546, 549, 644 N.E.2d 393 (1994). In a nutshell, municipal legislative authorities possess discretionary authority, albeit limited, on deciding the sufficiency and validity of a petition to amend a city charter. *State ex rel. Sinay v. Soddors*, 80 Ohio St.3d 224, 231, 685 N.E.2d 754 citing *Morris*, 71 Ohio St.3d 52, 641 N.E.2d 1075; Gotherman and Babbit, *Ohio Municipal Law*, 119 Section T 7.37(B) (1992).

Returning then to the italicized question posed above, is this an act by a legislative body that can rightly be said to be ministerial in nature and not requiring exercise of official judgment and discretion? The answer is readily understood: city councils are vested with limited, discretionary authority to examine the face of a petition to propose a charter amendment to the ballot and determine whether it is valid and sufficient and, in doing so, cannot rightly be said to be undertaking an act that is “ministerial in nature and not requiring exercise of official judgment and discretion.”

It is in this legal framework that the arguments of Relators should be examined by this Court to determine whether the responsibility of Powell City Council in this case was so black-and-white that not forwarding the petition to the Board of Elections was fraudulent or a gross abuse of discretion. Respondents submit to this Court that applying the mandamus standard (“clear legal duty”) to a situation where a governmental body is vested with discretion, subject only to review by a court for gross abuse of discretion, should rarely lead this Court to the conclusion that judicial intervention is warranted.

By way of a postscript, it follows from the foregoing that Relators’ case law precedent interpreting a clerk of council or auditor’s duty under R.C. 731.28 and R.C. 731.29, relating to referendum or initiative petitions with regard to an ordinance, are of very limited applicability. There, it is clear from the very statutory structure of the process—placing the responsibility in the hands of a clerk or auditor—that it was the intent of the legislature that an administrative officer perform a ministerial, almost nondiscretionary act. Here, it is not a matter of statutory interpretation. And the responsibility is not in the hands of an administrative functionary. The Ohio Constitution vests City Council, not an administrative official, with the discretion and authority to determine whether a charter amendment initiative petition proposes a valid and

lawful charter provision. Only this Court's previous decisions with regard to issuance of a writ of mandamus to place a proposed charter amendment on the ballot have weight in this context.

By the same token, Powell City Charter Article VI (Sections 6.01 through 6.06) relate to initiative and referendum petitions with regard to ordinances, not charter amendments, and are not relevant to the Court's consideration of the subject mandamus petition. Powell City Charter 12.01 is the only relevant section, and it directs the Court to Article XVII, Section 9 (and therefore Section 8) of the Ohio Constitution. Many of Relators' arguments applying Article VI of the Charter are simply misdirected and irrelevant.

A. PROPOSITION OF LAW NO. 1: A PROPOSED CHARTER AMENDMENT WHICH DELEGATES LEGISLATIVE AUTHORITY TO A VERY SMALL PRIVATE COMPONENT OF A COMMUNITY IS UNLAWFUL ON ITS FACE.

To be sure, legislative authority in a city is originally vested in the people, and typically delegated by charter or statute to city council. However, the citizens ultimately may reclaim that authority and deal directly with certain matters through a referendum or initiative. That being said, when the people of Ohio reserved the power, the people did not envision re-delegating that power to a narrow segment of the community. This is the scenario presented by Relators' proposed charter amendment. Powell City Council properly exercised its discretion under the Ohio Constitution in determining the proposed re-delegation of power to the presidents of five homeowners association is unlawful and contrary to the power of the people. Comprehensive planning affects the entire city. Allowing a narrow group of private individuals to decide what is best for all is not the citizens of Powell reclaiming their delegated power.

The people of the City of Powell delegated adoption and modification of a comprehensive plan ("master plan") to Powell Council when the Charter was adopted. Powell City Charter 4.07. A comprehensive plan is used by local governments to show what a

community should look like at sometime in the future, e.g., it depicts different use districts for an entire community. (Emphasis added.) (Baldwin, *Ohio Handbook Series Ohio Planning & Zoning Law*, Section 4:29 (2014 Ed.) The Ohio Revised Code does not set forth the manner of adopting a comprehensive plan. However, R.C. 713.25 implies that plans are to be adopted by the local planning commission upon a procedure established by a local rule, ordinance, or charter and Powell's Charter delegates this power to Powell Council.

The electors of the City of Powell can reserve to themselves power to deal directly with matters that might be assigned to the legislature and may reclaim a delegated power. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672-73, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). Article 4, Section 14 of the proposed charter amendment herein delegates the power to modify the comprehensive plan to a narrow segment of the community, e.g., five homeowners associations.

Article 4, Section 14 of Relator's proposed charter amendment provides as follows:

Article 4, Section 14: No later than February 1, 2015, the City Council of Powell, Ohio shall organize a Comprehensive Plan Commission to draft a Preliminary Comprehensive Plan for zoning and development in the City of Powell, Ohio. The Comprehensive Plan Commission shall consist of the following five members: (1) the President of the Bartholomew Run Homeowners Association or such person's designee; (2) the President of the Olentangy Ridge Civic Association or such person's designee; (3) the President of the Grandshire Homeowners Association or such person's designee; (4) the President of the Liberty Lakes Homeowners Association or such person's designee; and (5) the President of the Murphy Park Homeowners Association or such person's designee.

(Ex. 2T). Moreover, Article 4, Section 18 of Relators' proposed charter amendment then requires Powell Council to consider the Preliminary Comprehensive Plan, make adjustments *within* the parameters of the Comprehensive Plan Commission's Phase I findings and pass an ordinance no later than March 31, 2015 adopting a Final Comprehensive Plan (Ex. 2T).

This delegation of power is evident on the face of the petition and is unlawful. In a powerful opinion arising out of a charter amendment in Ohio, the United States Supreme Court has set forth the distinction between delegation of powers to the people and delegation of powers to a narrow segment of the community. In the *City of Eastlake, supra*, the Supreme Court was presented with a charter amendment initiated by the citizens of Eastlake, Ohio, to require any rezoning passed by council to be approved by a 55% vote of the electors on the ballot. The Supreme Court held that, in establishing a charter and delegating it the legislative authority, the citizens can reserve to themselves the power to deal directly with matters that might otherwise be assigned to council (here, rezoning matters). *Id.* at 672 citing *Hunter v. Erickson*, 393 U.S. 385, 392, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969). In other words, the citizens could “undelegate” the authority to make zoning decisions and make such decisions themselves. See also, *Rispo Investment Co. v. City of Seven Hills*, 90 Ohio App.3d 245, 629 N.E.2d 3 (8th Dist. 1993) (ward delegation of power to change a zoning classification not unlawful delegation of power); *State ex rel. Standard Oil Co. v. Combs*, 129 Ohio St. 251, 194 N.E. 875 (1935) (requiring consent of those persons most affected by a modification is not an unlawful delegation of power).

However, the opinion is just as apparent that the result would have been exactly the opposite if the case would have involved a “delegation of legislation power, originally given by the people to a legislative body, and in turn delegated by the legislature to a narrow segment of the community, not the people at large.” *Id.* at 677. In the *City of Eastlake*, the court makes clear that its decision is not inconsistent with two decision relied upon by the Ohio Supreme Court in originally determining the matter, *Eubank v. Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912) and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 59, 73 L.Ed. 210 (1928). In *Eubank*, the Court invalidated a city ordinance which

conferred the power to establish building setback lines upon the owners of two-thirds of the property abutting any street. Similarly, the Court in *Roberge* struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.

Relators imply that the reading of the petition's "content" equates to a substantive review. Relators cite several cases to support the prohibition of the substantive review of proposed amendments. The distinguishing factor between the cases involving charter amendments the Relators rely upon is that in those cases, the defect in the petition's sufficiency and validity was not apparent on the face of the petition and extrinsic evidence was used in making the determination. *See, e.g., Morris*, 71 Ohio St.3d 52, 641 N.E.2d 1075 (extrinsic evidence was received that a circulator did not witness signatures); *State ex rel. Polcyn v. Burkhart*, 33 Ohio St.2d 7, 292 N.E.2d 883 (1973) (extrinsic evidence used to determine metes and bounds outside the face of the petition). The remaining case upon which Relators' rely, *State ex rel. North Main Street Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222 (2005), does not involve a charter amendment that requires council review. The *Webb* case is an initiative petition for a proposed ordinance that requires a ministerial review by a clerk and is therefore not relevant to a proposed charter amendment. As noted above, the plain language of the charter initiative on the face of the petition delegates power to a small segment of the community to plan what is best for the entire community.

While Powell Council did not rely upon extrinsic evidence in this case in making its determination, there is extrinsic evidence that further supports barring the delegation of power to the president, or their designee, of the five homeowners associations listed. The City of Powell

has 31 subdivisions but only 5 are represented in the proposed amendment (Ex. G at 84; see also, City of Powell, *Subdivisions of the City of Powell*, [http://www.cityofpowell.us/documents/maps/Powell%20Subdivision%20Map%20\(6-23-2014\).pdf](http://www.cityofpowell.us/documents/maps/Powell%20Subdivision%20Map%20(6-23-2014).pdf) (accessed September 5, 2014). Even more troubling is that one of the homeowners associations listed, Liberty Lakes Homeowners Association, is not even located within the City of Powell but in Liberty Township (Ex. G at 84; City of Powell, *Subdivisions of the City of Powell*, [http://www.cityofpowell.us/documents/maps/Powell%20Subdivision%20Map%20\(6-23-2014\).pdf](http://www.cityofpowell.us/documents/maps/Powell%20Subdivision%20Map%20(6-23-2014).pdf) (accessed September 5, 2014); Exs. 2U and 2V).

The exclusive combination of homeowners' associations presidents (or their designees) determining the future development for the entire City of Powell as set forth on the face of the proposed charter amendment is not an example of "the people" taking back the legislative authority as proposed in the *City of Eastlake* or *Ripso*. In fact, this proposed charter amendment excludes "the people" and is like that of *Eubank* and *Roberge* and the exclusion is evident on the face of the petition. Accordingly, Powell Council did not grossly abuse their discretion in refusing to certify the sufficiency and validity of the Relators' petitions.

B. PROPOSITION OF LAW NO. 2: THE CITY OF POWELL DETERMINED THE SUFFICIENTLY AND VALIDITY OF THE PROPOSED CHARTER AMENDMENT IN ACCORDANCE WITH THE OHIO CONSTITUTION AND POWELL CITY CHARTER.

Relators submit Powell Council abused its discretion by not acting "forthwith" by considering the proposed charter amendment on August 5, 2014. The cases upon which Relators rely, e.g., *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 641 N.E.2d 1075; *State ex rel. Citizens for a Better Portsmouth v. Syndor*, 61 Ohio St.3d, 572 N.E.2d 649 (1991) and *State ex rel. Jurcisin v. Cotner*, 10 Ohio St.3d 171, 462 N.E.2d 381 (1984), all involved arbitrary delays

in review which pushed the submission time of a charter initiative beyond the next election date. This is not what occurred in Powell Council's consideration of the proposed charter amendment.

Ohio Constitution Article XVIII, Section 8 requires submission to the electors at the next regular election if one occurs not less than 60 or more than 120 days after its passage. In this instance, Respondent Ross received the statement from the Delaware County Board of Elections on August 1, 2014, and an ordinance was drafted (per the Constitution) to submit the petition to the electors and placed on Council's agenda for its next regular meeting of August 5, 2014 (Ex. 2F). Powell Council did not fail to take action on August 5, 2014. Instead, Powell Council set the determination for the next Powell Council meeting, August 19, 2014 and performed a first reading on the Ordinance, pursuant to Powell City Charter 5.03 and the Ohio Constitution Article XVII, Section 8 requiring submission to the electors by Ordinance (Ex. 2F). Relators take exception to the two reading requirement, arguing Powell Council should have passed the Ordinance by emergency or on the consent agenda. However, Powell Council was well within the timeline required by the Ohio Constitution and the Delaware County Board of Elections deadlines such that suspending the rules and passing the ordinance was not necessary. The additional time not only provided the public additional notice of the consideration but also gave council the opportunity to review the voluminous brief submitted by the petitioners on the morning of the August 5, 2014 Powell Council meeting (Compl. ¶ 47).

Relators "forthwith" proposition is without merit. There is no evidence to support Relators argument that Powell Council did not handle the proposed charter amendment in a timely manner and, more importantly, within the parameters required by the Ohio Constitution and Powell City Charter.

C. PROPOSITION OF LAW NO. 3: THE COUNCIL CLERK DID NOT HAVE A DUTY TO SUBMIT THE PROPOSED CHARTER AMENDMENT

Relators submit the Respondent Ross should have ignored Powell Council's determination that the proposed charter amendment was not valid and proceeded to submit the proposed charter amendment to the Delaware County Board of Elections. Relators inappropriately rely on Powell City Charter 6.02 to support their proposition that the Respondent Ross was required to take action. Powell City Charter 6.02 applies to initiatives for ordinances. As this case involves a proposed charter amendment, Powell City Charter 12.01 and Article XVIII, Sections 8 and 9 of the Ohio Constitution control. As set forth in Section B, Proposition of Law No. 2, all decisions are made by council or the legislative body, not by the clerk.

D. PROPOSITION OF LAW NO. 4: THE FORM OF THE PART PETITIONS IS NOT VALID.

Although the referendum petition with regard to Ordinance 2014-10 (and the companion initiative petition proposing an ordinance to repeal Ordinance 2014-10) is not at issue in this case, a recent decision of the Delaware County Board of Elections may be relevant with regard to the proposed Charter Amendment initiative petition. In reviewing the face of the Ordinance 2014-10 petitions, Powell Council found the form of the petitions sufficient (Ex. 2G). Since Powell Council's decision, the initiative and referendum petitions were forwarded to the Delaware County Board of Elections. Developers filed a Notice of Protest and a hearing was held before the Delaware County Board of Elections (Ex. 2R). The Delaware County Board of Elections found the format of the petition did not comply with the Powell City Charter and the prescribed forms of the Secretary of State (Ex. 2C at 190-193)².

² Relators have subsequently appealed the Board's decision and filed another original action in mandamus before this Court, *State ex rel. Brian Ebersole, et al. v. Delaware Co. Bd. of Elections*, Case No. 14-250.

Title and text are requirements are important so that the signers are immediately alerted to the subject of the initiative. *State ex rel. Esch v. Lake Cty. Bd. of Elections*, 61 Ohio St.3d 595, 575 N.E.2d 835 (1991). Strict compliance is required. *State ex rel. Comm. for the Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections*, 96 Ohio St.3d 308, 2002-Ohio-4194, 774 N.E.2d 229, ¶ 49 citing *State ex rel. Phillips v. Lorain Cty. Bd. of Elections*, 93 Ohio St.3d 535, 539, 757 N.E.2d 319 (2001). The Secretary of State provides a model form for petitions (Ex. 2J). The model petition states, “the following is a full and correct copy of the title and text of the proposed ordinance.” (Ex. 2J.) As Relators concede, the circulators did not use the Secretary of State model initiative, but instead circulated the proposed charter amendment, a separate initiative and a referendum and attached as an exhibit to the petitions the measure that was subject of the petition (Ex. 2J; Relators Brief 22; Ex. 2T at 98-100). In this case, the proposed charter amendment was attached as Exhibit 3 to the part petitions (see Ex. 2T).

Respondents submit that, as a quasi-judicial body, the Delaware County Board of Elections is in the best position to determine whether the form of the petition meets the requisite requirements to alert a signer to the subject matter of the petitions (Ex. 2C at 99-107). Therefore, should the Court determine Powell Council grossly abused their discretion in finding the proposed charter amendment invalid on its face, the Court should find the petitions insufficient in form.

IV. CONCLUSION

Relators have not shown a clear legal right to the relief requested or a clear legal duty on the part of the Respondents to place this issue on the ballot. For the reasons stated above,

Respondents respectfully urge this Court to deny the requested writ and dismiss this cause in its entirety.

Respectfully submitted,



Eugene L. Hollins (00440355)

COUNSEL OF RECORD

Jennifer B. Croghan (0078800)

FROST BROWN TODD LLC

One Columbus

Ten West Broad Street, Suite 2300

Columbus, Ohio 43215

(614) 464-1211

(614) 464-1737 (Fax)

ghollins@fbtlaw.com

jcroghan@fbtlaw.com

COUNSEL FOR RESPONDENTS

THE CITY COUNCIL OF POWELL OHIO AND

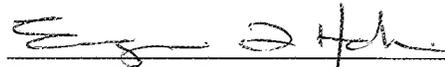
SUE ROSS CITY CLERK POWELL

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Merit Brief* was served upon the following, this 5th day of September 2014, by electronic mail:

Christopher B. Burch
chris@callenderlawgroup.com
COUNSEL FOR RELATORS

Bruce L. Ingram
Joseph R. Miller
Christopher L. Ingram
blingram@vorys.com
jrmiller@vorys.com
clingram@vorys.com
COUNSEL FOR INTERVENORS
THE CENTER OF PWOELL CROSSING LLC
AND DONALD R. KENNEY, JR.



Eugene L. Hollins (00440355)
COUNSEL OF RECORD
Jennifer B. Croghan (0078800)
FROST BROWN TODD LLC

APPENDIX

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio (Refs & Annos)
Article XVIII. Municipal Corporations (Refs & Annos)

OH Const. Art. XVIII, § 7

O Const XVIII Sec. 7 Municipal charter

Currentness

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.

CREDIT(S)

(1912 constitutional convention, adopted eff. 11-15-12)

Notes of Decisions (343)

Const. Art. XVIII, § 7, OH CONST Art. XVIII, § 7

Current through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014).

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio (Refs & Annos)
Article XVIII. Municipal Corporations (Refs & Annos)

OH Const. Art. XVIII, § 8

O Const XVIII Sec. 8 Referenda on whether to frame charter and on adoption of proposed charter

Currentness

The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

CREDIT(S)

(1912 constitutional convention, adopted eff. 11-15-12)

Notes of Decisions (85)

Const. Art. XVIII, § 8, OH CONST Art. XVIII, § 8

Current through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014).

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio (Refs & Annos)
Article XVIII. Municipal Corporations (Refs & Annos)

OH Const. Art. XVIII, § 9

O Const XVIII Sec. 9 Amendment of charter; referendum

Currentness

Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments may be mailed to the electors as hereinbefore provided for copies of a proposed charter, or, pursuant to laws passed by the General Assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

CREDIT(S)

(1970 SJR 31, am. eff. 1-1-71; 1912 constitutional convention, adopted eff. 11-15-12)

Notes of Decisions (68)

Const. Art. XVIII, § 9, OH CONST Art. XVIII, § 9

Current through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014).

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.

Baldwin's Ohio Revised Code Annotated
Title VII. Municipal Corporations
Chapter 713. Planning Commissions (Refs & Annos)
Regional and County Planning Commissions; Joint Planning Councils

R.C. § 713.25

713.25 Effect of adoption of plans

Currentness

The planning commission of any municipal corporation to which a regional or county plan is certified under section 713.24 of the Revised Code, may adopt such plan, and it shall thereupon have the same force within such municipal corporation as is provided by law or charter for plans prepared and adopted by the local planning commission. The board of county commissioners may adopt such plan so far as it relates to nonmunicipal territory. Thereafter no public building, roadway, bridge, viaduct, or other public improvement or utility, publicly or privately owned, whose construction or location would constitute a departure from the plan, shall be constructed or authorized by the board except by unanimous vote. Such plans shall not designate the specific lots or parcels of land upon which such system, facilities, buildings, and improvements are proposed to be placed, but only the general site or location thereof. The effect of the adoption of such plan by the board shall cease as regards the location of any sewage or garbage disposal plant, and no official action of the board shall be controlled thereby in such respect, unless the site shown on the plan as the location of such plant is purchased within six months after the adoption of the plan by the board, or unless proceedings for the appropriation of the necessary property are commenced within a period of six months and such property is then or thereafter appropriated in such proceedings.

CREDIT(S)

(1953 H 1, eff. 10-1-53; GC 4366-17)

Notes of Decisions (10)

R.C. § 713.25, OH ST § 713.25

Current through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014).

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.

Baldwin's Ohio Revised Code Annotated
Title VII. Municipal Corporations
Chapter 731. Organization (Refs & Annos)
Initiative and Referendum

R.C. § 731.28

731.28 Ordinances and measures proposed by initiative petition

Effective: July 2, 2010

Currentness

Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation by the general assembly may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation.

When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, transmit a certified copy of the text of the proposed ordinance or measure to the board of elections. The auditor or clerk shall transmit the petition to the board together with the certified copy of the proposed ordinance or other measure. The board shall examine all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition. The board shall return the petition to the auditor or clerk within ten days after receiving it, together with a statement attesting to the number of such electors who signed the petition.

The board shall submit such proposed ordinance or measure for the approval or rejection of the electors of the municipal corporation at the next general election occurring subsequent to ninety days after the auditor or clerk certifies the sufficiency and validity of the initiative petition to the board of elections. No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the measure in such municipal corporation shall be subject to the veto of the mayor.

As used in this section, "certified copy" means a copy containing a written statement attesting it is a true and exact reproduction of the original proposed ordinance or other measure.

CREDIT(S)

(2010 H 48, eff. 7-2-10; 1995 H 99, eff. 8-22-95; 1991 H 192, eff. 10-10-91; 1980 H 1062; 126 v 205; 125 v 713; 1953 H 1; GC 4227-1)

Notes of Decisions (74)

R.C. § 731.28, OH ST § 731.28

Current through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014).

Baldwin's Ohio Revised Code Annotated
Title VII. Municipal Corporations
Chapter 731. Organization (Refs & Annos)
Initiative and Referendum

R.C. § 731.29

731.29 Ordinances and measures subject to referendum

Effective: July 2, 2010
Currentness

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.

When a petition, signed by ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation, is filed with the city auditor or village clerk within thirty days after any ordinance or other measure is filed with the mayor or passed by the legislative authority of a village, or in case the mayor has vetoed the ordinance or any measure and returned it to council, such petition may be filed within thirty days after the council has passed the ordinance or measure over the veto, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such auditor or clerk shall, after ten days, and not later than four p.m. of the ninetieth day before the day of election, transmit a certified copy of the text of the ordinance or measure to the board of elections. The auditor or clerk shall transmit the petition to the board together with the certified copy of the ordinance or measure. The board shall examine all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition. The board shall return the petition to the auditor or clerk within ten days after receiving it, together with a statement attesting to the number of such electors who signed the petition. The board shall submit the ordinance or measure to the electors of the municipal corporation, for their approval or rejection, at the next general election occurring subsequent to ninety days after the auditor or clerk certifies the sufficiency and validity of the petition to the board of elections.

No such ordinance or measure shall go into effect until approved by the majority of those voting upon it. Sections 731.28 to 731.41 of the Revised Code do not prevent a municipal corporation, after the passage of any ordinance or other measure, from proceeding at once to give any notice or make any publication required by such ordinance or other measure.

As used in this section, "certified copy" means a copy containing a written statement attesting that it is a true and exact reproduction of the original ordinance or other measure.

CREDIT(S)

(2010 H 48, eff. 7-2-10; 1995 H 99, eff. 8-22-95; 1991 H 192, eff. 10-10-91; 1980 H 1062; 129 v 324; 126 v 205; 125 v 713; 1953 H 1; GC 4227-2)

Notes of Decisions (89)

R.C. § 731.29, OH ST § 731.29

Current through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014).

ARTICLE IV
LEGISLATIVE AUTHORITY

4.01 NUMBER, SELECTION, TERM

Except as reserved to the people by this Charter, the legislative powers of the City shall be vested in a Council of seven (7) members, elected for four (4) year overlapping terms. All members of Council shall be elected at large.

(Amended 5-7-13)

4.02 QUALIFICATIONS

Any elector who has resided for at least (1) year in the City prior to the date of filing of his or her petition of candidacy, shall be eligible to have his or her name placed on the ballot, if the petition is sufficient as hereinafter provided, and to serve as a member of Council, if elected. Any person convicted of a felony under the laws of this state or any other state or the United States while under court supervision for such offense, including probation and parole, or any individual currently under court order as an adjudicated mental incompetent shall be prohibited from having his or her name placed on the ballot or serving as a member of Council.

(Amended 5-7-13)

4.03 INCOMPATIBLE OFFICES

No holder of an incompatible national, state, county or local government office shall be eligible to enter upon or hold office as a Council member, and no such members shall hold employment with the City. Council shall determine, at its sole discretion, the incompatibility of offices.

(Amended 5-7-13)

4.04 VACANCIES

Any Council member who ceases to be an elector or a resident of the City or who accepts and enters upon the performance of the duties of an incompatible office, shall automatically and immediately vacate his office as a Council member. The Council shall have the sole authority to determine that one of its members is no longer a resident of the City, by vote of a majority of all members of Council, whose determination of this issue shall be final in all respects. The Council shall have power to accept the resignation of any of its members or of any other elected officer of the City by an affirmative vote of a majority of all members of Council.

(Amended 5-7-13)

4.05 VACANCIES, HOW FILLED

Any vacancy in the office of a Council member shall be filled by the affirmative vote of a majority of all members of Council within sixty (60) days of acceptance of resignation or within sixty (60) days after Council has declared a vacancy by the selection of a person meeting the qualifications provided in Section 4.02 of this Charter, and who has submitted to the Clerk of Council a written statement indicating a willingness to fill the unexpired term. If Council fails to fill a vacancy in Council within sixty (60) days after the occurrence of the vacancy, the Mayor shall appoint a person to serve for the time as provided in this section.

In all cases, the person so selected shall serve until the first Municipal election occurring not less than one hundred (100) days after selection, at which election a successor shall be chosen by the voters for the remainder of the unexpired term, if any; if not, for a full term.

(Amended 5-7-13)

4.06 SALARY OF COUNCIL MEMBERS

APPENDIX 7

The salary of Council members shall be set by ordinance. No increase in salary shall become effective as to any member in office when such ordinance is adopted or as to newly elected members unless the ordinance is adopted prior to such member's election. Council members in office when such ordinance is adopted may be paid the increased salary only if and when they are elected to succeed themselves. No increase in salary may be passed as emergency legislation.

(Amended 5-7-13)

4.07 POWERS OF COUNCIL

All legislative powers of the City shall be vested in the Council, except as otherwise reserved to the people by this Charter. The legislative powers of Council include, but are not limited to, the following:

- a. Creation of additional departments as it may deem necessary and define their duties;
- b. Adoption and modification of the master plan for the City as an official map of the City;
- c. Regulation of the use of private real estate in the City by establishing zones, limiting the use of each zone and limiting the height of buildings and the intensity of land use;
- d. Enactment of a subdivision ordinance, which may provide for platting fees;
- e. Enactment of a comprehensive building code;
- f. Adoption of an appropriation ordinance based on the annual budget and delegation of its enforcement to the City Manager;
- g. Authorization of a levy of taxes and the issuance of bonds, as provided in this Charter and the laws of the State of Ohio;
- h. Grant public utility franchises by ordinance, by a vote of not less than a majority of all members of Council; no such franchise shall be passed as an emergency ordinance;
- i. Approve, modify or disapprove the recommendations of the Planning and Zoning Commission made to Council;
- j. Management and control of the finances and property of the Municipality, except as otherwise provided in this Charter; and
- k. Exercise all other powers granted to the Council by this Charter and by the Constitution and laws of the state of Ohio.

(Amended 5-7-13)

4.08 MEETINGS OF THE COUNCIL

The Council shall hold its organizational meeting on or before the tenth (10th) day of January following the preceding general municipal election. At this meeting, the newly elected members shall take the oath of office and the Council shall proceed to elect a Mayor and a Vice-President of Council from among its own members, and appoint a Clerk of Council, and may transact such further business as may come before it. Thereafter, regular Council Meetings shall be held as prescribed in the Council Rules as frequently as Council chooses. All meetings of the Council shall be open to the public subject to the right of Council to meet, but not take action, in a non-public executive session held during a regular or special meeting under circumstances permitted by the laws of the State of Ohio. Regular meetings shall be held at the usual place for conducting such meetings unless ten (10) days public notice is given. Special meetings may be called by the Mayor or by three (3) members of Council. Special meetings of Council may be held with twenty- four (24) hours notice to all Council members, media, and the public. The purpose of the meeting must be stated in the notice. Four (4) Council members shall constitute a quorum.

(Amended 11-2-04)

4.09 ELECTION CONTESTS

The Council shall be the judge of the election and qualifications of its own members, and for such purpose shall have power by subpoena to compel the attendance of witnesses and the production of ballots and records. (Amended 5-7-13)

4.10 RULES, MINUTES

The Council shall adopt its own rules, in conformity with the provisions of this Charter. It shall cause to be kept minutes of its proceedings, which shall be a public record. (Amended 5-7-13)

4.11 CLERK OF COUNCIL

There shall be a Clerk of Council, appointed by the Council from outside its membership, to serve at the pleasure of Council. The Clerk shall give notice of Council meetings, keep the minutes, advertise public hearings, record in a separate book and cause to be published ordinances adopted by the Council, and perform such other duties as may be required by this Charter, or by ordinance, or by the rules of the Council. The Clerk may be appointed to serve full-time or part-time and the Council may assign the duties of the Clerk of Council to any employee of the City as an additional duty. The Clerk of Council shall receive a salary as established by the Council. The Clerk of Council may be removed at any time with or without cause, at a regular meeting of Council by a vote of a majority of all members of Council. In the event of a vacancy or temporary absence in the office of Clerk of Council, the Mayor shall designate a qualified person who shall perform the duties of the City Clerk during that period. (Amended 5-7-13)

4.12 FAILURE TO TAKE OATH

The Council may declare vacant the office of any elected or appointed member of Council who has failed to take the required official oath within ten (10) days after Council's organizational meeting or a meeting held for the purpose of administering the oath. (Enacted 5-7-13)

4.13 EXPULSION OF MEMBERS

The Council may censure or expel any member of Council for disorderly conduct or violation of its rules, and may also declare any member's seat vacant for absence where such absence has continued for two consecutive calendar months. No expulsion or declaration of vacancy shall take place without the affirmative vote of not less than two-thirds of all members of Council and until the delinquent member has been notified of the charge(s) against them and has had an opportunity to be heard. (Enacted 5-7-13)

ARTICLE V
ORDINANCES AND RESOLUTIONS

5.01 ACTION BY COUNCIL

Action of the Council establishing any offense, or providing for the imposition of any penalty, or for the levy of any tax, or for the expenditure of any public funds, or the contracting of any indebtedness, shall be taken by ordinance. Other actions may be taken by resolution.

(Amended 5-7-13)

5.02 INTRODUCTION OF ORDINANCES

Prior to introduction, each ordinance shall be submitted to the Department of Law for approval as to form, then introduced in writing by a member of Council or by the City Manager, and shall contain a title, an opening clause: "Be it ordained by the Council of the City of Powell, Ohio," and shall set forth the action to be taken. Each ordinance shall contain one subject, which shall be set forth in its title; however, general appropriation ordinances may contain the various subjects and accounts for which monies are to be appropriated. (Amended 5-7-13)

5.03 CONSIDERATION OF ORDINANCES

Each ordinance shall be read on two (2) different days, provided that Council may dispense with this rule by the affirmative vote of not less than two-thirds of all members of Council or by the inclusion of the proposed ordinance on the consent agenda as described in Section 5.04. After its introduction, a proposed ordinance shall be given a first reading by title provided that Council may require a reading in full by the affirmative vote of a majority of all members of Council. The proposed ordinance shall then lie over until the next meeting of Council. At least five (5) days before the second reading of the ordinance, the Clerk of Council shall cause to be posted a notice and summary of the content of the proposed ordinance. The notice shall invite interested persons to attend and express their opinions thereon to Council. At the meeting of Council so advertised, the proposed ordinance shall be given a second reading, which may be by title only, and all persons present who desire to be heard for or against its adoption shall be heard, under such rules as the Council may provide. Written arguments and briefs, for or against, may also be filed at this hearing for consideration by Council. After the second reading and such public hearing thereon, the Council may vote on adoption or rejection of the proposed ordinance. The vote upon each ordinance shall be taken by roll call and recorded by the Clerk of Council. The affirmative vote of a majority of all members of Council shall be necessary to adopt an ordinance, except as otherwise provided in this Charter. (Amended 5-7-13)

5.04 CONSENT AGENDA

Notwithstanding the foregoing, the Council may by resolution designate a specific listing of items which shall be listed as part of a consent agenda on the regular Council meeting agenda. Such items shall be read and a vote shall be taken for approval of all items listed under the consent agenda. Any member of Council may, upon demand, remove any item from the Consent Agenda whereupon it shall be placed on the regular agenda for that Council meeting.

(Amended 11-2-04)

5.05 ADOPTION OF ORDINANCES

After two (2) readings, or if the waiting period and hearing are waived by a suspension of the rules, the Council may vote by roll call on whether the ordinance shall be adopted or rejected. A favorable vote of a majority of all members of Council shall be necessary to adopt an ordinance,

except as provided otherwise in this Charter. Final passage shall be certified by the signature of the Mayor and the Clerk of Council. (Amended 5-7-13)

5.06 EMERGENCY ORDINANCES

The Council may, by the affirmative vote of not less than two-thirds of all members of Council, pass an emergency ordinance after declaring that such emergency exists and give the reasons therefore. Only ordinances that are necessary for the immediate preservation of the public peace, health, safety or general welfare as determined by Council in its sole discretion may be passed as emergencies. Such ordinances shall take effect immediately upon their passage. Emergency ordinances shall be published within one (1) week after their passage.

The following types of ordinances shall not be passed as emergency legislation:

- a. Tax increases.
- b. Any appropriations in excess of twenty five percent (25%) of the City's Annual General Fund appropriation except in response to terror-initiated or natural disasters, including but not limited to any event characterized as a terrorist act by the office of Homeland Security, wind storms and earth movement or flooding.
- c. All ordinances establishing, amending, revising, changing or repealing zoning classifications, districts, uses or regulations.
(Amended 5-7-13)

5.07 RESOLUTIONS

Actions by Council not required by this Charter to be by ordinance may be taken by resolution. Such resolution shall be introduced in writing, by a member of Council or the City Manager, and may be adopted by voice vote of a majority of all members of Council. No waiting period, notice or publication shall be required and a resolution shall become effective immediately upon its adoption. The Clerk of Council shall record resolutions in a separate book, which shall be a public record. (Amended 5-7-13)

5.08 PUBLICATION OF ORDINANCES AND RESOLUTIONS

Ordinances and, if desired, resolutions shall be published by posting copies thereof in not less than two (2) public places in the City for a period of not less than fifteen (15) days after their adoption. The public places for such posting shall be determined by Council. Council may, by ordinance or resolution, require that ordinances and resolutions be published by other means in addition to the postings as required by this section. The Clerk of Council shall make and retain a certificate as to the times and places where such postings are done and other means, if any, by which an ordinance or resolution is published. (Amended 5-7-13)

5.09 EFFECTIVE DATE OF ORDINANCES

All ordinances except emergency ordinances shall take effect thirty (30) days after passage by Council (or such other date not less than thirty (30) days after passage as established by Council in an ordinance), and shall be signed by the Mayor and the Clerk of Council in order to afford an opportunity for filing referendum petitions. (Amended 5-7-13)

5.10 ADOPTION OF ORDINANCE BY REFERENCE

The Council may adopt standard ordinances and codes prepared by public and private agencies on such matters as fire prevention, building construction, electrical wiring, plumbing, heating, ventilating and air conditioning, and other similar topics by reference to the date and source of the code without reproducing the same at length in the ordinance. In all cases in which such an ordinance or code shall be adopted by reference, publication of the code at length, by the City, shall not be required. However, such codes shall be kept on file in the office of the Clerk of Council for consultation by interested persons.

(Amended 5-7-13)

ARTICLE VI
RECALL, INITIATIVE, REFERENDUM

6.01 REMOVAL BY RECALL

No petition for removal of an elected officer of the Municipality shall be filed until such officer has served for at least six (6) months of the term during which such officer is sought to be recalled. Any elected officer of the City may be removed from office by the electors of the City. The procedure to effect such removal shall be:

(A) A petition signed by electors equal in number to at least fifteen (15) percent of the total votes cast at the last preceding regular municipal election, as defined by the Ohio Revised Code, and demanding the election of a successor to the person sought to be removed, shall be filed with the Delaware County Board of Elections. Such petition shall contain a general statement in not more than two hundred (200) words of the grounds upon which the removal of the person is sought. The form sufficiency, and regularity of any such petition shall be determined as provided by the laws of the State of Ohio.

(B) If the petition is sufficient, and if the person whose removal is sought does not resign within five (5) days after the sufficiency of the petition has been determined, Council shall thereupon order and fix a day for holding an election to determine the question of his or her removal, and for the selection of a successor to each officer named in said petition. Such an election shall be held not less than thirty (30) days nor more than forty (40) days from the time of the finding of the sufficiency of such a petition. The Delaware County Board of Elections shall publish notice and make all arrangements for holding such an election.

(C) The nomination of candidates to succeed each officer sought to be removed shall be made without the intervention of a primary election, by filing with the Delaware County Board of Elections, at least twenty (20) days prior to such a special election, a petition proposing a person for each office, signed by electors equal in number to ten (10) percent of the total votes cast at the last preceding regular municipal election.

(D) The ballots at such a recall election shall be in such form as the Board of Elections for Delaware County, Ohio shall proscribe and shall, with respect to each person whose removal is sought, submit the questions: "Shall (name of person) be removed from the office of (name of office) by recall?"

Immediately following each such question, there will be printed on the ballots, the two propositions in the order set forth:

"For the recall of (name of person)."

"Against the recall of (name of person)."

Under each of such questions shall be placed the names of the candidates to fill the vacancy.

The names of the officers whose removal is sought shall not appear on the ballot to succeed such officer. The Board of Elections may modify said ballot for its administrative purposes.

In any such election, if a majority of the votes cast on the question of removal are affirmative, the person whose removal is sought shall be removed from office upon the announcement of the official canvass of that election, and the candidate receiving the plurality of the votes cast for the candidates for that office shall be declared elected. The successor of any person so removed shall hold office during the unexpired term of his predecessor.

In any such election where a majority of votes cast on the question of removal are negative, no further recall petition shall be filed against such incumbent for a period of one year.

(E) If no one is elected, the removal of any elected officer of the City by recall shall constitute a vacancy of the office previously held by that elected officer and such vacancy shall be filled as provided for in this Charter. (Amended 5-7-13)

6.02 INITIATIVE.

Ordinances and other measures providing for the exercise of any powers of government granted by the Ohio Constitution or the laws of the State of Ohio, may be proposed by initiative petition. Such initiative petition must be signed by electors of the City equal to ten (10) percent of the total number of votes cast at the last preceding regular municipal election. The Clerk of Council shall receive the petitions for all initiatives.

When a petition is filed with the Clerk of Council signed by the required number of electors proposing an ordinance or other measure, such Clerk shall, after ten (10) days, transmit a certified copy of the text of the proposed ordinance or measure to the Delaware County Board of Elections. The Clerk of Council shall transmit the petition to the Board of Elections together with the certified copy of the proposed ordinance or other measure. The Board shall examine all signatures on the petition to determine the number of electors of the City of Powell who signed the petition. The Board of Elections shall return the petition to the Clerk of Council within ten (10) days after receiving it, together with a statement attesting to the number of such electors who signed the petition.

Upon receipt of the statement from the Board of Elections, the Clerk of Council shall submit the petition, the proposed ordinance, and the statement to the Council on the date of its next regular meeting. If the petition and proposed ordinance are determined by the Council to be sufficient and valid, the Council shall, at such regular meeting, read and act upon the same. Council may adopt the ordinance in its original form. Should the Council fail to take action or reject the proposed ordinance, in whole or in part, the Clerk of Council shall provide for the submission of the proposed ordinance in its original form to a vote of the electors of the City at the next succeeding general election.

Upon receipt of the proposed ordinance, the Board of Elections shall submit such proposed ordinance or measure for approval or rejection of the electors of the City at the next succeeding general election occurring subsequent to seventy-five (75) days after receipt of the proposed ordinance. (Amended 5-7-13)

6.03 REPEALING ORDINANCES; PUBLICATION

Proposed ordinances for repealing any existing ordinance or ordinances, in whole or in part, may be submitted to the Council as herein provided in the preceding sections for initiating ordinances. Initiated ordinances adopted by the electors shall be published as in the case of other ordinances.

6.04 REFERENDUM

Any ordinance passed by the Council shall be subject to referendum, except emergency ordinances passed pursuant to Section 5.06 of this Charter and as otherwise provided by any applicable section of the Revised Code, including without limitation Section 731.30. The effective date of ordinances is governed by Section 5.09 of this Charter. If a petition signed by electors of the City, not less in number than ten (10) percent of the total votes cast at the last preceding general municipal election, is filed with the Clerk of Council within thirty (30) days after passage of an ordinance subject to referendum, requesting that any such ordinance be repealed or submitted to a vote of the electors of the City, the ordinance shall not take effect until the steps indicated herein have been taken.

The Clerk shall, within ten (10) days after the filing of a referendum petition, transmit a certified copy of the petition to the Delaware County Board of Elections. The Board shall examine all signatures on the petition to determine the number of electors of the City who signed the petition. The Board shall return the petition to the Clerk of Council within ten (10) days after receiving it, together with a statement attesting to the number of such electors who signed the

petition. Upon receipt of the statement from the Board, the Clerk of Council shall submit the petition and the statement to the Council on the date of its next regular meeting. Council shall determine the sufficiency and validity of the petition. If the petition is determined by Council to be sufficient and valid, the Council shall, at such regular meeting, read and act upon the same. Council may repeal the ordinance subject to referendum. Should Council fail to take action or fail to repeal the ordinance subject to referendum, the Clerk of Council shall provide for the submission of such ordinance to a vote of the electors of the City. The Board of Elections shall submit the ordinance to the electors of the City, for their approval or rejection, at the next general election occurring subsequent to seventy-five (75) days after receipt of such ordinance from the Clerk of Council.

(Amended 5-7-13)

6.05 INITIATIVE AND REFERENDUM PETITION PROCEDURES

Any initiative or referendum petition may be presented in separate parts, but each of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure. Each part of any referendum petition shall contain the number, a full and correct copy of the title and date of passage of the ordinance or other measure sought to be referred.

Each signer of any such petition must be an elector of the City in which the election, upon the ordinance or other measure proposed by such initiative petition or the ordinance or measure referred to by such referendum petition, is to be held, and shall place on such a petition, after his name, the date of signing, his place of residence, including street and number, and the ward and precinct.

Each part of such petition shall contain the affidavit of the person soliciting the signatures thereto, which shall state the number of signers of each such part and that, to the best of his knowledge and belief, each of the signatures contained on such part is the genuine signature of the person whose name it purports to be, that he believes such persons are electors of the City, and that they signed such petition with knowledge of the contents thereof.

Upon receipt of a statement from the Delaware County Board of Elections, pursuant to Chapter 731 of the Revised Code, attesting to the number of electors who signed such petition, Council by resolution shall determine the sufficiency and validity of the petition. In determining the validity of any such petition, all signatures that are found to be irregular shall be rejected, but no petition shall be declared invalid in its entirety when one or more signatures are found to be invalid except when the number of valid signatures is found to be less than the total number required.

The petition and signatures upon such petition shall be prima facie presumed to be in all respects sufficient. No ordinance or other measure submitted to the electors of the City and receiving an affirmative majority of votes cast thereon, shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the ordinance or measure was procured, nor shall rejection, by a majority of the votes cast thereon, of any ordinance or other measure submitted to the electors of such City be held invalid for such insufficiency.

Ordinances proposed by initiative petition and referendums receiving an affirmative majority of the votes cast thereon, shall become effective as provided by the laws of the State of Ohio.

Where the Charter is silent concerning initiative and referendum petition procedures, the laws of the State of Ohio shall be followed, except the statutory functions and duties of the City Auditor shall be performed by the Clerk of Council. (Amended 5-7-13)

6.06 APPROVAL OR REJECTION

(A) Ordinances submitted to the Council by petition and passed by the Council as herein provided, shall be subject to the referendum in the same manner as other ordinances.

(B) Ordinances rejected or repealed by an electoral vote shall not be re-enacted, in whole or in part, except by an electoral vote.

(C) Ordinances approved by an electoral vote shall not be repealed, amended or supplemented, except by an electoral vote.

(D) The adoption or rejection of ordinances submitted to an electoral vote shall take effect as provided by the laws of the State of Ohio.

(Enacted 5-7-13)

ARTICLE XII
CHARTER PROVISIONS

12.01 AMENDMENTS TO THE CHARTER

Any section of this Charter may be amended as provided in Article XVIII, Section 9 of the Ohio Constitution, by the submission of the proposed amendment or amendments to the electors of the City.

As often as necessary, but no less frequently than every ten (10) years, the Council shall appoint a Charter Review Commission who shall review the Charter and make recommendations to the Council for proposed amendments, if any, to be submitted to the voters of the City. Any such ten (10) year time period shall commence upon the date that the then-appointed Charter Review Commission submits its final report and recommendations to the Council. The appointment of a Charter Review Commission within the prescribed period shall not preclude the Council from submitting recommended Charter amendments to the voters from time to time.

(Amended 5-7-13)

12.02 EFFECT OF PARTIAL INVALIDITY

A determination that any part of this Charter is invalid shall not invalidate or impair the force or effect of any other part thereof, except to the extent that such other part is wholly dependent for its operation upon the part declared invalid.