

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. BRIAN EBERSOLE, *et al.*, :
: Relators, :
: Case No. 2014-1469
v. :
: ORIGINAL ACTION IN MANDAMUS
CITY COUNCIL OF POWELL, OHIO, *et al.*, :
: Respondents. :

**MERIT BRIEF OF INTERVENING RESPONDENT
THE CENTER AT POWELL CROSSING, LLC**

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I. STATEMENT OF THE CASE

This expedited election action concerns an attempt to put to referendum by Charter Initiative an administrative action approving a mixed-use development in the City of Powell, Ohio. While Relators paint the Charter Initiative as a re-write of Powell's Comprehensive Plan and zoning scheme, the actual text of the proposed Initiative contains an obvious attempt at an end-run around Article II, Section 1f of the Ohio Constitution.

Powell City Council, consistent with the property's zoning classification, approved a final development plan for the mixed-use development. Rather than pursue an administrative appeal from this decision to the Court of Common Pleas, the Relators instead circulated petitions for three ballot measures to reverse City Council's administrative action.

The Relators circulated petitions to: (1) referendum Ordinance 2014-10, City Council's approval of the Development Plan (the "Referendum"); (2) initiate a repeal of Ordinance 2014-10 (the "Repeal Initiative"); and (3) initiate a charter amendment to repeal Ordinance 2014-10 and prohibit similar mixed-use developments (the "Charter Initiative" or "Initiative"). Regardless of how the measures are portrayed, all three petitions seek to nullify Ordinance 2014-10. All three petitions were circulated simultaneously by the same circulators and signed by the same people. All three petitions suffer from the same or similar facial defects that required their invalidation.

In 2012, Powell voters approved an amendment to the City's Charter requiring City Council to review any proposed ballot measures, both for validity and sufficiency before those ballot measures may be placed on the ballot. Powell City Charter §§ 6.02 and 6.04. As a result of exercising its duties under the Charter, all three measures were reviewed by City Council for sufficiency and validity.

Following its review, City Council unanimously declined to forward the Charter Initiative to the Board of Elections for placement on the ballot. Among the defects contained in the Charter Initiative, the proposal attempts to referendum an administrative decision contrary to Article II, 1f of the Ohio Constitution, and its part-petitions fail to include the title and text of the proposed charter amendment in violation of Powell City Charter § 6.05. Even if the title were included, the title is inaccurate, incomplete, and misleading. Following the Charter Initiative's invalidation, Relators filed this action.

The Referendum and Repeal Initiative were forwarded by City Council to the Board of Elections at which Intervenor, The Center at Powell Crossing, LLC, ("Powell Crossing"), presented a Protest pursuant to R.C. § 3501.39. The Delaware County Board of Elections conducted a quasi-judicial hearing. Consistent with the Court's decisions in *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539 (1998), and its progeny, the Board unanimously ruled that Ordinance 2014-10 was an administrative decision that could not be subject to referendum or repeal. Additionally, the Board determined that both measures failed to comply with the City Charter and state law because the initiative part-petitions -- identical in form to those at issue here -- failed to state the title and text of the proposed ordinance and the referendum part-petitions failed to state the title and date of the measure to be put to referendum as required by the Powell Charter § 6.05. The Board found that instead of using part-petition forms prescribed by the Ohio Secretary of State, Relators altered their forms to be misleading. Accordingly, both the Referendum and Repeal Initiative are invalid. Relators then filed a separate original action in this Court, assigned Case No. 2014-1520, concerning the invalidation of those illegal efforts.

Powell Crossing intervened in this Action to protect its vested property rights in the Final Development Plan approved by City Council. Relators have no clear legal right to the relief they seek, nor do Powell City Council or its Clerk have any legal duty to perform the actions requested by Relators. Relators also failed to pursue their adequate remedy at law by not filing an administrative appeal to the Court of Common Pleas. Instead, Relators ask this Court to overrule decades of precedent in this original expedited election matter.

There being no clear legal right to the Relators' requested relief, no corresponding duty by Powell City Council or its Clerk to provide that relief, and other potential adequate remedies at law, this Court must deny Relators' requested extraordinary relief.

II. STATEMENT OF FACTS

A. The Property at Issue.

The property singled out in the Charter Initiative is an 8.3 acre tract of land located south of West Olentangy Street between Sawmill Parkway and Liberty Street at 147 West Olentangy Street (the "Property"). (Int. Resp. App. at 1, Charter Initiative Art. 4, § 21 and "Uncodified"¹.) Powell Crossing owns the Property. Currently, the Property is vacant other than an existing structure that serves as a dwelling and a small business location.

B. Powell Crossing's Proposed Development Project.

In 2005, the City rezoned the Property into its Downtown Business District. (Ex. 2-A², Ordinance 2005-20 – Property's Rezoning.) The City's Downtown Business District is a planned district which specifically permits retail and multi-family uses pursuant to the Powell

¹ For the Court's convenience, a true and accurate copy of the "Amendment to City Charter of Powell, Ohio" is set forth in the Appendix.

² Unless otherwise stated herein, the exhibits cited refer to the exhibits to *Joint Evidence of Respondents City Council of Powell, Ohio and Sue Ross, City Clerk of Powell, Ohio, and Intervening Respondent The Center at Powell Crossing, LLC*.

Zoning Code (“PZC”). (Ex. 1-B, PZC §§ 1143.08, 1143.16.2(b).) As stated in the PZC, the Downtown Business District was created to promote “mixed use pursuits ... adaptive reuse of older commercial and office structures, and those constructed originally as residences ... [through] a fine-grained intermixture of small-scale residential, office, and retail uses. . . .” (Ex. 1-B, PZC § 1143.16.2(b).) Powell Crossing designed its project to promote this purpose.

The project will transform a largely vacant tract into a mixed use development with approximately 14,000 sq. ft. of retail space and sixty-four (64) multi-family dwelling units. (Ex. 2-B, Final Approved Development Plan.) It also preserves the historic Dr. Campbell House by repurposing it for office and retail. (*Id.*) Several new public amenities will be created, including a park-like green square along the Property’s frontage, improved streetscapes, and additional bike paths. (*Id.*)

C. The Administrative Approval of Powell Crossing’s Development Project.

The City of Powell’s Planning and Zoning Commission unanimously recommended approval of the Final Development Plan in accordance with the Downtown Business District Zoning. (Ex. 1, ¶ 10.) Pursuant to PZC § 1143.11, that recommendation was submitted to Powell’s City Council for consideration. (*Id.* at ¶ 11.)

City Council approved the Final Development Plan on June 17, 2014. (*Id.* at ¶ 14.) During that hearing, Council Member Michael Crites correctly pointed out that Council’s consideration of the Final Development Plan was an administrative – and not a legislative – act. (Ex. 1-D, Minutes of City Council’s June 17, 2014 Meeting at p.14; Ex. 2-C, Tr. Aug. 26, 2014 Protest Hearing at 37-38.) The Final Development Plan conformed to the Property’s zoning in the Downtown Business District and the plan did not require any change to the Property’s

zoning. (Ex.1, ¶ 9.) City Council's approval did not change or alter the Property's zoning, but administered existing zoning. (*Id.*)

As the Powell Director of Development, David Betz, testified, City Council's approval of the Development Plan did not change the City's zoning map or modify the Property's zoning:

Q: Was the downtown business district changed or amended for this proposed development?

A: No it was not.

Q: Did city council in any way change or alter the property [sic] zoning?

A: No, it did not.

Q: Did [City Council] administer the zoning already in place?

A: Yes, it did.

Q: Does the property today remain zoned in the downtown business district?

A: Yes, it does.

Q: Finally, Mr. Betz, so I am clear, was this plan approved by city council as part of administering the zoning already in place for this property?

A: Yes, it was.

(Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 31-43.) Moreover, during its June 17 meeting, City Council permitted public comment on the Final Development Plan. (Ex. 1, ¶ 14.) One of the Relators, Ms. Valvona, admitted during City Council's meeting that the project met the City's existing standards for the Property. (*Id.* at ¶ 13, Ex. 1-D, Minutes of City Council's June 17, 2014 Meeting at p. 11.) Council approved the Final Development Plan on June 17 and memorialized its decision in Ordinance 2014-10. (Ex. 1-E, Ordinance 2014-10.)

D. The Three-Pronged Referendum of Ordinance 2014-10.

Following the approval of the Final Development Plan (Ordinance 2014-10), Relators chose to circulate and file the ballot measures to reverse Council's administrative decision. On July 17, 2014, Relators filed three petitions with the Clerk of Powell's City Council:

- (1) A Referendum Petition to referendum Ordinance 2014-10 (the Referendum);
- (2) An Initiative Petition to repeal Ordinance 2014-10 (the Repeal Initiative), entitled: "AN ORDINANCE REPEALING CITY OF POWELL ORDINANCE 2014-10 AND REJECTING THE FINAL DEVELOPMENT PLAN FOR THE CENTER AT POWELL CROSSING LLC, A DEVELOPMENT OF 14,000 SQ. FT. OF RETAIL IN TWO BUILDINGS, PRESERVING THE OLD HOUSE FOR COMMERCIAL USE, AND DEVELOPMENT OF 64 APARTMENT RESIDENTIAL UNITS ON 8.3 ACRES, LOCATED AT 147 W. OLENTANGY STREET."; and
- (3) An Initiative Petition to Amend the Powell City Charter (the Charter Initiative), entitled: "AN AMENDMENT TO THE CITY CHARTER OF POWELL, OHIO TO SUBSTITUTE THE COMPREHENSIVE PLAN OF THE VILLAGE OF POWELL OF DECEMBER 1995 WITH A NEW COMPREHENSIVE PLAN FOR ZONING AND DEVELOPMENT IN THE CITY OF POWELL, OHIO."

(Ex. 2-P, Protest filed with City Council of Powell, Ohio on August 1, 2014 at Protest Exs. 4-6.)

Despite its misleading title, the Charter Initiative encompasses a great deal more than just adopting a new comprehensive plan. The Charter Initiative nullifies the administrative approval of the Final Development Plan by effectively repealing it (Int. Resp. App. at 1, Charter Initiative Art. 4, § 21), singles out the Property and strips it of uses permitted under its current zoning (*id.* at "Uncodified" section), and ensures that no future action of City Council can permit the uses set forth in the Final Development Plan on the Property (*id.* at Art. 4, §§ 20 – 21):

WHEREAS, on June 17, 2014, City Council of the City of Powell, Ohio passed **Ordinance 2014-10** approving a Final Development Plan for the Center at Powell Crossing LLC, a development of 14,000 Sq. Ft. of retail in two buildings, preserving the Old House for commercial use, and

development of 64 apartment residential units on 8.3 acres, located at 147 W. Olentangy Street;

WHEREAS, the people of the City of Powell, Ohio have determined that **the approval of the Final Development Plan pursuant to City of Powell, Ohio Ordinance 2014-10 is not in the best interests of the people of the City of Powell, Ohio.**

Article 4, Section 20: **All Ordinances** of the City of Powell must comply with the Final Comprehensive Plan legislatively adopted pursuant to Section 18 of this Article IV.

Article 4, Section 21: The Final Comprehensive Plan legislatively adopted pursuant to Section 18 of this Article IV **shall not be compatible with Ordinance 2014-10 and/or the Final Development Plan for the Center at Powell Crossing LLC**, a development of 14,000 sq. ft. of retail in two buildings, preserving the old house for commercial use, and development of 64 apartment residential units on 8.3 acres, **located at 147 W. Olentangy Street.**

Uncodified: **No party, public or private, shall take any actions**, including but not limited to construction activity, **in reliance upon Ordinance 2014-10 and the Final Development Plan for the Center at Powell Crossing LLC**, a development of 14,000 sq. ft. of retail in two buildings, preserving the old house for commercial use, and development of 64 apartment residential units on 8.3 acres, **located at 147 W. Olentangy Street.** The subject property for the Ordinance 2014-10 Final Development Plan shall remain economically viable for other uses, including residential and non-residential uses, notwithstanding this amendment to the City Charter of Powell, Ohio.

(Id. (emphasis added).)

All three proposals, the Referendum, Repeal Initiative and Charter Initiative seek to nullify City Council's administrative approval of the Final Development Plan. The Chairman of the Delaware County Board of Elections observed that there is no discernible difference between

the Repeal Initiative and Referendum. (Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 186 (“[T]his initiative, the way it’s written and presented is **merely a back door way of a referendum.**”) (emphasis added).)

Likewise, all three petitions fail to comply with the requirement in City Charter § 6.05 that the title and date (referendum) or title and text (initiatives) be contained in each part-petition. (See Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 190-193 finding that Referendum and Charter Initiative did not comply with required petition forms).

E. The Invalidation of All Three Referendum Attempts.

After the three petitions were filed with Powell’s Clerk of Council, Powell Crossing filed a Notice of Protest with the Delaware County Board of Elections on July 28, 2014. (Ex. 2-D.) During an August 1, 2014, meeting, the Board of Elections observed that the City’s Charter required City Council to take the “first pass” on the Petitions’ sufficiency and validity. (Ex. 2-E.) That same day, Powell Crossing filed a Protest with City Council concerning the three petitions. (Ex. 2-P.) On August 5, City Council held its first reading on the Ordinance concerning the Charter Initiative and tabled the Resolutions concerning the Referendum and Repeal Initiative so that all three petitions could be reviewed together at its August 19, 2014 meeting. (Ex. 2-F, Tr. Aug. 5, 2014 Meeting of the City Council of Powell.)

At Council’s August 19, meeting, a dissenter’s animus against the Final Development Plan and its apartment style homes was made clear:

My name’s Lannie Gilliam, III. I live at 300 Ridge Side Drive, Powell. **I don’t want apartments built in Powell**, and I’m a hypocrite for saying that because I own rental property. I lived in Section 8 housing. And rental property can be tough. **It takes one drug dealer, one gang dealer – or gangbanger they used to call them – to flip that place upside down.** I love Powell. I want to live here, I want to be buried in Ohio. I’m from Tennessee originally. **I have a fear that Powell could turn into Ferguson, Missouri.** Please think about that. Thank you.

(Ex. 2-G, Tr. of Aug. 19, 2014 Meeting of the City Council of Powell at 53-54 (emphasis added).) Pursuant to Charter §§ 6.02 and 6.04, City Council reviewed the petitions' sufficiency and validity, and invalidated the Charter Initiative. (*Id.* at 90.)

City Council also determined that another forum would be more appropriate to consider whether the subject of all three petitions, Ordinance 2014-10, was administrative and therefore inappropriate for a municipal ballot measure under Article II, Section 1f of the Ohio Constitution. (*Id.* at 60-61 (discussing necessity of conducting a quasi-judiciary hearing for administrative/legislative determination); Int. Resp. App. at 3, Ohio Const. Art. II, Sec. 1f.) Relators subsequently commenced this action concerning the Charter Initiative.

Meanwhile, Powell Crossing filed a Protest pursuant to R.C. § 3501.39 with the Delaware County Board of Elections on the Referendum and Repeal Initiative. (Int. Resp. App. at 13, R.C. § 3501.39.) The Board of Elections conducted a quasi-judicial hearing on August 26, 2014 and invalidated both measures. (Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 184-185.) Based on the evidence before it, the Board unanimously determined that Ordinance 2014-10 was an administrative decision and that under the Ohio Constitution and this Court's prior decisions, Ordinance 2014-10 cannot be the subject of a municipal ballot measure. (*Id.*) The Board also expressly found that the part-petitions – identical in form to those circulated for the Charter Initiative – failed to follow the City Charter's requirements and the prescribed Secretary of State forms for Municipal Petitions and Referenda. (*See* Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 190-193 (discussing the Relators' failure to disclose the title and text of the proposed measure on the face of each part-petition).) Relators then filed a separate action in this Court regarding the Initiative to Repeal and the Referendum. (Supreme Court of Ohio, Case No. 2014-1520.)

Both the Powell City Council and the Delaware County Board of Elections saw through the Relators' three-pronged attempt to circumvent Ohio's established administrative appeal procedures. As set forth below, Relators cannot show a clear legal right to the requested extraordinary relief, cannot prove that the Powell Respondents have a clear legal duty to take any further action on the Charter Initiative, and did not avail themselves of the adequate remedy at law available to them. Accordingly, this Court should deny Relators' requested extraordinary relief.

III. ARGUMENT

RELATORS HAVE NO CLEAR LEGAL RIGHT AND RESPONDENTS HAVE NO LEGAL DUTY TO PERFORM THE ACTIONS DEMANDED BY RELATORS.

A. The Legal Standard and Applicable Law Bar Relators from the Extraordinary Relief They Seek.

To obtain a writ of mandamus, Relators must establish a clear legal right to the requested relief, a corresponding clear legal duty of the Respondents to provide that relief, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, ¶ 11. When seeking such extraordinary relief, relators are required to prove that they are entitled to the writ by clear and convincing evidence.³ *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, paragraph three of the syllabus.

³ As an initial matter, Relators cannot meet their burden to establish that they are entitled to a writ by clear and convincing evidence because they have not complied with the Supreme Court Rules of Practice for the admission of evidence in original actions. *See State ex rel. Brenders v. Hall*, 71 Ohio St.3d 632, 637, 1995-Ohio-106, fn. 1 (1995) (“[E]vidence submitted under the Supreme Court Rules of Practice in an original action in this court should comport with the Rules of Evidence.”). None of Relators' evidence has been submitted in accordance with the Ohio Rules of Evidence. Evidence that is not properly authenticated may be stricken by the court. *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 63 Ohio St.3d 190, 192-193, (1992).

Under this clear and convincing standard, Relators must also prove strict compliance with governing elections laws. “The settled rule is that **election laws are mandatory and require strict compliance** and that substantial compliance is acceptable only when an election provision expressly states that it is.” *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, ¶ 49 (emphasis added), citing *State ex rel. Phillips v. Lorain Cty. Bd. of Elections*, 93 Ohio St.3d 535, 539, 2001-Ohio-1627 (2001); see also *State ex rel. Columbus Coalition for Responsive Government v. Blevins*, Slip Op. 2014-Ohio-3745, ¶ 10 (requiring strict compliance with pre-circulation requirement). Thus, unless a requirement expressly states that some lower standard is permitted, strict compliance is required.

Relators lack the legal right to compel an election on the proposed Charter Initiative in numerous respects:

- (1) Article II, Section 1f of the Ohio Constitution does not authorize electors to repeal or referendum Ordinance 2014-10;
- (2) Each part-petition fails to comply with the requirement of Powell Charter § 6.05 that the full text and title be disclosed in the petition;
- (3) The Charter Initiative’s title misleads the electorate by failing to disclose that it will referendum Ordinance 2014-10;
- (4) The Charter Initiative impermissibly delegates the City’s zoning to the whims of five unelected and unaccountable individuals;
- (5) The Charter Initiative attempts to illegally spot zone the Property;
- (6) The Charter Initiative removes certain permitted uses from the Property’s zoning while leaving no clear standards to identify the remaining permitted uses on the Property;
- (7) The Charter Initiative attempts to retroactively deprive Powell Crossing of its vested property rights; and
- (8) The Charter Initiative is not support by a sufficient number of valid signatures.

Relators fail to meet their evidentiary burden and cannot prove that they have a clear legal right to the relief they seek, nor that Powell’s City Council or its Clerk have a corresponding legal duty to provide that relief. Accordingly, the Relators’ requested relief must be denied.

B. Relators Have No Clear Legal Right and Respondents Have No Legal Duty To Conduct an Election on a Referendum of an Administrative Decision.

1. Relators Have No Right Under the Ohio Constitution to Initiate an Election on an Administrative Decision.

Relators do not dispute that this Court can determine whether the Charter Initiative’s attempted referendum of Ordinance 2014-10 is an unauthorized municipal ballot measure. (Relators’ Br. at 41 - 43.) Time and again, this Court has barred attempts to refer or initiate the repeal of administrative decisions through ballot measures as unauthorized under the Ohio Constitution. The Charter Initiative’s attempt to referendum Ordinance 2014-10 is no different.

It is well established that only municipalities’ legislative actions are permissible subjects of initiatives and referenda. *See, e.g., State ex rel. City of Upper Arlington v. Franklin County Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093, ¶ 19. The Ohio Constitution expressly limits ballot measures to legislative matters:

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

(Int. Resp. App. at 3, Ohio Constitution, Art. II, Section 1f (emphasis added).)

Article II, Section 1f, “**is the sole constitutional source** of initiative and referendum powers, reserved by the people of the state to the people of each municipality.” *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 542 (1998) (holding that cities cannot expand initiative and referendum powers through their charters beyond the powers granted by Art. II, Sec. 1f) (emphasis added). “Section 1f, Article II **clearly limits**

referendum and initiative powers to questions that are **legislative in nature.**” *Id.* at 543 (emphasis added).

This Court has repeatedly reaffirmed the constitutional limitations of referendum and initiative petitions as set forth in *Buckeye Community Hope*, including, as here, in the context of administrative approvals of development plans pursuant to existing zoning. *See State ex rel. Comm. for the Referendum of Ordinance No. 3844-02 v. Norris, Clerk*, 99 Ohio St.3d 336, 2003-Ohio-3887, ¶ 42 (holding city’s administrative decision approving a final development plan and final plat was “nonreferendable.”); *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, ¶ 6 (rejecting referendum of city ordinance approving development plan because it “merely executed and administered existing laws, its enactment constitutes **an administrative action, which is not properly the subject of either referendum or initiative.**”) (emphasis added); *State ex rel. Marsalek v. Council of S. Euclid*, 111 Ohio St.3d 163, 167, 2006-Ohio-4973 (holding city had “**no legal duty**” to place referendum on ballot where the resolution at issue approved a planned-unit residential development as a conditional use under existing zoning) (emphasis added). *See also State ex rel. City of Upper Arlington*, 119 Ohio St. 3d 478, 484, 2008-Ohio-5093, ¶ 27 (holding that a board of elections “abused its discretion and clearly disregarded applicable law by denying [a] protest” against an initiative on an administrative action).

2. The Approval of the Final Development Plan Through Ordinance No. 2014-10 Was an Administrative Action.

City Council’s approval of the Final Development Plan was an administrative action not subject to referendum. Council approved the Final Development Plan pursuant to existing

zoning; there was no alteration to the City's Zoning Code.⁴ (Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing; Ex. 1, ¶¶ 9, 15.) As a matter of settled law in this State, the administration of existing zoning laws is not legislative action. *See Buckeye Community Hope*, 82 Ohio St.3d at 545 (“The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing and other applicable regulations, constitutes administrative action and is not subject to referendum proceedings.”); *Marsalek*, 111 Ohio St.3d at 165-66; *Talarico*, 106 Ohio St.3d at 486 (holding an ordinance was an administrative act because it did not “constitute an amendment of the zoning of the property”); *Norris*, 99 Ohio St.3d at 343 (holding an ordinance that adopted a final development plan in a planned commercial district (“PCD”) was an administrative act because it did not cause a “zoning change” to the property).

Moreover, simply because a city council memorializes an administrative decision as an ordinance, does not somehow convert its administrative action into a legislative one. *Buckeye Community Hope*, 82 Ohio St.3d at 544 (“the city’s position that the approval of the site plan was a legislative action because the council took action via an ordinance (rather than by resolution or other means) is in error”).

Relators do not seriously contend that Ordinance 2014-10 was an administrative action. Instead, Realtors attempt to sidestep the issue by claiming the Ordinance was void *ab initio* due to purported defects in Powell Crossing’s application. (Relators’ Br. at 42.)⁵ The extraordinary writ of mandamus is not issued as a substitute to an administrative appeal. Having declined the

⁴ Notably, the Delaware County Board of Elections unanimously found Ordinance 2014-10 to be an administrative action by Council when it rejected Relators’ companion ballot measures to referendum the ordinance. (Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 184-185.)

⁵ Relators falsely claim that Ordinance 2014-10 contains a “term” that characterizes the measure as “legislation.” (Compl. at ¶ 10.) However, by “term,” Relators are merely referencing the Clerk of Council’s signature stamp. (See Ex. 1-E, Ordinance 2014-10.) That signature stamp is the same stamp used on all of Powell’s ordinances and resolutions, regardless of whether they are administrative or legislative actions. (Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 42; compare Ex.2-H, Resolution 2014-01 (electing current mayor containing stamp) with Ex.1-E, Ordinance 2014-10 (approving final development plan containing stamp).)

opportunity to timely raise those claims in the appropriate forum pursuant to R.C. Chapter 2506, Relators have waived them here. (*See* Int. Resp. App. at 9-12.)⁶ In the alternative, Relators argue that *Buckeye Community Hope* should be distinguished on its facts (without stating how such a distinction is possible) or that it was “wrongly decided” and unworkable. (Relators’ Br. at 42-43). As demonstrated above, this Court has repeatedly rejected such arguments. As a matter of law and fact, Council’s approval of the Final Development Plan in administering the existing zoning cannot be the basis of any ballot measure – including the Charter Initiative.

3. The Charter Initiative Is an Unlawful Referendum of Ordinance 2014-10.

Contrary to the title of the Charter Initiative and Relators’ portrayal of the measure, the entire purpose and effect of it is to nullify Ordinance 2014-10. In their attempt to disguise the Initiative as nothing more than substituting a new comprehensive plan for the old one, Relators hide the text that singles out Powell Crossing, its Property, and Ordinance 2014-10, which it nullifies.

Article II, Section 1f of the Ohio Constitution reserves initiative powers solely to referenda of legislative actions, not of administrative decisions. *Supra*, III.B.1; Int. Resp. App. at 3. It is irrelevant that the attempted referendum is contained within an amendment to a municipal charter, because a municipality’s charter cannot unilaterally expand the initiative authority granted by the Ohio Constitution. *See Buckeye Community Hope*, 82 Ohio St.3d at 542 (holding that a city’s initiative and referendum authority is limited by Article II, Sec. 1f of the Ohio Constitution). Accordingly, Relators cannot ignore Article II, Section 1f of the Ohio Constitution and append a referendum of an administrative decision to a charter amendment.

⁶ Relators purposely elected to forgo the administrative appeal process despite being specifically advised of this process during City Council’s June 17 deliberations over approval of the Final Development Plan. (Ex. 1-D, Minutes of City Council at June 17, 2014 Minutes p. 14, at Resp. J.E. 000163.)

Creating an exception to Article II, Section 1f for a charter amendment would negate this important constitutional provision.

The text leaves no doubt that the amendment is dedicated to reversing Powell Crossing's development plan and repealing Ordinance 2014-10. The first "Uncodified" Section does not have anything to do with a comprehensive plan. Instead, this Section prohibits any "party, public or private" from taking **any action** in furtherance of the Final Development Plan approved through Ordinance 2014-10. This provision nullifies the approval of the Final Development Plan. Construction cannot begin because City Officials are prohibited from taking actions such as issuing a building permit or certificate of occupancy under the Development Plan. (*See e.g.*, Int. Resp. App. at 14, Powell Building Code § 1335.02 (prohibiting any Certificate of Occupancy from being issued on construction that is not completed per approved plans and specifications).) Nor can the Final Development Plan be re-approved through any other iteration because the Final Development Plan, Ordinance 2014-10, and multi-family housing are all expressly incompatible with the Property's zoning under the amendment. (Int. Resp. App. at 1, Charter Initiative, Art. 4, §§ 19 – 21.)

The essence of the Charter Initiative is the nullification of Ordinance 2014-10. Though Relators caption and title the proposed Charter Initiative something other than a referendum of Ordinance 2014-10, there can be no dispute that it is another "back door" referendum attempt. As such, Relators have no clear legal right to subject Ordinance 2014-10 to a referendum. Article II, Section 1f of the Ohio Constitution forbids it. *See Marsalek*, 2006-Ohio-4973 at ¶ 20; Int. Resp. App. at 3.

Relators' requested extraordinary relief should be denied.

C. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Approve a Petition that Violates the City Charter’s Form Requirements by Failing to Disclose the Proposal’s Title and Text.

The City’s Charter expressly requires that each part “of **any initiative petition shall contain a full and correct copy of the title and text** of the proposed ordinance or other measure.” (Ex. 2-I, Current Powell City Charter, § 6.05 (emphasis added).) Strict compliance is required. *State ex rel. Comm. for the Referendum of Lorain Ordinance No. 77-01*, 2002-Ohio-4194, ¶49. Yet, instead of placing the text and title of the proposed charter initiative on their Petitions as required, the text and title of the Initiative was contained only in an entirely separate document purportedly circulated with the part-petitions.⁷

Efforts to minimize the verbatim title and text requirement contained in R.C. § 731.31 have repeatedly been rejected by this Court. (Int. Resp. App. at 8.)⁸ *See e.g., State ex rel. Esch v. Lake Cnty. Bd. of Elections*, 61 Ohio St.3d at 597 (citing cases); *State ex rel. Becker v. City of Eastlake*, 93 Ohio St.3d 502, 507 (2001) (“Omitting the title of a proposed measure is a ‘fatal defect because it interferes with the petition’s ability to fairly and substantially present the issue and might mislead electors.’”) (citations omitted); *State ex rel. Burech v. Belmont Cnty. Bd. of Elections*, 19 Ohio St.3d 154, 155 (1985) (holding that title and text requirement must be strictly enforced). For example, in *State ex rel. Esch*, it was argued that “the lack of a title is a technical defect and that strict compliance with this R.C. § 731.31 requirement is not necessary.” 61 Ohio

⁷ Though Relators dismiss this flaw as “lack[ing] merit,” a bi-partisan majority of the Delaware County Board of Elections disagreed. (Ex. 2-C, Tr. Aug. 26, 2014, Protest Hearing at 190-193). The Board expressly found Relators violated this requirement when addressing Relators’ companion referenda attempts. Relators concede that the Charter Initiative petition follows exactly the same format as the petitions the Delaware County Board of Elections found to violate the City Charter’s form requirements. (Relators’ Br. at 22 (admitting the “other two petitions follow[] the same format as the charter amendment petition...”).)

⁸ As in the City Charter, R.C. § 731.31 expressly requires that “each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure. . . .”

St.3d at 597. This Court disagreed. Strict compliance is required, a petition cannot be held to a lesser standard. *Id.* at 597-598.

Neither the full and accurate title, nor the text of the Charter Initiative, appears on the face of *any* of the part-petitions. Instead, each part-petition merely refers to an “amendment to the City Charter of Powell, Ohio” and attempts to “incorporate” the title and text contained in an entirely separate document purportedly attached to the part-petitions. While Relators argue that they substantially complied with the City Charter’s title and text requirements by incorporating an exhibit by reference, (Relators’ Br. at 24 – 26), neither the City Charter nor Ohio law permit substantial compliance. Instead of strictly complying with the law, Relators intentionally deviated from the Ohio Secretary of State’s prescribed municipal initiative petition form which conspicuously states: “**The following is a full and correct copy of the title and text of the proposed Ordinance:**” (Ex. 2-J (emphasis added).) Relators purposely deleted this sentence from their own customized part-petitions and intentionally omitted the title and text from their part-petitions.

Notably, Relators cannot cite to any law that permits a circulator to incorporate by reference an initiative’s title and text set forth in an entirely separate document to satisfy this fundamental petition requirement. That is because mere “incorporation” undermines the obvious intent of this requirement – to “immediately alert[] signers to the nature of [the measure].” *See e.g., State ex rel. Esch*, 61 Ohio St.3d at 597. In fact, this Court has previously stated that “we do not condone” such tactics. *State ex rel. Thurn v. Cuyahoga County Bd. of Elections*, 72 Ohio St.3d 289, 292 (1995). Moreover, there is no evidence that the electors even circulated the extrinsic exhibits with each part-petition. Rather, each circulator’s statement only purports to attest that the content *preceding* his or her statement was actually circulated. (*See e.g., 2-T* at

“Circulator Statement” (making a declaration of only the *foregoing* when, at best, the extrinsic exhibit *followed* the statement, if at all).)

Instead of immediately alerting signers to the nature of the Relators’ proposal by stating the title and text upfront, the Petitions mislead signers by acknowledging only that Ordinance 2014-10 “is referenced in the proposed charter amendment.” (*Id.*) Not only does each part-petition fail to disclose what Ordinance 2014-10 approved, each part-petition deceptively omits altogether that the proposed Initiative repeals Ordinance 2014-10. Because Relators failed to include the full text and title of the Initiative on their Petitions as required by the Powell City Charter, Relators have no clear legal right to the advancement of this defective Petition and City Council and its Clerk have no corresponding legal duty to forward the Petition to the Board of Elections.

D. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Approve a Petition that is Facially Misleading.

The Charter Initiative’s title and preamble, set forth in “Exhibit 1” purportedly attached to the Petition, fail to fully and fairly present the Initiative. (Int. Resp. App. at 1, Charter Initiative.) Such incomplete and misleading efforts violate the Charter’s Initiative Petition requirements set forth in § 6.05 of the City’s Charter and controlling Ohio law.

“More so than the text, the title immediately alerts signers to the nature of [the measure].” *State ex rel. Esch v. Lake Cnty. Bd. of Elections*, 61 Ohio St.3d 595, 597 (1991) (rejecting initiative petitions that lacked the relevant title) (emphasis added). Disclosing a measure’s full and correct title on the face of each part-petition immediately alerts a petition signer of the measure’s aim. Accordingly, Powell Charter § 6.05 requires the measure state the “**full** and **correct** title.” (Ex. 2-I, Current Powell City Charter, § 6.05.) A city council has no duty to forward charter initiative petitions to a board of elections when such petitions are misleading.

See e.g., State ex rel. Hackworth v. Hughes, 97 Ohio St.3d 110, 2002-Ohio-5334, ¶ 35 (upholding City Council’s decision that the formatting of text within a proposed Charter Initiative could mislead the electorate, requiring the initiative’s invalidation); *State ex rel. Bay Citizens for Safety v. City Council of Bay Village*, 8th Dist. Cuyahoga No. 91889, 2008-Ohio-4225 (upholding City Council’s decision that petition was facially misleading). A petition must “**fairly and substantially present** the proposed charter amendment to the electorate.” *Hackworth*, 2002-Ohio-5334 (denying writ to overturn City Council’s decision to refrain from adopting ordinance to place a proposed charter initiative on the ballot) (emphasis added).

Contrary to the Relators’ assertions, the proposed Charter Initiative contains more than one subject, each of which must be reflected in the title. (*See e.g., Ex. 2-I, Current Powell City Charter*, § 5.02 (requiring that the subject of a legislative proposal “shall be set forth in the title”).) However, the Initiative’s title only reflects one component of the initiative – the Comprehensive Plan – as its subject:

AN AMENDMENT TO THE CITY CHARTER OF POWELL, OHIO TO
SUBSTITUTE THE COMPREHENSIVE PLAN OF THE VILLAGE OF
POWELL OF DECEMBER 1995 WITH A NEW COMPREHENSIVE
PLAN FOR ZONING AND DEVELOPMENT IN THE CITY OF
POWELL, OHIO.

(Int. Resp. App. at 1, Charter Initiative.) The actual text of the Initiative not only pertains to a Comprehensive Plan, it also attempts to referendum Ordinance 2014-10 (*Id.* at Art. 4, §§ 20-21 and “Uncodified”), rezone the Property (“Uncodified” section), create a new five-person commission (Art. 4, § 14), and confine the scope of all future ordinances (Art. 4, § 20).

The Court need look no further than the additional “exhibits” to the Petition to determine that the proposal entails more than one subject. (Int. Resp. App. at 1, Charter Initiative (“incorporate[ing]” the City’s Zoning Map for the Downtown Business District and “referenc[ing]” Ordinance 2014-10).) Yet because of the incomplete and misleading title,

petition signers were not alerted to the Initiative's aim. Simply put, the Charter Initiative's title fails to fully and fairly portray the proposal by deceptively omitting the referendum effort and its other subjects from its title, requiring its invalidation. *See, e.g., Hackworth*, 2002-Ohio-5334, ¶ 35; Powell Charter § 6.05.

In *State ex rel. Cody v. Stahl*, the Court of Appeals addressed an initiative petition similar to Relators' here. 8th Dist. Cuyahoga No. 83037, 2003-Ohio-6180. Just as in this case, the *Stahl* initiative attempted to circumvent the referenda process by mislabeling its referendum as an initiative. *Id.* at ¶ 15. The court held that where a petition is captioned as an "Initiative Petition," but "seeks repeal of an ordinance," the petition is a referendum petition. *Id.* Thus the *Stahl* court found that the proposed initiative "fails properly and immediately to alert signers as to its full nature." *Id.*

Relator's initiative is equally misleading as the petition in *Stahl*. The initiative is simply an attempted end-run around the referenda process and its title fails to "properly and immediately...alert [petition] signers as to [the petition's] full nature." *Stahl*, 2003-Ohio-6180 at ¶ 15. Such misleading petitions are invalid.

In addition to the Charter Initiative's misleading and incorrect title, the Initiative's preamble is also misleading to the Powell electorate. The first and third whereas clauses of the preamble each mislead Powell voters by stating "Whereas, the People of the City of Powell, Ohio **have determined** that the [Comprehensive Plan] is need of wholesale revision..." and "Whereas, the people of the City of Powell, Ohio **have determined** that the approval of the Final Development Plan pursuant to City of Powell, Ordinance 2014-10 is not in the best interests of the people of the City of Powell, Ohio." (Int. Resp. App. at 1, Charter Initiative (emphasis added).) Both clauses improperly mislead voters by suggesting that the people of Powell have

already determined, as of the time of the election, that the Comprehensive Plan “is in need of wholesale revision” and that “Ordinance 2014-10 is not in the best interests of the people” when no such determinations have been made.

In *State ex rel. Bay Citizens for Safety v. City Council of Bay Village*, the court found a similar preamble facially misleading. 8th Dist. Cuyahoga No. 91889, 2008-Ohio-4225. In *Bay Village*, the preamble contained a whereas clause stating “Whereas, an initiative petition relative to the staffing of the Bay Village Fire Department was circulated and voted upon by the people of the City of Bay Village.” *Id.* at ¶ 2. The City Council rejected the proposed initiative petition because the preamble, which stated that the initiative “was...voted upon by the people of City of Bay Village,” was incorrect and misleading, “because such an event had not happened.” *Id.* at ¶ 3. The court of appeals agreed, finding the petition to be “misleading on its face.” According to the court:

This could cause at least two deleterious effects. First, it could cause consternation among electors thinking “what are we doing signing this petition or voting on it,” if it has already been circulated and voted upon. Second, an elector could think the measure has already been passed and all that is being asked is to “get on the bandwagon” and approve that which has already been approved. This could make obtaining signatures or votes much easier. Moreover, the clause was unnecessary....Because these misleading tendencies are in the form of the petition and visible on its face, the Bay Village City Council acted properly when it refused to submit the subject initiative petition to the Board of Elections.

Id. at ¶ 7 (citing *Hackworth*). Relators’ Initiative Petition creates the same deleterious effects identified by the court in *Bay Village* and should be rejected on this basis as well.

Accordingly, Relators have no clear legal right to the advancement of this defective Petition and City Council and its Clerk have no corresponding legal duty to forward the Petition to the Board of Elections.

E. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Initiate a Measure the City Council Determined Invalid.

1. As Relators Concede, Powell's Municipal Charter Requires City Council to Approve the Validity of a Proposed Charter Amendment Before Submitting the Proposal to the Ballot.

Relators concede that Powell's Municipal Charter requires Powell's City Council to approve the validity of the Charter Initiative before it can proceed to the ballot. (Relators' Br. at 29 (conceding that City Council "has a duty pursuant Powell [sic] City Charter § 6.05 to determine whether the petitions are sufficient **and valid.**") (emphasis added).) Yet, Relators arbitrarily confine Council's review of the proposed amendment to the City's Charter to that of a rubber stamp on the sufficiency of signatures gathered and approval of the form of the petition. (Relators' Br. at 18-22.) Relators' entire argument rests on cases that do not apply here – unlike the cases cited by Relators, Powell's voters amended their Charter to require that City Council determine the validity of a ballot measure before it proceeds to the ballot.⁹ (Ex. 2-I, Current Powell City Charter, §§ 6.02, 6.04 and 6.05.)

Just last year, in the May 2013 special election, Powell's voters overwhelmingly approved an amendment to the City's initiative and referendum procedures to specifically authorize City Council to screen insufficient and invalid petitions from the ballot. (*Compare* Ex. 2-I *with* Ex. 2-K.) As approved by Powell's voters, the Charter was amended to require proposed Charter amendments to be reviewed by City Council for their sufficiency and validity:

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.

⁹ Relators' reliance on *State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49 (1991); *Morris v. Macedonia City Council*, 71 Ohio St.3d 52 (1994); *State ex rel. Polcyn v. Burkhardt*, 33 Ohio St.2d 7 (1973); and *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437 (2005) is misplaced because none of the charters of the cities involved required that Council approve the validity of a ballot measure.

If the petition and proposed ordinance are determined by Council to be sufficient and valid, the Council shall, at such regular meeting, read and act upon same. . . .

(Ex. 2-I, Current Powell City Charter, § 6.02 (emphasis added).) Powell has adopted a municipal home rule form of government. Charter at Preamble (“We, the people of the City of Powell, in order to secure and exercise the **full powers of local self-government** under the Constitution of the State of Ohio do enact and ordain this Charter.”). The Ohio Constitution expressly permits Powell to amend its charter in order to exercise all powers of local self-government that are not in conflict with the general laws:

Article XVIII, Section 7

Any municipality may frame and adopt or **amend a charter** for its government and may, subject to the provisions of section 3 of this article, **exercise thereunder all powers of local self-government**.

Article XVIII, Section 3

Municipalities shall have **authority to exercise all powers of local self-government** and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are **not in conflict with general laws**.

(Int. Resp. App. at 4-5 (emphasis added).) Consistent with this authority, the majority of Powell’s voters last year approved requiring City Council, as part of its review of proposed charter initiatives, to determine whether the proposal is in fact valid before it can proceed further.

This requirement is harmonious with the amendment framework set forth in Article XVIII, Sections 8 – 9 of the Ohio Constitution. (Int. Resp. App. at 6-7.) Municipalities are permitted to add requirements to the Constitution’s charter amendment framework as long as the additional requirements do not conflict with the Ohio Constitution. *State ex rel. Bedford v. Board of Elections*, 62 Ohio St.3d 17, 22 (1991) (“However, we have allowed municipalities to supplement the constitutional charter amendment process with procedures that are not contrary to

the express provisions in Section 9. *** [P]rocedures may be added to the constitutional charter amendment process if the additions do not conflict with the Ohio Constitution.”) (citations omitted). Powell’s Charter’s requirement for City Council to determine if an amendment is valid does not conflict with the Constitution.

Under the Ohio Constitution’s framework, a proposed amendment to a municipal charter must be considered via ordinance by the municipality’s legislative authority. (Int. Resp. App. at 6, Ohio Constitution Art. XVIII, Sec. 8 (“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 ***.”).) (emphasis added). It is during the Council’s consideration of that ordinance that Powell’s Charter requires Council to determine whether the proposal is valid. There is no requirement that Council must automatically *approve* every proposal supported by a sufficient number of electors, only that Council provide an ordinance. Because there is no conflict with the Ohio Constitution, City Council is to determine a charter amendment’s validity. *State ex rel. Bedford*, 62 Ohio St.3d at 22.

While Relators attempt to make much of the timing of City Council’s actions, there is no evidence that the timing of City Council’s ultimate action on the Charter Initiative (August 19) would have barred it from the ballot. Therefore, *State ex rel. Concerned Citizens for More Professional Gov’t v. City Council of Zanesville*, 70 Ohio St.3d 455 (1994), is inapposite. (Relators’ Br. at 15-16.) In *Zanesville*, the City Council delayed action on the ordinance to place the initiative on the ballot until *after* the sixty-day deadline to qualify for the upcoming general election. 70 Ohio St.3d at 459. Moreover, Relators concerns regarding City Council’s reticence

to act upon the Charter Initiative's ordinance during its first reading on August 5 are moot. (Relators' Br. at 15-17; 26-28.) Council timely acted on the measure.

2. Nothing in Powell's Charter or the Ohio Constitution Confines City Council's Review of an Initiative to Amend Its Charter to Matters of Form Only.

Relators request this Court to amend Powell's Charter to limit Council's review merely to "the form of the petitions." (Relators' Br. at 18.) However, it is well-established that in construing a municipal Charter, the terms set forth in the Charter must be used and cannot be arbitrarily supplemented or nullified. *See State ex rel. Cater v. City of N. Olmsted*, 69 Ohio St.3d 315, 324, 1994-Ohio-488. When interpreting municipal charter provisions, "it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Id.* Relators cannot point to a single provision in Powell's Charter that restricts City Council to solely reviewing the "form of the petitions."

The cases cited by Relators are inapposite.¹⁰ Contrary to Relators' misrepresentations otherwise, *Morris v. City Council of Macedonia* fails to account for City Council's responsibility to determine the sufficiency and validity of the petitions.¹¹ In *Morris*, the Macedonia City Council only reviewed whether a petition contained sufficient signatures to qualify for the ballot. *Morris v. City Council of Macedonia*, 71 Ohio St.3d 52, 55 (1996). Unlike here, Macedonia's charter did not authorize its City Council to review the petition for its validity. *Id.* (noting that the procedures set forth in the Ohio Revised Code and Ohio Constitution governed). Likewise, in *State ex rel. Polcyn v. Burkhardt*, there was not a municipal charter procedure requiring

¹⁰ Relators misstate this Court's holding *State ex rel. N. Main St. Coalition v. Webb* by claiming that a city council improperly exceeded its authority to determine whether a proposed ordinance is legislative or administrative. (Relators' Br. at 19.) In *Webb*, this Court held that a village clerk – not city council – was limited in the scope of her review; moreover, the initiative in *Webb* concerned a legislative and not administrative matter. 106 Ohio St.3d 437, 2005-Ohio-5009 ¶¶ 27, 35.

¹¹ Relators contend that the Macedonia City Council "was required to address sufficiency and validity." (Relators' Br. at 17-19.) However, the decision references only an inquiry into the "sufficiency of the petitions" – not a separate obligation under the Charter to review the validity. *Morris*, 71 Ohio St.3d at 55.

Toledo's City Council to determine the validity of a proposed charter amendment before approving the ordinance to place the proposal on the ballot. *State ex rel. Polcyn v. Burkhart*, 33 Ohio St.2d 7, 8-9 (1973). For this same reason, *State ex rel. Citizens for Better Portsmouth v. Sydnor* and *State ex rel. DeBrosse v. Cool* are also distinguishable. In *Sydnor*, that City Council was limited to examining the petitions for their sufficiency and not validity, 61 Ohio St.3d 49, 52 (1991), and in *Debrosse*, Piqua's Charter did not vest the Piqua Commission with the obligation to review petitions for their validity either, 87 Ohio St.3d 1, 3 (1999). Finally, *Pfeifer v. Graves*, concerned a statewide initiative governed by entirely different law than here. 88 Ohio St. 473, 477 (1913).

Powell's Charter expressly obligates City Council to determine whether proposed amendments to the charter are valid. (Ex. 2-I, Current Powell City Charter, § 6.02.) The Charter Initiative petition's defects are self-evident from its face. Contrary to the rules of construction, Relators have requested this Court to arbitrarily add limitations to Powell's Charter that do not exist. To do so would require nullifying last year's amendment to Powell's Charter approved by a majority of its voters. Accordingly, Relators have no clear legal right and Powell's City Council and its Clerk have no legal duty to approve a charter amendment that City Council determined was invalid.

F. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Initiate a Measure that Impermissibly Delegates the City's Zoning to Five Unelected and Unaccountable Individuals.

The Charter Initiative's proposal to delegate a standardless legislative function to five unelected and unaccountable individuals is invalid on its face. *See City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 675 (1976). As the United States Supreme Court explained, legislative powers originally given by the people to a legislative body that are subsequently delegated to a narrow segment of the community are invalid. *Id.* at 677 (construing: *Eubank v.*

Richmond, 226 U.S. 137 (1912) and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928)); Meck & Pearlman, *Ohio Planning and Zoning Law*, § 8.4 at 382 (2014 Ed.) (“a local government *** is responsible for setting clear standards by which the zoning ordinance is administered and **cannot delegate that responsibility by allowing a citizens committee to make decisions having the effect of law *****”) (emphasis added). Yet, the Charter Initiative usurps City Council’s legislative zoning authority and delegates that responsibility to a narrow segment of the community through a “citizens committee.”

Powell’s Charter currently vests in City Council exclusive legislative authority to control the City’s zoning and master plan. (Ex. 2-I, Current Powell City Charter, § 4.07(b) and (c) (“**All legislative powers of the City shall be vested in the Council *****” to among other things, adopt and modify the master plan, and regulate land use.) (emphasis added).) The Charter Initiative creates a “Comprehensive Plan Commission” limited to five unnamed individuals¹²: (1) The President of the Bartholomew Run Homeowners Association; (2) The President of the Olentangy Ridge Civic Association; (3) The President of the Grandshire Homeowners Association; (4) The President of the Liberty Lakes Homeowners Association;¹³ and (5) The President of the Murphy Park Homeowners Association. (Int. Resp. App. at 1, Charter Initiative, Art. 4, § 14.) This Commission is expressly delegated the responsibility, among other duties, to “make findings regarding the current state of the Powell community’s character and identity in light of current socioeconomic conditions.” (*Id.* at Art. 4, § 15.) There are no standards to guide this process. (*Id.*)

¹² Or some unknown person to be designated.

¹³ Liberty Lakes Subdivision is not even located within the City of Powell and consequently twenty percent of the citizen commission would not even be Powell residents. See City of Powell, *Subdivisions in 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 Sept. 2, 2014); (Ex. U, Art. Of Inc. of Liberty Lakes HOA, at 1 (stating that the Liberty Lakes Subdivision is located in Liberty Township, Delaware County, Ohio).)

Flipping *Eubank v. Richmond* on its head, the Charter Initiative dictates to City Council that it must adopt ordinances complying with the Commission’s “findings” and limits Council’s actions:

- (1) The “Final Comprehensive Plan” must be consistent with the citizens’ “findings” (Article 4, Section 18) (“The City Council of Powell, Ohio shall consider the Preliminary Comprehensive Plan, make adjustments as necessary **consistent with the Phase I findings*****”);
- (2) The “Final Comprehensive Plan” must also meet “objective criteria” (Article 4, Section 19) (“The Final Comprehensive Plan **shall be in compliance with the following objective criteria *****”);
- (3) The Property cannot be used as described in Ordinance 2014-10 (Article 4, Section 21) (“The Final Comprehensive Plan *** **shall not be compatible** with Ordinance 2014-10”); and
- (4) No future ordinance may ever alter the foregoing (Article 4, Section 20) (“**All Ordinances** of the City of Powell **must comply** with the Final Comprehensive Plan***”).

(*Id.* (emphasis added).) The citizens’ “findings” form the foundation of the entire effort because every subsequent decision flows from those “findings.”¹⁴ Council is required to act consistent with the citizens’ “findings” when acting upon the plan and Council is expressly prohibited from ever approving an ordinance that does not comply with the zoning plan that is consistent with the “findings.”

City Council’s legislative authority cannot be delegated to an administrative commission, much less an unaccountable group of five individuals:

In accordance with settled principles that **no American legislative body can constitutionally and validly delegate to administrative officers** an exercise of discretionary power which is arbitrary, it is established that any municipal ordinance which vests an arbitrary discretion in public administrative officials **with reference to the rights, property, or**

¹⁴ Relators attempt a sleight of hand in claiming that the “Final Comprehensive Plan” need not be consistent with the “Preliminary Comprehensive Plan.” (Relators’ Br. at 35.) The “Final” plan must stem from the “Preliminary” plan developed by the committee and be consistent with the committee’s “findings” under the proposed Article 4, Section 18.

business of individuals, without prescribing a uniform rule of action, making the enjoyment of such rights depend upon arbitrary choice of the officers without reference to all persons of the class to which the ordinance is intended to be applicable, and without furnishing any definite standard for the control of the officers, **is unconstitutional, void, and beyond the powers of a municipality.**

State ex rel. Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 473 (1955) (quotations omitted) (emphasis added). Thus, the Charter Initiative's attempt to circumscribe all future Powell ordinances that particularly concern citizens' property rights cannot be delegated to the whims and fancies of five unaccountable citizens. Such attempts are facially invalid. *See id.*

The Charter Initiative is invalid on its face. Relators have no clear legal right and Powell's City Council and its Clerk have no legal duty to take any action in furtherance of this illegal measure.

G. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Initiate a Measure that Spot Zones the Property.

Additionally, the Charter Initiative seeks to illegally "spot zone" Powell Crossing's Property. *See Pilla v. City of Willowick*, 11th Dist. Lake No. 8-243, 1982 Ohio App. LEXIS 13454 (December 23, 1982). "Spot zoning" occurs when a property or its owner(s) are singled out through discriminatory zoning practices. *See id.* at *11. Inquiring into whether discriminatory zoning is at work in election initiatives has been held to be specifically appropriate. *See id.* ("[W]hether the result achieved by [an] ordinance [is] discriminatory ... may be made even in the case of a referendum is specifically provided for in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).").

Here, the Charter Initiative singles out and discriminates against Powell Crossing and its Property. Article 4, § 21 and "uncodified" provisions target Powell Crossing and its Property specifically to limit its current zoning. These provisions do not affect other similarly situated properties that share the same zoning classification. As a result, unlike its identically zoned

Downtown Business District neighbors, Powell Crossing will be deprived of its vested property right in the Final Development Plan and the uses permitted by the Property's current zoning.

Moreover, the discriminatory animus of the Initiative's proponents, who appear concerned with "socioeconomic conditions," was revealed to Council when one of Relators' supporters claimed that approval of the Final Development Plan's apartments could lead to an infusion of "gangbangers" and could supposedly transform the town "into Ferguson, Missouri." (Ex. 2-G, Tr. of Aug. 19, 2014 Meeting of the City Council of Powell at 53-54.) Such discriminatory animus has no place in contemporary society and Relators' discriminatory zoning effort to eliminate fully permitted multi-family housing should not be recognized by this Court as a clear legal right warranting extraordinary relief. Relator's request for a writ should be denied.

H. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Initiate a Measure that is a Standardless Zoning Regulation.

The Charter Initiative also fails to articulate any zoning standard or regulation that would fill the void of the Property's zoning if the current permitted uses under the Property's Downtown Business District zoning are curtailed. (See Int. Resp. App. at 1, Charter Initiative, Art. 4, § 21 and "uncodified" provisions.)

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Wedgewood Ltd. P'ship I v. Twp. of Liberty*, 456 F. Supp. 2d 904, 937 (S.D. Ohio 2006) (citation omitted); *Columbus v. Thompson*, 25 Ohio St.2d 26, 30 (1971). Stated differently, a regulation that gives unfettered discretion to governmental officials is unconstitutionally vague because it allows arbitrary and discriminatory enforcement. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on

an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”)

The Property is currently zoned for all uses permissible within the Downtown Business District which includes multi-family housing and commercial use. (Ex. 1-B, PZC §§ 1143.08, 1143.16.2(b).) The Initiative strips the Property of these uses by prohibiting its zoning from being compatible with Ordinance 2014-10 or the approved Final Development Plan. (*See Int. Resp. App.* at 1, Charter Initiative, Art. 4, § 21.) By failing to specify which uses remain permissible for the Property, the Initiative leaves enforcement of the Property’s zoning to arbitrary and discriminatory enforcement of a standardless regulation. Such vague standards are facially invalid. Relators cannot demonstrate a clear legal right, nor a corresponding clear legal duty of Powell’s City Council or its Clerk, to further this invalid Initiative.

I. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Initiate a Measure that Attempts to Retroactively Rezone the Property.

Because Powell Crossing’s right to the Property’s current zoning has already vested, the Initiative cannot now retroactively deprive Powell Crossing of that vested property right. Contrary to Relators’ contention that Powell Crossing’s right in the Property’s current zoning has not vested (Relators’ Br. at 40), Powell Crossing’s property right vested the instant it submitted the Final Development Plan to City Officials. *See Gibson v. City of Oberlin*, 171 Ohio St. 1 (1993). Once an application is submitted, the applicant is protected from future attempts to impose legislative changes on the Property’s zoning because such changes would constitute retroactive zoning. *See id*; *see also State ex rel. Fairmont Center v. Arnold*, 138 Ohio St. 259, 266 (1941) (holding that retroactive rezoning violates Article II, Section 28 of the Ohio Constitution and violates a landowner’s due process rights.) Yet, retroactive zoning is precisely the Charter Initiative’s aim.

Not only does the Article 4, Section 21 of the Initiative require a rezoning of Intervenor's Property to some undefined category that is "not compatible" with the existing zoning, but the "uncodified" provision purports to prohibit any activity or reliance on uses consistent with Powell Crossing's right to use the Property under its current zoning – a fundamental property right that has already vested. It is an elementary principal of law that a municipality cannot give retroactive effect to its law. *See also Save the Lake v. Schregardus*, 141 Ohio App. 3d 530, 539 (10th Dist. 2001) (“[T]he Supreme Court of Ohio reaffirmed the notion that a municipality may not give retroactive effect to an ordinance in order to deprive a property owner of a substantial right.”).

The Initiative simply cannot retroactively deprive Powell Crossing of its right to develop the Property. Accordingly, the Initiative suffers from yet another obvious infirmity. Petitioners had the opportunity to dispute Council's approval of the Final Development Plan through an administrative appeal. Foregoing that opportunity, Petitioners cannot retroactively undo that decision here.

Relators have no clear legal right and Powell's City Council and its Clerk have no legal duty to cure Relators' waiver of their ability to appeal Ordinance 2014-10.

J. Relators Have No Clear Legal Right and Respondents Have No Legal Duty to Approve a Petition that Lacks Sufficient Valid Signatures.

The Charter Initiative's petition lacks a sufficient number of valid signatures that comply with the City Charter's requirement that each elector specify the elector's precinct. (Ex. 2-I, Current Powell City Charter, § 6.05.) As set forth in the City of Powell's Charter: “Each signer of any [initiative or referendum] petition . . . **shall** place on such a petition, after his name . . . his place of residence, including street and number, and the ward and **precinct**.” (*Id.*) (emphasis added).

This Court has upheld similar ward and precinct requirements several times. Where “the law is clear that the ward and precinct, whether written in by the signer himself or by someone else under his direction, must follow the signature of the signer in a petition[,] . . . a signature not followed, amongst other requirements, by the ward and precinct of the signer does not comply with [the ward and precinct requirement], and, therefore, cannot be held to be a valid and sufficient signature.” *State ex rel. Poor v. Addison*, 132 Ohio St. 477, 481-82 (1937) (agreeing with rejection of proposed amendment to Columbus City Charter on ward/precinct requirement); *see also State ex rel. Corrigan v. Perk*, 19 Ohio St.2d 1, 3 (1969) (“We find no federal constitutional provision or principle which is offended [by a ward/precinct requirement]. . . .”); *Bliss v. Monagan*, 9th Dist. Lorain No. 3080, 1980 Ohio App. LEXIS 14061 (Dec. 3, 1980) (rejecting a Constitutional challenge to a ward/precinct requirement).

While Relators claim that they substantially complied with this petition requirement, strict compliance is required. *See State ex rel. Comm. for the Referendum of Lorain Ordinance No. 77-01*, 2002-Ohio-4194 at ¶ 49 (elections procedures require strict compliance unless stated otherwise). Nor can this requirement be rendered a nullity. *See State ex rel. Cater v. City of N. Olmsted*, 69 Ohio St.3d 315, 324, 1994-Ohio-488 (rules of construction prohibit nullifying plain terms); *State ex rel. Finkbeiner v. Lucas County Bd. of Elections*, 122 Ohio St.3d 462, 2009-Ohio-3657, ¶ 31 (“[W]e have consistently held that “[m]unicipal charters must be construed to give effect to **all separate provisions** and to harmonize them with statutory provisions whenever possible.” (citations omitted) (emphasis added)).

There is no evidence that any precinct within Delaware County or Powell is named only “A” or “G” – much less a ward and precinct so denominated. (*See Ex. 2-L*, Delaware County Board of Elections Powell Precinct Boundary Map (denominating Powell Precincts as “Powell

__”); Ex. 2-M, Delaware County Board of Elections’ 2013 General Election Canvass Report (denominating Powell Precincts as “Powell __”); Ex. 2-N, Delaware County Board of Elections Voter Record (denominating Powell Precincts as “Powell __”); Ex. 2-O, Ohio Secretary of State Voter Record (denominating Powell Precincts as “Powell __”).) Accordingly, all signatures that fail to strictly comply with the ward and precinct requirement are invalid. *See State ex rel. Poor v. Addison*, 132 Ohio St. at 481-82.

While more than one third of the electors provided their correct precinct (167 petition signers), nearly two-thirds did not (242 petition signers). (Ex. 2-T.) “Accordingly, those signatures of municipal residents which were filed ... without [the] ward and precinct designation, are invalid.” *State ex rel. Corrigan v. Perk*, 19 Ohio St.2d at 4. As Relators concede, they were required to obtain at least 238 valid signatures, (Relators’ Br. at 24), yet even ignoring all other defects, only a maximum of 167 of the petition’s potential signatures contain a cognizable precinct rendering it insufficient.

There being a lack of sufficient signatures to support the petition, Relators have no clear legal right and Powell’s City Council and its Clerk have no legal duty to act upon the Initiative.

K. Relators Failed to Pursue Their Adequate Remedy in the Ordinary Course of Law.

As previously set forth, Relators never challenged the approval of the Final Development Plan when they had the legal right to do so under Revised Code Chapter 2506. *Supra*, III.B; Int. Resp. App. at 9-12. When the Final Development Plan was submitted in compliance with the existing zoning, Relators opposed the plan. Relators lost. Relators were warned during the deliberations that the nature of Council’s action was administrative. (Ex. 1-D, City Council June 17, 2014 Meeting Minutes.) Relators chose not to challenge this decision by administrative appeal. Instead, Relators pursued a petition plan that is fundamentally flawed, contrary to law,

and invalid on its face. After failing to exhaust their adequate remedy at law, and without any clear legal right, Relators now request extraordinary relief from this Court. Having had an alternative remedy in the ordinary course of law, Relators are unable to obtain extraordinary relief. *See Talarico*, 2005-Ohio-5061 at ¶ 11.

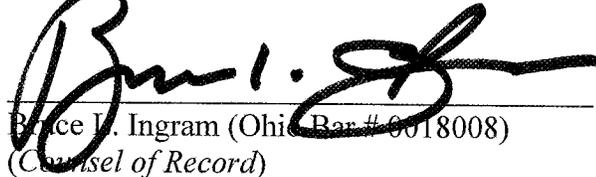
Failing to meet the heavy burden for such relief, the requested writs should be denied.

IV. CONCLUSION

For the foregoing reasons, Relators attempt to put Ordinance 2014-10 to a referendum through a Charter Initiative must fail. The Relators have no clear legal right to place the invalid Charter Initiative on the ballot, and neither the City Council of Powell, Ohio nor its Clerk have any corresponding legal duty to take any further action on the Charter Initiative. Relators' requested extraordinary relief should be denied.

Respectfully submitted,

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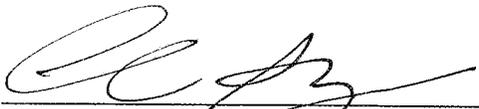
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served via electronic mail to the following this 5th day of September, 2014:

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