

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel.,
Brian Ebersole
215 Squires Court
Powell, Ohio 43065

14-1469

Original Action in Mandamus

State ex rel.
Sharon Valvona
225 Squires Court
Powell, Ohio 43065

State ex rel.,
Thomas Happensack
127 Kellys Court
Powell, Ohio 43065
Relators,

Expedited Elections Matter Pursuant to
S.Ct.R. Prac.12.08

v.

City Council of Powell, Ohio
47 Hall St.
Powell, Ohio 43065

Sue Ross
City Clerk of Powell, Ohio
47 Hall St.
Powell, Ohio 43065
Respondents.

**AMICUS BRIEF OF OHIO HOME BUILDERS ASSOCIATION, INC. AND THE
BUILDING INDUSTRY ASSOCIATION OF CENTRAL OHIO IN SUPPORT OF
RESPONDENTS CITY COUNCIL OF POWELL, OHIO, SUE ROSS, CITY CLERK OF
POWELL, OHIO AND INTERVENING RESPONDENT THE CENTER AT POWELL
CROSSING, LLC.**

FILED
SEP 05 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

The Ohio Home Builders Association, Inc. (OHBA) and Building Industry Association of Central Ohio respectfully submit this brief as amicus curiae in support of Respondents. OHBA and BIA urges the Court to deny Relators request for writ of mandamus. Relators cannot prove that they either 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.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Home Builders Association, Inc. is a 4,000 plus member trade association representing home builders, land developers and their associate vendors in a legislative and regulatory capacity on a statewide basis. OHBA serves its membership by taking a proactive approach to state issues and legislation to promote the residential construction business. As Ohio's premier home building industry representative, OHBA represents an industry that creates significant economic growth in Ohio while also advocating for local and statewide policies that foster the public's ability to obtain affordable housing.

As the only statewide association representing the residential construction and land development industry, OHBA has unique insight into the practical reality of the home building industry. Further, the Building Industry Association of Central Ohio is an association of builders, developers and affiliated businesses operating in Franklin and surrounding counties. Collectively, OHBA and the BIA of Central Ohio can offer valuable perspective on the level of impact promoting certainty and predictability in the land development and building process can have on its membership and their ability to provide affordable housing opportunities in Ohio, as well as, the vital role the residential construction industry plays in the Ohio economy. The goal of our membership is to provide safe, quality, affordable housing to all of the citizens of this

great state. OHBA and the BIA have experience examining the industry practice of pursuing legitimate regulation ensuring certainty and predictability in the law.

The poor economic conditions that continue to persist in Ohio are aggravated by any uncertainty involved in the land development process; predictability is essential. Allowing unlawful ballot measures to usurp a City's right to regulate its zoning scheme and attempting to delegate Council's authority to a very small, private component of a community would set dangerous precedent for future development. The lack of predictability and certainty in planning and regulation impacts the ability to provide affordable housing. Uncertainty results in significantly higher costs, and potentially no resulting development. As set forth in the proposed Charter Initiative, the delegation of Council's authority to a small group of five individuals on the Commission, not only constitutes an unlawful delegation of legislative power, but leaves the door wide open for both arbitrary and discriminatory development regulations. Furthermore, the proposed Charter Initiative would be depriving Powell Crossing of its right to develop the Property. Allowing such impermissible practices would negatively impact the building industry, the purchaser and local economy.

ARGUMENT

I. The Proposed Charter Initiative is Unconstitutional and Therefore Invalid, Leaving Relators No Legal Right to Compel Election

To obtain a writ of mandamus, Relators must establish a clear legal right to that relief, a corresponding clear legal duty of the Respondents to provide the requested 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.

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

(1) The Charter Initiative impermissibly delegates the City's zoning to the whims of five unelected and unaccountable individuals;

(2) 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;

(3) The Charter Initiative retroactively deprives Powell Crossing of its vested property rights.

More specifically, as apparent from the face of the Charter Initiative, the Initiative lacks any standards to set out what zoning would then be pertinent to the Property if the current acceptable zoned uses are rescinded. A regulation providing unencumbered discretion to government officials is unconstitutionally vague permitting arbitrary and discriminatory application. *See Grayned v. City of Rockford, 408 U. S. 104, 108-109 (1972)*. Here, such an initiative will effectively impose a moratorium on any new development until and assuming new standards are written and adopted by City Council.

Furthermore, the proposed language suffers from another fundamental flaw: it would constitute retroactive application of the law. It is well founded in law and "[T]he Supreme Court 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." *Save the Lake v. Schregardus*, 141 Ohio App. 3d 530, 539 (2001). Powell Crossing's right to the use the Property has been approved as Council administered existing laws and permitted zoning classification of the property. Relators cannot use the Charter Initiative as an opportunity to undo the submittal and retroactively apply new laws, which is ultimately what would be occurring. Given the proposed "uncodified" provisions, if the Charter Amendment prevails, Powell Crossings right to use the property is barred. Plainly, the Charter Initiative retroactively deprives Powell Crossing of its vested

property rights. For the foregoing reasons, the Proposed Charter Initiative is unconstitutional and therefore invalid, leaving relators no legal right to compel election.

II. *The Facially Defective Proposed Charter Initiative Hinders on Crucial Elements of a Healthy Building Industry: Providing for Certainty and Predictability*

The building industry is a vital participant in a healthy economy. Residential construction provides significant income and jobs for local workers. Home building generates important local economic activity, stimulating positive results for residents, as well as added returns for local governments. The construction activity has an ongoing impact, rippling into new homes occupied by residents who pay taxes and buy goods and services in the area. Such rippling effects and ongoing benefits are essential in fully appreciating the positive impacts home building has on the economy. For example, NAHB estimates the one year local impacts of building 100 single family homes in a typical metro area include \$21.1 million in local income, \$2.2 million in taxes and other revenue for local governments and 324 local jobs.¹ Moreover, in a Central Ohio MSA 2013 Residential Construction Economic Impact study prepared for the BIA of Central Ohio, the total direct labor income from building homes (single family and condominiums) sold in 2013 totaled \$240,243,963. Additionally, the number of direct construction jobs from building homes sold in 2013 totaled 6,563.

The ability to compete efficiently in the home building industry and optimally price a home depends on the degree to which overall costs are certain and predictable. Any exposure to developers and builders of increased risk of uncertainty, liability, and litigation expenses will be reflected in home prices. The impermissible delegation of the City's zoning to the urges of five

¹ *The Local Impact of Home Building in a Typical Metro Area: Income, Jobs, and Taxes Generated*, NAHB Housing Policy Dept., <http://www.nahb.org/generic.aspx?sectionID=784&genericContentID=35601>. June 2009.

unelected and unaccountable individuals, removal of certain permitted uses from the Property's zoning while leaving no clear standards to identify the remaining permitted uses on the Property, and retroactively depriving Powell Crossing of its vested property rights surely would result in additional costs of potential litigation and continuously changing circumstances. The overall tremendous uncertainty would be devastating to the building economy and the ability to provide affordable housing. As written, the Charter Initiative would effectively impose a moratorium on new developments in the area until new standards and regulations could be written and approved.

One of the often overlooked impacts of building and development regulations are their effect on housing affordability. Every time a local or higher level government issues a new construction/development regulation it can potentially raise costs. Higher costs invariably translate into higher home prices and higher prices in turn disqualify more households from being able to afford new homes. The National Association of Home Builders (NAHB) has studied its Priced Out model to evaluate effects of pending new regulations on housing affordability in local markets. Mitigating increased risk and cost associated with continuously changing standards will aid in keeping prices more affordable. NAHB's analysis *State and Metro Area House Prices: The Priced Out Effect*, illustrates the number of households priced out of the market for a median priced new home by a \$1000.00 price increase. Broken down into various housing markets around the state, the results of the study evidence the effect. For example, as the median price of a new home increases \$1000, 1,452 households in the Columbus, Ohio market would no longer be able to qualify for a new home purchase, and 8,724 households would be priced out of the entire state of Ohio market.²

² Natalia S. Siniavskaja, Ph.D., *State and Metro Area House Prices: the "Priced Out" Effect*, www.HousingEconomics.com. August 2014.

Permitting such attempts at placing a facially defective Charter Initiative on the ballot is detrimental to the residential construction industry, not just in Powell, but throughout the state of Ohio. An approval of the Court in this Complaint for Writ of Mandamus will undoubtedly lead to other challenges across Ohio in an attempt to stop developments approved in compliance with all existing regulations, and circumventing a Council's authority to establish its Comprehensive Plan. Such an approval would stifle the little growth we have seen in this state and make housing less affordable in desirable communities. Given the vital role the home building industry plays in a healthy economy, it is imperative to contemplate the positive impact both certainty and predictability have on the industry.

CONCLUSION

Relators cannot prove that they either 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. In order to provide safe, quality, affordable housing to all of the citizens of Ohio, adoption and enforcement of regulations on development must be lawful and constitutional ensuring certainty and predictability in the law.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 5th, 2014, a copy of the foregoing was served on Eugene Hollins, Christopher Burch, Bruce Ingram, Joseph Miller, and Christopher Ingram via email pursuant to Civ.R. 5(B)(2)(f) at ghollins@fbtlaw.com, chris@callenderlawgroup.com, blingram@vorys.com, jrmiller@vorys.com, and clingram@vorys.com.



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