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I. INTRODUCTION

Relators are citizens of the City of Powell, Ohio who have a long-term interest in land use and development in Powell. A real divide between Powell City Council (“Council”) and the interests of Powell citizens became apparent on June 17, 2014 when Council passed Ordinance 2014-10 to fundamentally alter the landscape of Downtown Powell. Through Ordinance 2014-10, Council approved a high density apartment building project in the heart of Downtown Powell. Exhibit A, T. By passing Ordinance 2014-10, Council rejected popular opinion against this type of development in Downtown Powell.

From the beginning, Relators and other Powell citizens have tried to convey to Council popular sentiment regarding the long-term interests and identity of Powell. Long prior to the passage of Ordinance 2014-10 on June 17, 2014, in fact, Powell citizens attended Council meetings, Planning and Zoning Commission meetings, and otherwise reached out to their representatives and public officials to promote thoughtful development in Powell.

On July 9, 2014, shortly after Council passed Ordinance 2014-10, Relators filed a letter with Council sharing their concern with the direction of development in Powell:

At stake is the core identity of the Powell community in years to come. We, as residents, must make a long-term commitment to the sense of community that attracted so many families to Powell in the first place. Our prior efforts to communicate popular opinion to City Council through written and verbal correspondence have apparently fallen on deaf ears, at least for a majority of City Council. Among other thoughtful efforts to communicate, we have given extensive public testimony before the Powell Zoning Commission and Powell City Council.

Exhibit B, which is Relators’ cover letter to Council and Clerk accompanying pre-circulation petition filings.

To promote Powell citizens' long term interests, Relators organized an initiative petition for a proposed charter amendment for a new comprehensive plan for land use and development in Powell. The proposed charter amendment directing Council to legislatively create a new comprehensive plan is not a "back door" referendum on Ordinance 2014-10, as Intervening Respondent The Center at Powell Crossing, LLC ("the Developer") blithely asserts. This case is about citizens of Powell who are concerned about their City in the long run. Powell needs a new comprehensive plan; the 1995 comprehensive plan for *the Village of Powell* is outdated as applied to *the City of Powell* in 2014, given a dramatic rise in population, technological development, and many other changes to the community since 1995. Exhibit B. The proposed charter amendment directs Council to legislatively create the much needed comprehensive plan, subject to the criteria set forth therein under Section 19 of Article IV. Exhibit C.

The charter amendment petition at issue here clearly complies with all the rules to propose a charter amendment by initiative petition. Due to the unlawful actions of Council, Relators presently seek a writ compelling Council to submit the charter amendment question to Powell electors at the November 4, 2014 general election. In this reply brief, Relators buttress their opening brief to address a host of meritless arguments that the Respondents have raised in their merit briefs.

II. ARGUMENT

A. The proposed charter amendment is an amendment to the Powell City Charter that is not an administrative act, nor a "back door referendum" on Ordinance 2014-10.

As set forth in the introductory section above, the proposed charter amendment is a measure designed to shape the long-term interests of Powell in years to come, not, as Respondent Developer claims, a "back door referendum" on a single project. Respondent Developer's Brief,

at 16. To be sure, the proposed charter amendment is not compatible with Ordinance 2014-10, but that is because the project set forth under Ordinance 2014-10 is not compatible with Powell citizens' long-term interests. Relators' and other Powell citizens' long-term interests go well beyond the single project in Ordinance 2014-10. The proposed charter amendment is a measure designed to address long-term interests of Powell, with one of many consequences being that Ordinance 2014-10 is not compatible with the amendment.

Fundamentally, the proposed charter amendment cannot be described as an administrative act because it is an amendment to the Powell Charter, *i.e.* the City's foundational document. The proposed charter amendment cannot be considered an administrative law because the authority for the charter amendment comes directly from the people, not an agency. Ohio Const. Art. XVIII §§ 8, 9 ("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.").

The Ohio Constitution provides specific provisions for amending municipal charters by petition or proposal of the legislative authority, namely Ohio Const. Art. XVIII §§ 8, 9. The Powell Charter itself, at Section 12.01, even recognizes that the Charter may be amended pursuant Ohio Const. Art. XVIII § 9. A separate provision of the Ohio Constitution provides for the municipal power of initiative and referendum for "legislation," but not amendments to municipal charters. That provision is Ohio Const. Art. II § 1f.¹

As a matter of law, then, even if the Developer were able to establish that the proposed charter amendment is administrative (and it certainly cannot), there would be no basis under Ohio Art. II § 1f to withhold the measure from the ballot as an administrative law under *Buckeye*

¹ Ohio Const. Art. II § 1f provides as follows: "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."

Community Hope v. City of Cuyahoga Falls, 82 Ohio St.3d 539 (1998) (citing Ohio Const. Art. II § 1f). Instead, Ohio Const. Art. XVIII §§ 8, 9 provides the authority for amending municipal charters, which is a constitutional provision that the Relators’ charter amendment petition clearly complied with here.

And, if this Court finds the “administrative issue” relevant, Relators certainly *do* contest whether Ordinance 2014-10 is an administrative action and whether any tribunal may decide, prior to voter approval, whether a measure proposed by petition is administrative or legislative (Respondent Developer ambiguously suggests that Relators do not contest these issues through its merit brief, at 12). In fact, Relators are currently contesting these issues in another case seeking a writ to compel the Delaware County Board of Election to submit a referendum on Ordinance 2014-10 and a proposed ordinance to repeal Ordinance 2014-10 to Powell electors.²

Should this Court reach the question as to whether Ordinance 2014-10 is an administrative action or legislation (it should not), it must find that the ordinance is indeed legislation. The Powell Zoning Administrator and Planning and Zoning Commission have limited powers under the Powell Charter, City ordinances, and laws of Ohio. *Consolidated Management, Inc. v. City of Cleveland*, 6 Ohio St.3d 238, 242-43 (1983); *Zurow v. City of Cleveland*, 61 Ohio App.2d 14 (1978) (“The Board’s power to grant variances is limited to specific cases where the following three circumstances exist”); *Northern Boiler Co. v. David*, 157 Ohio St. 564 (1952). Furthermore, Powell zoning code § 1143.11 sets forth strict jurisdictional requirements for applicants for Planned District Development Plans to invoke the

² *State ex rel. Ebersole et al. v. Delaware County Board of Elections*, Ohio Supreme Court Case No. 1520. In that case, Relators are contesting the Delaware County Board of Elections illegal determination that Ordinance 2014-10 is an administrative law, and as such, escapes popular accountability through the initiative and referendum process.

jurisdiction for the Powell Zoning Administrator and Planning and Zoning Commission to consider such applications.

However, as set forth in Relators' opening brief, at pages 39-40, the Developer here failed to satisfy several strict jurisdictional requirements for Planned District Development Plans under the Powell zoning code. Specifically, the Developer failed to provide evidence of financing for the project, the ability to post bond, or even sign applications attesting to the truth of those applications, all of which are required under Powell zoning code § 1143.11(c)-(i). Respondents' Exhibit 2C, Tr. at 132, 140-41 (Powell Director of Development David M. Betz testimony before the Delaware Board of Elections on August 26, 2014); Relators' Exhibit W (Ebersole Affidavit).

Because the Developer failed to satisfy these strict jurisdictional requirements, the Powell Zoning Administrator and Powell Zoning and Planning Commission did not have jurisdiction to consider the applications. *Strongsville Bd. of Edn. v. Wilkins*, 108 Ohio St.3d 115, 2006-Ohio-248, ¶ 19. ("the Tax Commissioner shall not consider an application for exemption of property unless the application has attached thereto a certificate executed by the county treasurer"); *Cleveland Clinic Found. v. Wilkins*, 103 Ohio St.3d 382, 2004-Ohio-5468. The Developer's application was void *ab initio*. And, under well-settled law, subject matter jurisdictional issues may not be waived, despite the Developer's claims to the contrary. Respondent Developer's merit brief, at 15.

Thus, due to the Developer's failure to invoke the jurisdiction of the Zoning Administrator and Planning and Zoning Commission, Council derivatively did not have *administrative* jurisdiction to approve the Developer's application. Therefore Council necessarily acted in a legislative capacity when it passed Ordinance 2014-10 to approve the

Developer's project. As a consequence, even if this Court reaches the "administrative issue," and it certainly should not because there is a charter amendment at issue here, Ordinance 2014-10 is legislation and there is no requirement for Relators to exhaust administrative remedies. As set forth in Relators' opening brief at 42-43, moreover, to the extent *Buckeye Hope*, 82 Ohio St.3d 539, has any applicability to this case (even though the case is inapposite here), *Buckeye Hope* should be overruled under *Westfield Insurance Co. v. Galatis*, 100 Ohio St.3d 216 (2003).

In summary, the proposed charter amendment for a new comprehensive plan for Powell addresses the long-term interests of Powell. The proposed charter amendment goes far beyond Ordinance 2014-10. There is absolutely no basis for finding that the proposed amendment to the Powell Charter here, to be authorized directly by the people, is an administrative act.

B. The text of the proposed charter amendment does not constitute an unlawful delegation of legislative authority.

The text of the proposed charter amendment clearly shows that there is no unlawful delegation of legislative authority under the proposed amendment; all legislative power under the proposed amendment is vested in Powell City Council. The Respondents, through their merit briefs, nevertheless make unfounded assertions that the proposed charter amendment unlawfully delegates legislative authority. Without carefully examining the text of the proposed charter amendment, Respondent Developer's brief plainly misstates its content, as follows: "The 'Final Comprehensive Plan' must be consistent with the citizens' 'findings.'" Respondent Developer's brief, at 29. This contention is plainly wrong.

As explained in Relators' opening brief, at pages 33-36, Council exercises all legislative authority to enact the Final Comprehensive Plan under the proposed amendment. The proposed amendment organizes an *advisory* citizens' commission that makes *non-binding*

recommendations to Council through a “Preliminary Comprehensive Plan.” See Exhibit C (the proposed charter amendment). The proposed charter amendment also directs Council to legislatively enact a Final Comprehensive Plan. The specific requirements for the “Final Comprehensive Plan” legislatively enacted by Council under the amendment are set forth therein and there is no requirement for the Final Comprehensive Plan to be consistent with the advisory Preliminary Comprehensive Plan or citizens’ findings. As set forth in Relators’ opening brief at page 35, moreover, Respondent Developers are impermissibly inserting language into the amendment when they argue that the legislatively enacted Final Development Plan must be consistent with the Preliminary Comprehensive Plan and/or the advisory commission’s findings. The proposed charter amendment vests all legislative power under the amendment in Council; there is simply no unlawful delegation of legislative authority.

Next, Respondents Council and Clerk Sue Ross (“the City Respondents”) cite *City of Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668 (1976) to support their unfounded theory that the proposed charter amendment unlawfully delegates legislative authority. But the *City of Eastlake* case is inapposite here because it does not address the text of the specific proposed amendment at issue here. Moreover, the *City of Eastlake* case, if it has any applicability to this case at all, is mere dicta as it relates to the City Respondents’ position because there was *not* an unlawful delegation in that case.

More fundamentally, it is premature to address the substantive content of the proposed charter amendment prior to voter approval on Election Day. See, Relators’ opening brief, at 29-33 (Proposition of Law No. 2); *State ex rel. DeBrosse v. Cool*, 87 Ohio St. 1, 6 (1999). And under the Ohio Constitution, Art. XVIII §§ 8, 9, Council may only act “legislatively,” not judicially or quasi-judicially, to determine the sufficiency and validity of the charter amendment

petition. There is simply is no authority for Council to make the judicial or quasi-judicial determination as to whether the proposed charter amendment constitutes an unlawful delegation of legislative authority and the claim is prematurely raised in any event.

Respondent Developer nonetheless argues that this Court should depart from this bedrock principle. Respondent Developer erroneously reads controlling Ohio Supreme Court precedent as distinguishable here due to a hypertechnical reading of the terms “sufficiency and validity.” Respondent merit brief, at 26. In *State ex rel. N. Main St. Coalition v. Webb*, however, this Court expressly recognized the limited scope of a municipal clerk’s duty to review petitions for both “sufficiency and validity” under R.C. 731.28. 106 Ohio St.3d 437, 2005-Ohio-5009, ¶¶ 27, 38. In *Webb*, R.C. 731.28 gave a city clerk the duty to determine the sufficiency *and* validity of petitions. As a result, the *Webb* case clearly means that the limited scope of Council’s review applies to both the determination of sufficiency *and* validity.

Unquestionably, Powell City Council’s duty to review the petition for sufficiency and validity in this case is limited to matters of form, and furthermore, the bedrock principle that content-based objections to the petition are premature clearly applies. *Id.*; *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 55 (1994).³

³ The City Respondents and the Respondent Developer (in a footnote) observe that the proposed charter amendment provides for “the President of the Liberty Lakes Homeowners Association or such person’s designee” to be a member of an advisory citizens committee. City Respondents’ merit brief, at 12-13; Respondent Developer merit brief, at 28.

The Liberty Lakes Subdivision is located right next to the City of Powell in Liberty Township. The Respondents have made no claim that this affects the lawfulness of the charter amendment petition at issue here, or the proposed charter amendment itself. If a party challenges the charter amendment after electors approve the amendment, and if there is a ripe and justiciable controversy at that time, and if a deciding tribunal found the language offensive of some law, still a deciding tribunal could sever any offending language (and Relators submit there is none) under Powell City Charter § 12.02 and/or *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927). Powell Charter § 12.02 provides that “[a] determination that any part of this Charter is invalid

C. This Court must issue a writ compelling Council to submit the proposed charter amendment to Powell electors because Council has abused its discretion, which is the proper standard to apply here.

As Powell Law Director Eugene Hollins has recognized, it is well-established that this Court should review the actions of Council in this mandamus action under an abuse of discretion standard. *Webb* at ¶ 27 (“Although a writ of mandamus will not control Webb’s exercise of her discretion, it will correct an abuse of that discretion.”). In an email to the undersigned counsel for Relators on August 11, 2014, Law Director Hollins recognized the abuse of discretion standard applicable to this action as follows:

[I]t is settled Ohio law that, in making the sufficiency and validity determination, the applicable decisionmaker (here, City Council) has limited, discretionary authority. See *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222. Courts review this determination utilizing an “abuse of discretion” standard. (emphasis in original).

Exhibit N, at 4 (unnumbered pages). This statement directly applies to the very charter amendment petition at issue in this case. Exhibit N, at 5, 8 (statement of the undersigned counsel that “your response appears only to address the propriety of a suit in mandamus with respect to the Charter initiative petition.”). Here, because Council abused its limited discretion to review the form of the charter amendment petition for sufficiency and validity, this Court must issue a writ compelling Council to submit the charter amendment question to the Powell electorate at the November 4, 2014 general election.

On several occasions, this Court has similarly issued writs of mandamus compelling a city council to submit a charter amendment proposed by initiative petition to the electorate. See, e.g., *Morris*, 71 Ohio St.3d 52 (1994); *State ex rel. Committee for the Charter Amendment et al.*

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.”

v. City of Westlake et al., 97 Ohio St.3d 100 (2002); *State ex rel. Committee for the Charter Amendment Petition-Voter Approval for Commercial Rezoning, Superstores, and Shopping Centers v. City of Avon*, 81 Ohio St.3d 590 (1998); *State ex rel. Citizens for Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49 (1991).

The City Respondents' brief, which is signed by Law Director Hollins, nevertheless makes the puzzling and erroneous claim that this Court must apply a "fraud, corruption, or gross abuse of discretion standard." City Respondents' merit brief, at 1. The City Respondents do not cite any actual authority for this assertion on the first page of their brief. Instead, the City Respondents engage in a discussion of legislative and judicial bodies and cite to a case where this Court refused to issue a writ of mandamus to compel the Ohio General Assembly to follow its own procedural rule. City Respondents' merit brief, at 5, citing *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633 (1999).

In *Davidson*, this Court found that enforcement of the General Assembly's rules are nonjusticiable under a specific provision of the Ohio Constitution so providing, namely Ohio Const. Art. II § 7. Ohio Const. Art. II § 7 obviously is not applicable to this case. The *Davidson* case is simply inapposite here, as demonstrated by the several recent cases in which this Court has issued writs compelling city councils to perform their clear legal duties to submit proposed charter amendments under Ohio Const. Art. XVIII, §§ 8, 9, including *Morris*, *City of Westlake*, *City of Avon*, and *Sydnor*.

In the end, Council cannot hide behind a standard of review to abdicate its duty under Ohio Const. Art. XVIII §§ 8, 9 to submit the proposed charter amendment to Powell electors forthwith. The proper standard to apply here is an abuse of discretion standard. Further,

Relators have presented clear and convincing evidence that Council indeed abused its discretion and the writ must be granted.

D. The petitions satisfy all form requirements for municipal initiative and referendum petitions under the Powell City Charter, Ohio Constitution, and other applicable laws.

Respondents wrongly allege through their briefing that the petitions are defective in form, even though Council failed to identify any defects in the *form* of the petition for a proposed charter amendment. Council identified only the alleged unlawful delegation issue based upon the *content* of the proposed amendment. But like the Relators' two non-charter petitions that Council found sufficient and valid, the petition for the proposed charter amendment is signed by a sufficient number of Powell electors and sufficient and valid in all respects. Complaint, ¶¶ 69-70; Exhibit O, Tr. at 70, 76 (transcript of August 19, 2014 Council meeting where Council found Relators' referendum petition and initiative petition to repeal Ordinance 2014-10 sufficient and valid). As explained in Relators' opening brief at pages 23-26, and further explained below, the petition for a proposed charter amendment has no defects in form.

First, the City Respondents' now allege that Relators' petitions, including the charter amendment petition, are invalid because they did not exactly follow the Ohio Secretary of State's form for municipal initiative and referendum petitions.⁴ City Respondents' brief, at 15. In so arguing, the City Respondents' brief implicitly disavows Council's own determination at the August 19, 2014 Council meeting that Relators' referendum petition and initiative petition to repeal Ordinance 2014-10 are sufficient and valid. City Respondents' brief, at 15-16.

Now the City Respondents argue that, not they, but the Delaware County Board of Elections at a August 26, 2014 meeting, made the correct determination regarding Relators' two

⁴ Respondent Developer also makes this argument through its merit brief, at 17-18.

non-charter amendment petitions. But as Delaware County Prosecutor Christopher Betts repeatedly advised the Board of Elections at the August 26, 2014 Board of Elections meeting, there is no requirement to follow the Ohio Secretary of State's general form for municipal initiative and referendum petitions. Respondents' Exhibit 2C, Tr. at 80, 101, 191-92 ("I'm not aware of a hard and fast rule that says you have to use that Secretary of State's form").

A petition for the City of Powell cannot exactly follow the Secretary of State's form because the form does not comply with all requirements for petitions under the Powell Charter. And of course the statewide form does not comply with all rules, since charter municipalities such as Powell set forth special requirements under each charter that are not uniform throughout the State. One Secretary of State form cannot comply with the initiative and referendum rules under more than one hundred different municipal charters in Ohio. Powell Charter § 6.05, for example, contains specific requirements regarding the listing of precincts that is not required under state law or provided for on the Secretary of State's form. In addition, Powell Charter § 6.05 requires circulator affidavits attesting that petition signers had knowledge of the contents of the petition to the best of the circulator's knowledge. Relators simply could not have complied with the Powell Charter without deviating from the Secretary of State's form. The charter amendment petition cannot be invalidated on this basis.

Second, the charter amendment petition satisfies the requirement under Powell Charter § 6.05 regarding the title and text of measures proposed by initiative petition. As set forth on page 24 of Relators' opening brief, the title and text of the proposed charter amendment was attached to the petitions and actually incorporated or incorporated by reference on the face of the petitions. The first page of each part petition for the proposed charter amendment specifically

provides that the proposed charter amendment is “incorporated herein and attached hereto as Exhibit 1.” Exhibit E.

Citing no evidence, Respondent Developer makes the baseless assertion that the attachments accompanying each part petition were not actually attached to the part petitions as circulated. Respondent Developer’s merit brief, at 18. To be sure, the attachments to the part petitions were actually circulated with the part petitions. In fact, affidavits provide sworn statements from each circulator that the petition signers had knowledge of the contents of the petitions. Exhibits E. Thus, the circulator affidavits attest to the truth of the statements on the first page of the petitions that the attachments were physically attached to the petitions as circulated. And Relator Sharon Valvona testified before Powell City Council that she personally told each circulator how important it was that the petitions be circulated with their attachments. Exhibit O, Tr. at 34. The charter amendment petition strictly complied with all rules for charter initiative petitions under the Powell Charter and Ohio Constitution, including the title and text requirement.

Third, the Developers assert that the charter amendment petition fails to satisfy the charter’s “precinct” requirement under Powell City Charter § 6.05. Respondent Developer merit brief, at 34-35. This argument is an extension of the Developers’ now-abandoned argument that the petitions are invalid because petition signers did not list their ward, even though there are no wards in Powell. Exhibit G, at 8 (Developer “Notice of Protest” before Board of Elections). Like the “ward” argument, the “precinct” argument is obviously meritless. The valid signatures on the petitions have the proper precinct listed.

Respondent Developer nonetheless contends that precincts are not properly listed where they state, for example, Precinct “A” under a column labeled “Precinct” rather than Precinct

“Powell A.” Exhibit E. But the reference to “A” on the petitions clearly means “Powell A” because the signers signed a petition for the City of Powell. Under penalty of prosecution for a election falsification, the petition signers attested that they were Powell electors by signing the petitions, which means that they were attesting to have a Powell precinct. The first page of each part petition specifically identified the petition signers as “the undersigned, electors of the City of Powell, Ohio.” Exhibit E. Furthermore, the circulator affidavits attest that petition signers had knowledge of the contents of the petitions, which again requires petition signers to be Powell electors on the first page. The Powell Charter simply requires that signers list their “precinct” and that was done here for all valid signatures.

Fourth, there are a sufficient number of signatures. On August 1, 2014, the Delaware County Board of Elections properly determined that the petition requires 238 signatures in order to be valid. Exhibit H, Tr. at 14 (transcript of Board of Elections meeting). The Board of Elections further attested that the initiative petition for a charter amendment contains 367 valid signatures. Exhibit H, at Tr. 37; Exhibit I (signature attestation statement of Board of Elections). At Council’s August 19, 2014 meeting it wrongly invalidated additional signatures due to speculation regarding the color of ink, but nonetheless found that the charter amendment contains 254 valid signatures. Exhibit O, Tr. at 59, 78 (transcript of Council’s August 19, 2014 meeting). Thus, the charter amendment petition is signed by a sufficient number of signatures and every public body that has reviewed the petitions, including Council, has so found.

Fifth, Respondent Developer makes the unfounded assertion that the petitions are invalid because they are allegedly misleading. This argument goes beyond the form of the petitions and is prematurely raised, but also meritless in any event. As set forth in Relators’ opening brief, each part petition incorporated, attached, and made available to each signatory the entirety of the

documents discussed and referenced in the petitions. And again, each circulator provided a sworn affidavit to attest that to the best of their knowledge each signatory understood the contents of the petitions signed. Exhibit E. Respondent Developer has provided no evidence to support its baseless claim that the charter amendment petition is misleading.

Nonetheless, Respondent Developer now contends that the charter amendment petition is misleading because the Respondent Developer wrongly believes that the charter amendment is a referendum on Ordinance 2014-10 in disguise. Respondent Developer further argues that the proposed charter amendment presents more than “one subject.” Respondent Developer merit brief, at 20. Yet, as discussed above in Part I and Part II, the charter amendment is not a referendum on Ordinance 2014-10, but instead addresses the long-term interests of Powell citizens and reaches far beyond Ordinance 2014-10. Even if the proposed charter amendment were somehow determined to be a referendum (and as discussed under Part II above it certainly is not), still the initiative petition for the charter amendment did not violate rules for referendum petitions, as the charter amendment petition was filed with the City of Powell within thirty days after Council passed Ordinance 2014-10.

Respondent Developer goes on to argue that the portion of the proposed charter amendment that states that the people of Powell “have determined” that Powell needs a new comprehensive plan is misleading. Respondent Developer merit brief, at 21. In so arguing, Respondent Developer cites a non-binding court of appeals case that found misleading a petition that included text of a proposed ordinance stating that the proposed ordinance “was circulated and voted upon by the people.” Respondent Developer Brief, at 22, citing *State ex rel. Bay Citizens for Safety v. Bay Village City Council*, 8th Dist. Cuyahoga No. 91889, 2008-Ohio-4225. The *Bay Village City Council* case is simply inapposite, as the text of the proposed charter

amendment in this case is obviously distinct from the *Bay Village* case. The proposed charter amendment here does not state that the proposed charter amendment has already been voted on. And, the “have determined” language, which is part of the *proposed* charter amendment that *may* become part of the Powell Charter if approved by Powell electors, is not misleading in any event.

* * *

In summary, Relators’ charter amendment unquestionably achieves “strict compliance” with the rules for municipal charter amendment petitions under the Ohio Constitution and Powell Charter.

E. The Developer’s other substantive claims attempting to invalidate the petitions are prematurely raised and meritless in any event. The proposed charter amendment does not give rise to spot zoning, is not void for vagueness, and does not violate any retroactivity prohibition.

Aside from its premature and meritless unlawful delegation of legislative authority argument, Respondent Developer has additionally raised other premature substantive objections to the content of the proposed charter amendment. Again, it is premature to address the substantive content of the proposed charter amendment prior to voter approval on Election Day. See, Relators’ opening brief, at 29-33 (Proposition of Law No. 2); *State ex rel. DeBrosse v. Cool*, 87 Ohio St. 1, 6 (1999). Still, Respondent Developer asserts that the content of proposed charter amendment constitutes illegal spot zoning, is void for vagueness, and an illegal retroactive law. Each unfounded assertion that is prematurely raised will be refuted below in turn.

First, with reference to allegedly “discriminatory animus,” Respondent Developer argues that the proposed charter amendment constitutes “illegal spot zoning.” Respondent Developer merit brief, at 30-31. First of all, the “discriminatory animus” that Respondent Developer refers to is a comment by Lonnie Gilliam at the August 19, 2014 Council meeting, which was made

during the public comment portion of the meeting. Respondent Developer merit brief, at 8. Mr. Gilliam is not a Relator or a party to this action and his comments cannot be attributed to Relators in this case. The charter amendment does not discriminate against anyone and is not designed to “discriminate” against anyone. Again, the proposed charter amendment is a measure designed to promote the long-term interests of the City of Powell and goes well beyond implications for Ordinance 2014-10. There is simply no discrimination or illegal spot zoning here.

Second, Respondent Developer argues that the proposed charter amendment is void for vagueness because it does not provide, in the Developer’s erroneous view, sufficient standards. Respondent Developer merit brief, at 31. The proposed charter amendment directs Powell City Council to legislatively enact a Final Comprehensive Plan, subject only to the criteria set forth therein under Section 19 of Article IV. Exhibit C. Furthermore, the proposed charter amendment provides more guidance to Council regarding the comprehensive plan than the current Powell Charter § 4.07, which grants Council the legislative authority for “[a]doption and modification of the master plan for the City as an official map of the City.” The proposed charter amendment simply is not “unconstitutionally vague.”

Third, Respondent Developer makes the unfounded argument that the proposed charter amendment illegally operates to retroactively deprive the Developer of vested rights. As detailed in Relators’ opening brief, at pages 38-40, the Developer does not have vested right in the zoning of the property and the argument is premature at present. There is no existing non-conforming use, the property sits vacant still today, the Developer’s plan to build (if any) are not until some undetermined time in 2015 at the earliest, and the Developer did not properly file a Planned District Development Plan with the City (and in so doing failed to provide evidence of

financing). Relators' opening brief, at 38-40. The proposed charter amendment cannot be withheld from the ballot over this premature and meritless "retroactivity" claim.

III. CONCLUSION

As set forth in Relators' opening and reply briefs, Relators have established a clear legal right, clear legal duty, and the lack of an adequate remedy in the ordinary course of law entitling them to a writ of mandamus. *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 440-41, 2005-Ohio-5009, ¶ 23 (2005). Relators have a clear legal right to the relief requested because they have submitted a sufficient and valid charter amendment petition signed by a sufficient number of Powell electors. Respondent Council has a clear legal duty to perform the actions sought under Ohio Const. Art. XVIII §§ 8, 9. And, Relators have no adequate remedy in the ordinance course of law due to the proximity of the November 4, 2014 general election.

Accordingly, Relators respectfully request that this Court issue a peremptory writ, alternative writ, or a writ of mandamus compelling Respondent Council to "forthwith" provide for the submission of the proposed charter amendment to a vote of the electors of Powell at the November 4, 2014 general election under Ohio Const. Art. XVIII §§ 8, 9. In the alternative to such relief, Relators request that this Court issue a peremptory writ, alternative writ, or a writ of mandamus compelling Respondent City Clerk of Powell Sue Ross to provide for the submission of the proposed charter amendment to a vote of the electors of Powell at the November 4, 2014 general election under Powell City Charter § 6.02.

If this Court does not compel the City Respondents to submit the proposed charter amendment to Powell electors, Relators further pray that this Court: (1) issue a peremptory writ or writ of mandamus compelling Respondent Council to forthwith determine that the initiative petition for a proposed charter amendment is sufficient and valid; and/or (2) issue an alternative

writ Respondent Council to show cause for their unlawful and illegal determination that the initiative petition for a proposed charter amendment is invalid.

Finally, Relators respectfully request that this Court assess the costs of this action against the Respondents, including an award to Relators of their reasonable attorneys' fees and expenses under R.C. 733.59, R.C. 733.61, and any other applicable laws, as well as any other relief as may be appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack was served by hand delivery this 8th day of September, 2014, upon the following counsel:

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