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*Council for Intervenors The Center at Powell
Crossing LLC and Donald R. Kenney, Jr.*

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INTRODUCTION

This expedited elections matter arises from the citizens of Powell, Ohio and their long term and short term concerns for land use and development in the City of Powell, Ohio. The existing disconnect between Powell City Council (“Council”) and Powell citizens recently came to a head when, on June 17, 2014, Council passed Ordinance 2014-10 to fundamentally alter the landscape of Downtown Powell. Exhibit B (Relators’ letter to the City of Powell dated July 9, 2014). Through Powell City Ordinance 2014-10, Council approved a Planned District Development Plan for The Center at Powell Crossing, LLC, to develop 64 high-density residential apartment units on 8.3 acres of land located in Downtown Powell. Exhibit A (copy of certified copy of Ordinance 2014-10). By passing Ordinance 2014-10, Council rejected Powell citizens’ efforts to convey popular opinion to Council. Exhibit B.

To correct the direction of Powell in the long term and immediate term, Powell residents, taxpayers, and qualified electors Sharon Valvona, Thomas Happensack, and Brian Ebersole (“Relators”) organized three petitions that address land use and development in Powell.¹ The first petition, an initiative petition, addresses the long term interests of Powell citizens through a proposed charter amendment that directs Council to legislatively adopt a new comprehensive plan for land use and development in Powell. Due to the illegal and unlawful actions of Council withholding the charter amendment question from the ballot, that petition is the subject of another case currently pending before this Court, *State ex rel. Ebersole et al. v. City Council of Powell et al.*, Supreme Court Case No. 2014-1469.

¹ The committee for each petition is referred to as follows: the “Committee for Referendum of Powell City Ordinance 2014-10”; the “Committee for Initiative for proposed Ordinance for Repeal Powell City Ordinance 2014-10”; and the “Committee for Initiative for Powell Comprehensive Plan Charter Amendment.”

The other two petitions, a referendum on Ordinance 2014-10 and an initiative petition for an ordinance to repeal Ordinance 2014-10, address Powell citizens' immediate interest in preventing development that will fundamentally alter the landscape of Downtown Powell with high-density apartment units. Relators brought the present action for a writ of mandamus, peremptory writ, or alternative writ to compel Respondent Board of Elections to submit the referendum question and proposed ordinance presented by the petitions to the Powell electorate at the November 4, 2014 general election.

As Powell City Council determined at its August 19, 2014 meeting, the referendum petition for Ordinance 2014-10 and the initiative petition for a proposed ordinance to repeal Ordinance 2014-10 contain a sufficient number of valid signatures to place the measures on the November 4, 2014 ballot and are sufficient and valid in all respects. Pursuant to Powell City Charter §§ 6.02, 6.04, moreover, Respondent Board of Elections has a duty to submit the proposed measures to Powell electors. Nonetheless, Respondent Board of Elections has unlawfully, illegally, in plain disregard of the law, and in an abuse of discretion, refused to perform its clear legal duty to submit the referendum for Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 to Powell electors. Furthermore, due to the proximity of the November 4, 2014 election, Relators lack an adequate remedy in the ordinary course of law. *See, e.g., State ex rel. Greene v. Montgomery Cty. Bd. of Elections*, 121 Ohio St.3d 631, 2009-Ohio-1716, ¶ 10.

Accordingly, Relators respectfully request that this Court issue a writ of mandamus, peremptory writ of mandamus, or alternative writ compelling Respondent Board of Elections to submit the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 to Powell electors at the November 4, 2014 general election.

STATEMENT OF THE CASE AND FACTS

On July 9, 2014, pursuant to the Powell City Charter and R.C. 731.32,² Relator Sharon Valvona, on behalf of Relators, filed with Powell Clerk of Council Sue Ross (“Clerk Ross”) the following: (1) a copy of Ordinance 2014-10 certified by Clerk; (2) a certified copy of a proposed ordinance to repeal Ordinance 2014-10; and (3) a certified copy a proposed charter amendment. Complaint, ¶ 10. Exhibit B (cover letter accompanying the pre-circulation filing), Appx. 20.

Together with the certified documents filed on July 9, 2014, Sharon Valvona, on behalf of Relators, filed blank draft copies of the referendum petition and two initiative petitions with Clerk Ross. Complaint, ¶ 12. The cover letter accompanying the certified filings and three draft petitions requested that Council and Clerk Ross review the petitions for infirmities or defects prior to circulation. Complaint, ¶ 13; Exhibit B. On July 10, 2014, Clerk Ross, acting on the advice of Powell Law Director Eugene Hollins, notified Relator Brian Ebersole that she and Council refused to review the petitions for infirmities or defects. Complaint, ¶ 14; Exhibit D (email from Clerk Sue Ross to Relator Brian Ebersole).

From July 11, 2014 through July 16, 2014, Relators organized the circulation to Powell electors of the following three petitions: (1) a referendum petition to repeal Ordinance 2014-10; (2) an initiative petition for a proposed ordinance to repeal Ordinance 2014-10; and (3) an initiative petition for a proposed charter amendment to the Powell City Charter. Complaint, ¶ 15.

On July 17, 2014, within thirty days after the date of passage of Ordinance 2014-10, Relators filed with Clerk Ross the following three petitions: the referendum petition; the petition for a proposed ordinance; and the petition for a proposed amendment to the Powell City Charter.

² Powell City Charter § 6.05, provides as follows: “Where the Charter is silent concerning initiative and referendum petition procedures, the laws of the State of Ohio shall be followed, except the statutory functions and duties of the City Auditor shall be performed by the Clerk of Council.”

Complaint, ¶ 16; Exhibit G (cover letter accompanying the July 17, 2014 filing). Each and every part petition for the two initiative petitions satisfies all applicable form requirements for initiative petitions under the Ohio Constitution, Powell City Charter, and other applicable laws. In addition, each and every part petition for the referendum petition satisfies all applicable form requirements for referendum petitions under the Ohio Constitution, Powell City Charter, and other applicable laws. Complaint, ¶¶ 17-18.

Clerk Ross accepted the Relators' filing of the three petitions on July 17, 2014. Clerk Ross held the petition for a proposed charter amendment for eleven days and then transmitted the petition to Respondent Delaware County Board of Elections on July 28, 2014, together with a certified copy of the proposed charter amendment to the Powell City Charter. Complaint, ¶ 19. Clerk Ross likewise held the initiative petition for an ordinance to repeal Ordinance 2014-10 for eleven days and then transmitted that petition to Respondent Board of Elections on July 28, 2014, together with a certified copy of the proposed ordinance to repeal Ordinance 2014-10. Complaint, ¶ 20. Lastly, Clerk Ross held the referendum petition for eight days and then transmitted that petition to Respondent Board of Elections on July 25, 2014, together with a certified copy of Ordinance 2014-10. Complaint, ¶ 21.

On July 28, 2014, The Center at Powell Crossing LLC and Donald R. Kenney Jr. ("the Developers") filed a "Notice of Protest" regarding the petitions with Respondent Board of Elections outside any applicable legal procedure but purportedly pursuant to R.C. 3501.39. Complaint, ¶ 22; Exhibit H (Developers' "Notice of Protest").³ The Developers' Notice of Protest wrongly argued that the signatures and petitions are invalid because roughly two-thirds of

³ The Developers are the Intervenor herein. This Court properly refused to allow Donald R. Kenney to intervene in *State ex rel. Ebersole et al. v. City Council of Powell et al.*, Supreme Court Case No. 2014-1469.

petition signers did not list their ward on the petitions. Complaint, ¶ 23; Exhibit H. The Notice of Protest specifically stated: “The part-petitions at issue fail to provide any place for an elector to provide his or her ward.” Exhibit H, at 8. But there are no wards in Powell, Ohio. Complaint, ¶ 25. The Notice of Protest nonetheless supported its position by falsely stating that “more than one third of the electors provided their correct ward and precinct [when signing the petitions].” Complaint, ¶ 26; Exhibit H, at 8. The Developers did not serve Relators with this Notice of Protest, either directly or through counsel, even though Relators were clearly identified on each of the part petitions as a committee of petitioners, together with their complete mailing addresses. Complaint, ¶ 27; Exhibit H, at 27 (Certificate of Service).

On July 31, 2014, the Delaware County Board of Elections forwarded a copy of the Notice of Protest to Relator Thomas Happensack via email. Complaint, ¶ 28. At its August 1, 2014 meeting, Respondent Board of Elections determined that a minimum of 238 valid signatures were needed to satisfy the requirements of Article VI of the Powell Charter. Complaint, ¶ 29; Exhibit I, at Tr. 14 (transcript of August 1, 2014 Board of Elections meeting).

Respondent Board of Elections also attested that the referendum petition for Ordinance 2014-10 contains 376 valid signatures, the initiative petition for a charter amendment to the Powell City Charter contains 367 valid signatures, and that the initiative petition for a proposed ordinance to repeal Ordinance 2014-10 contains 378 valid signatures. Complaint, ¶¶ 30-32; Exhibit I, at Tr. 36-39; Exhibit J (Board of Elections attestation statement). In turn, Respondent Board of Elections passed motions referring the three petitions to Council, together with a statement certifying the number of valid signatures on each petition. Complaint, ¶ 33; Exhibit I, Tr. at 36-39.

That same day, on August 1, 2014, the Developers filed a Notice of Protest with Council arguing that each of the three petitions are invalid. Complaint, ¶ 36. The Developers did not provide notice to Relators on the day the Notice of Protest was filed with the City, either directly or through counsel, even though Relators' addresses are listed on each part petition and the undersigned counsel for Relators appeared on the Relators behalf at the August 1, 2014 Board of Elections meeting. Complaint, ¶ 36; Exhibit I, Tr. at 29. Not until August 4, 2014, at approximately 5:06 PM, did counsel for the Developers electronically serve the undersigned counsel with the Developers' Notice of Protest to Council. Complaint, ¶ 37.

On the morning of August 4, 2014, Relator Sharon Valvona sent via email a one-page letter to Powell Law Director Eugene Hollins to notify him that Council had a duty at its August 5, 2014 regular meeting to determine the sufficiency and validity of the three petitions and submit the proposed charter amendment to electors forthwith. Complaint, ¶ 38; Exhibit K (letter from Sharon Valvona to Eugene Hollins).

The next regular meeting of Council following receipt of Respondent Board of Elections' statement attesting to the number of valid signatures fell on August 5, 2014. Complaint, ¶ 41. On the morning of August 5, 2014, Relators, as a committee of petitioners, filed with the City, by email and hand delivery, a Position Statement in response to the Developers' unfounded objections to the petitions. Complaint, ¶ 40; Exhibit M (Petitioners' Position Statement). Relators filed the Position Statement just five days after Relators first received notice of the Developers' Board of Elections Notice of Protest on July 31, 2014.

On August 5, 2014, Council held its regularly scheduled meeting at 7:30 PM. Complaint, ¶ 42. At that meeting, however, Council failed to perform its clear legal duty to determine the sufficiency and validity of the petitions under Powell City Charter §§ 6.02, 6.04, 6.05.

Complaint, ¶ 43; Appx. 6-8. Respondent Council likewise failed to perform its clear legal duty to “forthwith” provide for the submission of the proposed charter amendment to Powell electors pursuant to Ohio Const. Art. XVIII §§ 8, 9. Complaint, ¶ 44.

In failing to perform its clear legal duties, Council followed the advice of Law Director Eugene Hollins. Law Director Hollins publicly advised Council as follows at the August 5, 2014 regularly scheduled meeting:

One thing that we may want to consider as Council this evening is tabling the resolutions and taking all three pieces of legislation up on the 19th.

Complaint, ¶ 45; Exhibit N, Tr. at 8 (transcript of August 5, 2014 Council meeting).

Rather than determine the sufficiency and validity of the three petitions at the August 5, 2014 meeting and provide for the submission of the proposed measures to Powell electors, Council: (1) tabled Resolution 2014-16 proposing to determine the sufficiency and validity of the referendum petition; (2) tabled Resolution 2014-17 proposing to determine the sufficiency and validity of the initiative petition to repeal Ordinance 2014-10; and (3) held a “first reading” of Ordinance 2014-41 proposing to submit the initiative petition for the proposed charter amendment to Powell electors. Complaint, ¶ 46; Exhibits S (Resolution 2014-16); Exhibit T (Resolution 2014-17; Exhibit U (Ordinance 2014-41).

At the August 5, 2014 Council meeting, Relators Brian Ebersole and Thomas Happensack gave separate public testimony that Council may consider only the form, not content, of the three petitions (when determining the sufficiency and validity of the petitions). Complaint, ¶ 47; Exhibit N, Tr. at 14, 18-19. Mr. Ebersole added that “the reason that you act so quickly is because you’re just looking at the form of the petition.” Exhibit N, Tr. at 14. Law Director Hollins promised Relators and all other Powell citizens at the August 5, 2014 Council

meeting that Council would determine whether to submit the proposed charter amendment to Powell electors at the next regularly scheduled Council meeting on August 19, 2014. Exhibit N, Tr. at 7-8.

At approximately 12:31 PM on August 11, 2014, Relators sent a taxpayer demand letter via email to Law Director Hollins notifying him that, among other things, Council at the August 5, 2014 meeting: (1) violated its clear legal duty to determine the sufficiency and validity of the three petitions; and (2) violated its clear legal duty to forthwith provide for the submission of the proposed charter amendment to Powell electors. Complaint, ¶ 49; Exhibit O (letter from the undersigned counsel to Eugene Hollins).

Through the letter, Relators further notified Law Director Hollins that Council's failure to fulfill its duties at the August 5, 2014 meeting triggered clear legal duties under Powell City Charter §§ 6.02, 6.04 for Clerk Ross to provide for the submission of the proposed ordinance to repeal Ordinance 2014-10 to electors and provide for the submission of the referendum on Ordinance 2014-10 to Powell electors. Complaint, ¶ 50; Exhibit O. The letter ultimately demanded that Law Director Hollins bring a suit in mandamus to compel Council and Clerk Ross to perform their duties to submit the proposed charter amendment, proposed ordinance, and referendum to the electors of Powell. Complaint, ¶ 50; Exhibit O.

On the evening of August 11, 2014, Law Director Hollins and counsel for Relators exchanged emails disputing the legal duties of Council and Clerk Ross. Complaint, ¶ 51. In his initial response email to the Relators' demand letter, Law Director Hollins addressed only the initiative petition for a proposed charter amendment and stated that "filing any mandamus action prior to Council's August 19 meeting would clearly be premature." Complaint, ¶ 52; Exhibit P (email correspondence between Christopher Burch and Eugene Hollins). On August 15, 2014,

the undersigned counsel sent an email to Law Director Hollins rebutting Law Director Hollins flawed reasoning for failing to bring suit against Council and Clerk Ross and reiterating the Relators' demand that Law Director Hollins bring a suit in mandamus. Exhibit P.

At approximately 4:12 PM on August 15, 2014, the Developers filed a "Reply Brief" with Council in support of their Notice of Protest filed on August 1, 2014. Complaint, ¶ 53.

Then at the regular Council meeting on August 19, 2014, the undersigned counsel urged Council to "stay in your lane" to consider only the form, not substance, of the three petitions when reviewing them for sufficiency and validity. Complaint, ¶ 54; Exhibit N, Tr. at 7-8 (transcript of August 19, 2014 Council meeting). Council unanimously passed Resolution 2014-16 to determine that the referendum petition is sufficient and valid. Complaint, ¶ 55; Exhibit Q, Tr. at 70; Exhibit S. Similarly, Council unanimously passed Resolution 2014-17 to determine that the initiative petition for an ordinance to repeal Ordinance 2014-10 is sufficient and valid. Complaint, ¶ 56; Exhibit Q, Tr. at 76; Exhibit T.

However, at the August 19, 2014 Council meeting, Council illegally, unlawfully, in plain disregard of the law, and in an abuse of discretion refused to submit the proposed charter amendment to electors on the basis of the *content* of the proposed charter amendment. Complaint, ¶ 58; *State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 53 (1991) ("council's authority is limited to approving the form of the petition, *not its content*.") (emphasis added). Council specifically refused to submit the proposed charter amendment to electors because it wrongly believes that the proposed charter amendment constitutes an unconstitutional delegation of legislative authority. Complaint, ¶ 59; Exhibit Q, Tr. at 78-90.

Notably, Council did not identify any defects with the *form* of the petition for a proposed charter amendment. Complaint, ¶ 60; Exhibit Q, at 77-90. Council further determined that there

are a sufficient number of valid signatures on each of the three petitions to satisfy the number of signatures requirement under the Ohio Constitution and Powell City Charter. Complaint, ¶ 61; Exhibit Q, Tr. at 77-78.

Following the August 19, 2014 Council meeting, the charter amendment petition took a separate procedural path from the referendum petition and initiative petition and at issue in this case. On August 20, 2014, the Relators sent Law Director Hollins a letter demanding that he bring a suit in mandamus to compel Council and Clerk Ross to perform their duties to submit the proposed charter amendment to the electors of Powell. Complaint, ¶ 62; Exhibit R (letter from the undersigned counsel to Eugene Hollins). The letter further explained that the proposed charter amendment does not constitute an unconstitutional delegation of legislative authority and, more fundamentally, is a substantive issue that is premature and beyond the scope of Council's review. Complaint, ¶ 62; Exhibit R. Law Director Hollins failed to respond to the August 20, 2014 letter. As a consequence, Relators instituted an action in mandamus in the Ohio Supreme Court on August 22, 2014 against Respondents therein Powell City Council and Clerk of Council Sue Ross to compel the submission of the proposed charter amendment to the electors of Powell.

The referendum petition for Ordinance 2014-10 and initiative petition for a proposed ordinance to repeal Ordinance 2014-10, on the other hand, took a separate procedural path that ultimately led to the present action. After Council approved the referendum and initiative petitions at issue here on August 19, 2014, the Developers filed a Notice of Protest with Respondent Board of Elections on August 21, 2014 to contest the submission of the referendum for Ordinance 2014-10 and proposed ordinance to repeal Ordinance 2014-10 to Powell electors. Complaint, ¶ 63. On August 25, 2014, Relators filed a Memorandum in Response to the Developers' Notice of Protest with Respondent Board of Elections, with regard to the

referendum petition for Ordinance 2014-10 and the initiative petition for an ordinance to repeal Ordinance 2014-10. Complaint, ¶ 65; Exhibit V.

Then on August 26, 2014, Respondent Board of Elections held a hearing to determine whether to submit the referendum for Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 to Powell electors. Complaint, ¶ 66. At the August 26, 2014 hearing before Respondent Board of Elections, the Developers failed to establish that The Center at Powell Crossing, LLC complied with all jurisdictional requirements under the Powell zoning code for the Planned District Development Plan approved through Ordinance 2014-10, including requirements under Powell zoning code § 1143.11. Complaint, ¶ 67.

Also at the August 26, 2014 hearing, Powell Director of Development David M. Betz gave testimony regarding Ordinance 2014-10. Director Betz testified that, as City of Powell Director of Development, he does not require landowners to provide evidence of financing when he considers the landowner to be an “established developer.” Complaint, ¶ 68; Exhibit Y, Tr. at 132, 140. Section 1143.11(c)(9) of the Powell zoning code, however, requires evidence of financing for Planned District Development Plans. Nonetheless, Director Betz did not require The Center at Powell Crossing, LLC to submit proof of financing to the City because he considered the entity to be an established developer. But past practice does not excuse strict financing requirements under the Powell zoning code, and, according the Ohio Secretary of State records, The Center at Powell Crossing, LLC was just organized in 2012. Exhibit X.

Like the failure to show that The Center at Powell Crossing, LLC satisfied the jurisdictional requirement under the Powell zoning code to provide financing, the Developers likewise failed at the August 26, 2014 hearing to show that The Center at Powell Crossing, LLC satisfied other requirements of the Powell zoning code. That is, Director Betz confirmed that

The Center at Powell Crossing, LLC failed to provide the City of Powell with evidence of its ability to post bond for the development project identified in Ordinance 2014-10, as required pursuant to Powell zoning code § 1143.11(c)(10). Complaint, ¶ 70; Exhibit Y, Tr. at 141. In addition, The Center at Powell Crossing, LLC failed to show that it had sufficiently and adequately verified that the information contained in The Center at Powell Crossing, LLC's development application as true and correct, as required pursuant to Powell zoning code § 1143.11(c)(11). Complaint, ¶ 71. Still further, The Center at Powell Crossing, LLC failed to show that it signed and attested to the "truth and exactness" of the Final Development Plan identified in Ordinance 2014-10, as required pursuant to Powell zoning code § 1143.11(i). Complaint, ¶ 72.

At the August 26, 2014 hearing, Respondent determined illegally, unlawfully, in plain disregard of the law, and in an abuse of discretion, that Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 are administrative actions that are not subject to popular referendum under the Ohio Constitution and the Powell City Charter. Complaint, ¶ 73; Exhibit Y, Tr. at 185. Respondent further determined, illegally, unlawfully, in plain disregard of the law, in an abuse of discretion, and contrary to the express findings of Council, that the referendum petition for Ordinance 2014-10 and the initiative petition for a proposed ordinance to repeal Ordinance 2014-10 do not satisfy all form requirements under the Powell Charter because the petitions did not follow exactly an Ohio Secretary of State form. Complaint, ¶ 74-75; Exhibit Y, Tr. at 140-41. Compliance with the Secretary of State's form is not a legal requirement and, furthermore, the form is incompatible with the Powell Charter.

In the end, Respondent Board of Elections illegally, unlawfully, in plain disregard of the law, in an abuse of discretion, and contrary to Council's findings, sustained the Developers'

objections to find that the referendum petition for Ordinance 2014-10 and initiative petition for a proposed ordinance to repeal Ordinance 2014-10 are insufficient and invalid. Complaint, ¶ 76. As a consequence, Respondent Board of Elections failed to submit the referendum and proposed ordinance to Powell electors at the November 4, 2014 general election. Complaint, ¶ 76. To vindicate their rights and the rights of all Powell electors to have the referendum and proposed ordinance to repeal Ordinance 2014-10 presented to voters, Relators then brought the present action in mandamus in this Court on September 2, 2014.

For the reasons that follow, and those already stated, this Court must grant a writ compelling Respondent Board of Elections to submit the referendum petition for Ordinance 2014-10 and the initiative petition for a proposed ordinance to repeal Ordinance 2014-10 to the electors of Powell at the November 4, 2014 general election.

ARGUMENT

Relators' Proposition of Law No. 1:

Initiative and referendum petitions are sufficient and valid in all respects and must be submitted to electors under the Powell City Charter where the petitions satisfy all legal form requirements, contain a sufficient number of signatures, and further, challengers to the petitions have failed to establish that the measures proposed by the petitions are administrative actions

Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack have submitted sufficient and valid initiative and referendum petitions that are signed by a sufficient number of Powell electors. As a consequence, Relators have a clear legal right under Section 1f of Article II of the Ohio Constitution and Powell City Charter §§ 6.02, 6.04, 6.05 to have a referendum on Ordinance 2014-10 and a proposed ordinance to repeal Ordinance 2014-10 submitted to Powell electors at the November 4, 2014 general election.

Further, Powell Charter §§ 6.02, 6.04 specifically provides a clear legal duty that, upon a determination by Powell City Council that the petitions are sufficient and valid, Respondent Board of Elections must “submit” measures proposed by initiative and referendum petition to Powell electors. Exhibit Q, Tr. at 70, 76 (transcript of Council proceedings determining that the petitions are sufficient and valid). By failing to provide for the submission of the proposed measures to the Powell electorate at its August 26, 2014 hearing or at any time thereafter, Respondent Delaware County Board of Elections has violated its clear legal duty to place the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 on the November 4, 2014 ballot. Moreover, Relators have no adequate remedy at law given the proximity of the November 4, 2014 general election.

Consequently, Relators have satisfied all legal requirements entitling them to a writ of mandamus and this Court should grant the writ of mandamus, peremptory writ, and/or alternative writ compelling Respondent Board of Elections to submit the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 to the Powell electorate at the November 4, 2014 general election.

A. Standard of Review

“In extraordinary actions challenging the decision of a board of elections, the applicable standard is whether the board engaged in fraud, corruption, abuse of discretion, or clear disregard of statutes or pertinent law.” *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-3579, ¶ 34.

Despite the abuse of discretion standard, the Powell City Charter § 6.05 places the burden to find petitions insufficient and invalid on the challenger to the petitions. Appx. 8. Powell City Charter § 6.05 provides that all petitions prima facie valid, thereby placing the burden on the

challenger, as follows: “The petition and signatures upon such petition shall be prima facie presumed to be in all respects sufficient.” Appx. 8. That means the onus is on the challenger to show that the petitions are clearly insufficient.

If there is any doubt as to whether the challenger has sustained its burden, this Court must “liberally construe” legal provisions for referenda petitions “in favor of the power reserved to the people” and find that the petitions are sufficient and valid. *See State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, ¶ 28 (“duty to liberally construe municipal referendum provisions in favor of the power reserved to the people”). The standard of strict compliance, by contrast, applies only to “election laws,” not substantive issues regarding the administrative or legislative nature of a proposed measure that has applications far beyond elections law. *State ex rel. Commt. For the Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections*, 96 Ohio St.3d 308, ¶ 49 (2002) (“The settled rule is that election laws are mandatory and require strict compliance”).

B. The petitions are sufficient and valid in all respects and signed by the requisite number of Powell electors, despite Respondent Board of Elections’ clearly unlawful finding that the petitions are invalid because Relators failed to follow the Ohio Secretary of State’s form for municipal initiative and referendum petitions.

The referendum petition for Ordinance 2014-10 and the initiative petition for an ordinance to repeal Ordinance 2014-10 clearly have no defects in form. Indeed, the Powell City Council did not identify any defects in the form of the petitions when they passed Resolutions 2014-16 and 2014-17 (Exhibits S and T) to find the petitions sufficient and valid in all respects. Relators followed all legal requirements for municipal initiative and referendum petitions and accordingly have submitted petitions that are sufficient and valid in all respects.

Nevertheless, Respondent Board of Elections unlawfully determined that the petitions are insufficient and invalid because the petitioners failed to exactly follow the Ohio Secretary of State's form for municipal initiative and referendum petitions. But as Delaware County Prosecutor Christopher Betts repeatedly advised Respondent Board of Elections, following the Ohio Secretary of State's general form for municipal initiative and referendum petitions is not a requirement for such petitions under the Powell City Charter or any other applicable law. Exhibit Y, 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”).

Nor could it be, as it would have been impossible for Relators to follow the Secretary of State's form because the form does not comply with all requirements for petitions under the Powell City Charter. And of course the statewide form does not comply with all rules, because 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 each of over one hundred different charters Ohio. Powell Charter § 6.05, for example, contains specific requirements regarding the listing of precincts that is not required under state law. Appx. 8. 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 could not have complied with the Powell Charter without deviating from the Secretary of State's form.

Respondent Board of Elections and the Developer (Intervenor in the present action) nevertheless maintain, wrongly, that the petitions are invalid for deviating from the Secretary of State's form. Despite this meritless objection, the petitions *do* satisfy all requirements under the Powell Charter, including the requirements under Section 6.05 regarding the title and text of

ordinances being referred through referendum petitions and ordinances proposed by initiative petition. Specifically, the petitions satisfy the requirement under Powell Charter § 6.05 that initiative petitions “shall contain a full and correct copy of the title and text” of the proposed measure and that referendum petitions “contain the number, a full and correct copy of the title and date of passage of the ordinance” sought to be referred. Exhibits E, F; Appx. 8.

Full and complete copies of City Ordinance 2014-10, the proposed ordinance to repeal City Ordinance 2014-10 were all physically attached to and specifically identified as “incorporated herein” into their respective petitions on the first page of each part petition. See, the initiative and referendum petitions, included in evidence as Exhibits E and F.

In fact, the first page of each part petition for the proposed ordinance provides that the proposed ordinance is “attached hereto as Exhibit 1, and incorporated herein.” Exhibit 1 to the petition, in turn, provides the title of the proposed ordinance as follows:

CITY OF POWELL, OHIO ORDINANCE

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.

To “incorporate” means to make something part of something else. *Acme Arsenia Co., Inc. v. J. Holden Constr. Co., Ltd.*, 8th Dist. Case No. 91450, 2008-Ohio-6501, ¶¶ 14-18; *McKenzie v. Cintas Corp.*, 12th Dist. Case No. 2012-11-110, 2013-Ohio-1310, ¶ 13. Thus, the title and text of the proposed ordinance were attached to the petitions and actually incorporated

or incorporated by reference into the petitions. The petitions unquestionably satisfied the “text and title” requirement for initiative petitions under Powell Charter § 6.05.

Similarly, there is no question that Relators satisfied the text, title, and date requirement for the referendum petition under Powell Charter § 6.05. The first page of each part petition for the referendum states that it is a referendum for City “Ordinance 2014-10 passed by the City Council of Powell, Ohio on the 17th day of June, 2014,” and further that “[a] full and correct copy of the title and text of Ordinance No. 2014-10 is attached hereto as Exhibit 1.” A certified copy of City Ordinance 2014-10, including the text, title, and date of the ordinance was therefore incorporated, attached, and made a part of each part petition.

The Respondents’ unfounded contention that the petitioners failed to satisfy title, text, and date requirements under Powell City Charter § 6.05 is simply incorrect. The aim of these requirements is to give petition signatories knowledge of the contents of the petitions. Contrary to this purpose, the Respondents are apparently suggesting, wrongly, that the petitions should list the title and text of the proposed measures in extremely small font on the first page of the petition, which would have made the petitions confusing.

Moreover, the petition signers here do understand the substance of the petitions. In fact, circulator affidavits provide sworn statements from each circulator that the petition signers had knowledge of the contents of the petitions. Exhibits E, F (the initiative and referendum petitions).⁴ The circulator affidavits further attest to the truth of the statements on the first page

⁴ Each of the twelve part petitions for each of the three petitions (total of 36 part petitions) was circulated with a true, accurate, and complete certified copy of Ordinance 2014-10. A copy of a true, accurate, and complete certified copy of Ordinance 2014-10 is filed here as Relators’ Exhibit A. Here, Relators’ Exhibit E is a black and white copy of all twelve part petitions for the referendum petition, excluding the copy of Ordinance 2014-10 that was attached to each part petition as circulated and filed. Exhibit F is a black and white copy of all twelve part petitions for the initiative petition for an ordinance to repeal Ordinance 2014-10, excluding the copy of

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 Q, Tr. at 34.

The petitions unquestionably have accomplished “strict compliance” with the rules for initiative and referendum petitions under Powell Charter, including the title and text requirements under Powell Charter § 6.05. Nevertheless, Respondent Board of Elections and the Developer have raised additional meritless issues with the form of the petitions. See, Exhibit H, Developers’ “Notice of Protest” filed with Respondent Board of Elections on July 28, 2014. These arguments are refuted below in turn.

First, the Developers assert that the petitions fail to satisfy the charter’s “precinct” requirement under Powell City Charter § 6.05. 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. Like the “ward” argument, the “precinct” argument is obviously baseless. The valid signatures on the petitions have the proper precinct listed.

The Developers nonetheless contend that precincts are not properly listed where they state, for example, Precinct “A” rather than Precinct “Powell A.” 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

Ordinance 2014-10 that was attached to each part petition as circulated and filed. While Exhibits E and F are black and white copies, each part petition for the referendum petition and initiative petition to repeal as circulated and filed included a notice printed in red ink on the first page.

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, F. 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.

Second, the petitions contain far more than the requisite number of valid signatures. In fact, every public body that has reviewed the petitions, *i.e.* Council and the Delaware County Board of Elections, have found that all three petitions contain more than enough signatures, *i.e.* more than 238. On August 1, 2014, the Board of Elections initially found that the referendum petition had 376 valid signatures and the initiative petition to repeal had 378 valid signatures, which is significantly more than the 238 required signatures. At its August 19, 2014 meeting, Powell City Council wrongly invalidated additional signatures, but still found that the referendum petition has 321 valid signatures and the initiative petition to repeal has 322 valid signatures, which is, again, still more than enough signatures to place both measures on the ballot. Exhibit Q, Tr. at 60, 71.

Third, the petitions are not invalid due to allegedly “misleading captions and content,” as the Developer has claim. Again, 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. Exhibits E, F. Nonetheless, the Developers make the completely baseless assertion that the petition signers were somehow “misled” through “gamesmanship.” Exhibit H. To the contrary, Relators did everything they could to make sure that the petition signers understood the contents of the petitions.

In summary, there are no defects with the form of the referendum petition for Ordinance 2014-10 or the initiative petition for a proposed ordinance to repeal Ordinance 2014-10. Relators therefore respectfully request that this Court allow a writ compelling Council to submit the referendum for Ordinance 2014-10 and proposed ordinance to repeal Ordinance 2014-10 to Powell electors at the November 4, 2014 general election.

C. Ordinance 2014-10 is legislation because the final development plan approved therein is void *ab initio* under the Powell zoning code for failure to comply with stringent legislative requirements to invoke the jurisdiction of the Powell Zoning Administrator and the Powell Zoning and Planning Commission.

As a factual matter, Ordinance 2014-10 is legislation properly subject to popular initiative and referendum under existing law. Respondent Board of Elections asserts that Ordinance 2014-10 is an administrative action, but without explaining how the ordinance implements existing legislation or even what lower agency had jurisdiction over the alleged administrative decision. So the argument goes, Ordinance 2014-10 escapes popular accountability as an administrative action because Ohio Const. Art. II § 1f confers municipalities with the power of initiative and referendum only for “legislation,” not administrative acts. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, 542 (1998), on motion for reconsideration from *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 566 (1998).

The argument fails to reach “first base” because Ordinance 2014-10 is legislation. In *Donnelly v. Fairview Park*, the Ohio Supreme Court held that “the test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence.” 13 Ohio St.2d 1 (1968) (underlining added).

Assuming, *arguendo*, that Relators were somehow required to exhaust administrative remedies prior to filing initiative and referendum petitions, there would be no need to do so in this case because The Center at Powell Crossing, LLC's application is void *ab initio*.

The Center at Powell Crossing, LLC's application simply was never filed. That is, due to several defects in the application for a Planned District Development Plan, the Powell Zoning Administrator and the Powell Zoning and Planning Commission lacked jurisdiction to address the application. Most notably, the Developer failed to provide evidence of financing for the project, as required pursuant to Powell zoning code § 1143.11(c)(9). Appx. 11-18. At a hearing before Respondent Board of Elections on August 26, Powell Director of Development David Betz even admitted that he waived the jurisdictional requirement under the Powell zoning code to provide evidence of financing with Planned District Development Plans. Exhibit Y, Tr. 140.

Because lower administrative bodies lacked jurisdiction, Council derivatively lacked jurisdiction to administratively consider the Developers' plan and necessarily acted in a legislative capacity when it approved the plan through Ordinance 2014-10. There is no right or requirement to appeal legislative decisions pursuant to R.C. 2506.01 et seq. and Ordinance 2014-10 is properly the subject to popular initiative and referendum. Appx. 19.

- 1. The procedural requirement to perfect a Planned District Development Plan application under the Powell zoning code is a stringent jurisdictional requirement that must be satisfied in order to invoke the jurisdiction of Powell administrative bodies to consider the application.**

***Consolidated Management, Inc. v. City of Cleveland*, 6 Ohio St.3d 238, 242-43 (1983).**

In order to execute or administer the Powell zoning code, as Respondents allege was done here, the applicant for a Planned District Development Plan under the Powell zoning code must first invoke the jurisdiction of Powell administrative bodies, namely the Powell Zoning

Administrator and the Powell Zoning and Planning Commission. Powell zoning code § 1143.11; *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). Otherwise the application for a development project is void *ab initio*, never having invoked the authority of the municipal agency to consider the application in the first place.

In *Consolidated Management*, for example, this Court held that the Cleveland Board of Zoning Appeals (“BZA”) held powers limited to those legislatively conferred upon it by Cleveland City Council through Cleveland ordinances. 6 Ohio St.3d at 241. There, Cleveland ordinances set forth specific criteria required for the Cleveland BZA to grant a variance, including a showing that a zoning classification presented an “unnecessary hardship” to the applicant landowner.⁵ *Id.* at 242. When the BZA granted a variance without requiring the applicant to provide evidence of an unnecessary hardship, it exceeded its authority and this Court invalidated the variance at issue. *Id.* at 242-43. This Court further held that, had City Council authorized the BZA to grant variances with unlimited discretion, that would constitute an unconstitutional delegation of legislative authority; in other words, municipal legislative authorities must provide municipal agencies with clear criteria for granting variances. *Id.* at 242.

Powell administrative bodies likewise have only those limited powers expressly conferred upon them pursuant to the Powell Charter, codified ordinances, and state law. For example, Powell Charter § 11.01 creates the Powell Planning and Zoning Commission, which

⁵ “A variance is intended to permit amelioration of strict compliance of the zoning ordinance in individual cases. It is designed to afford protection and relief against unjust invasions of private property rights and to provide a flexible procedure for the protection of constitutional rights. *Consolidated Management*, 6 Ohio St.3d, at 240.

has only those powers conferred upon it by the Powell Charter and laws of the State of Ohio. Appx. 9. Powell code § 1143.11, in turn, provides procedures that must be followed for the consideration and approval of a “Planned District Development Plan.” Section 1143.11 specifically provides that “Planned District Development Plans **shall** be approved in accordance with the procedures established herein in this section.” (emphasis added). Thus, the procedures listed in § 1143.11 must be followed in order to invoke the jurisdiction of the Zoning Administrator and Planning and Zoning Commission.

There is no authority or jurisdiction for these Powell administrative bodies to consider an application for a Planned District Development Plan where these procedures in § 1143.11 have not been followed. Following the rule of *Consolidated Management*, if the Powell zoning code gave the Zoning Administrator and Zoning and Planning Commission unlimited discretion, that would amount to an unconstitutional delegation of legislative authority. 6 Ohio St.3d 238, 242-43 (1983). For that reason, the Powell Charter and zoning code does *not* give its administrative bodies, or Director Betz, unfettered discretion. When Council acts to approve a Planned District Development Plan that did not properly invoke the jurisdiction of the Powell Zoning and Planning Commission, then, it necessarily acts legislatively. Council has no authority to act in an administrative capacity where the jurisdiction of lower administrative bodies, and derivatively Council’s own administrative jurisdiction, was not properly invoked in the first instance.

Furthermore, subject matter jurisdictional requirements are indeed strict requirements. In *Strongsville Bd. of Edn. v. Wilkins*, for example, this Court held that that Tax Commissioner, *i.e.* an administrative body, did not have jurisdiction to consider an application for property tax exemption where the applicant failed to provide a statutorily required certificate from the county treasurer. 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. Also, subject matter jurisdictional requirements are stringent requirements set forth by law, which private parties cannot agree to waive or otherwise set aside. *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189, ¶ 16; *Deerhake v. Limbach*, 47 Ohio St.3d 44 (1989), citing *American Restaurant & Lunch Co. v. Glander*, 147 Ohio St. 147 (1946).

2. The Center at Powell Crossing, LLC did not satisfy the strict jurisdictional requirements under the Powell zoning code to invoke the jurisdiction of the Zoning Administrator and the Powell Zoning and Planning Commission to consider the application. Powell zoning code §§ 1143.11 et seq.

To sustain its burden to show that Ordinance 2014-10 is an administrative action, Respondent Board of Elections must show that the Planned District Development Plan approved through Ordinance 2014-10 meets all jurisdictional requirements under the Powell zoning code. There is not a single case withholding a measure proposed by petition from the ballot despite factual disputes over facts relevant to the administrative/legislative issue. And here, Respondent Board of Elections has failed to satisfy its burden due to The Center at Powell Crossing, LLC’s several independent failings to comply with jurisdictional requirements for submitting Planned District Development Plans under the Powell zoning code. Each individual failure to comply with the jurisdictional requirements of the zoning code invalidates the application.

First, and most astoundingly, The Center at Powell Crossing, LLC has not provided evidence “of the ability of the applicant to carry forth its plan” with “financing,” as Powell zoning code § 1143.11(c)(9) requires. In fact, Powell Development Director David Betz testified before the Delaware County Board of Elections on August 26, 2014, that the Developer never

provided evidence of financing to the City for the development project identified in Ordinance 2014-10, even though the City zoning code requires it. Exhibit Y, Tr. at 132, 140.

Mr. Betz testified that he did not require the Developer to provide documentary evidence of financing because he viewed the developer as “established.” Specifically, Mr. Betz testified that “[w]e know they can handle a development of this type just based on past practice. So we really didn’t need to get any written verification that they have financing.” Exhibit Y, Tr. 132. To Mr. Betz, he may waive the financing requirement because, even though The Center at Powell Crossing, LLC never provided evidence of financing, if he perceives that they have “financing capabilities based upon their past record and everything else.” Exhibit Y, Tr. 141-42.

But being an “established developer” in Director Betz’s subjective judgment does not mean that the Developer has financing in this case. Far from it, in fact the failure to provide documentary evidence, still today in the present action before this Court, is illuminative that there likely has no financing for the project. Rather than provide documentary evidence regarding financing, The Center at Powell Crossing, LLC’s Preliminary Development Plan application read as follows: “[t]he Applicant owns the property. The applicant is an established developer.” Exhibit A, at 14. That response does not even represent to the City of Powell that financing is available, let alone document it; the strict jurisdictional requirement under Powell zoning code § 1143.11(c)(9) has not been satisfied here.

And, even if being an “established developer” were sufficient to satisfy the financing requirement (it certainly is not), The Center for Powell Crossing LLC is not an established developer because it was just organized in October 2012 according to the Ohio Secretary of State’s website. Exhibit X. The failure to provide proof of financing deprives the Powell

Planning and Zoning Commission of jurisdiction to consider the application, and derivatively, deprives Council of jurisdiction, such that the Developers' plan is void *ab initio*.

Second, The Center at Powell Crossing LLC failed to provide evidence “of the applicant’s ability to post a bond if the plan is approved assuring completion of public service facilities to be constructed within the project area by the developer,” as Powell Zoning Code § 1143.11(c)(10) requires. Exhibit A, at 14. Powell Director of Development David Betz even testified at the August 26, 2014 Board of Elections hearing that the Developer did not post bond, as follows:

For me to require them even to post the bond for a development plan that may not have any public infrastructure improvements, **I don’t even know that a bank would approve anything like that.**

Exhibit Y, Tr. at 141 (emphasis added). Furthermore, the Developers’ application does not provide any evidence that it actually posted bond, instead reading: “The Applicant shall provide evidence that it has it has [sic] the ability to post a bond for the City of Powell Council prior to Final Development Plan approval.” But again, Mr. Betz confirmed that the Developer did not satisfy Powell zoning code § 1143.11(c)(10), the defect is jurisdictional, and the Zoning Administrator and Planning and Zoning Commission never had jurisdiction to consider the application. The application is void *ab initio*.

Third, The Center at Powell Crossing, LLC has not shown that its Final Development Plan satisfied the requirement under Powell zoning code § 1143.11(i) that “[e]ach application shall be signed by the owner, attesting to the truth and exactness of all information supplied on the application for the final development plan.” In fact, the certified copies of Ordinance 2014-10 that Clerk Ross certified to the petitioners as a “true and exact copy of the original Powell City Ordinance 2014-10” contain the Final Development Plan as Exhibit A thereto, but is

missing a signature on behalf of the property owner, The Center at Powell Crossing LLC. See, Exhibit A. The Developers later produced a document signed by one Valerie Swiatek, but the document does not attest the “truth and exactness” of the Final Development Plan.

Fourth, The Center at Powell Crossing, LLC’s Preliminary Development Plan application likewise failed to verify the truth of the application. Exhibit A, at 14. Powell zoning code § 1143.11(c)(11) expressly requires “[v]erification by the owner of the property that all the information in the application is true and correct to the best of his knowledge.” Nonetheless, no natural person ever signed or verified the Preliminary Development Plan application on behalf of The Center at Powell Crossing, LLC. Instead, the application provides as follows:

The applicant has reviewed the included information in the Preliminary Development Plan submittal and believes it to be true and correct to the best of the applicant’s knowledge.

Exhibit A, at 14.

Still today, the truthfulness of the Final Development Plan and the Preliminary Development Plan has not been properly signed and verified. And these defects matter, particularly because The Center at Powell Crossing LLC made a false statement to Respondent Board of Elections through its “Notice of Protest” filed on July 28, 2014. Exhibit H, at 8. The Notice of Protest wrongly argued that the petitions are invalid because roughly two-thirds of petition signers did not list their ward. Exhibit H, at 8. But there are no wards in Powell and, to support the unfounded “ward argument,” the Notice of Protest falsely stated that “more than one third of the electors provided their correct ward and precinct [when signing the petitions].” Exhibit G, at 8. Against this background, the failure to sign and verify the Preliminary Development Plan and the Final Development Plan matters, is jurisdictional, and means that the Developers’ application is void *ab initio*.

Fifth, as yet another defect, Exhibits A and B are missing altogether from the Preliminary Development Plan, which are also necessary to fulfill requirements under Powell Zoning Code. Pursuant to § 1143.11(c)(4), the Preliminary Development Plan must contain a legal description of the property. But Exhibit B thereto, while purporting to provide such a legal description, is not actually attached to the Preliminary Development Plan. Thus, there is a fifth independent failure to satisfy the stringent jurisdictional requirements to submit an application for a Planned District Development Plan under the Powell zoning code.

In light of the Developers' failure to meet these clear and unambiguous jurisdictional requirements of the Powell zoning code, the Powell Zoning Administrator and the Powell Zoning and Planning Commission never had jurisdiction to consider the Developers' Planned District Development Application in the first place. Powell City Council derivatively lacked jurisdiction to act administratively on the application. Thus, Council has failed to "administer" or "execute" any legislative enactment. *Donnelly v. Fairview Park*, 13 Ohio St.2d 1 (1968). Even the text of Ordinance 2014-10 provides that "[t]his legislation has been posted in accordance with the City Charter[.]" Exhibit A, at 4. Due to the failure to follow the Powell zoning code and invoke Council's administrative jurisdiction, Ordinance 2014-10 is necessarily a legislative enactment subject to popular initiative and referendum.

D. Even if the referendum petition is found to be administrative, the proposed ordinance to repeal Ordinance 2014-10 constitutes legislation because the initiative petition process itself is legislative under Ohio Const. Art. II § 1f.

The initiative petition for an ordinance to repeal Ordinance 2014-10 unquestionably exercises the *legislative* authority vested in the people of Powell pursuant to Ohio Const. Art. II, § 1f ("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*”), Appx. 21. As legislation, the proposed ordinance to repeal trumps Ordinance 2014-10 even if Ordinance 2014-10 is somehow determined to be an administrative act. If there is any doubt as to the meaning of this provision, the ambiguity should be resolved in favor of the people. *S. Euclid City Council*, 130 Ohio St.3d 6, ¶ 28; *see also Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, ¶ 16 (strictly construing tax reduction statutes in derogation of the equal rights of all other taxpayers, *i.e.* the people).

* * *

For the reasons set forth under this Proposition of Law No. 1, Relators have demonstrated that they have submitted sufficient and valid referendum and initiative petitions containing a sufficient number of valid signatures. Relators therefore have a clear legal right to have the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 submitted to Powell electors. This Court must issue a writ compelling Respondent Board of Elections to perform its clear legal duties to submit the referendum to Powell electors under Powell City Charter § 6.04 and the proposed ordinance to Powell electors under Powell City Charter § 6.02. Due to the proximity of the November 4, 2014 general election, moreover, Relators have no adequate remedy in the ordinary course of law. Relators have stated a claim upon which relief may be granted.

Relators' Proposition of Law No. 2:

Referendum and initiative petitions may not be challenged with claims alleging the unconstitutionality or illegality of the content of the referendum measure and proposed ordinance prior to voter approval because such challenges are premature.

State ex rel. DeBrosse v. Cool, 87 Ohio St. 1, 6 (1999) (“Any claims alleging the unconstitutionality or illegality of the substance of the proposed ordinance, or actions to be taken pursuant to the ordinance when enacted, are premature before its approval by the electorate.”), followed.

If this Court erroneously determines that Relators have not factually demonstrated entitlement to a writ pursuant to Proposition of Law No. 1, still this Court must grant a writ as a matter of law. For the reasons that follow, issues addressing the character of laws as administrative actions or legislation are premature prior to enactment, and furthermore, administrative laws *are* properly subject to referendum and repeal by ordinance. Still, this Court need not address this Proposition of Law No. 2 if it is determined that Relators are entitled to a writ under Proposition of Law No. 1.

A. Objections to the referendum on Ordinance 2014-10 and the initiative to repeal Ordinance 2014-10 on the basis that Ordinance 2014-10 is an administrative act are premature at this juncture.

Respondent Board of Elections’ objections to the content of the petitions, including its objection that Ordinance 2014-10 is an administrative action, are premature and not ripe for review at this juncture. Respondent Board of Elections is effectively arguing, wrongly, that the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10, are unconstitutional. To Respondent Board of Elections, the municipal power of initiative and referendum is severely curtailed under Ohio Const. Art. II § 1f (even though that provision is an affirmative grant of power) because Section 1f refers to “legislation” rather than administrative acts -- and even though legislation trumps administrative laws. Yet Ohio Const. Art. XVIII § 7

guarantees all municipalities the right to “exercise . . . all powers of local self-government.” Appx. 2. If municipalities have all powers of local self-government, those same powers should extend to the ultimate source of authority, *i.e.* the people.

As a fundamental matter, there is no actual case or controversy for a tribunal, judicial or otherwise, to address unless and until the proposed measures are approved by voters and enacted into law. *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921) (“Of course if the electors adopt legislation which violates the Constitution it will be invalid, and all parties injuriously affected thereby will be protected by the courts.”). As this Court has explained the related ripeness doctrine, “the time for judicial relief is simply not yet arrived.” *State ex rel. Elyria Foundry Co. v. Indus. Comm. of Ohio*, 82 Ohio St. 3d 88, 89 (1998).

In the context of contested initiative petitions, controlling Ohio Supreme Court precedent has upheld this bedrock principle time and again. In *State ex rel. DeBrosse v. Cool*, the Court refused to prematurely consider whether a proposed ordinance violated substantive provisions of the Piqua City Charter regarding appropriations. 87 Ohio St. 1, 6 (1999), citing with approval *Hillenbrand*, 103 Ohio St. 286, syllabus. In *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, the Court refused to prematurely consider whether, if enacted, a proposed ordinance would violate substantive zoning ordinances. 72 Ohio St.3d 289, 293 (1995). Likewise in *Hillenbrand*, the Court refused to opine on the legality of the proposed measure under the contracts clauses of the Ohio and federal constitutions. In *Pfeifer v. Graves*, the Court found moot a question as to the illegality of a proposed state law prohibiting the shipment of liquor. 88 Ohio St. 473 (1913).

In the leading case of *Hillenbrand*, the Ohio Supreme Court pointed out the obvious inconsistency with addressing the substantive legality of popularly proposed measures but not proposed ordinances of city council, as follows:

[I]f such an ordinance were introduced and pending in the city council, 'the court would not pronounce a judgment or decree' on the question whether it would be constitutional if passed, and the same rule applies under the same authority when the legislation is pending before the electors.

In other words, it would be anomalous to review the content of laws requiring voter approval prior to enactment, but not ordinary legislation requiring approval only by a legislative body.

Indeed, the only issues that may be raised prior to approval by the electorate are those that could not be addressed after Powell electors vote on the proposed measures. Consistent with this well-settled principle, the only post-election issues that the Powell City Charter prohibits are those issues pertaining to the form of the petitions. See, the Powell City Charter, at § 6.05, Appx. 8, specifically providing as follows:

No ordinance or other measure submitted to the electors of the City and receiving an affirmative majority of votes cast thereon, **shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the ordinance or measure was procured**, nor shall rejection, by a majority of the votes cast thereon, of any ordinance or other measure submitted to the electors of such City be held invalid for such insufficiency (Emphasis added).

Thus, in a manner akin to the final judgment rule, issues with the form of the petitions must be addressed at present because they may not be addressed later.

Respondents' assertions that Ordinance 2014-10 is an administrative action rather than legislation, on the other hand, are based upon hypothetical facts that have not yet occurred. If and when voters approve the measures proposed through the petitions, then there may be a

justiciable controversy and, at that time, the proper party may bring a legal action to challenge its legality. At present, however, substantive issues are not ripe and a judicial determination of such issues amounts to an improper advisory opinion.

Furthermore, there is no standard to apply when reviewing the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 for constitutionality because the measures are not yet law. Normally, laws are presumptively constitutional and must be proved unconstitutional beyond a reasonable doubt. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11 (“Laws are entitled to a strong presumption of constitutionality, and the party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.”) (internal citations and quotations omitted). But here, it is not clear what standard to apply to Respondent Board of Elections’ claim that the proposed measures are administrative because the proposed measures are not yet law. The proposed measures have not been given the opportunity to go through the popular legislative process that provides indicia of reliability and leads to the presumption of constitutionality.

Still further, opining on substantive legal issues with the proposed measures raises other public policy concerns as well. If referendum questions and proposed ordinances could be prematurely quashed on their substantive lawfulness, biased interests in opposition could simply hold up the petition process with complex substantive claims that take a long time to resolve. *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 57 (1994) (“To hold otherwise would allow council members opposed to a charter amendment initiative to circumvent their constitutional duty to submit the issue “forthwith”); *State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 53 (1991).

As another concern, members of boards of elections, as opposed to judges, do not necessarily have the years of legal training and experience necessary to understand and decide complex and fact-intensive legal issues. Even if boards of elections members are well-trained lawyers, still they do not necessarily have any expertise in zoning laws and the determination as to whether an act is administrative or legislative.

At the August 26, 2014 Board of Elections meeting, for instance, Board member Ed Helvey, who happens to be an experienced attorney, specifically admitted “I’m new to this zoning stuff, I’ll make no bones about that.” Exhibit Y, Tr. at 43. Just prior to voting against the submission of the proposed measures to electors because they allegedly constitute administrative actions, Mr. Helvey further stated:

I got to tell you, this is the first time I’ve ever contemplated that we would get so deep into the weeds to determine what the legislative intent and operations of municipalities are. **I don’t feel overly qualified** than any other lay person looking and hearing these issues for the first time. We’ve not dealt with this before. I don’t feel comfortable one way or the other. (emphasis added).

Exhibit Y, Tr. at 173-74. In casting his vote against Relators’ petitions, fellow Board member Shawn Stevens echoed Mr. Helvey’s comments, noting that “my notes lined up exactly with Mr. Helvey’s.” Exhibit Y, Tr. at 177. Inexperience with complex legal issues and particularly zoning issues among Board members only serves to underscore that issues with the content of the petitions, including the administrative and legislation issue, are improperly raised prior to actual approval by the people on Election Day.

For these several reasons, the determination as to whether a law constitutes and administrative action or legislation is premature unless and until voters actually approve the measure.

B. Even if this Court reads *Buckeye Community Hope* and its progeny as controlling the present case, still the Ohio Supreme Court should overturn *Buckeye Hope* pursuant to *Westfield Insurance Co. v. Galatis*, 100 Ohio St.3d 216 (2003).

There is not a single case withholding a proposed measure from the ballot because it is administrative despite factual disputes that are relevant to determining whether the law constitutes an administrative act or legislation. Because there is a factual dispute in this case regarding the Developers' failure to comply with the Powell zoning code and invoke the jurisdiction of municipal agencies, *Buckeye Hope* and its progeny are inapplicable to this case and do not provide authority to withhold Relators' petitions from the ballot.

Nonetheless, if this Court finds that there is binding precedent that Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 are administrative acts, then *Buckeye Community Hope*, 82 Ohio St.3d 559 (1998), should be overruled pursuant to *Westfield Insurance Co. v. Galatis*.

In *Buckeye Community Hope v. City of Cuyahoga Falls*, this Court, by a 4-3 decision, originally held that "the people of a municipality may, by charter, reserve to themselves the power to approve or reject, by popular vote, any actions of city council regardless of whether such actions are administrative or legislative in nature." 81 Ohio St.3d 559, 569 (1998). On a motion for reconsideration that raised no new arguments, this Court then reversed the first *Buckeye Hope* case. By another 4-3 decision, this Court then held that administrative laws are not subject to popular referendum. 82 Ohio St.3d 559 (1998). But as the case at bar demonstrates, the *Buckeye Hope* rule (82 Ohio St.3d 559) must be corrected as wrongly decided and unworkable.

In *Westfield Insurance Co. v. Galatis*, the Ohio Supreme Court set forth three requirements for the Ohio Supreme Court to overrule a prior decision. 100 Ohio St.3d 216

(2003). The following criteria must be affirmatively demonstrated: “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” Each of the three requirements is satisfied here with respect to *Buckeye Hope*, 82 Ohio St.3d 539.

First, the decision is wrongly decided. As the Ohio Supreme Court originally held prior to reversing itself on a motion to reconsider:

In analyzing the scope of authority conferred upon municipalities by Section 7, Article XVIII [municipal home rule], appellees correctly point out that “the people of a chartered city can create any form of government they want. There is no requirement that a charter city have a planning commission or even a city council. The people need not hire any planning experts. **The people of a city can choose to require that all legislation and site plans be approved by a majority of the voters in a town meeting.** * * * In other words, they may reserve to themselves the power to have a direct democracy on all legislative and administrative functions of the city. The power of local self-government means nothing less. * * *”

Buckeye Community Hope Foundation v. City of Cuyahoga Falls, 81 Ohio St.3d 559, 566 (1998) (emphasis added).

In other words, under municipal home rule, the people are the ultimate source of authority and there is no sense in limiting their power of referendum when, as the source of authority, they can adopt any form of government they desire. The municipal home rule of the Ohio Constitution, Ohio Const. Art. XVIII §§ 3, 7, grants the people of a municipality the ability “to exercise all powers of local self-government” and Ohio Const. Art. II § 1f does not limit that power. Appx. 1, 2, 21. Thus, the *Buckeye Hope* line of cases is wrongly decided.

Second, the alleged rule that boards of elections may determine whether a law is administrative or legislative is clearly unworkable for the reasons discussed above in Part A.

Among them, there is no standard of review for a proposed law such as the proposed ordinance to repeal Ordinance 2014-10, as opposed to actual laws. There is no ripe case or controversy, just hypothetical facts. As confirmed by the comments of Board member Ed Helvey, moreover, boards of elections are *not* a boards of planning experts that are well-situated to determine the finer points of the Powell zoning code as applied to a complex project, particularly on short notice. Still further, given the expedited nature of elections cases, there is little time for factfinding, the discovery process, issuing subpoenas, and other pre-trial litigation and hearing preparation. The petitioners had only a week following the August 19, 2014 Council meeting to prepare a written argument and present a hearing before Respondent Board of Elections on August 26, 2014.

Thus, there is great difficulty determining at this early stage whether a law is administrative or legislative. Like measures proposed by a legislative body such as Council, challenges to the legality of a proposed law must wait until the proposed measure is ultimately enacted. To do so now defies practical workability.

Third, abandoning *Buckeye Hope* does not create undue hardship in this case or otherwise. Here, the Developers have not even begun to build and do not plan to do so, if at all, until 2015. Exhibit W. The property sits vacant still today. Moreover, there is no existing nonconforming use of the property. The Developers have done nothing to show that there is an existing nonconforming use. For example, they could have followed the procedure Powell Zoning Code § 1125.05 to obtain a certificate for nonconforming use. As the Ohio Supreme Court has explained:

Where no substantial nonconforming use is made of property, **even though such use is contemplated** and money is expended in preliminary work to that end, a **property owner acquires no**

vested right to such use and is deprived of none by the operation of a valid zoning ordinance denying the right to proceed with his intended use of the property.

Smith v. Juillerat, 151 Ohio St. 424 (1954) (emphasis added). There must be some actual nonconforming *use* of property for there to be a vested right in that use.

As discussed above, moreover, the failure to follow the zoning code requirements to secure financing, post bond, and sign the development application seriously calls into question whether The Center at Powell Crossing, LLC's claims to reasonable reliance interest in developing the property. Thus, the Developers, like others, do not have rational reliance interest in the rule of *Buckeye Hope*, particularly given its controversial nature and questionable reasoning.

Against this background, even if there is controlling Ohio Supreme Court precedent as applied to this case, and Relators submit that there is not, still *Buckeye Hope* must be overruled under *Westfield Insurance Co. v. Galatis*.

* * *

For these reasons, including the presence of factual disputes, substantive questions surrounding the content of the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 are prematurely raised prior to approval by the electorate. No tribunal, including this Court, should address the substantive merits of Respondents' claim that the referendum question and the proposed ordinance to repeal Ordinance 2014-10 are administrative actions rather than legislation. And, if this Court determines that it is appropriate to address the administrative issue at this juncture, the proposed measures should not be withheld from the ballot because *Buckeye Hope*, 82 Ohio St.3d 559, should be overruled.

Relators' Proposition of Law No. 3:

Respondent Board did not have jurisdiction to hold its August 26, 2014 hearing or withhold the referendum measure and proposed ordinance from the ballot because, as an arm of the State government, it may not interfere with municipal home rule and elections under the Powell City Charter.

State ex rel. Semik v. Board of Elections of Cuyahoga County, 67 Ohio St.3d 334, 336 (1993), followed.

Under the Powell Charter, Respondent Board of Elections has a clear legal duty to “submit” measures proposed by initiative and referendum petition to Powell electors, upon determination by Powell City Council that the petitions are sufficient and valid, as occurred here. Exhibit Q, Tr. at 70, 76 (transcript of Council proceedings where Council determined that the petitions are sufficient and valid). There is no reason, and no legal requirement under the Powell Charter, for the determination of sufficiency and validity to be performed twice by separate entities, *i.e.* Council and Respondent Board of Elections. Respondent Board of Elections is therefore without jurisdiction or authority to hold a hearing and withhold the proposed measures from the ballot because the Powell City Charter does not so provide. This Court must grant a writ compelling Respondent Board of Elections to submit the referendum question and proposed ordinance to repeal Ordinance 2014-10 to Powell electors at the November 4, 2014 election.

More specifically, the Powell City Charter §§ 6.02, 6.04 directs Respondent Board of Elections to perform a ministerial duty to place the referendum for Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 on the November 4, 2014 ballot. For the proposed ordinance, Powell City Charter § 6.02 provides as follows:

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

Likewise, Powell City Charter § 6.04 provides for this Board to submit that measure as follows:

The Board of Elections shall submit the ordinance to the electors of the City, for their approval or rejection, at the next general election occurring subsequent to seventy-five (75) days after receipt of such ordinance from the Clerk of Council.

This language does not provide Respondent Board of Elections with discretion to choose not to submit the referendum and proposed ordinance to the electors of Powell. Where the Powell City Charter provides a duty to determine the sufficiency and validity of petitions, it is clear, as in Section 6.05. Powell City Charter § 6.05 provides as follows: “Council by resolution shall determine the sufficiency and validity of the petition.” There is no such directive under the Powell Charter for Respondent Board of Elections to also determine sufficiency and validity and, consequently, Respondent Board must refrain from doing so.

Respondent Board of Elections has no authority to determine sufficiency and validity in this case and, accordingly, must submit the measure to Powell electors notwithstanding the Developers’ objections. R.C. 3501.11(k), which provides for boards of elections to determine sufficiency and validity of petitions in some cases, is a state law that is inapplicable to this case because the Powell City Charter controls and makes no mention of the statute. And again, the result is fair because Council already determined that the petitions are sufficient and valid; there is no need for the Respondent Board to perform that function again.

By its silence, Respondent Board of Elections has already recognized that it is bound by the Powell City Charter in abiding by the 75-day requirement for submitting to measures proposed by initiative and referendum to Powell electors. That is, Respondent Board agrees that it must follow the Powell City Charter to submit proposed measures filed more than 75 days prior to the November 4, 2014 election, not the 90-day rule under the Ohio Revised Code. There

is an inconsistency when going beyond the directive of the Powell City Charter to determine sufficiency and validity while simultaneously abiding by the Powell City Charter's 75-day rule. At the August 26, 2014 hearing, counsel for the Developer even recognized the authority of the Powell Charter over the present matter. Exhibit Y, Tr. at 80-82 (statement of Joseph Miller to Respondent Board of Elections that "you're controlled by the city's charter").

Indeed, the Ohio Supreme Court has held that county boards of elections do not have a discretionary role to determine the sufficiency and validity of a charter municipal measure proposed by initiative petition where the city charter does not so provide. In *State ex rel. Semik v. Board of Elections of Cuyahoga County*, the Ohio Supreme Court held that county boards of elections may not interfere with municipal elections as follows:

The board of elections is not in any sense a municipal functionary. It is strictly a board and an arm of the state government. It would be anomalous indeed that an agency of the state government could impose upon a municipality a special election in a matter in which the municipality alone was affected.

67 Ohio St.3d 334, 336 (1993). There, the Court refused to interfere with the Cuyahoga County Board of Elections' "ministerial duty" to place a charter amendment question submitted by a municipal legislative authority on the ballot. *Id.* at 337. Likewise, here, Respondent Board of Elections must not interfere with the Powell Charter and Council's decision to submit the referendum on Ordinance 2014-10 and the initiative to repeal Ordinance 2014-10 to Powell electors.

Relators' Proposition of Law No. 4:

Claims are not barred by the equitable doctrine of laches where a mandamus action is brought within seven days, specifically four business days, of a board of elections abdicating its clear legal duty to submit a measure to the electorate, particularly where relators continuously notified the board of elections of its clear legal duties.

Respondents have raised the unfounded claim that Relators' action in mandamus is barred by the equitable doctrine of laches. But Relators were extremely diligent in notifying both the Delaware County Board of Elections and Powell City Council of their legal duties in bringing this claim to enforce their clear legal right to have the referendum and initiative petitions at issue submitted to Powell electors. *See State ex rel. Commt. For the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St.3d 100, 103 (2002).

As an initial matter, Relators were extremely diligent in expeditiously notifying Council of its duties and responsibilities while the three petitions were before Council. Unfortunately, it nonetheless took Council over a month to determine that the referendum and initiative petitions were clearly sufficient and valid from the date the petitions were filed on July 17, 2014 to the August 19, 2014 Council meeting where the petitions were deemed sufficient and valid. Council held two meetings after they had the authority to submit the petitions to electors, *i.e.* upon receipt of the Board of Elections' signature attestation statement on or about August 1, 2014.

When the petitions were eventually forwarded to the Board of Elections following the August 19, 2014 meeting, Relators diligently filed their memorandum in response to the Developers' objections on August 25, 2014 and appeared at the Board of Elections hearing the following day. Exhibit V. Then on September 2, 2014, Relators filed an action in this Court to compel Respondent Board of Elections to submit the proposed measures at issue here to Powell electors.

To be sure, Relators diligent efforts before Council, as recounted below, are relevant to the delay that Respondents presently assert because, if any delay exists, Relators have *not* caused it. The petitions were filed with Clerk Ross on July 17, 2014, within thirty days after Council passed Ordinance 2014-10. Clerk Ross later filed the petition with Respondent Board of Elections. The very next business day following Council's receipt of the signature attestation statement from the Board of Elections, on August 4, 2014, Relator Sharon Valvona immediately sent a letter to Law Director Hollins explaining Council's legal duties. Exhibit K. The letter expressly informed Law Director Hollins that Council may consider only the form of the petitions when reviewing for sufficiency and validity. Exhibit K. Later on August 4, 2014, the undersigned counsel sent Law Director Hollins a short email explaining that Council may review only the form, not substance, of the petitions. Exhibit L.

Then on the morning of August 5, 2014, Relators submitted a Position Statement to Council that thoroughly explained Respondent Council's duties to determine the sufficiency and validity of the three petitions at the August 5, 2014 meeting and Council's limited authority to review the sufficiency and validity of all three petitions for form, *not content*. Exhibit M (Petitioners' Position Statement). Relators prepared for the Council meeting on the evening of August 5, 2014 and diligently presented evidence to Council regarding the sufficiency and validity of the referendum and initiative petition at issue. Nonetheless, Council failed to decide the sufficiency and validity of the three petitions at their August 5, 2014 meeting.

Then on August 11, 2014, and again on August 15, 2014, Relators notified Law Director Hollins that Council violated its clear legal duty to submit proposed measures to Powell electors. Complaint, ¶¶ 49-51; Exhibit O. Relators further requested that Law Director Hollins bring a suit in mandamus pursuant to R.C. 733.58 to compel Council to perform its duties. Law Director

Hollins declined to do so, but because Council promised to take up the issue at the August 19, 2014 meeting, with the potential for submitting the proposed measures at that time, Relators waited until the August 19, 2014 meeting in an effort avoid unnecessary litigation. Exhibit O.

At the August 19, 2014 meeting, the undersigned Council for Relators again notified Council of its duty to act and of its limited discretion to review the form, not content, of the petitions. Complaint, ¶ 54; Exhibit Q, Tr. at 7-8. Of course at the August 19, 2014 meeting, Council submitted the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 to electors, but illegally withheld the proposed charter amendment for a new Powell comprehensive plan over substantive concerns with the content of the proposed charter amendment. On August 20, 2014, Relators sent Law Director Hollins a letter notifying him that Council violated its clear legal duty with respect to charter amendment petitions and requested that he bring a suit in mandamus to compel Council to place the charter amendment question on the ballot. Complaint, ¶ 62; Exhibit R. When Law Director Hollins failed to do so, Relators brought a mandamus action in this Court on August 22, 2014 to vindicate their rights to have the charter amendment question presented to Powell electors.

On August 21, 2014, the Developer filed objections to the petitions at the Board of Elections. In response, on August 25, 2014, Relators filed a memorandum in response to the Developers' objections to the referendum and initiative petitions that are the subject of the present action. Exhibit V. Then on August 26, 2014, counsel for Relators appeared at the hearing before Respondent Board of Elections to explain that the referendum and initiative petitions at issue in this action must be submitted to the Powell electorate. When, at the August 26, 2014 hearing, Respondent Board of Elections illegally, unlawfully, in an abuse of discretion, and in plain disregard of the law failed to submit the proposed measures to electors, Relators

brought the present action just seven days later (four business days later) to compel Respondent Board of Election to perform its clear legal duty.

Without question, Relators have been extremely diligent in their efforts to protect their rights and the rights of Powell electors to vote on referendum question and proposed ordinance to repeal Ordinance 2014-10. Certainly the Relators have not prejudiced any other party. There is no basis for finding that the relief Relators seek is barred by laches.

Relators' Proposition of Law No. 5:

Estoppel does not excuse Council's failure to submit a referendum question and ordinance proposed by initiative petition to electors because estoppel goes to the content of the proposed measure and may only be addressed if and when voters approve the proposed measure. Furthermore, there has been no showing of prejudice or estoppel in this case.

Next, Respondents raise the unfounded defense that Relators' action is barred due to estoppel. Presumably, this defense refers to the Developers' allegedly vested rights to rely on Ordinance 2014-10. But, the estoppel defense is a premature substantive issue that must be addressed, if at all, after voters ultimately approve the proposed measures. *State ex rel. DeBrosse v. Cool*, 87 Ohio St. 1, 6 (1999). The estoppel defense turns upon a fact-intensive inquiry into the use of the property and other matters that is not properly raised at present.

And, like the Developers' other objections, the argument fails even if this Court prematurely addresses it. The Developer has failed to present any evidence establishing an "existing nonconforming use" of the property or other reasonable reliance on Ordinance 2014-10. *See* Powell City Ordinance Chapter 1125 et seq. (providing procedures to establish an existing nonconforming use); R.C. 713.15. Still today, the land sits undeveloped and without any use, let alone a non-conforming use. Exhibit W (Columbus BusinessFirst article). At a

minimum, if the project is ever built, the land will continue to sit vacant until the Developer begins construction at some undetermined time *next year* in 2015. Exhibit W.

The Developer may claim, wrongly, that its application with the City to develop the property developed a reliance interest in the property. Even if that were the case (it is not), still the Developer has no reasonable reliance on Ordinance 2014-10 because it failed to fulfill all the jurisdictional requirements to submit a Planned District Development Plan under the Powell zoning code, as explained in Part C to Proposition of Law No. 1 above.

The most notable failures to comply with the Powell zoning code was revealed through the testimony of Powell Development Director David Betz before the Delaware County Board of Elections on August 26, 2014. As Director Betz testified, the Developers never provided evidence of financing to the City for the development project identified in Ordinance 2014-10, even though the City zoning code § 1143.11(c)(9) requires it. Exhibit Y, Tr. at 132, 140-41. Nor did The Center at Powell Crossing LLC “provide [adequate] evidence that it has it has [sic] the ability to post a bond for the City of Powell Council prior to Final Development Plan approval,” as the Powell zoning code requires. Exhibit Y, Tr. at 141; § 1143.11(c)(10). Still further, The Center at Powell Crossing LLC never verified the truth of its Preliminary Development Plan under § 1143.11(c)(11) or its Final Development plan under § 1143.11(i) (“Each application shall be signed by the owner, attesting to the truth and exactness of all information supplied on the application for the final development plan.”). Exhibit A, at 14.

In summary, the Developers’ estoppel argument is premature and meritless because it has no vested interest in the existing use of the property and has not even filed a proper Planned District Development Plan with the City of Powell.

CONCLUSION

Against this background, Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack 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). The two petitions that are the subject of this original action in mandamus, a referendum on Ordinance 2014-10 and an initiative petition for an ordinance to repeal Ordinance 2014-10, address Powell citizens' immediate interest in preventing development that will fundamentally alter the landscape of Downtown Powell with high-density apartment units. The charter amendment at issue in *State ex rel. Ebersole et al. v. City Council of Powell et al.*, Case No. 2014-1469 addresses the long-term interests of Powell citizens through a proposal for Powell City Council to adopt a new comprehensive plan for land use and development in the City of Powell.

As Council determined at its August 19, 2014 meeting, the referendum petition for Ordinance 2014-10 and the initiative petition for a proposed ordinance to repeal Ordinance 2014-10 contain a sufficient number of valid signatures to place the measures on the November 4, 2014 ballot and are sufficient and valid in all respects. Pursuant to Powell City Charter §§ 6.02, 6.04, then, Respondent Board of Elections has a duty to submit the measures proposed by the two petitions to Powell electors. Unfortunately, Respondent Board of Elections has unlawfully, illegally, in plain disregard of the law, and in an abuse of discretion, refused to perform its clear legal duty to submit the referendum for Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 to the electors of Powell. Furthermore, due to the proximity of the November 4, 2014 election, Relators lack an adequate remedy in the ordinary course of law.

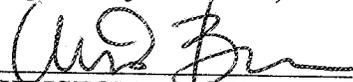
See, e.g., State ex rel. Greene v. Montgomery Cty. Bd. of Elections, 121 Ohio St.3d 631, 2009-Ohio-1716, ¶ 10.

Accordingly, Relators respectfully request that this Court issue a writ of mandamus, peremptory writ of mandamus, or alternative writ compelling Respondent Board of Elections to submit the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 to Powell electors at the November 4, 2014 general election.

In the alternative to compelling Respondent Board of election to submit the proposed measures to Powell electors, Relators request that this Court issue a peremptory writ, alternative writ, or a writ of mandamus compelling Respondent Board of Elections to determine that the referendum petition for Ordinance 2014-10 and the initiative petition for an ordinance to repeal Ordinance 2014-10 are sufficient and valid in all respects, or to show cause for their illegal and unlawful determination that the initiative and referendum petitions at issue here are not sufficient and valid in all respects.

Finally, Relators request that this Court assess the costs of this action against Respondents, including an award to Relators of their reasonable attorneys' fees and expenses under any and all applicable laws.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit 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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