

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. BRIAN EBERSOLE, <i>et al.</i> ,	:	
	:	
Relators,	:	
	:	Case No. 2014-1520
v.	:	
	:	ORIGINAL ACTION IN MANDAMUS
DELAWARE COUNTY	:	
BOARD OF ELECTIONS, <i>et al.</i> ,	:	
	:	EXPEDITED ELECTIONS MATTER
Respondents.	:	

MERIT BRIEF OF RESPONDENT

Christopher B. Burch (*Counsel of Record*)
 Callender Law Group
 20 S. Third Street, Suite 261
 Columbus, OH 43215
 T: (614) 300-5300
 F: (614) 324-3201
 chris@callenderlawgroup.com

Counsel for Relators

Carol O'Brien
 Delaware County Prosecutor
 Christopher D. Betts
 Assistant Prosecuting Attorney
 Andrew J. King (*Counsel of Record*)
 Assistant Prosecuting Attorney
 Delaware County Prosecutor's Office
 140 North Sandusky Street, 3rd Floor
 Delaware, OH 43015
 T: (740) 833-2690
 F: (740) 833-2689
 aking@co.delaware.oh.us

Counsel for Respondent

Bruce L. Ingram (*Counsel of Record*)
 Joseph R. Miller
 Christopher L. Ingram
 Vorys, Sater, Seymour and Pease LLP
 52 E. Gay Street, P.O. Box 1008
 Columbus, OH 43216-1008
 T: (614) 464-6400
 F: (614) 464-6350
 blingram@vorys.com
 jrmler@vorys.com
 clingram@vorys.com

*Counsel for Intervening Respondent,
 The Center at Powell Crossing, LLC*

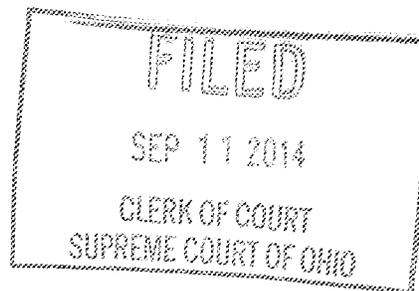


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Statement of Case and Facts

Equity does not favor the Relators.

Although the City of Powell's recent administrative decision to approve Intervener's development plan is the Relators' proximate complaint, the legislation enabling this dates back to 1991. (*See* Ex. 1C1B p.144.) This is when the City amended its zoning code to include planned districts that are still used by the City. (*See id.*)

Thirteen years later, the City prepared a downtown revitalization plan and directed the City's Planning and Zoning Commission to review it. (*See id.*, p. 148) After public hearings, the Commission recommended that the downtown area be zoned either business or residential with a planned development overlay. (*See id.*; Ex. 1C1A.) In 2005, the City re-zoned the parcel at issue (along with the entire downtown) making it subject to the already existing planned development overlay requirements. (Ex. 1C1A.)

Following the framework first established in 1991, the Commission began reviewing development plans for all parcels in the downtown district. (*See* Ex. 1C1B, p.136-150.) All proposed development plans followed the same process. (*See id.*) The parcel owner would file an application, which had to include specific submissions. (*Id.*) After an owner files an application, the Director of Development reviews it for compliance with the City's zoning code and prepares a staff report. (*Id.*) That report is then sent to the Commission, who reviews the entire application. (*Id.*) Once the Commission approves the plan, it is then sent to Powell City Council for final approval. (*Id.*)

The Commission followed this administrative process when reviewing Intervener's application. (Ex. 2A, p.133-139.) No zoning change was requested; and none was made. (*Id.*)

Throughout the process, the scope of the review was limited to whether the plans complied with the requirements of the overlay district. (*Id.*) And on June 17, 2014 the administrative process concluded when Council passed Ordinance 2014-10, thereby determining that the proposed development plan so complied. (Ex. 1A1E.) No administrative appeal was taken from this action. (Ex. 2A, p. 138-139.)

Rather, Relators circulated, and later filed with the City Clerk, three petitions aiming to overturn the Council’s administrative decision. (Ex. 2C.) One was a proposed charter amendment that would remove future approval authority from the Council and vest that power with five homeowner’s associations. (*Id.*; Ex. 2H.) Another was a referendum action that sought to overturn the administrative decision memorialized in Ordinance 2014-10. (Ex. 2C.) And the third was a “referendum by initiative petition” that sought to overturn the same ordinance. (Ex. 2C.)

The Delaware County Board of Elections has been involved in the dispute over the development of this parcel twice. (Ex. 2C; Ex. 2A.) Initially, the Powell City Charter charged the Board with determining the validity of the signatures by checking the signatures on the petitions against the signature cards on file with the Board.¹ (Ex. 2C.) The Charter then contemplated that the petitions would be returned to Council, which would review them for sufficiency and validity. (*Id.*) The Board found the petitions to have a sufficient number of facially valid signatures. (*Id.*) Although the Intervener filed a Protest, the Board determined the scope of its initial charge to be

¹ The Charter does not specify how the Board is to review signatures validity, other than to determine the number of valid electors of the City that signed the petitions. The Board interpreted the Charter to command a very narrow review for validity of the elector being a Powell resident and proceeded accordingly. Its interpretation of that provision has not be challenged.

quite narrow and declined to hear the protest, unless the matter was returned to them after review by Council. (*Id.*)

Council reviewed the matter over the course of two regular meetings. (Ex. 2D, E, and H.) On August 19, Council determined that the charter amendment was improper and refused to return the petition back to the Board. (Ex. H.) Council returned the remaining two petitions. This occurred 76 days prior to the general election, making them timely filed under the Charter. (Ex. 2A.) Before the Board could add them to the ballot, it received a re-filed protest by Intervener, and then a response by the Relators. (Ex. 1A and 1B.) The Board was required, under R.C. 3501.39, to hear the protest; so, it promptly scheduled the hearing. (Ex. 1D.) Arguments and evidence were accepted at the August 26th protest hearing. (Ex. 2A.)

Two issues were predominant. The Intervener claimed the decision was administrative and thus a constitutionally impermissible action from which to seek either a referendum or an initiative. (Ex. 1A.) And the Intervener argued that the petitions suffered from numerous fatal facial defects, such as failing to include the title and text of Ordinance 2014-10 in the body of the petition. (*Id.*)

The Relators argued that the petitions were compliant because the exhibits attached to the petition's contained the required information. (Ex. 1B.) And then, in an argument more appropriate for an administrative appeal, the Relators argued that the approval of the development plan exceeded Commission's and Council's administrative authority. (*Id.*) Despite the availability of an administrative appeal, Relators did not appeal Ordinance 2014-10. (Ex. 2A, p.138-139.) Instead, they argued, legal alchemy transmuted an otherwise administrative action into a legislative one. (Ex. 1B.)

In a unanimous decision, the Board determined that Ordinance 2010-14 was an administrative action and not the proper subject of either a referendum petition or a referendum by initiative petition. (Ex. 2A.) And the Board determined the form of the petitions did not properly comply with the Charter and Revised Code, particularly because they failed to include essential information in the body of the petitions. (*Id.*) In response, Relators have sought a writ of mandamus from this Court.

Argument

Respondent's First Proposition of Law:

A city council's approval of a final development plan is an administrative action and such an action is beyond the scope of the initiative and referendum powers delegated to municipalities under the Ohio Constitution.

Intervener, The Center at Powell Crossing, LLC, submitted a final development plan for approval under section 1143.11 of the City of Powell's zoning code. The City of Powell's Planning and Zoning Commission followed this administrative procedure and approved the plan. No amendments or alterations were made to the Code or the zoning of Intervener's property. Therefore, the approval of the plan under Section 1143.11 was an administrative action and accordingly not subject to a ballot action.

A. None of the Relators' propositions of law demonstrate that they are entitled to a writ of mandamus.

In their merit brief, Relators failed to set forth the standard for obtaining a writ of mandamus. It is as follows: "To be entitled to the requested writ of mandamus, the [relator] must establish a clear legal right to the requested relief, a clear legal duty on the part of the board of elections to provide it, and the lack of an adequate remedy in the ordinary course of the law." *State*

ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections, 2013-Ohio-36, ¶14, 135 Ohio St. 3d 162, 164. And Relators must prove these elements by clear and convincing evidence. *Id.*

The Board maintains that the Relators are not entitled to the writ because, among other reasons, the Relators have (or had) other adequate remedies such as a declaratory judgment action or an administrative appeal; the Board has a clear legal duty not to accept these issues for placement on the ballot, under *Buckeye Community* and its progeny; and Relators do not have a clear legal right to the writ because of the doctrine of laches and their ballot measures are unconstitutional because they exceed the proper scope of initiatives and referendum.

B. Relators are not entitled to equitable relief because they failed to exhaust administrative remedies by not filing an appeal under R.C. §2506.

The administrative decision by the Commission and the Powell City Council is an administrative appeal under R.C. §2506.01 and thus subject judicial review. And an administrative appeal is an adequate remedy that precludes mandamus. *State ex rel. Kronenberger-Fodor Co. v. Parma*, 34 Ohio St. 2d 222 (1973), syllabus.

Because mandamus is foreclosed by Relators' failure to seek an administrative appeal, they present novel arguments as to why this matter was not truly administrative. Relators argue that Ordinance 2014-10 is improper because Council was without subject-matter jurisdiction to hear the application. Relator's Brief, p. 22. At its essence, Relators' argument is that an administrative body usurped legislative authority. *McFee v. Nursing Care Mgt. of Am., Inc.*, 2010-Ohio-2744 ¶24. Alternatively, Relators have argued that because Council can act in both capacities and lacked jurisdiction to act administratively, Ordinance 2014-10 should be deemed legislative. Relator's

Brief, p. 22. Both of these arguments could have and should have been properly raised in an administrative appeal, rather than before a board of elections.

An administrative appeal was not only the best vehicle to resolve these claims, but also it was readily available. At the meeting where Ordinance 2014-10 was adopted, two of the three Relators spoke out against it.² So did several other residents, including Paul Mohler who is an adjacent landowner and unquestionably could have brought an administrative appeal. *Schomaeker v. First Nat. Bank of Ottawa*, 421 N.E.2d 530, 537 (1981).

Additionally, in the context of an expedited elections case, this Court lacks the time and the resources for a fact intensive inquiry into whether Powell failed to adhere to its own zoning code. By the Relator's own argument, this fact intensive determination is necessary to prevail on their claim. Relator's Brief, p. 22-29. It is Relators' own failure to take an administrative appeal that wrongfully converted an administrative claim into an elections matter; equity should not reward them with a writ. Because Relators failed to exhaust their administrative remedies, the case should be dismissed.

C. Council's final approval of Ordinance 2014-10 was an administrative action and therefore is not subject to either a referendum or an initiative.

Even if the Court addresses this matter on the merits, the Board contends that a simple examination of Powell's zoning code demonstrates that this was an administrative action.

For property owners seeking to develop their lands in the planned development district, the City of Powell created an administrative process for approving their plans. Powell City Code Chapter 1143.11. The process begins with a pre-application meeting, followed by the filing of a

² Although not stated in the minutes, Relators' attorney was also present.

combined preliminary and final development plan with the Planning and Zoning Commission. *Id.* Within 40 days, the Planning and Zoning Commission is directed to hold a hearing, after which it can approve the plan or deny it with recommendations. *Id.* After approval, a final development plan is submitted, on which the Commission has another hearing. *Id.* If approved, City Council is directed to hold a public hearing on the approved final development plan. *Id.*

There is no dispute that this procedure was followed when passing Ordinance 2014-10, which approved the development plan of the parcel at issue. Relators' arguments focus on the content of the application itself and not the process. Indeed, Relators' merit brief acknowledges that Chapter 1143.11 of the Powell City Code controls whether the development plan was compliant. Relator's Brief, p. 22. Further, the testimony of David Betz, Powell's Director of Development, supports the Board's conclusion that action under 1143.11 is administrative—not legislative. (Ex.2A, p. 133-139.)

This distinction is important because Article 2, Section 1f of the Ohio Constitution restricts the initiative and referendum powers solely to legislative action. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St. 3d 539, 542 (1998). In *Buckeye Community* this Court held “actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings.” *Id.* at 545.

Five years later this Court re-affirmed *Buckeye Community* and held that administrative approval of a development plan is not legislative and thus not subject to a referendum. *State ex rel. Comm. for the Referendum of Ordinance No. 3844-02 v. Norris, Clerk*, 2003-Ohio-3887, 99 Ohio St. 3d 336. Like *Norris*, the action at issue here is the administrative approval of a development

plan by an administrative body. *See id.* This makes it subject to the *Buckeye Community Hope* rule against repeal by ballot measures. *Id.*, at ¶20. So, applied here, the Board properly kept the measures to repeal Ordinance 2014-10 from the ballot.

In addition to the authority of *Norris*, the Board's decision is also vindicated by the next case in this line, *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St. 3d 481, 2005-Ohio-5061. *Talarico* states that "[t]he 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." *Id.* ¶23 (internal citation omitted).

Council's passage of Ordinance 2014-10 was carried out under Chapter 1143.11 of the Code; it did not enact changes to the zoning code. Because the zoning was in place; this action was administrative. Further, and relevant to overcoming Relators' arguments, *Talarico* also involved an initiative petition. *Talarico*, 2005-Ohio-5061, ¶1. The Court made no distinction between the two measures and found that both measures were improperly aimed at repealing an administrative action. *Id.*, at ¶31.

The application of this precedent to this matter leaves no room to doubt that Ordinance 2014-10 was administrative and not subject to either type of ballot action. *See also State ex rel. Marsalek v. Council of S. Euclid*, 111 Ohio St. 3d 163, 2006-Ohio-4973 (approval of conditional use permit for a planned-unit development was administrative). Accordingly, the Court should uphold the Board's determination that the ballot measures are improper.

D. Council had subject-matter jurisdiction to consider the Intervener's application; therefore, Ordinance 2014-10 is valid.

To avoid the application of *Buckeye Community*, Relators claim that they are entitled to an equitable remedy based on a hyper-technical interpretation of the administrative requirements of Chapter 1143.11 of Powell's code. Relators assert that the question of Ordinance 2014-10 is subject to a referendum turns on the absence of certain formalities in the application to the Planning and Zoning Commission. Relator's Brief, p. 22-29. They contend their absence completely deprived Council of subject matter jurisdiction. *Id.*

This claim of lack of jurisdiction is unavailing. It should be noted that if Relators believe Ordinance 2014-10 is void for lack of jurisdiction, then they should have pursued either an administrative appeal or filed a declaratory judgment action. The availability of either remedy prevents granting their writ. This is because repealing a void ordinance is a nullity. Yet, Relators seek to co-opt this Court (and previously the Board) in pursuing this vein act. If the court accepted this argument, then issuing a writ would be futile.

Perhaps aware of the consequence of their jurisdictional argument (they lose), Relators argue that because Council performed an otherwise regulatory action without jurisdiction, the resulting action is necessarily legislative. This is a novel claim. But it too is vacuous. Council took up the matter because the Planning and Zoning Commission forwarded it to them under Chapter 1143.11 of the Code. Council was sitting and hearing the matter as an administrative body; therefore, if it lacked subject matter jurisdiction, then its action would be void. It would not be transmuted from a void administrative into a legitimate legislative action merely because they voted on it. *See e.g. State ex rel. Marsalek v. Council of S. Euclid*, 111 Ohio St. 3d 163, 2006-Ohio-4973.

An illustration demonstrates the absurdity. If a court adjudicated a case in the absence of subject matter jurisdiction, then the law would properly say the judgment is void. The law would not say that the court was (somehow) assuming the role of the appropriate court with jurisdiction, thus resulting in a properly rendered judgment. The fact that Council can sit both legislatively and administratively may slightly confuse the issue, but it does not change the character of the action taken here.

Simply, this subject matter jurisdiction argument is a red herring. Relators are not entitled to a writ because this Court's precedent is unswerving in requiring the Board of Elections to only approve referenda from legislative acts. *See State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 2008-Ohio-5093, ¶27, 119 Ohio St. 3d 478, 484 (holding the board of elections abused its discretion by allowing ballot issues regarding an administrative action to be placed on the ballot). Ultimately, this argument betrays the Relators because they implicitly acknowledge that absent procedural defect, Ordinance 2014-10 is an administrative act.

The Relators have failed to show by clear and convincing evidence that the Board failed to carry out its clear legal duty. Particularly, they failed to show that the Board erred in determining that Ordinance 2014-10 was administrative. Therefore, the writ should be denied.

E. The petitions were deficient because they failed to include the title and text of the ordinance in the body of the petition, the attestation does not confirm that the exhibits were circulated, and the title of the precinct was incomplete.

Relators' petitions failed to strictly comply with the Revised Code and Powell's charter. This Court has said the following regarding compliance with elections laws: "The settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is." *State ex rel. Comm. for the*

Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections, 2002-Ohio-4194, ¶49, 96 Ohio St. 3d 308, 317. Nothing in the Charter allows for substantial compliance.

First, and most importantly, the petitions circulated among the electors did not contain the title and text in the body of their initiative petition or the title of Ordinance 2014-10 in the referendum petition. Section 6.02 of the Powell City Charter requires that “any [initiative] petition shall contain a full and correct copy of the title and text of the proposed ordinance....” Regarding referendum, Section 6.04 of Charter states “any referendum petition shall contain the number, a full and correct copy of the title and date of passage of the ordinance....” Powell City Charter, Section 6.04.

This Court has held that “Omitting the title and/or text of a proposed ordinance is a fatal defect because it interferes with the petition's ability to fairly and substantially present the issue and might mislead electors.” *State ex rel. Hazel v. Cuyahoga Cnty. Bd. of Elections*, 1997-Ohio-129, 80 Ohio St. 3d 165, 167. Relators argue that attaching the text and title as an exhibit and “incorporating” them into the body of the petition is sufficient. When title and text is included as an exhibit, it does not satisfactorily stop electors from being misled. If the voter has to flip through numerous pages and past the signature blocks, then they may miss critical information and be misled as to the petition’s purpose. This invites opportunities for gamesmanship when drafting petitions.

This was of particular concern to the Board, as the Secretary of State’s model form directs circulators to put this information into the body of the petition. (Ex. 2A.) The Board was unpersuaded by Relators’ argument that repaginating the body was too difficult and creating their own petitions from scratch was much easier. *Id.* The burden of putting the title and text into the

body was slight, but the risk of misleading voters was great. And it should be noted Relators' counsel was involved in the drafting of the petitions. *Id.* So, the decision to materially depart from the model and exclude these requirements from the face of the petition itself is even less excusable.

In addition, the initiative petition is incurably misleading because it is covert referendum, i.e. a referendum by initiative, which is impermissible:

Additionally, there are other doubts about the validity of the petition which preclude the issuance of a writ of mandamus. The petition is characterized as an 'Initiative Petition.' However, it also seeks the repeal of an ordinance, and is, thus, a referendum petition. The petition fails properly and immediately to alert signers as to its full nature. In *State ex rel. Esch v. Lake Cty. Bd. of Elections* (1991), 61 Ohio St.3d 595, 575 N.E.2d 83, the Supreme Court of Ohio affirmed the invalidity of an initiative petition over the failure to title it properly.

State ex rel. Cody v. Stahl, 2003-Ohio-6180. This alone is reason enough to deny a writ regarding the initiative petition.

Second, related to the omission of the text and title from the body, is the failure of the circulators to attest that the exhibits were circulated with the petitions. When the petitions were filed with the Board, the exhibits appeared after the attestation, which certifies only the documents before it. So, the Board was faced with a serious factual issue of whether the signers ever saw the exhibits. Despite this potentially fatal issue, the Relators did not submit any evidence on this issue to the Board.³ Even under Relators' argument, the exhibits were the only way to deem the petitions compliant. Without evidence showing the exhibits were circulated and presented to the electors before signing, the Board had no other choice than to conclude that the petitions were improper.

³ Counsel made an assertion that they were so circulated but presented no evidence. p. 74-75

Third, the petitions failed to fully identify the elector's precinct as required by Section 6.05 of the Charter. There were enough valid signatures only if including the precinct number alone, on the petition, was sufficient. The Board concluded that it was not.

Here, the Relators failed to properly identify the precinct by not first noting it was "Powell" and then providing the number designation. Now, in some situations the number alone may be sufficient, but Powell is a growing city with amoeba-like borders. There are many places where Liberty Township precincts touch Powell precincts. The only way to be certain whether the elector is in the City or Township is to fully write the name of the precinct. The Relators did not do this for a sufficient number of signatures.

Relators argue that they should be excused from their failure to adapt and use the Secretary of State's form; their failure to provide complete precinct information; and their failure to properly attest to the completeness of the petitions. This laxness is incongruent with the extreme exactness that they demand from Intervener regarding the application submitted to Powell. The party seeking equity must do equity. *State ex rel. Comm. for the Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections*, 2002-Ohio-4194, ¶35, 96 Ohio St. 3d 308, 315. Relators cannot have it both ways. The Court should find the initiative petition facially deficient as a covert referendum and find the referendum petition noncompliant with the Charter.

Respondent's Second Proposition of Law:

When a protester claims that the ballot measure is improper because it seeks to repeal an administrative action, the board of elections must look past the face of the ballot measure and examine the act purported to be administrative.

A. The Board did not review prospective legislation; rather, it reviewed Council's action in passing Ordinance 2014-10.

The first half of Relators' Proposition of Law No. 2 argues that proposed legislation (the initiative petition) should not be reviewed for validity. Relator cites to cases prohibiting judicial review of prospective legislation. Relator's Brief, p. 31-35. Relator argues since an initiative is proposed legislation the Board should not be evaluating what is facially prospective legislation. *Id.*, at p. 34. This is basically a re-framing of Relator's next argument that the Court should reverse the *Buckeye Community* line of cases and require that these issues be resolved judicially and after the election. As argued below, the Court should decline this invitation.

In any event, the issue here is not the impact of the ballot measures, rather the question here is the nature of the action Council took when it approved the final development plan—was it administrative or legislative? This Court has directed boards of elections to consider the action taken in the municipality and has not held that language of the ballot measure is determinative. *See e.g. State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 2008-Ohio-5093, ¶27, 119 Ohio St. 3d 478, 484. When focused, as the Board was, on Council's action, this argument falls away. Ordinance 2014-10 is not prospective, Council has already approved it. Thus, Relators' concerns are misplaced.

B. The Court should refuse to overrule *Buckeye Community* and its progeny.

In a tacit acknowledgement of how this Court's precedent supports the Board, Relators ask that those cases be overturned. Not only has this court consistently followed *Buckeye Community*

Hope, but there is nothing unique about this case that warrants reconsideration of past precedent. Indeed, even if Relators prevailed in this matter and succeeded in prospectively changing how planning and zoning is administered, it would be a Pyrrhic victory.

This is because Intervener sought approval for development before any legislative change. As a result, Powell would be estopped from applying these new rules to the developer. *Gibson v. City of Oberlin*, 171 Ohio St. 1, 5 (1960). Plus, there are significant Equal Protection concerns with singling out a single developer for unique treatment. Especially in light of the futility of overruling this precedent, the Court should reject this invitation.

The Court should reject this proposition of law and continue to follow its prior precedent that was first established in *Buckeye Community Hope*.

Respondent's Third Proposition of Law:

When a city charter is silent on election protests and incorporates Ohio's elections laws, a board of elections is required to follow R.C. §3501.39 and hold a hearing before accepting a ballot measure to the ballot.

Once these ballot measures were returned to the Board of Elections, the Board would have placed them on the ballot in accordance with Sections 6.02 and 6.04 of the Charter except that a protest was filed by Intervener. The Charter itself is silent on how protests should be heard. But under Sections 6.05 and 7.03, the Charter requires deferral to and/or incorporates applicable Ohio elections law. Therefore, the Board was required by both the Revised Code and the Charter to hear a protest under R.C. 3501.39. And the Relators' concerns about violation of home rule are baseless—the Charter itself mandates a hearing by incorporating the state's elections laws, namely R.C. §3501.39. Powell City Charter, Sections 6.04 and 7.03.

Moreover, the Board did not exceed the scope of its authority. Once a protest was filed, it had a clear duty to determine whether Ordinance 2014-10 was administrative. *See State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 2008-Ohio-5093, ¶27, 119 Ohio St. 3d 478, 484 (holding the board of elections abused its discretion by allowing ballot issues regarding an administrative action to be placed on the ballot). After arguments and the introduction of evidence, the Board concluded that Ordinance 2014-10 was administrative and thus not subject to a referendum. Because the protest was properly filed under R.C. §3501.39, the Board's actions were valid. The Relators' proposition of law is meritless; therefore, the Court should deny the writ.

Respondent's Fourth Proposition of Law:

When a municipality's charter allows for the submission of ballot measures to a board of elections at a date later than otherwise provided by the Revised Code, a relator will be barred by laches for an inexcusable delay of seven days before seeking a writ of mandamus.

The doctrine of laches consists of four elements: "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 1995-Ohio-269, 74 Ohio St. 3d 143, 145. All four elements are present; therefore, the Board is entitled to have the matter dismissed.

A. Relators have not acted with utmost diligence and have no excuse for their delay of seven days; therefore, the doctrine of laches bars their claim.

Unreasonable delay and the absence of an excuse are two of the elements for the doctrine of laches at issue. *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St. 3d 143, 145 (1995).

Considering first the unreasonable delay element, this Court has held nine days is an unreasonable delay when prosecuting an election case. *Paschal v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St. 3d 141, 142 (1995). Yet, this Court has held that a ten-day delay is not unreasonable. *State ex rel. Owens v. Brunner*, 2010-Ohio-1374 ¶¶17-23, 125 Ohio St. 3d 130. Because this case is more like *Paschal*, this Court should hold that a seven-day delay was unreasonable.

First, like *Paschal*, this election case involves a ballot issue—not a candidate’s petition for office. The difference between the two petitions is significant. A first-time candidate may be self-funding and self-managing the candidate’s petition effort. Because candidate petitions usually require far fewer signatures than a ballot issue petition, it is quite likely most candidates will be handling the circulating and the filing of the petition personally. So, an individual can become a qualified candidate with relatively little money, effort, or community support.

On the other hand, particularly in a municipality, a ballot issue requires not only more signatures but often more steps before it can be certified to the ballot. As a result, a group of citizens, such as Relators, seeking redress in the Supreme Court can generally be expected to be better organized, better funded, and better prepared than most candidates. This case is a typical example.

For the Relators to get these measures to the Board, they required the involvement of several interested citizens and an attorney to draft the proposed ballot language, prepare the petitions, and offer advice on how to navigate the Revised Code and Powell’s charter. Plus, counsel for relators filed a writ of mandamus against the City of Powell on the third day after the petition on the proposed charter amendment was not returned to the Board. That complaint was longer and

more complex than the one here. Relators have a more sophisticated operation than most candidates have when preparing their petitions.

Considering the extensive involvement of counsel, the sophisticated nature of the Relators, and the fact nearly all of the documents were gathered for use in the companion case, it was unreasonable for counsel to wait seven days to file this action.

Second, like *Paschal*, there is an absence of excuse. Although this Court has recently been willing to excuse delays for a variety of reasons, none of those are present here. *State ex rel. Coughlin v. Summit Cty. Bd. of Elections*, 2013-Ohio-3867 ¶15, 136 Ohio St. 3d 371 (finding filing five days after receiving the transcript diligent); *State ex rel. Voters First v. Ohio Ballot Bd.*, 2012-Ohio-4149 ¶17 (relators needed time to review approved ballot language and prepare a legal defense); and *State ex rel. Owens v. Brunner*, 2010-Ohio-1374 ¶18, 125 Ohio St. 3d 130 (excusing a ten-day delay due to relator's need to obtain records).

Here, counsel has represented the Relators since before the first part-petition was circulated and has continuously represented by the same counsel throughout. They have been aware of the main legal arguments driving this matter since at least July 28th, when the Interveners filed their initial protest. Based on the filings in the companion case, Relators' counsel appeared on their behalf before city council and the Board, where he filed documents and made arguments.

And at the August 26 protest hearing, both the Relators and the Interveners prepared briefs and evidence for presentation to the Board. Further, on almost the same record, Relators were able to prepare and file their Complaint with this Court on August 22nd. Moreover, as late as Thursday, September 4th, Relators still had not ordered the transcript of the protest hearing. (Ex. 3.) Quite unlike the relators in *Coughlin*, Relators waited seven days to file suit and then waited days before

ordering the only document not already in their possession. Accordingly, the Relators failed to act with the utmost diligence and have no excuse for failing to do so.

B. The Board is substantially prejudiced by the delay because it is now unlikely this Court will render a decision before it has to set the ballot and mail out ballots to U.S. citizens overseas or in the military.

The other element of laches at issue whether the prejudice the Board will suffer because of the delay in filing this action. *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St. 3d 143, 145 (1995). Because Powell's City Charter allowed for ballot issues to be filed 75 days before an election (instead of the usual 90 days), the Board has already been hampered in its efforts to prepare the ballot. In a little over a week from this filing, the Board must have the absentee ballots of U.S. military members and overseas personnel mailed out Saturday, September 20th. (Ex. 4)

In order to finalize the ballot for printing, the Board has to successfully complete several steps. First, the ballot language will need to be written and approved by the Prosecuting Attorney. (*Id.*) Then the ballot language will be sent to the Secretary of State for two levels of legal review. (*Id.*) Assuming that no changes have to be made, the ballot issue will be added to the ballot, which then has to be entered into the computer system and tested. (*Id.*) Once it passes all the tests and checks, it can then be printed and prepared for mailing. (*Id.*) This delay will cause unnecessary hardship to the Board of Elections, its staff, the Secretary of State's Office, and the Prosecuting Attorney's office, in preparing the final ballot.

Relators delay in seeking a writ on ballot issues was more prejudicial than if this were litigation ensuing from a candidate protest. Ballot issues, unlike adding a candidate to the ballot, require the three levels of review (beyond the Board's own review). Not only is adding a ballot issue more burdensome, but turnaround time for adding issues is significantly greater.

Accordingly, if a decision is not rendered by early next week, it would be exceptionally difficult to add the ballot issues before the ballots are printed and mailed out. (*Id.*)

And once the first ballots are mailed, it would undermine the regularity and consistency of the elections process to force the Relators' ballot issues onto the ballot. This would result in two different ballots being returned by electors. And the ones with the earlier ballots would be denied the opportunity to vote on an important local issue. This would effectively prefer later voters over the earlier ones, a violation of Equal Protection. *See Bush v. Gore*, 531 U.S. 98, 104 (2000).

Relator's failure to act with the utmost diligence is the primary cause of both actual and probable future prejudice. Relators' delay of seven days, on an already tight time frame, has made a difficult situation into a nearly impossible one for the Board. Because all of the elements are present, the Court should find this action barred by laches and dismiss the Complaint.

Respondent's Fifth Proposition of Law:

When a board of elections is satisfied that the ballot measure seeks to improperly repeal an administrative action, it need not consider whether the municipality would be estopped from denying a developer final approval of the submitted plan.

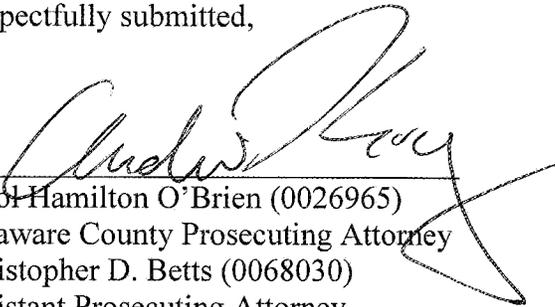
In Relator's fifth proposition of law, it argues that the affirmative defense of estoppel does not apply. As stated above, the Board believes that Intervener may have a vested right in the current zoning code. *Gibson v. City of Oberlin*, 171 Ohio St. 1, 5 (1960). But the consideration of this goes beyond the Board's charge of separating administrative acts from legislative ones. Accordingly, the Board asks this Court to resolve the matter based on the arguments presented by Intervener.

Conclusion

This Court charged all boards of election with the duty of keeping ballot measures seeking to undo administrative actions from the ballot. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St. 3d 539, 542 (1998). Here, the Board reviewed Ordinance 2014-10 and determined that it was an administrative action. Based on that conclusion, the Board followed *Buckeye Community* and did not place those measures on the ballot. Relators cannot prove by clear and convincing evidence that Ordinance 2014-10 was legislative. Plus, Relators failed to exhaust administrative remedies, which precludes granting them the writ, and Relators' action is barred by laches for inexcusably delaying seven days and prejudicing the Board.

Respondent asks that this Court deny the writ of mandamus.

Respectfully submitted,



Carol Hamilton O'Brien (0026965)
Delaware County Prosecuting Attorney
Christopher D. Betts (0068030)
Assistant Prosecuting Attorney
Andrew J. King (0080206) (Counsel of Record)
Assistant Prosecuting Attorney
COUNSEL OF RECORD
Delaware County Prosecuting Atty.'s Office
140 North Sandusky Street, 3rd Floor
Delaware, Ohio 43015
Telephone: (740) 833-2690
Facsimile: (740) 833-2689
e-mail: cobrien@co.delaware.oh.us
cbetts@co.delaware.oh.us
aking@co.delaware.oh.us

COUNSEL FOR RESPONDENT

Certificate of Service

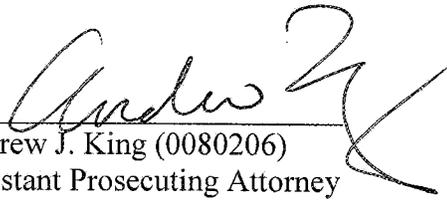
In accordance with S. Ct. Prac. R. 3.11(B)(3) and 12.08(C), the undersigned hereby certifies that a copy of the foregoing *Merit Brief of Respondent* has been served on the following listed individual(s) via email at the following email addresses on this the day of filing, being the 11th day of September, 2014:

Christopher B. Burch
Email: chris@callenderlawgroup.com

Joseph R. Miller
jrmiller@vorys.com

Christopher L. Ingram
clingram@vorys.com

Bruce L. Ingram
blingram@vorys.com



Andrew J. King (0080206)
Assistant Prosecuting Attorney