ORIGINAL

In the
Supreme Court of Ohio

STATE EX REL. BRIAN EBERSOLE SHARON VALVONA, AND THOMAS HAPPENSACK,	:	Case No. 2014-1520
Relators,	:	ORIGINAL ACTION IN MANDAMUS
v.	:	PEREMPTORY AND/OR ALTERNATIVE WRIT REQUESTED
DELAWARE COUNTY BOARD OF ELECTIONS,	:	EXPEDITED ELECTIONS MATTER PURSUANT TO S. CT. R. PRAC. 12.08
Respondent,	:	
THE CENTER AT POWELL CROSSING, LLC.	:	
Intervening Respondent.	:	

REPLY BRIEF OF RELATORS BRIAN EBERSOLE, SHARON VALVONA, AND THOMAS HAPPENSACK

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I. INTRODUCTION

Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack presently seek a writ of mandamus compelling Respondent Delaware County Board of Elections ("Respondent Board") to perform its clear legal duty to submit a referendum and proposed ordinance to the Powell electorate. The proposed measures seek to refer and repeal Powell City Ordinance 2014-10, through which Powell City Council ("Council") approved a high density apartment building project that fundamentally alters the landscape of Downtown Powell.

Respondent Board and Intervening Respondent The Center at Powell Crossing, LLC ("Respondent Developer") focus their briefing on the argument that Ordinance 2014-10 escapes popular accountability pursuant to this Court's holding in *Buckeye Community Hope v. City of Cuyahoga Falls*, 82 Ohio St.3d 539 (1998). There, this Court held that administrative acts of a municipal legislative authority, *e.g.* city council, are not subject to popular initiative and referendum under Ohio Const. Art. II § 1f.

But *Buckeye Community Hope* is not a bar to the relief that Relators presently seek. *First of all*, Respondent Board is without jurisdiction under the Powell Charter in this case to even determine the sufficiency and validity of the petitions at issue. Powell Charter §§ 6.02, 6.04 clearly and unambiguously directs Respondent Board to perform a ministerial duty to "submit" the proposed referendum and ordinance to repeal to Powell electors.

Secondly, the subject of the proposed measures, Ordinance 2014-10, is in fact legislation subject to initiative and referendum. In this case, Respondent Developer's application to develop the land was void *ab initio* because it did not satisfy the strict jurisdictional requirements to invoke the administrative jurisdiction of Powell's administrative zoning bodies. As a result, Council necessarily acted legislatively when it passed Ordinance 2014-10 on June 17, 2014.

Thus, this Court may grant Relators the relief sought consistent with the *Buckeye Community Hope* decision. Nonetheless, if this Court determines that Ordinance 2014-10 is administrative, *Buckeye Community Hope*, 82 Ohio St.3d 539 (1998) should be overruled.

For these reasons, and the reasons set forth below and through Relators' opening brief, Relators respectfully request that this Court grant a writ compelling Respondent Board to submit the proposed measures at issue to Powell electors at the November 4, 2014 election.

II. ARGUMENT

A. Respondent Board never had jurisdiction to determine the sufficiency and validity of the petitions under the Powell Charter.

As a matter of law, the Powell City Charter does not give Respondent Board the power to determine the sufficiency and validity of the petitions at issue. Instead, Powell Charter §6.02, 6.04 imposes a ministerial duty for Respondent Board to "submit" the proposed measures to Powell electors. Both Respondents concede that the Powell Charter controls the duties of Respondent Board, but wrongly argue that the Charter is "silent" as to these duties.

The Powell Charter is not silent here. In fact, the Charter expressly, *i.e.* not silently, places the function of determining the sufficiency and validity of the petitions in Powell City Council. Powell Charter §6.05 ("Council by resolution shall determine the sufficiency and validity of the petition."). The Charter does not place this same function in Respondent Board, nor would it make sense to perform the sufficiency and validity function twice through two separate bodies. The Charter clearly and unambiguously directs Respondent Board to "submit" the proposed measures to the Powell electorate under Powell Charter §6.02, 6.04.

Given that the Powell Charter controls the analysis, as Respondents concede, it does not matter that Respondent Developer filed a protest pursuant to a state law, namely R.C. 3501.39. To allow a state law to interfere with workings of municipal elections would be to contravene the

fundamental purpose for municipal home rule under Ohio Const. Art. XVIII §§ 3, 7, *i.e.* to give the people the power of self-rule. *Perrysburg v. Ridgway*, 108 Ohio St. 245, 255 (1923) (discussing the purpose for municipal home rule). Indeed, this Court has recognized that county boards of election should not interfere with municipal initiative petitions. *State ex rel. Semik v. Board of Elections of Cuyahoga County*, 67 Ohio St.3d 334, 336 (1993) ("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.").

Further, *State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections* does not provide authority for Respondent Board to determine the sufficiency and validity of the petitions under the Powell Charter in this case. 119 Ohio St.3d 478, 2008-Ohio-5093 (2008). *Upper Arlington* does not address the Powell Charter and the municipality in that case had *not* previously determined validity when the board of elections received the petitions. *Id.* at ¶ 10 (the city "reserv[ed] the right to challenge the validity of the petition."). In this case, by contrast, Council has determined that the petitions are sufficient and valid and Respondent Board has no duty under the Powell Charter to address sufficiency and validity. Instead, Powell Charter §§ 6.02, 6.04 directs Respondent Board to "submit" the proposed measures to Powell electors.

B. Under existing law, Ordinance 2014-10 is legislation that is properly subject to initiative and referendum.

As set forth in Relators' opening brief, at pages 21-29, Ordinance 2014-10 is legislation because the Developer failed to comply with the strict jurisdictional requirements necessary to invoke the administrative process for Planned District Development Plans under the Powell zoning code. 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).

Here, the Developer never "executed" or "administered" an existing law under *Donnelly* because the application failed to invoke the administrative jurisdiction of the Powell Zoning Administrator and Powell Planning and Zoning Commission ("P&Z Commission") in the first instance. Among other jurisdictional defects with Respondent Developer's application, there is no evidence of financing or ability to post bond, or even a signature attesting to the truth of the statements therein. Powell zoning code §§ 1143.11(c)-(i); Exhibit Y, Tr. 132, 140-41 (testimony of Powell Development Director David M. Betz). Because these Powell agencies lacked subject matter jurisdiction over Respondent Developer's application, Powell City Council derivatively lacked administrative jurisdiction to pass Ordinance 2014-10. Consequently, Council necessarily acted in its legislative capacity when it enacted Ordinance 2014-10.

1. Ordinance 2014-10 is legislation because the Developer failed to satisfy strict jurisdictional requirements necessary to execute the administrative process for Planned District Development Plans under the Powell zoning code.

Powell administrative bodies have only those limited powers expressly conferred upon them pursuant to the Powell Charter, ordinances, and state law. *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"). For example, Powell Charter § 11.01 creates the Powell P&Z Commission, which has only those powers conferred upon it by the Powell Charter and laws of the State of Ohio. Powell zoning 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(c) specifically provides that "Preliminary Planned District Development Plans

shall be approved in accordance with the procedures established herein in this section." (emphasis added). Section 1143.11(i) for "Final Planned District Development Plans" likewise uses the mandatory language "shall" to impose jurisdictional requirements.

Where, as here, the strict jurisdictional requirements for Planned District Development Plans under § 1143.11 are not satisfied, the application is *void ab initio*. *Patton v. Diemer*, 35 Ohio St.3d 68 (1988) ("[A] judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*."); *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70 (1998) ("[Subject matter jurisdiction] is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void."). A administrative or judicial body without subject matter jurisdiction simply does not have the power to act. *See, e.g., Strongsville Board of Education v. Wilkins*, 108 Ohio St.3d 115, 2006-Ohio-248, ¶ 19. ("the Tax Commissioner shall not consider an application for exemption of property unless the application has attached thereto a certificate executed by the county treasurer"); *Cleveland Clinic Found. v. Wilkins*, 103 Ohio St.3d 382, 2004-Ohio-5468.

In such situations where, as here, the act is "void" due to subject matter jurisdictional defects, parties may not waive such defects. These defects are distinct from merely "voidable" defects that do not pertain to subject matter jurisdiction. Where an act is merely voidable (rather than void) in the absence of a defect in subject matter jurisdiction, the defect may be waived if not timely asserted. *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, ¶¶ 10-12 ("It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over

the particular case merely renders the judgment voidable.") (internal citations omitted). But here, where the act is void, no act of Relators could create administrative jurisdiction.[1]

As set forth more fully in the Relators' opening brief at pages 25-29, it is clear that the Developer's application is void *ab initio* because the Developer failed to comply with at least *five* strict jurisdictional requirements for Planned District Development Plans under the Powell zoning code. *First*, the Developer failed to provide evidence of financing for the project, as zoning code § 1143.11(c)(9) requires. *Second*, the Developer failed to provide evidence of an ability to post bond, as zoning code § 1143.11(c)(10) requires. *Third*, the Developer did not sign and attest to the truth and exactness of the final development plan, as zoning code § 1143.11(i) requires. *Fourth*, the Developer did not sign the preliminary development plan to verify the truth of the statements contained therein, as zoning code § 1143.11(c)(11) requires. *Fifth*, the Developer did not provide a legal description of the property, as § 1143.11(c)(4) requires.

Again, these are all strict jurisdictional requirements that the Powell zoning code § 1143.11 directs "shall" be satisfied before the Powell Zoning Administrator and P&Z Commission may consider Planned District Development Plans. Powell Director of Development David Betz even testified before Respondent Board confirming that he did not require the Developer to provide evidence of financing or ability to post bond for the project approved through Ordinance 2014-10. Exhibit Y, Tr. 132, 140-41.

Far from establishing that the Developer's application for a Planned District Development Plan complies with the jurisdictional requirements of the Powell zoning code, the

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[1] In its Statement of Facts, at page 5, Respondent Developer's brief states that Relator Sharon Valvona admitted that the Developer's project met zoning standards. But Ms. Valvona, who is not a lawyer and did not admit that the Developer satisfied zoning code requirements (certainly not strict jurisdictional requirements), cannot confer jurisdiction upon a municipal agency such as the P&Z Commission. The Developer's application is void *ab initio* rather than voidable.

Respondents have failed to rebut the clear evidence of at least five independent subject matter jurisdictional defects. Instead, Respondent Developer argues that its failure to comply with strict jurisdictional requirements, including the requirement to provide evidence of financing, is "irrelevant." Respondent Developer brief, at 16. Through a short footnote Respondent Developer argues that it complied with the zoning code, but then only through conclusory statements ignoring the five specific defects that Relators have identified.

Due to these jurisdictional defects, Ordinance 2014-10 cannot be characterized as "executing" or "administering" an existing law under the *Donnelly* test. 13 Ohio St.2d 1 (1968). The Powell Zoning Administrator and P&Z Commission lacked jurisdiction to consider the application. In turn, Council derivatively lacked administrative jurisdiction over the Developer's application and necessarily acted in a legislative capacity when it passed Ordinance 2014-10.

2. There is no requirement to exhaust administrative remedies prior to filing initiative and referendum petitions, particularly where, as here, the subject of the petitions is legislation.

Both Respondents allege that Relators were required to exhaust administrative remedies prior to filing referendum and initiative petitions regarding Ordinance 2014-10. Respondent Board brief, at 10-11; Respondent Developer brief, at 2, 13, 17. Respondent Developer even goes so far as to erroneously argue that "[i]t cannot be disputed that Ordinance 2014-10 was anything other than an administrative action." Respondent Developer brief, at 13.

But there is no requirement to "exhaust administrative remedies" prior to filing a referendum or initiative petition. An administrative appeal challenging whether an administrative act properly executes existing law is fundamentally distinct from a popular determination of the people to repeal or initiate an ordinance. In other words, an administrative

appeal does not provide Relators with an adequate remedy at law because administrative appeals are markedly distinct from initiative and referendum petitions.

Tellingly, both Respondents fail to cite a single case holding that there is a requirement to exhaust administrative remedies prior to filing initiative and referendum petitions. So long as *Buckeye Community Hope*, 82 Ohio St.3d 539 (1998), remains good law, courts may address whether measures proposed by petition are legislative or administrative. In fact, this Court addressed "the administrative issue" in several contested petition cases that the Respondents cite even though petitioners never appealed pursuant to R.C. 2506.01. Respondent Developer brief, at 11-13, citing *State ex rel. Oberlin Citizens for Responsible Development v. Talarico*, 106 Ohio St.3d 481 (2005), *State ex rel. Commt. for the Referendum of Ord. No. 3844-02 v. Norris*, 99 Ohio St.3d 336 (2003), *State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478 (2008), *State ex rel. Marsalek v. S. Euclid City Council*, 111 Ohio St.3d 163 (2006).

Even if there were a requirement to exhaust administrative remedies prior to filing initiative and referendum petitions (there is not), there is no requirement here because, as discussed above, Ordinance 2014-10 is legislation. Legislation, as opposed to administrative acts, may not be appealed under R.C. 2506. *Berg v. City of Struthers*, 176 Ohio St. 146 (1964).

3. The cases Respondents cite for withholding the proposed measures from the ballot are all distinguishable from the present case.

The cases that Respondents rely upon for support are cases that are all distinguishable because they do not address the factual issues regarding subject matter jurisdiction present here. In *Talarico*, for example, the Court specifically stated: "Relators do not claim that this provision [of the zoning code] is inapplicable." 106 Ohio St.3d 481, ¶ 24. In *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, the Court noted that "[t]he facts giving rise to this appeal are not in dispute." 81 Ohio St.3d 559, 560 (1998). In *Norris*, the Court did not address any

dispute as to whether the ordinance at issue fully complied with applicable zoning ordinances. 99 Ohio St.3d 336, ¶¶ 3, 33. In *State ex rel. Upper Arlington*, the Court likewise made the predicate factual findings to determining that there was an administrative law at issue. 119 Ohio St.3d 478, ¶ 23 (finding that Council appropriated sufficient funds for solid waste disposal).

At most, relators in prior "contested petition cases" have taken issue with whether the property was "effectively rezoned" due to discretionary determinations of the municipal zoning agency regarding substantive zoning issues. A dispute over discretionary determinations of a municipal agency, however, is markedly distinct from disputes over mandatory jurisdictional requirements set forth by law. In *State ex rel. Marsalek v. S. Euclid City Council*, for example, Relators argued that the approval of a conditional use permit effectively "rezoned" the property due to changes in the use of the property from an unplanned one-family residential district to a planned residential district. 111 Ohio St.3d 163, ¶¶ 2, 7, 14, 15. This Court held that the resolution at issue did not amend the substantive use requirements of the zoning code and, as such, the resolution was not subject to referendum under *Buckeye Community Hope*.

But in *Marsalek* there was no dispute surrounding the subject matter jurisdictional requirements for invoking the jurisdiction of the municipal zoning agency under applicable zoning ordinances. Substantive requirements under the zoning code regarding the use of property as, say, commercial or residential use are far different from strict jurisdictional requirements that carve-out an agency's jurisdiction in the first instance. In fact, Powell zoning code § 1143.08 provides the Powell P&Z Commission with discretion over substantive use requirements.[2] But while municipal zoning agencies may have discretion over the substantive

[2] Powell zoning code § 1143.08(b) provides, in pertinent part: "Wherever development standards are specified herein or elsewhere in this Zoning Ordinance, as in the official schedules of permitted uses and dimensional requirements, these standards shall apply except where other

use requirements, they do not have discretion over the strict subject matter jurisdictional requirements that define their own administrative jurisdiction in the first instance.

And for good reason—to give a municipal agency authority to define its own jurisdiction would clearly constitute an unlawful delegation of legislative authority. *Consolidated Management, Inc. v. City of Cleveland*, 6 Ohio St.3d 238, 242-43 (1983). By contrast, discretionary determinations regarding substantive zoning requirements generally are not an unlawful delegation where the agency has objective guidelines for exercising its discretion. Here, the Powell zoning code is clear in setting forth strict jurisdictional requirements through § 1143.11(c) and (i), which directs that applicants for Planned District Development Plans "shall" satisfy the strict subject matter jurisdictional requirements set forth therein.

Against this background, the cases that Respondents cite, namely *Buckeye Community Hope*, *Norris*, *Talarico*, *Upper Arlington*, and *Marsalek*, do not support a finding that Ordinance 2014-10 is administrative. Those cases do not address whether the ordinance at issue complied with strict jurisdictional requirements to invoke administrative jurisdiction. Ordinance 2014-10 is legislation and Respondents have failed to carry their burden to show otherwise.

4. 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.

Separately, even if Ordinance 2014-10 constitutes an administrative act, the initiative petition for an ordinance to repeal Ordinance 2014-10 exercises the *legislative* authority vested

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such standards have previously been established and approved by the Planning and Zoning Commission for areas located in planned districts. The official schedules of dimensional requirements shall provide a guide for approval of Development Plans, but can be modified as approved by the Planning and Zoning Commission. Where standards are not specified, the Planning and Zoning Commission, in approving a planned district development plan, shall establish such requirements as it deems necessary to protect and promote the public health, safety, and/or welfare of the community."

in Powell electors through Ohio Const. Art. II, § 1f. As Respondents point out, the *Talarico* case involves an initiative petition that was withheld from the ballot pursuant to the "administrative rule" of *Buckeye Community Hope*. But *Talarico* did not actually litigate this issue and the *Talarico* Court did not address whether the initiative process itself is legislative. Here, the proposed ordinance to repeal Ordinance 2014-10 is legislation pursuant to Ohio Const. Art. II § 1f that trumps Ordinance 2014-10 even if Ordinance 2014-10 is administrative.

Based upon the foregoing, this Court should find that Ordinance 2014-10 is legislation properly subject to popular initiative and referendum.

C. If this Court determines that Ordinance 2014-10 is administrative, still it should overrule *Buckeye Community Hope*, 82 Ohio St.3d 539 (1998).

Upon a motion for reconsideration, this Court in *Buckeye Community Hope v. City of Cuyahoga Falls* held that administrative actions are not subject to popular referendum. 82 Ohio St.3d 539 (1998) (hereinafter "*Buckeye Community Hope II*"). This case is distinguishable because Ordinance 2014-10 is legislation. Still, if this Court determines that Ordinance 2014-10 is administrative, *Buckeye Community Hope II* should be overruled pursuant to the three-prong rule for overturning precedent set forth in *Westfield Ins. v. Galatis*, 100 Ohio St.3d 216 (2003).

First, *Buckeye Community Hope II* was wrongly decided because administrative acts are properly the subject of referendum under Ohio Const. Art. II § 1f and Ohio Const. Art. XVIII §§ 3, 7. Respondent Developer argues, on the other hand, argues that *Buckeye Community Hope II* is grounded in constitutional text that authorizes the municipal power of initiative and referendum for "legislative action." But the *authorization* of initiative and referendum power under Ohio Const. Art. II § 1f should not be read as a *limitation* on that power.

To read Ohio Const. Art. II § 1f as shielding administrative acts of a city council from initiative and referendum would be to ignore the very purposes for municipal home rule and hold

form over substance. Without question, Powell City Council could pass an ordinance repealing Ordinance 2014-10 -- and the people should be able do the same thing. As this Court held in *Buckeye Community Hope I* prior to reversing course on a motion for reconsideration, Ohioans adopted municipal home rule in 1912 to give municipal electors power over their government. Ohio Const. Art. XVIII §§ 3, 7. 81 Ohio St.3d 559 (1998). If they so desire, the people could even adopt a government by town hall meeting to approve zoning plans. *Id.* at 566. And if the people could *indirectly* retake power over site plans through organizing a new form of government, they should be able to *directly* do so through initiative and referendum. Counsel for Respondent Developer fundamentally fails to grasp municipal home rule when he argues that the "remedy" for an administrative action is "not the ballot box." Exhibit Y, Tr. at 16.

Second, the *Buckeye Community Hope II* rule further defies practical workability, as demonstrated by this very case. See, Relators' opening brief, at 31-39. For one thing, there is no ripe case or controversy prior to voter approval, such that the "administrative issue" may never arise if the voters reject the proposed measure. In addition, complex legal zoning issues should be decided by courts rather than city councils or boards of elections largely comprised of non-lawyers. At a hearing regarding this matter, even Delaware County Board of Elections member Ed Helvey, who happens to be an experienced lawyer, expressed his inexperience with the complex zoning issues presented to the Board. Exhibit Y, Tr. at 43, 173-74.

Still further, reviewing petitions for the content of proposed measures gives parties with substantive opposition an opportunity to hold up submission of the measure to voters. *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"). In addition, there is no standard to apply when reviewing

proposed measures for constitutionality because the measure is not yet a law, even though duly enacted zoning measures normally enjoy a presumption of constitutionality. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Further, Respondents ignore this Court's long line of controlling precedent holding that substantive issues with measures proposed by petition are prematurely raised prior to voter approval. Respondent Developer brief, at 12 fn. 6; Relators' opening brief, at 31-35, citing *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999), *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 293 (1995), *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921), *Pfeifer v. Graves*, 88 Ohio St. 473 (1913). The cases Relators cite are grounded in the same workability issues raised here. When Respondents complain of the complexity of this expedited elections matter, they are really complaining of the premature posture of the substantive "administrative/legislative" issue that *they*, not Relators, have raised with the content of the proposed measures. Respondent Board brief, at 11.

Third, overturning *Buckeye Community Hope II* does not create undue hardship because the controversial rule has not given rise to reasonable reliance interests. *Buckeye Community Hope II* was decided on a controversial 4-3 vote following a motion for reconsideration. The particular issue here regarding the legislative or administrative nature of a final development plan has been particularly controversial; this Court held as recently as 1999 that ordinances approving final development plans are legislation. *State ex rel. Crossman Communities of Ohio, Inc. v. Greene Cty. Bd. of Elections*, 87 Ohio St.3d 132 (1999), overruled by *State ex rel. Commt. For the Referendum of Ord. No. 3844-02 v. Norris*, 99 Ohio St.3d 336, 343 (2003). As detailed through Relators' opening brief, at 38-39, Respondent Developer does not have reasonable reliance interests here because, among other reasons, it has not followed the zoning code.

D. The petitions strictly comply with all form requirements for initiative and referendum petitions under the Powell Charter and applicable laws.

Relators have strictly complied with all legal requirements for municipal initiative and referendum petitions and accordingly have submitted petitions that are sufficient and valid in all respects. Indeed, the Powell City Council determined that the petitions are sufficient and valid when they passed Resolutions 2014-16 and 2014-17 (Exhibits S and T). Relators' merit brief, at pages 13-21, rebuts several meritless "form" arguments that Respondents have raised with the petitions. In this section, Relators buttress these arguments in light of Respondents' merit briefs.

First, Respondents erroneously maintain that the petitions are defective because Relators did not exactly follow the Ohio Secretary of State's form for municipal initiative and referendum petitions. As explained in Relators brief, at pages 15-17, there is no legal requirement to follow the Secretary of State's form and it would have been impossible for Relators to follow the form because the form is not compatible with the Powell Charter. Counsel for Respondent Board Christopher Betts has even conceded this point. 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"). Respondent Board simply ignores Mr. Betts' admission in its brief.

Second, Respondents argue that the petitions are defective due to an alleged failure to satisfy "title and text" requirements under the Powell Charter. But the petitions *do* satisfy the requirements 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 (certified copies of the referendum and initiative petitions).

As explained in Relators' opening brief, at pages 17-18, the initiative and referendum petitions at issue physically attached and incorporated documentation satisfying these

requirements. 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 E. The first page of each part petition for the referendum states that it is a referendum for "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, and incorporated herein." Exhibit F.

Third, as explained more fully in Relators' opening brief at 19-20, the petitions *do* include each signers' voting precinct in Powell. For example, a signer listing "Precinct A" necessarily means "Powell Precinct A" because petition signers attested that they were Powell electors by signing the petitions, which means that they were attesting to have a Powell precinct. Respondent Board's brief, at page 18, arguing that the petitions do not satisfy the "precinct requirement" is puzzling, given that Respondent Board determined that the petitions did satisfy this "precinct requirement" at its August 26, 2014 hearing on this matter. Exhibit Y, Tr. at 190.

Fourth, as Respondent Board and Council both found, the petitions unquestionably contain more than the requisite 238 valid signatures. See, Relators' opening brief at 20.

Fifth, as detailed in Relators' opening brief at 18-20, the petitions are not misleading, as shown by the circulator affidavits attesting that petition signers understood the contents of the petitions. The circulator affidavits further attest to the truth of the first page of the petitions that the attachments were physically attached to the petitions as circulated. And Relator Sharon Valvona testified before Powell City Council that she personally told each circulator how important it was that the petitions be circulated with their attachments. Exhibit Q, Tr. at 34.

Sixth, Respondents argue that the initiative petition to repeal Ordinance 2014-10 is an "impermissible" referendum petition disguised as an initiative petition. Respondent Board brief,

at 17. But there is no prohibition on initiative petitions to repeal existing ordinances; in fact, Powell Charter § 6.03 expressly authorizes such petitions.[3] To argue otherwise, Respondent Developer confuses *State ex rel. Cody v. Stahl*, 2003-Ohio-6180, ¶ 18, a non-binding court of appeals case merely observing that initiative petitions must provide the title of proposed ordinances where applicable laws so require. Respondent Developer brief, at 21-22.

Based upon the foregoing, Relators have established that the petitions are sufficient and valid in all respects. There are no defects in form and Respondents have failed to satisfied their burden under the Powell Charter to show that the petitions are not sufficient and valid. Powell Charter § 6.05 (providing that the petitions are prima facie valid).

E. Laches does not bar Relators' action in mandamus because Relators have been extremely diligent in prosecuting this case.

Next, Respondent Board argues that the relief Relators seek is barred by the equitable doctrine of laches. As thoroughly detailed through Relators' opening brief at pages 43-46, however, Relators have been extremely diligent protecting their rights and the rights of Powell electors regarding the three petitions. If there has been any prejudice to the Respondent Board, it is due to the actions of Powell City Council, not Relators. This action was delayed two weeks because the Powell Council failed to timely act on the petitions on August 5, 2014, as the Powell Charter §§ 6.02, 6.04 requires. After needless (and unlawful) delay, Council finally determined that the petitions at issue here are sufficient and valid on August 19, 2014.

Relators did everything they could to avoid the two weeks of needless delay arising from Council's actions. Relators notified Council in writing that Powell Charter §§ 6.02, 6.04 requires Council to act on the petitions at issue here at its next regular meeting upon receipt of the

[3] Powell Charter § 6.03 provides as follows: "Proposed ordinances for repealing any existing ordinance or ordinances, in whole or in part, may be submitted to the Council as herein provided in the preceding sections for initiating ordinances."

signature attestation statement from Respondent Board, *i.e.* August 5, 2014. Exhibit O (Relators' demand letter to Powell Law Director Eugene Hollins dated August 11, 2014); Exhibit P (correspondence between the undersigned counsel and Law Director Hollins).

In addition, Relators explained to Council in writing and through public testimony that Council had a duty to act forthwith on the charter amendment petition at issue in the companion case.[4] Exhibit K, L, M (Relators' letters and Position Statement provided to Law Director Hollins); Exhibit N, Tr. at 10-11, 14, 33 (testimony of Relators at the August 5, 2014 Council meeting). Council stubbornly refused to act timely on the petitions, such that any prejudice that Respondent Board now faces is due to Council's unlawful actions delaying its determination regarding the sufficiency and validity of the petitions to August 19, 2014.

Relators have acted timely by bringing this case within seven days, specifically four business days, following Respondent Board's unlawful actions at its August 26, 2014 hearing. On August 25, 2014, Relators made great efforts to explain that the petitions are valid through a written memorandum in response to the Developer's protest. Complaint, ¶ 65; Exhibit V. Then on September 2, 2014, Relators timely filed a complaint in this Court. Due to preparation of the merit brief in the companion case regarding Relators' petition for a proposed charter amendment, which was also filed with this Court on September 2, 2014, Relators filed the complaint as soon as possible. In light of the Labor Day holiday, Respondent Board is effectively arguing that Relators were required to file their complaint within *three* days of the August 26, 2014, while brushing aside Council's needless two week delay earlier in the process.

This action is not barred by laches. There is simply is no "three-day" requirement and Relators have acted with the utmost diligence at all times. Relators' merit brief, at 43-46. In

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[4] *State ex rel Ebersole et al. v. City Council of Powell et al.*, Case No. 2014-1469.

fact, this Court has found as many as *ten days* permissible in expedited elections matters. *State ex rel. Owens v. Brunner*, 125 Ohio St.3d 130, 2010-Ohio-1374, ¶¶ 16-23. Any prejudice that the Respondent Board faces here is due to the actions of Powell City Council, not Relators.

F. The evidence submitted by Relators is properly admissible.

Through a footnote, Respondent Developer wrongly argues that Relators' evidence failed to comply with the Supreme Court Rules of Practice. Respondent Developer brief, at 9, fn. 4. As an initial matter, Respondent Developer has not identified a single piece of Relators' evidence that it specifically finds inauthentic, incomplete, or irrelevant. Instead, Respondent Developer made a blanket assertion about all of Relators' evidence. Further, Respondent Developer has not moved to strike or objected to any of Relators' exhibits or evidence. In fact, Relators' evidence is indeed authentic and properly admissible in this expedited matter.

Fundamentally, Relators evidence does comply with the Rules of Evidence. Several of Relators' exhibits are self-authenticating certified public records pursuant to Ohio R. Evid. 901(B)(7) and 902(4). For example, Relators' Exhibits E and F are certified copies of the referendum and initiative petitions filed with Powell City Clerk Sue Ross. Likewise, Relators' Exhibit A is a certified copy of Ordinance 2014-10 certified by Clerk Ross.

In addition, many of Relators' exhibits are documents that Respondents rely upon and have authenticated themselves, including the transcripts of all proceedings before Respondent Board and Powell City Council. That is, Relators' Exhibits I, N, Q, and Y are all transcripts of proceedings before Council and Respondent Board that Respondents have independently entered into evidence and authenticated, such that they may not object to these exhibits now.[5] For

[5] Relators' Exhibits I, N, Q, and Y are hearing and meeting transcripts that are the same as Respondents' Joint Exhibits 2C, 2D, 2E, and 2A. In addition, Relators' Exhibit V is Respondents' Joint Exhibit 1B.

example, Relators' references to Exhibit Y could just as easily be read as references to Respondents' Joint Exhibit 2C, since both exhibits are copies of the written transcript for the August 26, 2014 hearing before Respondent Board.

Still further, Relator Brian Ebersole clearly authenticated nearly all of Relators' exhibits in this case through the verified complaint filed in the companion case, *State ex rel. Ebersole et al. v. City Council of Powell et al.* Supreme Court Case No. 2014-1469. There, Relators provided the affidavit of Brian Ebersole with their verified complaint attesting to the statements in the verified complaint, including statements authenticating several exhibits attached to the verified complaint in that case. Many of the authenticated exhibits attached to the verified complaint in that case are reproduced as Relators' exhibits in the present action. Specifically, through the verified complaint in the companion case regarding the charter amendment petition, Relators authenticated the following Relators' exhibits reproduced in the present action: Relators' Exhibits B, D, G, H, I, J, K, M, N, O, P, Q, and R.[6] See the table of contents to Volumes I and II of Relators' Evidence filed in the present action to identify these exhibits.

And, Relators' verified complaint in the present action is also compelling evidence itself of the allegations presented in this case. *Crown Communication, Inc. v. Testa*, 136 Ohio St.3d 209, 2013-Ohio-3126,¶19. Relator Brian Ebersole provided a sworn affidavit attesting that the statements of fact presented in Relators' 93-paragraph complaint are true based upon his personal knowledge and that he is competent to testify to the same.

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[6] In the companion case, *State ex rel Ebersole et al. v. City Council of Powell et al.*, Case No. 2014-1469, these exhibits are identified, respectively, as Exhibit B, D, F, G, H, I, J, K, L, M, N, O, and P. See the table of contents to Volumes I and II of Relators' Evidence filed in the companion case. Also, in the companion case, Case No. 2014-1469, all of Relators' exhibits attached to the verified complaint were refiled in the case with Relators' Evidence under the same exhibit letters used to identify the exhibits in the verified complaint.

III. CONCLUSION

Relators have established a clear legal right, clear legal duty, and the lack of an adequate remedy in the ordinary course of law entitling them to a writ of mandamus. As Council already determined, the referendum petition for Ordinance 2014-10 and the initiative petition for a proposed ordinance to repeal Ordinance 2014-10 are sufficient and valid in all respects and contain a sufficient number of valid signatures. Pursuant to Powell Charter §§ 6.02, 6.04, Respondent Board has a clear legal duty to submit the measures proposed by the petitions to Powell electors and Relators have a corresponding clear legal right. Due to the proximity of the November 4, 2014 election, Relators also lack an adequate remedy in the ordinary course of law.

Thus, Relators respectfully request that this Court issue a writ of mandamus, peremptory writ of mandamus, or alternative writ compelling Respondent Board 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, Relators request that this Court issue a peremptory writ, alternative writ, or a writ of mandamus compelling Respondent Board to determine that the petitions are sufficient and valid in all respects, or to show cause why the petitions are not. 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack was served by email this 15th day of September, 2014, upon the following counsel:

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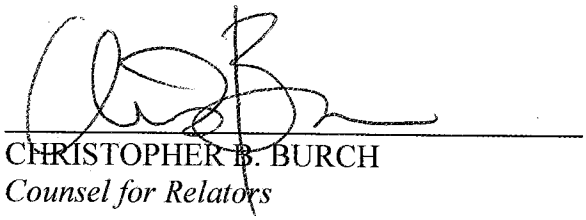

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