

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. BRIAN EBERSOLE, *et al.*, :  
: Relators, :  
: Case No. 2014-1520  
v. :  
: ORIGINAL ACTION IN MANDAMUS  
DELAWARE COUNTY BOARD OF :  
ELECTIONS, *et al.*, :  
: Respondents. :

MEMORANDUM IN OPPOSITION OF RESPONDENT  
THE CENTER AT POWELL CROSSING, LLC TO RELATORS'  
MOTION FOR RECONSIDERATION

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

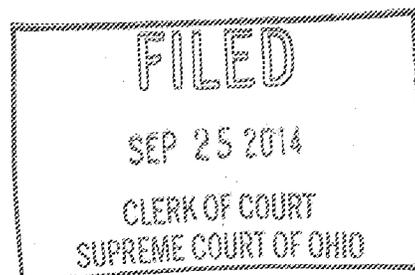
*Counsel for Relators*

Carol O'Brien  
Delaware County Prosecutor  
Christopher D. Betts  
Assistant Prosecuting Attorney  
Andrew 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  
cbetts@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  
jrmiller@vorys.com  
clingram@vorys.com

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



## I. INTRODUCTION

On September 19, 2014, this Court ruled that the Ordinance 2014-10 is not subject to referendum or initiative because it was an administrative action that approved a development within the contours of a preexisting zoning code. In doing so, this Court specifically rejected the Relators' invitation to overrule *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998), and the progeny of cases reaffirming its holding. Slip Opinion No. 2014-Ohio-4077, ¶¶ 37-42. Further, the Court found that the board of elections fulfilled its statutory duty to “[r]eview, examine, and certify the sufficiency and validity of petitions” when it held a protest hearing and rejected the referendum and initiative for placement on the ballot. *Id.* at ¶¶ 44-48.

Relators now ask this Court to reconsider its decision and order that a board of elections exceeds its authority when, in direct compliance with R.C. 3501.11(K) and 3501.39(A)(2), the board holds a protest hearing and determines the sufficiency and validity of proposed petitions. Not only does Relators' request ignore the clear legislative mandate to the board of elections, which the board appropriately fulfilled by applying this Court's established precedent, but Relators' request introduces unnecessary complication into a very straightforward issue. Relators' Motion for Reconsideration is an attempt to resuscitate an initiative and referendum that were properly rejected at every stage of the administrative and adjudicatory process. Relators simply raise and repackage the same exact arguments set forth in Relators' prior briefs. Despite Relators' insistence to the contrary, those arguments were specifically addressed and rejected by this Court. Relators' blatant and improper attempt to reargue their case is a violation of Supreme Court Practice Rule 18.02(B) and their Motion for Reconsideration should be denied.

## II. LAW AND ARGUMENT

### A. Relators' Motion for Reconsideration is merely a re-argument of their initial briefing to this Court.

Relators bring their Motion for Reconsideration pursuant to S.Ct.Prac.R. 18.02. This rule, however, does not provide a basis upon which this Court should reconsider its decision. Under S.Ct.Prac.R. 18.02, this Court uses its “reconsideration authority to ‘correct decisions which, upon reflection, are deemed to have been made in error.’” *Dublin City Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 139 Ohio St. 3d 212, 214 (2014) (quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383 (1995)). The Court “will not, however, grant reconsideration when a movant seeks merely to reargue the case at hand.” *Id.* (citing S.Ct.Prac.R. 18.02(B)); *State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St. 3d 379, 383 (2002) (A motion for reconsideration cannot be used to reargue issues raised in the party’s initial brief).

Relators’ Motion merely reargues that which was originally presented and considered by this Court. Relators admit as much. (Relators’ Mot. at 2 (requesting that the court “address Relators’ arguments”); Relators’ Mot. at 5 (asking that “this Court [re]consider their arguments”); Relators’ Memo. in Support at 4-5 (raising again what “Relators extensively argued in briefing”); Relators’ Memo. in Support at 9 (rearguing what was previously “set forth in Relators’ opening brief”); Relators Memo. in Support at 10-11 (urging the court to reconsider based on “several other arguments” that it contends “should be further addressed”).) The Relators’ request for reconsideration on the basis that issues already presented “should be further addressed” is expressly prohibited by S.Ct.Prac.R. 18.02.

In an attempt to avoid the inevitable conclusion that Relators are simply rearguing that which was fully briefed and addressed by this Court, they claim that this Court failed to “fully

consider” their arguments. (Relators’ Memo. in Support at 10-12.) This is false and ignores the thorough discussion engaged in by this Court in its opinion. The Court specifically addressed and rejected Relators’ arguments, explicitly stating “[w]e will consider each argument in turn.” Slip Opinion No. 2014-Ohio-4077, ¶ 28.

B. Relators’ misinformed assumptions regarding the impact of the Court’s decision are not a basis for reconsideration.

As set forth above, reconsideration is only proper were the decision itself is deemed to have been made in error. In their Motion for Reconsideration, however, Relators instead choose to engage in the futile exercise of pointing out the possible implications of the Court’s decision, none of which are based in fact or law. Relators’ contentions that “[i]f upheld, this Court’s opinion . . . invites parties opposed to the policy-content of proposed measures to prematurely raise meritless legal challenges” and that the opinion will leave courts with “no standard to apply when reviewing the proposed measure for constitutionality” are baseless and not errors in the decision such that reconsideration is proper. (Relators’ Memo. in Support at 9.) Similarly, Relators’ wild speculation that “the opinion introduces confusion in the municipal initiative and referendum process across the State” does not support finding error in the decision itself, something that is required for reconsideration. (*Id.* at 12.)

C. This Court properly denied the writ.

This Court properly denied Relators’ writ when it found that the board of elections has the authority (expressly granted to it by statute) to determine that Ordinance 2014-10 was an administrative act not subject to referendum or initiative. In considering the arguments of the parties, the Court unequivocally rejected Relators’ arguments regarding ripeness and the board’s jurisdiction. Yet, in their Motion for Reconsideration, Relators resort to mischaracterizing the Court’s reasoning in an attempt to undermine the merits of its decision. Their attempt must fail.

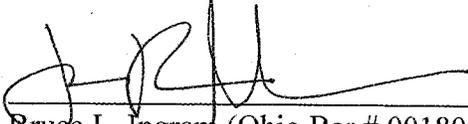
The Court in fact did *not* “set forth a new affirmative ‘duty’ for county boards of election to review the content of measures proposed by petition prior to voter approval.” (Relators’ Memo. in Support at 3.) Had Relators bothered to address the entirety of the Court’s reasoning in this regard, it would be clear that the board’s duty to determine the sufficiency and validity of petitions is mandated by state law and that “the only time that duty can be performed meaningfully is before the election.” Slip Opinion No. 2014-4077, ¶ 44. “The issue is not as complicated as the parties make it appear. The duties of the board, as set out in state law, supplement the duties described in the charter. The board was within its statutory authority to conduct the protest hearing.” *Id.* at ¶ 48. In so finding, this Court properly denied the writ.

### III. CONCLUSION

For the foregoing reasons, Relators’ Motion for Reconsideration should be denied. Relators’ Motion is an improper attempt for a second argument and additional briefing on issues considered and rejected by this Court. Relators’ requested extraordinary relief should be denied.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP



Bruce L. Ingram (Ohio Bar # 0018008)

(*Counsel of Record*)

Joseph R. Miller (Ohio Bar # 0068463)

Christopher L. Ingram (Ohio Bar # 0086325)

52 E. Gay Street, P.O. Box 1008

Columbus, OH 43216-1008

Telephone: (614) 464-6400

Facsimile: (614) 464-6350

Email: [blingram@vorys.com](mailto:blingram@vorys.com)

[jrmiller@vorys.com](mailto:jrmiller@vorys.com)

[clingram@vorys.com](mailto:clingram@vorys.com)

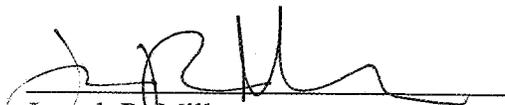
*Counsel for Intervening Respondent  
The Center at Powell Crossing, LLC*

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and accurate copy of the foregoing was served via electronic mail to the following this 25th day of September, 2014:

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

Carol O'Brien  
Delaware County Prosecutor  
Christopher D. Betts  
Assistant Prosecuting Attorney  
Andrew King  
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  
cbetts@co.delaware.oh.us  
*Counsel for Respondent*



Joseph R. Miller

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