ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. BRIAN EBERSOLE, *et al.*,	:	
Relators,	:	
	:	Case No. 2014-1469
v.	:	
	:	ORIGINAL ACTION IN MANDAMUS
CITY COUNCIL OF POWELL, OHIO, *et al.*,	:	
Respondents.	:	

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

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FILED
SEP 25 2014
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN OPPOSITION

I. INTRODUCTION

The proposed charter amendment at issue in this case is unconstitutional on its face. Relators insist that public and judicial resources must be wasted to force the Powell electorate to cast a meaningless vote on this ballot measure. Relators' re-argument of the case in their motion for reconsideration offers nothing that has not already been considered and rejected by this Court. The motion should be denied.

On September 19, 2014, this Court ruled that the proposed charter amendment was illegal and violated the law as set forth by the United States Supreme Court in *Eastlake v. Forest City Ents., Inc.*, 426 U.S. 668 (1976) and *Eubank v. Richmand*, 226 U.S. 137 (1912). Accordingly, the Court held that City Council had "no clear legal duty to put [Relators'] measure on the ballot." 2014-Ohio-4078, ¶ 32.

A facially unconstitutional charter amendment cannot be placed on the November ballot. To put such a measure to a vote is a waste of taxpayer resources and will be a colossal waste of judicial resources to overturn it if it passes. Moreover, Relators' ludicrous claim that this Court "ignored nearly every argument, if not every argument, that Relators made through briefing," (Relators' Memo. in Support at 1), does not invite them to repackage precisely the same arguments made in their prior briefs. Relators' Motion is a blatant violation of this Court's rule that a motion for reconsideration cannot reargue the case. 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). (*See also* Relators' Memo. in Support at 3 ("Specifically, this Court should consider at least four of Relators' previously raised arguments....").)

The Powell City Charter requires City Council to review the sufficiency **and** validity of a proposed charter initiative before placing it on the ballot. City Council correctly determined that Relators' proposed charter amendment was illegal; this Court agreed. Neither justice nor common sense are served by forcing the electorate to vote on an unconstitutional ballot measure.

II. LAW AND ARGUMENT

A. Powell's City Charter Required City Council To Review The Sufficiency And Validity Of Relators' Proposed Charter Amendment.

Powell's Charter Section 6.02, as amended on May 7, 2013, expressly delegates to City Council the authority to determine whether initiative petitions are "sufficient and valid." After reviewing the validity of the Relators' proposed charter initiative, and upon the advice of counsel, City Council determined that Relators' proposed charter amendment was unconstitutional and refused to place it on the ballot. This Court agreed.

As they have argued throughout their briefing in this case, Relators once again argue that prior precedent demands that this unconstitutional ballot measure be submitted to the electorate and this Court has no power to rule it off the ballot unless it passes. According to Relators, this Court has overturned more than one hundred years of precedent "*sub silencio* [sic]." Motion for Reconsideration at 3. All of the cases cited by Relators are factually and procedurally distinguishable from this one. None of the proposed ordinances at issue in the cases cited by Relators involve a facially unconstitutional delegation of legislative authority to a small group of private citizens. Furthermore, none of the cases cited by Relators involve a city charter that expressly empowered a city council to determine whether a proposed ordinance is "sufficient and valid." The only opportunity for City Council to meaningfully perform this duty is prior to the election. *See State ex rel. Ebersole et al. v. Delaware Cty. Bd. of Elections*, 2014-Ohio-4077, ¶ 44. Nothing in the cases cited by Relators suggests that mandamus will lie to order that a

facially unconstitutional ballot measure be submitted to the electorate. This Court correctly ruled as it did and did not overrule any established precedent in doing so.

B. Relators Did Not Establish The Requirements For A Writ.

Relators contend that this Court ignored all of their arguments because this Court did not address in its decision each and every issue raised in Realtors' more than sixty pages of briefing. This Court is not required to do so. Moreover, no purpose is served by reconsideration of the decision and forcing a vote on what has already been determined to be an unconstitutional ordinance. In addition to the unconstitutional delegation of power, the proposed charter amendment also has other equally fatal defects, including that it:

(1) Violates Article II, Section 1f of the Ohio Constitution;

(2) Fails to comply with the form requirements required under Powell Charter § 6.05, including that the full text and title be disclosed in the petition;

(3) Misleads the electorate by failing to disclose that it will referendum Ordinance 2014-10;

(4) Illegally spot zones the Property;

(5) Establishes no standards to identify what uses remain for the Property;

(6) Retroactively deprives Powell Crossing of its vested property rights; and

(7) Is not supported by a sufficient number of valid signatures.

There being no clear legal right to the Relators' requested relief, no corresponding duty by Powell City Council or its Clerk to provide that relief, and other potential adequate remedies at law, this Court must deny Relators' Motion for Reconsideration.

C. Relators' Complaints Regarding City Council's Second Reading Of The Proposed Charter Initiative Is Moot, Or Alternatively, Is Barred By The Doctrine Of Laches.

Relators once again attempt to claim they were prejudiced by the fourteen days that passed between the submission of the proposed charter amendment to the Clerk and Council's action on it. Yet, City Council was following procedures mandated by its Charter in proceeding as it did on the ballot measure. City Council did not postpone action or even table the ballot measure; instead, it had a first reading on the ordinance to adopt the measure on August 5 and a second reading of it on August 19 when it voted on the ordinance. Furthermore, no evidence exists that this charter-mandated procedure prejudiced Relators in the least; Relators had sufficient time after City Council acted to seek relief in this Court to place it on the November ballot. Relators were not prejudiced by their own wait and see attitude between August 5 and August 19. Moreover, any claimed prejudice to Relators was waived by their failure to seek immediate relief after the Council's first reading of the ordinance. Relators chose to wait fourteen days for the second reading and only thereafter sought relief from this Court on August 22. "[E]xtreme diligence and the promptest of actions are required in election cases." *Paschal v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 141, 142 (holding nine days is unreasonable delay in prosecuting an expedited election case).

D. Relators' Illegal Charter Initiative Is Incapable Of Severance.

Yet again recycling previous failed arguments, Relators contend that the Court must take a scalpel to the proposed charter amendment to attempt to extract the unconstitutional provisions. The entire ballot measure is infected with an unconstitutional delegation of power. The Relators' express intention was to create a mechanism to impose the will of five citizens on Powell through a comprehensive plan commission which creates a plan that City Council must adopt.

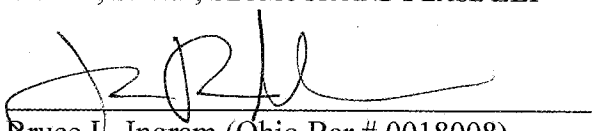
No amount of surgery on this charter initiative would save it. *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927). Moreover, relators did not ask for such relief in their Complaint For Writ of Mandamus (or argue for such relief in their Merit Brief) and therefore have waived their demand that this Court re-write the proposed charter amendment. *City of E. Liverpool v. Columbiana County Budget Comm'n*, 116 Ohio St. 3d 1201, 1201-1202 (2007) (finding that, upon reconsideration, an argument never presented in the briefs is "deemed to be abandoned").

III. CONCLUSION

For the foregoing reasons, Relators' Motion for Reconsideration should be denied. Relators' Motion is an only 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



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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:

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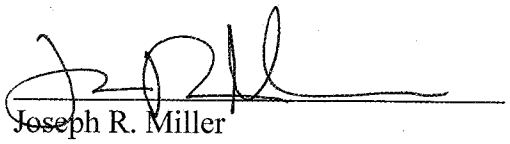

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