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**COUNCIL FOR INTERVENORS THE  
CENTER AT POWELL CROSSING LLC  
AND DONALD R. KENNEY, JR.**

## MEMORANDUM IN OPPOSITION

### **I. RELATORS HAVE NOT STATED VALID GROUNDS FOR RECONSIDERATION.**

Relators have moved this Court to reconsider its decision in *State ex rel. Ebersole v. Powell*, Slip Opinion No. 2014-Ohio-4078 with no legitimate basis or justification for reconsideration. The purpose of a motion for reconsideration is to “correct decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339, 341 (1995). There was no such error in this Court’s decision. Relators are unhappy with the result and are attempting to reargue the case. The Court should deny their motion for reconsideration.

#### **A. This Court Should Deny Relators’ Motion for Reconsideration Because Relators Seek to Reargue the Case.**

S.Ct.Prac.R. 18.02(B) states in pertinent part that a “motion for reconsideration *shall not constitute a reargument of the case . . . .*” (Emphasis added). Relators’ Motion for Reconsideration seeks to do just that. This cannot stand.

First, Relators argue that this Court ignored Ohio Supreme Court precedent. This is simply not true. Irrespective of the twenty-one cases Relators cite as controlling law, this Court clearly held that the charter amendment violated the United States Supreme Court decision in *Eubank v. Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912) and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928). The decisions in *Eubank* and *Roberge* control in this matter, not the cases cited by Relators. Relators’ attempt to inundate this Court with inapplicable cases is unavailing.

Second, Relators argue that the content of the charter amendment may not be considered by City Council. This is a restatement of subsection C under Relators’ Proposition of Law No. 1.

Relators are simply attempting to reargue the case. *See* Merit Brief of Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack.

Municipal legislative bodies are elected by the citizens and are entrusted with the powers and duties to serve all citizens in the municipality. As such, a municipal legislative body has the authority to refuse to submit a citizen initiated petition for a charter amendment to the board of elections if the initiative petition is unlawful on its face. The submission of a proposed charter amendment to a board of elections “by a legislative authority clearly implies, if it does not definitively express, that some power and some duty is intrusted to that legislative authority.” *State ex rel. Hinchliffe v. Gibbons*, 116 Ohio St. 390, 394, 156 N.E. 455 (1927). “[T]he submission should not be made unless the petitions are sufficient in form *and substance* and all statutory requirements calling for the submissions have been fairly met.” (Emphasis added.) *Id.* Accordingly, municipal legislative bodies have a legal duty to examine initiative petitions. This Court considered this issue and held that “the city council did not have a clear legal duty to put the measure on the November 4, 2014 ballot.” *State ex rel. Ebersole v. Powell*, Slip Opinion No. 2014-Ohio-4078.

Third, Relators’ argument that the opinion in this case creates an “affirmative duty” for the Secretary of State and boards of elections to review substantive issues is nonsensical. In fact, there is absolutely no mention of the Secretary of State in this Court’s opinion. Moreover, this Court placed no duty of any sort on the boards of elections. Relators cite no language that imposes such duty; rather, Relators rely on erroneous analysis to insert such imposition in this Court’s opinion.

Next, Relators request this Court to reconsider its opinion “because the opinion ignores Relators’ argument that the proposed charter amendment does not constitute an unconstitutional

delegation of legislative authority.” *See* Motion for Reconsideration of Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack, Section II, Subsection C. This argument is disingenuous. To be sure, this Court’s opinion dedicated an entire section to the consideration of whether the charter amendment unlawfully delegates legislative power. *State ex rel. Ebersole v. Powell*, Slip Opinion No. 2014-Ohio-4078, ¶¶30-32. This Court unequivocally held that the proposed charter amendment does unlawfully delegate legislative power. Relators again are attempting to reargue the case.

Furthermore, Relators argue that this Court should have severed any offending language rather than ruling that the entire proposed charter amendment was unlawful. In this instance, Relators are arguing a point that was not argued in their original merit brief and merely stated in a passing footnote in their reply brief. To say that this Court ignored this “argument” is misleading. A motion for reconsideration does not give Respondents another bite at the apple. Relators could have very well made such argument as a separate proposition of law, or even a subsection thereof, in their merit brief. They did not. Relators cannot be permitted to reargue this case for a second time.

Finally, Relators again attempt to reargue this case by stating that the Court’s opinion ignored their argument that the proposed charter amendment should be submitted to the Powell electors because Council failed to act “forthwith” at its August 5, 2014 meeting. This was Relators’ Proposition of Law No. 1 in their merit brief before this Court. *See* Merit Brief of Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack.

Additionally, this argument is moot. Whether the Powell City Council acted on this charter amendment at its August 5, 2014 meeting, or its August 19, 2014 meeting is irrelevant because this Court correctly held the proposed charter amendment was an unlawful delegation of

legislative powers. The charter amendment constituted an unlawful delegation of legislative power regardless of the date Council considered it. This Court need not waste time and resources addressing a moot argument. Relators' statement that this argument constitutes independent grounds for reconsideration is preposterous.

## **II. CONCLUSION**

Ultimately, the determination as to whether a charter amendment is to be submitted to the electorate rests with the legislative authority of a municipality. *See* Ohio Constitution, Article XVIII, Section 9. As such, a municipally legislative body may refuse to submit a charter amendment to the ballot if it is unlawful or unconstitutional on its face. A proposed charter amendment that delegates a municipality's comprehensive plan authority to an arbitrary group of five individuals constitutes an unlawful delegation of legislative authority and would set dangerous precedent for comprehensive planning moving forward.

With these considerations in mind, this Court properly held that the Powell City Council did not have a clear legal duty to place the charter amendment on the November 4, 2014 ballot. Relators are not permitted to reargue this case simply because they were unhappy with the result. For the foregoing reasons, the League respectfully requests this Court to reject Relators' Motion for Reconsideration.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing *Memorandum of Amicus Curiae the Ohio Municipal League in Opposition to Relators' Motion for Reconsideration*, has been sent via electronic mail on this 25<sup>th</sup> day of September, 2014 to:

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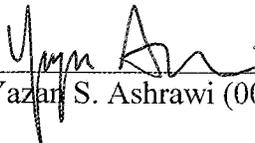
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