ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Brian Ebersole, et al.,	:	
Relators,	:	Case No. 14-1469
v.	:	Original Action in Mandamus
City Council of Powell, Ohio, et al.,	:	Expedited Elections Action
Respondents.	:	

RESPONDENTS CITY COUNCIL OF POWELL, OHIO AND SUE ROSS, CITY CLERK'S MOTION FOR CLARIFICATION AND/OR RECONSIDERATION OF COURT'S SEPTEMBER 29, 2014 DECISION

Christopher B. Burch (0087852)
COUNSEL OF RECORD
Callender Law Group
20 South Third Street, Suite 261
Columbus, Ohio 43215
(614) 300-5300
(614) 324-3204 (Fax)
chris@callenderlawgroup.com
Counsel for Relators Brian Ebersole, Sharon Valvona and Thomas Happensack

Eugene L. Hollins (00440355)
Law Director City of Powell
COUNSEL OF RECORD
Jennifer B. Croghan (0078800)
Frost Brown Todd LLC
One Columbus
Ten West Broad Street, Suite 2300
Columbus, Ohio 43215
(614) 464-1211
(614) 464-1737 (Fax)
ghollins@fbtlaw.com
jcroghan@fbtlaw.com
Counsel for Respondents The City Council Of Powell Ohio and Sue Ross City Clerk Powell

Bruce L. Ingram (00188008)
COUNSEL OF RECORD
Joseph R. Miller(0068463)
Christopher L. Ingram(0086325)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400
(614) 464-6350 (Fax)
blingram@vorys.com
jrmiller@vorys.com
clingram@vorys.com
Counsel for Intervenors The Center for Powell Crossing LLC, Donald R. Kenney, Jr.

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I. INTRODUCTION & PROCEDURAL HISTORY

This matter arises out of a complaint in mandamus seeking a writ to require Powell City Council to refer a proposed charter amendment delegating legislative authority to private interests to the voters of Powell. Briefs were filed by the Relators, the City, and Intervenors. On September 19, 2014, this Court held Relators were not entitled to a writ because city council did not have a clear legal duty to put the measure on the November 4, 2014 ballot because the proposed charter amendment violates prior U.S. Supreme Court precedent.

On September 22, 2014, Relators filed a motion for reconsideration. Opposing memoranda were filed by both the City and Intervenors. On September 29, 2014, this Court reconsidered whether its September 19, 2014 Decision, holding that the Charter amendment was unlawful, was premature before the proposed charter was passed by the electors of the City of Powell. Finding that the decision was premature, the Court granted Relators' writ.

The City requests clarification and/or reconsideration of the September 29, 2014 Decision on the order to submit the proposed charter amendment <u>on the November 4, 2014 ballot</u> because of the legal and practical difficulties in following the Order due to constitutional mandates of Ohio Constitution Article XVIII, Sections 8 and 9 (incorporated by reference in Powell City Charter 12.01), as well as the precise nature of its legal duty with regard to this petition, which legal duty is the crux of this mandamus action.

II. LAW & ARGUMENT

A. Standard

A trial court has inherent discretion with respect to its orders. *Horman v. Veverka*, 30 Ohio St.3d 41, 506 N.E.2d 218, 30 O.B.R. 83 (1987). The Court may on its own initiative or by motion under Civ. R. 59(A) "open a judgment, amend findings of fact and conclusions of law or

make new findings and conclusions, and enter a new judgment if the judgment is contrary to law." Similarly, Civ. R. 60(B) provides "upon motion and such terms as are just, the court may relieve a party or his legal representative from final judgment, order or proceeding for the following reasons: * * * (5) any other reason justifying relief from judgment." S.Ct.Prac.R. 12.08(B) allows this Court to reconsider a judgment entry or order in expedited election cases. For the reasons set forth below, the City is seeking such relief to clarify the Court's Order.

B. The Order Requiring the Respondents to Place the Proposed Charter Amendment on the November 4, 2014 Ballot is Contrary to Article XVIII of the Ohio Constitution Incorporated by Powell City Charter 12.01.

The City seeks clarification and/or reconsideration of the Court's September 29, 2014 decision ordering city council and the city clerk to "take all steps necessary to place the proposed charter amendment on the November 4, 2014 ballot and to submit the question to those voters who have already secured absentee ballots." The Court's mandate exceeds the City's authority and is irreconcilable with the constitutional mandates of Article XVIII, Sections 8 and 9 of the Ohio Constitution.

The first difficulty with the Court's writ is the requirement to "take all steps necessary to place the charter amendment on the November 4, 2014 ballot." The precise legal duty of the City Council and City Clerk is the submission of the proposed charter amendment by ordinance to the Delaware County Board of Elections ("Board"). Powell City Charter 12.02; Ohio Constitution Article XVIII, Section 8.

This ordinance will be placed on the agenda for City Council's meeting on Tuesday, October 7, 2014 for this purpose. The board of elections alone has the authority to place the charter amendment on the November 4, 2014 ballot and to provide ballots to those voters who have already secured absentee ballots. R.C. 3501.11. As the Board was not a party to this

action, the City can only ensure the ordinance is passed and submitted to the Board. Besides the City's lack of authority to carry out the Court's mandate, there are several other difficulties with the November 4, 2014 date.

The Court correctly found that Powell City Charter Section 12.01 governs amendments to the City's Charter. As this Court noted, Powell City Charter 12.01 states "[a]ny section of this Charter may be amended as provided in Article XVIII, Section 9 of the Ohio Constitution, by submission of the proposed charter to the electors of the City." (Emphasis added.) Article XVIII, Section 9 of the Ohio Constitution provides, "The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission . . ." Section 8 requires the following:

> * * * The ordinance providing for the submission of the question shall require that it be submitted to the electors at the ***next regular municipal election*** if one shall occur not ***less than 60 nor more than 120 days after its passage***; otherwise it shall provide for the submission of the question at a ***special election*** to be called and held within the time aforesaid. * * * ***Not less than 30 days prior to such election*** the clerk of the municipality ***shall*** mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. * * * (Emphasis added.)

Once the ordinance is forwarded to the Board pursuant to the writ of mandamus, the timeline required by Article XVIII, Section 8 of the Ohio Constitution cannot be accomplished for the November 4, 2014 date. Pursuant to Powell City Charter 7.02, the next regular municipal election for the City will not occur until November 3, 2015. This date is obviously outside of the Court's mandate. The November 4, 2014 election is less than 30 days away from City Council's next meeting and also does not meet the "less than 60 days" requirement set forth in Ohio Constitution Article XVIII, Section 8. Accordingly, a special election is constitutionally necessary.

The Board is empowered to set special election dates pursuant to R.C. 3501.01(E). According to the Ohio Secretary of State's 2014 Ohio Election Calendar, the next special election is February 3, 2015. When City Council meets on October 7, 2014 to pass the required ordinance to submit the proposed charter amendment to the ballot, setting a special election date of February 3, 2015 would be "not more than 120 days" after passage and meets the requirements of Article XVIII, Section 8 of the Ohio Constitution. It would be customary to name the date of the special election in the ordinance submitting the question to the electors, and City Council will in all likelihood identify February 3, 2015 as the date of the special election if the Court's order is narrowed to simply require the City to perform its legal duty.

In addition to the timeline to set the election, the City is required to send out a copy of the proposed charter amendment to each of the electors "not less than 30 days before the election." Article XVIII Ohio Constitution Article XVIII, Section 8. With Council meeting on October 7, 2014, there is less than 30 days remaining before the November 4, 2014 election making it impossible for the City to publish and distribute the proposed amendment before the deadline consistent with its constitutional mandate.

Beyond the legal and practical difficulties the City faces, the Board faces similar limitations to get this on the November 4, 2014 ballot. In the related case[1], the Board explained the difficulty and complexity of its efforts in preparing the ballot. It appears that, with less than a week before absentee ballots are mailed, the steps needed to incorporate the proposed charter amendment and finalize the ballot cannot be accomplished. As the Board explained in its Merit Brief at 24:

> 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. Then, the ballot language will

[1] *State ex rel. Ebersole v. Delaware Co. Bd. Elections*, Slip Opinion No. 2014-Ohio-4077 ("Related Case").

> be sent to the Secretary of State for two levels of legal review. 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. Once it passes all the tests and checks, it can then be printed and prepared for mailing.

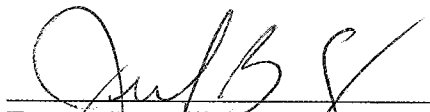
See, Respondents Brief filed in *State ex rel. Ebersole v. Delaware Co. Bd. Elections*, Case No. 2014-1520. The November 4, 2014 mandate will likely cause unnecessary hardship to the Board, its staff, the Secretary of State's office and the Prosecuting Attorney's office, in preparing the final ballot.

Moreover, given the history of this case and the Related Case, it is likely that, once the City's ordinance reaches the Board, Intervenors will file a protest. This Court explained in the Related Case that such a protest is permitted under state law. The Court found, "Under state law the duties of the board of elections include the duty to '[r]eview, examine, and certify the sufficiency and validity of the petitions. R.C. 3501.11(K). And R.C. 3501.39(A)(2) states that a board of elections must accept a petition unless a written protest is filed, the board conducts a hearing, and the election officials determine that the 'petition violates any requirement established by law.' * * *" *State ex rel. Ebersole v. Delaware Co. Bd. Elections*, Slip Opinion No. 2014-Ohio-4077, ¶ 46. The possibility of the filing of a protest, the Board's requirement to hold a hearing, and the potential of the Board following its own precedent in the Related Case by rejecting this measure too (the form of the petitions were found to be legally insufficient) means this matter may require further judicial proceedings prior to the placement on the ballot.

Respondents submit this Court's clarification and/or reconsideration of its judgment is in the best interest of all parties involved in this matter and the Delaware County Board of Elections. Respondents respectfully request a conference with a master commissioner prior to

October 7, 2014 City Council meeting to clarify its legal duty with regard to the charter amendment petition.

Respectfully submitted,



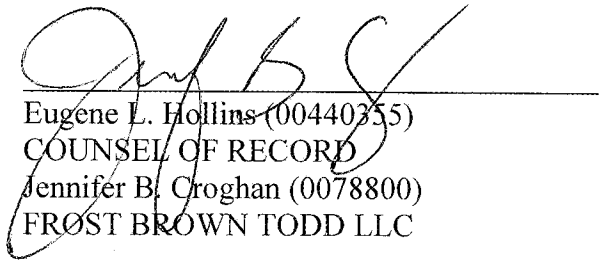
Eugene L. Hollins (00440355)
COUNSEL OF RECORD
Jennifer B. Croghan (0078800)
FROST BROWN TODD LLC
One Columbus
Ten West Broad Street, Suite 2300
Columbus, Ohio 43215
(614) 464-1211
(614) 464-1737 (Fax)
ghollins@fbtlaw.com
jcroghan@fbtlaw.com
COUNSEL FOR RESPONDENTS
THE CITY COUNCIL OF POWELL OHIO AND
SUE ROSS CITY CLERK POWELL

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Respondents City Council of Powell, Ohio and Sue Ross, City Clerk Motion for Clarification and/or Reconsideration* was served upon the following, this 2nd day of October 2014, by electronic mail:

Christopher B. Burch
chris@callenderlawgroup.com
COUNSEL FOR RELATORS

Bruce L. Ingram
Joseph R. Miller
Christopher L. Ingram
blingram@vorys.com
jrmiller@vorys.com
clingram@vorys.com
COUNSEL FOR INTERVENORS
THE CENTER OF PWOELL CROSSING LLC
AND DONALD R. KENNEY, JR.



Eugene L. Hollins (00440355)
COUNSEL OF RECORD
Jennifer B. Croghan (0078800)
FROST BROWN TODD LLC