

IN THE SUPREME COURT OF OHIO

State of Ohio, <i>ex rel.</i>)	
Renee Walker, <i>et al.</i>,)	Case No. 2015-1371
<i>Relators,</i>)	
v.)	
Jon Husted, Secretary of State of Ohio,)	Expedited Election Case Pursuant
<i>Respondent,</i>)	To S.C.R.P. 12.03
and)	
Joanne Dove Prisley,)	
40 Grosvenor Ave)	
Athens, Ohio 45701,)	
<i>Proposed Intervenor.</i>)	

MOTION TO INTERVENE OF JOANNE DOVE PRISLEY

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MOTION TO INTERVENE

Now comes Joanne Dove Prisley (hereafter “Proposed Intervenor Prisley”), the sole Athens County protestor to the Petition for Proposed County Charter in the election administrative proceeding before Respondent Jon Husted, Secretary of State of Ohio, and hereby moves the Court pursuant to the First Amendment to the United States Constitution and Civ. R. 24(A)(2) and Civ. R. 24(B)(2) to issue an order granting her leave to intervene as a Respondent. A Memorandum in Support is set forth below. In addition, Proposed Intervenor Prisley’s Protest filed pursuant to R.C. 307.95(B) (hereafter the “Prisley Protest”), which was filed with Respondent Husted in the election administrative proceeding, is attached hereto as Exhibit 1 and incorporated herein by reference for the purpose of demonstrating why Respondent Jon Husted, Secretary of State of Ohio, cannot be expected to represent Proposed Intervenor Prisley’s interests adequately. The Answer of Joanne Dove Prisley has been filed contemporaneously with that filing of this motion.

Respectfully submitted,

/s Michael M. Hollingsworth

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MEMORANDUM IN SUPPORT

I. Introduction

Proposed Intervenor Joanne Dove Prisley, a qualified registered voter of Athens County, Ohio and very active participant in the county's governmental affairs since 1963,¹ has moved this Court pursuant to the First Amendment of the United States Constitution, which guarantees her rights of freedom of speech and to petition the government, and Civ. R. 24(A)(2) and Civ. R. 24(B)(2) for an order allowing her to intervene as a Respondent. Proposed Intervenor Prisley wishes to defend and advocate the constitutional and legal bases for her Protest filed in opposition to the Petition for Proposed Athens County Charter pursuant to R.C. 307.95(B) with Respondent Jon Husted, Secretary of State of Ohio, for the reasons that (i) Respondent Husted, in his August 13, 2015, Letter of Decision failed to address most of the constitutional and legal propositions and arguments advocated on behalf of Proposed Intervenor Prisley in her Protest, which are grounded primarily in Article X, Sections 3 and 4, of the Ohio Constitution, and (ii) as a result, the Attorney General of Ohio, in his representation of Respondent Husted, would not be expected to advocate those positions sufficiently and but instead would defend only Respondent Husted's Letter of Decision, which is predicated for the most part on statutes and not on the constitutional requirements for a county charter.

II. Argument

A. **Proposed Intervenor Prisley Satisfies the Requirements for Intervention as of Right as Set Forth In Civ.R. 24(A)(2).**

Ohio R. Civ. P. 24(A) provides:

(A) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or

¹ See page 2 of the Prisley Protest.

transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Civ.R. 24(A)(2) should be liberally construed to permit intervention. *Ohio Dept. Admin. Svcs. v. State Employee Relations Board*, 54 Ohio St.3d 48, 51, 562 N.E.2d 125 (1990).

Proposed Intervenor Prisley is the only Athens County elector to have protested the Petition for Proposed Athens County Charter. Had she not filed the protest, the Petition for Proposed Athens County Charter would not be before this Court in this action. Certainly, she has an interest in this matter. This Court has allowed protestors to intervene in an expedited elections mandamus action in order to protect their interests. *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 15. Proposed Intervenor Prisley asks this Court to do the same for her.

Although Respondent Husted upheld Proposed Intervenor Prisley's Protest, he did not do so on most of the grounds advocated in the Prisley Protest. To the contrary, the primary reasons set forth in Respondent Husted's Decision were based on suppositions that were diametrically opposed to arguments made by Proposed Intervenor Prisley, which were based primarily on Article X, Section 3, of the Ohio Constitution. In particular, Respondent Husted ruled that (1) the proposed county charters did not change the forms of the county governments sufficiently, (2) county charter governments and alternative forms of government are synonymous, and (3) the proposed county charters failed because they did not provide for county executives, which are required for every alternative form of government to be part of those county charter governments. Those positions are extremely difficult to support upon a close reading of Article X, Section 3. While Secretary Husted very properly addressed his broad powers to determine the

adequacy of the proposed county charters (which determination Relators have indicated they intend to attack relentlessly) and identified the constitutional and general shortcomings of many provisions in the proposed county charters, just as Proposed Intervenor Prisley did in her Protest, overall Secretary Husted's Decision is quite limited. A defense of that Decision is not likely to protect and may actually impair Proposed Intervenor Prisley's interests, as set forth in her Protest.

Proposed Intervenor Prisley asks this Court to consider fully the scope of and restrictions upon a county charter adopted pursuant to Article X of the Ohio Constitution. It is a much more complex form of government than is that of a charter municipality.² That is because (i) the charter county continues as an arm of the State and is subject to the commands of the State, (ii) the delicate balance of the county and the townships and municipalities within the county must be maintained, and (iii) the very specific requirements and elective provisions found in Article X, Section 3, both authorize and limit what may be included in a county charter. By contrast, Article XVIII, Section 7, of the Ohio Constitution, as limited by Article XVIII, Section 3, grants very broad authority for a municipal charter with just one restriction (a municipal corporation's exercise of police powers may not conflict with the general laws of the State). The county charter and the municipal charter are very different documents.

Proposed Intervenor Prisley does not believe her interests in the following propositions of law and arguments found in her Protest will be adequately presented to the Court by Respondent Husted and the Attorney General and that her interests, including her First Amendment rights of free speech and to petition the government (see Prisley Protest, at 1), will be harmed as a result:

² This is true even when the entire county is to be formed as a municipality (which is not the case here) because of the county's continuing obligations to the State.

1. **The board of elections and therefore the Secretary have discretion to certify a petition proposed for election as invalid because it fails to comply with the substantive requirements of the law.** In *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, this Court stated: “[T]he subject matter of the proposed referendum and initiative is not proper for the ballot. . . . Because citizens of a municipality cannot exercise referendum powers greater than what the Constitution affords, an administrative action is beyond the scope of the referendum power.” *Id.*, ¶¶ 42, 46. (Prisley Protest, at 6.)
2. **A board of elections and therefore the Secretary must apply election laws strictly. A failure to do so is an abuse of discretion.** *State ex rel. Stoll v. Logan County Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-333, 881 N.E.2d 1214, ¶¶ 29, 42. “Under R.C. 3501.39(A)(2), a board of elections must reject any petition if it ‘violates any requirement established by law.’ “[T]he settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.” *Id.*, ¶ 32 (Prisley Protest, at 7.)
3. **A county charter can give the county no more than “limited ‘home rule’ powers”.** 9 Ohio Constitutional Revision Commission 1970-1977, at 27. (The Ohio Constitutional Revision Commission is referred to hereinafter as the “OCRC”.) **The county’s limited home rule powers under a county charter probably are not co-extensive with the home rule powers available under a municipal charter.** 7 OCRC 1970-1977, at 3494. “A careful analysis of Article X, Section 3 of the Constitution leads to the conclusion that by the adoption of a charter as provided in that section a county may be empowered to exercise *at least some* powers of local self-government in the same manner as provided for municipalities by Article XVIII, Section 3. *Id.* (emphasis added). (Prisley Protest, at 7, 8 & 8 n.2.)
4. **Article XVIII, Section 7, of the Ohio Constitution as limited by Article XVIII, Section 3, confers very broad powers of self-government upon charter municipal corporations. In telling contrast, Article X, Sections 3 and 4, confer only limited, specific powers upon charter counties.** (Prisley Protest, at 8 & 8 n.3.)
5. **“By adoption of a charter a county may either simply restructure its government or it may assume home rule powers similar to those of municipalities or be organized as a municipal corporation.”** 7 OCRC 1970-1977, at 3494. (Prisley Protest, at 9.)
6. **Article X, Section 3, of the Ohio Constitution states that “[e]very such [county] charter shall” (i) “provide the form of government of the county”; (ii) “determine which of its officers shall be elected and the manner of their election”; and (iii) “provide for the exercise of all powers vested in, and the**

performance of all duties imposed upon counties and county officers by law.”

As a result of the third of these mandatory requirements, “a county could by charter change its form of government and expand the powers which it may exercise and be less inhibited by statutory provisions in the manner of the exercise of those powers, [but] those duties required by general law of counties and county officers would still have to be carried out.” 8 OCRC 1970-1977, at 25. (Prisley Protest, at 9-10.)

7. **Article X, Section 3, of the Ohio Constitution also allows but does not require the county charter to (iv) “provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities”; (v) “provide for the organization of the county as a municipal corporation”; (vi) “provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county”; and (vii) “[provide] for the division of the county into districts for purposes of administration or of taxation or of both.” Home rule powers are available to counties in number (iv) above by claiming some or all powers vested in municipalities by the Constitution and the general laws of Ohio or in number (v) above by requiring the entire county be formed as a municipal corporation. In either event, the following provision in Section 3 can be claimed: “the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action . . .” (Prisley Protest, at 11-12.)**
8. **Of the permissive provisions allowed in a county charter by Article X, Section 3, only number (iv), a claim of “all or of any designated powers vested by the constitution or laws of Ohio in municipalities,” is at issue in the Proposed Athens County Charter. The powers of a non-charter municipality were claimed. *State ex rel. Vickers v. Summit County Council*, 93 Ohio St.3d 526, 528, 2001-Ohio-1622, 757 N.E.2d 310 (“*Vickers I*”). (Prisley Protest, at 12-13.)**
9. **The provision of R.C. 307.94 that allows petitioners to request that a board of elections ask a common pleas court judge to determine if a petition for proposed county charter is valid violates Article IV, Section 4(B), of the Ohio Constitution in that it requires an advisory opinion when there is no justiciable controversy. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 10. It also violates the separation of powers doctrine in that it requires the judge to act an arm of the Office of the Secretary of State. *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114. (Prisley Protest, at 13, 18-20.)**
10. **The “requirements of the law” by which the validity of the Petitions for Proposed County Charters must be judged are set forth in Article X, Sections 3 and 4, of the Ohio Constitution. The authority conferred through**

county charters upon counties emanate from the required provisions and the elective provisions.

- a. **“In construing constitutional provisions the court must apply the same general rules governing the construction of statutes, mindful, however, of the limitation that in such construction a strict rather than a liberal construction should be had . . .”** *Shryock v. Zanesville*, 92 Ohio St. 375, 383, 110 N.E. 937 (1915). (Prisley Protest, at 23.)
- b. **“When a charter form of government attempts to exercise powers exceeding those conferred by the Ohio Constitution and the Revised Code, it lacks authority to do so.”** *State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 705, 745 N.E.2d 494 (9th Dist. 2000). (Prisley Protest, at 23.)
- c. **The maxim *expressio unius est exclusio alterius*, which means “expression of one thing is the exclusion of another.”** BLACK’S LAW DICTIONARY, at 692 (rev. 4th ed. 1968). *See State ex rel. Giovanello v. Lowellville*, 139 Ohio St. 219, 222, 39 N.E.2d 527 (1942). “That maxim has peculiar application to any statute which in terms limits a thing to be done in a particular form, and in such case it necessarily implies that the thing shall not be done otherwise. That maxim finds its chief use as an aid in ascertaining the whole scope of a law.” *Cincinnati v. Roettinger*, 105 Ohio St. 145, 152, 105 Ohio St. 145 (1922). **Thus, the specificity found in Article X, Section 3, of the Ohio Constitution gives rise to limitations upon what may be included in a county charter.** (Prisley Protest, at 24.)

11. Time and again the proposed county charters exceed the scope and limitations established by Article X, Sections 3 and 4, of the Ohio Constitution.

- a. **They exceed the limitations implicit in the requirement that a charter county “exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law,” which clearly requires such counties to be subordinated to the State and the Ohio Constitution.** (Prisley Protest, at 30-31.)
- b. **The proposed county charters purport to authorize and empower municipal corporations, which instead owe their existence to Article XVIII of the Ohio Constitution.** (Prisley Protest, at 27.)
- c. **The proposed county charters purport to change corporate charters granted by the State, strip corporations of rights afforded by the federal and state constitutions and declare that all corporate acts are acts of the State.** (Prisley Protest, at 27, 30.)

- d. **The proposed county charters purport to change the State's rights of eminent domain, as if the county could delegate such powers to the State.** (Prisley Protest, at 28.)
12. **As a matter of form, the proposed county charters unlawfully attempt to combine a petition for proposed county charter with an elector legislative initiative.** (Prisley Protest, at 31-32.)
13. **As a matter of form, the proposed county charters unlawfully attempt to combine a petition for proposed county charter with zoning regulations.** (Prisley Protest, at 32-35.)

The foregoing demonstrates that the parties' will be unable to represent Proposed Intervenor Prisley's interests adequately. Put simply, the interests of the parties and those of Proposed Intervenor Prisley are not the same. The burden that Proposed Intervenor Prisley bears with inadequacy is minimal indeed. In *Trbovich v. UMW*, 404 U.S. 528 (1972), the Supreme Court of the United States stated: "The requirement of . . . Rule [24] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.*, at 538 n.10 (citing 3B J. Moore, FEDERAL PRACTICE ¶ 24.09-1 [4] (1969)).

For the foregoing reasons, Proposed Intervenor Prisley respectfully requests that the Court permit her to intervene in this action as a matter of right pursuant to Civ.R. 24(A)(2).

B. In the Alternative, Proposed Intervenor Prisley Satisfies the Requirements for Permissive Intervention Set Forth in Civ.R. 24(B)(2).

Intervention pursuant to Civ.R. 24(B)(2) also is proper. That rule states, in part:

(B) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or

made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Permissive intervention is to be granted liberally, and it excludes many of the requirements of intervention as of right. For example, the Civ.R. 24(A)(2) requirement that a proposed intervenor establish inadequate representation by existing parties is not a consideration for purposes of Civ.R. 24(B)(2). As discussed above, Proposed Intervenor Prisley clearly has an interest in the outcome of this matter. Since this case is still recent and the ultimate issue has yet to be placed before this Court, the proposed intervention cannot and will not prejudice or delay the rights of any of the existing parties or the voting public. Proposed Intervenor Prisley therefore requests that the Court grant permissive intervention under Civ.R. 24(B)(2), should the Court decide not to grant intervention as of right.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Motion to Intervene of Joanne Dove Prisley was served this 25th day of August, 2015, by electronic email delivery on the following:

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/s Michael M. Hollingsworth

Michael M. Hollingsworth (0002556)

**BEFORE THE OHIO SECRETARY OF STATE
COLUMBUS, OHIO**

**IN RE: PETITION FOR SUBMISSION
OF PROPOSED ATHENS COUNTY
CHARTER** :

NO. _____

RECEIVED

JUL 29 2015

**ATHENS COUNTY
BOARD OF ELECTIONS**

In re: Protest of Joanne Dove Prisley :

**PROTEST OF ELECTOR JOANNE DOVE PRISLEY SUBMITTED TO THE
OHIO SECRETARY OF STATE, OHIO'S CHIEF ELECTION OFFICER,
PURSUANT TO THE FIRST AMENDMENT TO THE UNITED STATES
CONSTITUTION AND OHIO REVISED CODE SECTIONS 307.95(B), (C), AND
(D), 3501.38 AND 3501.39 TO HAVE THE PETITION FOR SUBMISSION OF
PROPOSED ATHENS COUNTY CHARTER DECLARED INVALID**

I. INTRODUCTION

Pursuant to (i) the First Amendment to the United States Constitution, which guarantees and preserves an elector's rights of freedom of speech and to petition the state government and its agencies with protests, (ii) R.C. 307.95(B), (C), and (D), 3501.38 and 3501.39, and (iii) the discretion of the Ohio Secretary of State as the Chief Elections Officer to receive, review and act upon each and every protest filed by an elector, JOANNE DOVE PRISLEY ("Protestor"), a resident of Athens County, Ohio and a registered voter therein, hereby files this Protest against the Petition for Submission of Proposed County Charter ("Petition" and/or "Proposed County Charter") filed with the Athens County Board of Elections on or about June 24, 2015, for certification as valid and inclusion in the ballot for the November 3, 2015, general election. A copy of the Petition for Submission of Proposed County Charter is attached hereto as Exhibit A and is incorporated herein by reference. This Protest contends (1) the decision of the Athens County Court of Common Pleas, through absolutely no fault of the Judge, is void and the

decision of the Athens County Board of Elections certifying the Petition's invalidity should be reinstated and (2) the provisions of the Proposed County Charter fail to comply with and exceed the requirements of the law and therefore are invalid. The signatures to the Petition are not challenged.

II. QUALIFICATIONS OF PROTESTOR JOANNE DOVE PRISLEY

Protestor Joanne Dove Prisley, 40 Grosvenor Street, Athens, Ohio 45701, Athens County Board of Elections County ID# 8573, is a registered voter with a status of A-Active Voter who lives in Precinct 0014/1 Athens 3-4. Her registration date was February 8, 1963. In recent past, she voted in the following elections: May 5, 2015, November 4, 2014, May 6, 2014, November 5, 2013, May 7, 2013, and November 6, 2012. Protestor Prisley is qualified to vote in the upcoming general election on November 3, 2015. A certified Certificate of Registration issue by the Athens County Board of Elections for Protestor Prisley is attached hereto as Exhibit B and incorporated herein by reference.

Protestor Prisley has a long and strong history as an elector and active citizen in Athens County. She worked the polls from 1970 through 2012, and she currently sits on the Board of Metropolitan Housing Authority. She is a member of the Central Committee of the Athens County Democratic Party, and in the past, she has held a position on its Executive Committee. Protestor Prisley has held the Chair of the Planning Commission, and she has been a member of the Athens County Public Defender Commission and Legal Aid Association. She has worked on many projects for the Athens County Board of Elections through the years, and she also has conducted many training programs for the Board. Protestor Prisley previously worked for the former Ohio State Democratic Chairman, William Lavelle. She has been the Treasurer for fourteen candidates for public office.

III. PROCEDURAL POSTURE

R.C. 307.94 and 307.95 set forth the procedures for submitting a petition for submission of proposed county charter either to the county board of elections or board of county commissioners, at the election of the petitioners, for inclusion on the ballot to be voted upon by the electorate of the county. Even if a petition is filed with the board of county commissioners, the petition is quickly referred to the county board of elections for review. Thereafter, the process is the same for review and challenges, even though the deadlines differ depending upon where the petition first is filed.

Following the filing of the Petition with the Athens County Board of Elections pursuant to R.C. 307.94 on or about June 24, 2015, the Athens County Board of Elections had until “not later than the one hundred twentieth day before the date of the general election[, or Monday, July 6, 2015, to] certify[to the Athens County Board of Commissions] whether the petition [was] valid or invalid.” On Monday, July 6, 2015, after a public hearing and a 4-0 vote against the Petition, the Board certified the Petition to the Commissioners as invalid. A copy of the Certification Letter, dated July 6, 2015, is attached hereto as Exhibit C and incorporated herein by reference.

Exercising one of two options available to them under R.C. 307.94,¹ on Thursday, July 9, 2015, the Petitioners “request[ed] that the [Athens County B]oard of [E]lections proceed to establish the validity or invalidity of the [P]etition . . . in an action before the [Athens County C]ourt of [C]ommon [P]leas . . .” R.C. 307.94. A copy of the email message from Attorney

¹ “If the petition is certified by the board of elections to be invalid . . . , the petitioners' committee may protest such findings . . . , or request that the board of elections proceed to establish the validity or invalidity of the petition . . . in an action before the court of common pleas in the county.” R.C. 307.94. Had the Petitioners protested, presumably the Ohio Secretary of State, as Ohio’s Chief Election Officer, would have heard their protest pursuant to R.C. 3501.38 and 3501.39.

Terry Lodge, attorney for Petitioners, to Athens County Prosecutor Keller Blackburn, dated July 9, 2015, is attached hereto as Exhibit D and incorporated herein by reference. The Athens County Board of Elections was required to commence the proceeding within three days of the Petitioners' request. The three-day period ended on Sunday, July 12, 2015. Unable to take action on a weekend, the Board commenced the proceeding in court on Monday, July 13, 2015.

As described in R.C. 307.94, the court proceeding was an administrative procedure, not a judicial one, in which at the request of the Board, the Athens County Court of Common Pleas would make a decision regarding the Petition that in turn would become the final decision of the Board. After the judge had heard the matter, his "decision [was required to] be certified to the [Athens County B]oard of [E]lections and the [Athens County B]oard of [C]ounty [C]ommissioners in sufficient time to permit the [B]oard of [C]ounty [C]ommissioners to perform its duty to certify the petition" by "four p.m. on the one hundred eleventh day before the general election, by resolution, . . . to the [B]oard of [E]lections for submission to the electors of the county at the next general election." Thus, the Commissioners were required to certify the Petition to the Board of Elections by Wednesday, July 15, 2015. The judge rendered and filed his decision on the afternoon of Wednesday, July 15, 2015, certifying the Petition as valid. The court's Decision, which is attached as Exhibit E, appears to have been certified and faxed by the Judge about 1:30 P.M. in the afternoon. This faxed document was obtained from the Athens County Board of Elections.

On July 23, 2015, the Athens County Board of Commissioners certified the Petition back to the Athens County Board of Elections, which received it that same day. A copy of the Commissioners' Resolution is attached hereto as Exhibit F and incorporated herein by reference.

IV. PROCEDURE FOR THIS PROTEST

The General Assembly gives the final challenge to a petition for submission of proposed county charter to the electorate. No further challenges are allowed administratively. The procedure for elector protests is set forth in R.C. 307.95(B), which states:

(B) Protests against the board of election's findings concerning the validity or invalidity of a county charter petition . . . may be filed by any elector eligible to vote at the next general election with the board of elections not later than four p.m. of the ninety-seventh day before the election. Each protest shall identify the part of, or omission from, the petition . . . to which the protest is directed, and shall set forth specifically the reason for the protest. A protest must be in writing, signed by the elector making the protest, and shall include the protestor's address. Each protest shall be filed in duplicate.

The “ninety-seventh day before the election” is Wednesday, July 29, 2015. Protestor Prisley’s Protest is required to be filed in duplicate with the Athens County Board of Elections by that date. Thereafter, “[t]he [B]oard of [E]lections shall deliver or mail by certified mail one copy of each protest filed with it to the secretary of state. The secretary of state, within ten days after receipt of the protests, shall determine the validity or invalidity of the petition. . . . The determination by the secretary of state is final.” R.C. 307.95(C).

V. STANDARDS FOR DECISION

Presumably the statutory requirements that apply to a board of elections also apply to the decision of the Ohio Secretary of State, although the Ohio Secretary of State, as Ohio’s Chief Election Officer, likely has more discretion than does a board of elections. When a petition for a county charter is filed with a board of elections, “the board of elections shall immediately proceed to determine whether the petition and the signatures on the petition meet the **requirements of law . . .**” R.C. 307.94 (emphasis added). *See also* R.C. 307.95(A). The requirements of the law for the county charter for the most part are found in Article X, Section 3,

of the Ohio Constitution. Upon receipt of a protest, the board of elections must determine whether “the [P]etition is invalid, in accordance with any section of the Revised Code providing a protest procedure,” R.C. 3501.39(A)(1), “the petition violates any requirement established by law,” R.C. 3501.39(A)(2), or “the petition violates the requirements of . . . Chapter 3513. of the Revised Code, or any other requirements established by law.” R.C. 3501.39(A)(3). *Accord*, *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶ 46 (citing R.C. 3501.11(K) & R.C. 3501.39(A)(2)). “[A] county board of elections is authorized to review, examine and certify the sufficiency and validity of petitions and nominating papers even in the absence of a protest thereto.” *State ex rel. Ehring v. Bliss*, 155 Ohio St. 99, 97 N.E.2d 671, Syllabus ¶ 1 (1951) (citation omitted). *Accord*, 2000 Ohio Op. Atty Gen. 200, at *11 & *12n.2 (citing *Ehring* & R.C. 3501.39). A board of elections may determine the limits set by the Ohio Constitution. In *Ebersole*, the Supreme Court of Ohio upheld a board of election’s refusal to certify a referendum petition as valid. The board of elections had certified the petition as invalid because the referendum petition concerned an administrative action, not a legislative action. *Id.*, ¶ 27. The Supreme Court stated: “Because citizens of a municipality cannot exercise referendum powers greater than what the Constitution affords, an administrative action is beyond the scope of the referendum power.” *Id.*, ¶ 29 (citation omitted). The referendum power only applied to legislative actions. The Supreme Court upheld the board of election’s refusal to certify and held: “[T]he subject matter of the proposed referendum and initiative is not proper for the ballot.” *Id.*, ¶ 42 (bold and italics emphasis added). Thus, a board of elections can engage in “judicial or quasi-judicial determinations.” *Morris v. City Council of Macedonia*, 71 Ohio St.3d 52, 55, 641 N.E.2d 1075 (1994).

A board of elections must apply election laws strictly. A failure to do so is an abuse of discretion. In *State ex rel. Stoll v. Logan County Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-333, 881 N.E.2d 1214, the Supreme Court stated: **“Under R.C. 3501.39(A)(2), a board of elections must reject any petition if it ‘violates *any* requirement established by law.’ ‘[T]he settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.”** *Id.*, ¶ 32 (citation omitted) (bold and italics emphasis added). In *Stoll*, the Supreme Court held that the board of elections abused its discretion when it denied a protest and certified a petition. *Stoll*, ¶ 47.

VI. CHARACTERISTICS OF AN OHIO COUNTY CHARTER

Unlike the charter of a municipal corporation, the county charter creates a corporation that may become independent in many ways like a municipal corporation yet it continues to function as an arm of the state and must carry out the state’s commands. Those responsibilities limit the charter county’s power and independence. Moreover, the county must respect the authority and powers of municipal corporations and townships within its realm. Thus, an exercise of power by a municipal corporation may be inappropriate for a charter county even though technically the county might possess a municipal power for the exercise of such power. Unlike the charter of a municipal corporation, which does not confer home rule powers but can enhance them significantly, the county charter is necessary in order to give the county “limited ‘home rule’ powers”. 9 Ohio Constitutional Revision Commission 1970-1977, at 27. (The Ohio Constitutional Revision Commission is referred to hereinafter as the “OCRC”.) On the other hand, a county’s home rule powers likely will not equal those of a charter municipality that has

maximized its powers through charter provisions or even those of a non-charter municipality.²

The OCRC recognized those limitations when it reported as follows:

A careful analysis of Article X, Section 3 of the Constitution leads to the conclusion that by the adoption of a charter as provided in that section a county may be empowered to exercise *at least some powers of local self-government in the same manner as provided for municipalities by Article XVIII, Section 3.*

7 OCRC 1970-1977, at 3494 (emphasis added).

The county is limited by Article X, Sections 3 and 4, of the Ohio Constitution in what can be included in the county charter. The limitations imposed on municipal charters in Article XVIII, Sections 3 and 7, of the Ohio Constitution concern only the prohibited exercise of police powers in conflict with the general laws of the state.³ One might think of the limitations placed on a county charter by Article X in this manner: “You are authorized to do only what is on this list of items. The first three you must do. The remainder you may do, as you wish. Unless it is implied in what is explicitly allowed, you may do nothing else.” Article XVIII confers powers and limitations in a completely different way for municipal charters. Article XVIII empowers municipal corporations in a manner that is something like this: “You can do anything within the physical limits of your municipal corporation except you cannot exercise your police powers in a way that conflicts with the state’s general laws.”

² “The powers which may be conferred upon or granted to a county by a charter, however, probably are not coextensive with those granted to municipalities under Article XVIII, Section 3, except, possibly, in the case where the charter, as authorized by Article X, Section 3 ‘provide[s] for the organization of the county as a municipal corporation. . . .’” 7 OCRC 1970-1977, at 3494.

³ “There is not to be found in the Constitution any provision with respect to counties analogous to Article XVIII, Section 3, which is the direct grant of powers of local self-government to municipalities.” 7 OCRC 1970-1977, at 3493.

“By adoption of a charter a county may either simply restructure its government or it may assume home rule powers similar to those of municipalities or be organized as a municipal corporation.” 7 OCRC 1970-1977, at 3494. Article X, Section 3, of the Ohio Constitution sets forth what provisions a county charter “shall” include and what provisions it “may” include. Section 3 states: “The people of any county may frame and adopt or amend a charter as provided in this article . . .” The authorized “shall” or “must” items are:

“Every such charter shall”

“provide the form of government of the county”

“determine which of its officers shall be elected and the manner of their election”

“provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.”

The Proposed County Charter retains the board of commissioners form of government and essentially declares that nothing will change. It says all of its officers who were elected before will continue to be elected afterwards in the same manner as before. Finally, it makes the required commitment to “exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.”⁴ With respect to this obligation, the OCRC stated:

The proposal retains the provision that any county charter must “provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.” The intention of this provision seems to be to make it clear that even counties having charters continue to be administrative arms of the state for purposes of carrying out certain functions throughout the state. While, therefore, a county could by

⁴ This is required even if the county charter claims the optional right to form the entire county as a municipal corporation. 7 OCRC 1970-1977, at 3495.

charter change its form of government and expand the powers which it may exercise and be less inhibited by statutory provisions in the manner of the exercise of those powers, those duties required by general law of counties and county officers would still have to be carried out.

8 OCRC 1970-1977, at 25.

Since the words “by law” are used without restriction, it seems that the term includes both existing and future statutory enactments. . . . [T]he General Assembly would maintain the power to impose upon counties and county officers other duties which must be carried out. No provision similar to that just quoted is found in the provisions of the Constitution dealing with the powers of municipal corporations.

7 OCRC 1970-1977, at 3495.

The foregoing is all that is required to have a county charter. Home rule is not essential, and it certainly is not conferred by the foregoing. Petitioners have claimed that nothing will change with the adoption of the Proposed County Charter. (See Section 4.01 of the Proposed County Charter.) Had the proposed charter stopped here, that might have been an accurate statement. Very substantial changes are proposed with respect to the powers to be given to the Athens County Board of Commissioners. The assumption of all powers of a non-charter municipality, which is discussed below, would be a very significant increase in the duties and powers of the Athens County Board of Commissioners without a change in the county structure, institutions and personnel to accommodate those powers. The first of the “shall” or “must” requirements set forth above, “provide the form of government of the county,” would have permitted extensive changes to be included in the Proposed County Charter, such as the inclusion and shuffling of departments, officers, officials, duties, obligations, etc. in a manner that would support the Commissioners’ new powers. The 20-page Summit County Charter is a good

example of a county charter that was tailored to provide structure, resources and personnel that would permit the county council to perform more smoothly and efficiently.⁵

The authorized permissive “may” provisions that can be included in a county charter are:

“Any such charter may”

“provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities”

~~“provide for the organization of the county as a municipal corporation”⁶~~

“provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county”

“[provide] for the division of the county into districts for purposes of administration or of taxation or of both.”

Additionally,

“the right of the initiative and referendum is reserved to the people of each county on all matters which such county

⁵ A very large percentage of the Summit County Charter is devoted to definition of the county structure, processes, and personnel and their duties and powers. The charter is a part of the Summit County Code and is available for review and download online at <http://whdrane.conwaygreene.com/NXT/gateway.dll?f=templates&fn=default.htm&vid=whdrane:OHSummit>.

⁶ This authorization is not claimed or used in the Proposed County Charter. It has been lined out to prevent confusion with the option to assume all or any powers of a non-charter municipal corporation. The OCRC described this option as follows: “In the case of such organization of the county as a municipal corporation, the county charter may ‘provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein. . . .’ and thus do away with the prior county, municipal and township governments in the county and create in their place a new municipality which would have and be able to exercise all of the powers of a municipality.” 7 OCRC 1970-1977, at 3494-95.

may now or hereafter be authorized to control by legislative action”

Of the foregoing “permissive” provisions, the Proposed County Charter would appear to have claimed only the first, pertaining to the concurrent exercise of “all or of any designated powers vested by the constitution or laws of Ohio in municipalities.” In addition, it has claimed the Article X, Section 3, constitutional initiative and referendum rights for electors with respect to legislative action. Each of those supports the limited home rule powers claimed in the Proposed County Charter. The OCRC described the limited home rule powers that a county may claim in its charter. It stated:

County home rule under a charter is limited in that the charter must provide for the exercise of all powers vested in the county and for the performance of all duties imposed upon counties and county officers by law. A county under a charter would be subject to limitations on the power to levy taxes and incur debts in a manner similar to municipalities.

⁷ OCRC 1970-1977, at 3496. Moreover, in the exercise of municipal powers, the balance between the county, municipalities and townships, either as set forth in the Article X, Section 3’s requirements or in day-to-day relationships will tend to limit the home rule powers of a charter county. *Id.*⁷

By claiming “all or of any designated powers vested by the constitution or laws of Ohio in municipalities,” the Proposed County Charter would confer all of the powers of a non-charter

⁷ With respect to the zoning regulations included in the Proposed County Charter (see Protest below), however, there is a question as to whether the Proposed County Charter also “provide[s] for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county.” Article X, Section 3. The Proposed County Charter might impose those regulations on the county’s municipalities or townships, or both, without preserving the present powers and rights of the county’s municipalities or townships with respect to zoning. If so, the multiple majorities voting requirement found in Article X, Section 3, could apply in the event the Proposed County Charter is certified as valid and included on the ballot in the upcoming election.

municipality upon Athens County. In *State ex rel. Vickers v. Summit County Council*, 93 Ohio St.3d 526, 528, 2001-Ohio-1622, 757 N.E.2d 310 (“*Vickers I*”), the Supreme Court of Ohio reviewed the Summit County Charter, which likewise claimed all of such powers of a municipality. The Supreme Court, likely referring to Article XVIII, Section 2, of the Ohio Constitution, stated: “[T]he county charter incorporates general law relating to municipalities . . .”⁸

VII. PROTEST

- A. **Claim No. 1: The Certification of the Petition by the Athens County Court of Common Pleas to the Athens County Board of Elections and Athens County Board of Commissioners Is Void, and the Board of Elections’ Unanimous Certification of the Petition as Invalid Should Be Reinstated.**

Although they disagree with his decision, Protestor Prisley and her attorney do not wish to suggest any fault on the part of Judge George McCarthy of the Athens County Court of Common Pleas. To the contrary, she and her attorney believe Judge McCarthy responded admirably in two days’ time to the Athens County Board of Elections’ request for assistance “to establish the validity or invalidity of the petition.” Judge McCarthy quickly cleared his schedule, studied the confusing law pertaining to county charters, and wrote, filed and served a decision. Petitioners on the other hand were not diligent. As a result of their failure to act immediately upon learning on July 6, 2015, that the Board of Elections had denied their Petition by a 4-0 vote, the Board of Commissioners did not receive the Judge’s decision in time to certify the Petition to the Board of Elections for inclusion on the ballot by July 15, 2015, which was the statutory deadline for the certification.

⁸ Non-charter municipal corporations operate under the “[g]eneral laws”, as provided in Article XVIII, Section 2, of the Ohio Constitution. In contrast, charter municipal corporations derive their authority to exercise powers from Article XVIII, Section 7, of the Ohio Constitution. It states, in part: “Any municipality may frame and adopt . . . a *charter* . . . and . . . *exercise thereunder* all powers of local self-government.” (Emphasis added)

1. **Parts of the Petition Affected:** The entire Petition, as certified, is affected.

2. **Reasons:**

a. **Petitioners' Lack of Diligence:** The court's decision, filed July 15, 2015, was not certified to the Athens County Board of Elections and Athens County Board of Commissioners in time for the Commissioners to certify the Proposed County Charter back to the Board of Elections by July 15, 2015, as required by R.C. 307.94. Conversations of this attorney on July 27, 2015, with a representative of the Board of Elections and one of the Commissioners revealed that they received the court's decision on July 15, 2015, in the early afternoon around 1:30 P.M.. That was too late for the Commissioners to act on July 15, 2015.

The pertinent portion of R.C. 307.94 states:

If the petition is certified by the board of elections to be invalid . . . , the petitioners' committee may . . . request that the board of elections proceed to establish the validity or invalidity of the petition . . . in an action before the court of common pleas in the county. Such action must be brought within three days after the request has been made, and the case shall be heard forthwith by a ***judge or such court whose decision shall be certified to the board of elections and to the board of county commissioners in sufficient time to permit the board of county commissioners to perform its duty to certify the petition, if it is determined by the court to be valid . . . , to the board of elections not later than four p.m. on the one hundred eleventh day prior to the general election for submission to the electors at such general election.***

(Bold and italics emphasis added) The 111th day before the November 3, 2015, general election was Wednesday, July 15, 2015. The Board of Commissioners was required to meet formally in a special meeting following a one-day notice to the the press in order to act and certify the Judge's Decision to the Board of Elections. R.C. 121.22(C) states: "All meetings of any public body are declared to be public meetings open to the public at all times." "Meeting" means any

prearranged discussion of the public business of the public body by a majority of its members.” R.C. 121.22(B)(2). “‘Public body’ means . . . any . . . board, commission, . . . or similar decision-making body of any county . . .” R.C. 121.22(B)(1)(a). By the foregoing definitions, all meetings of the Athens County Board of Commissioners are public meetings. The required meeting for the Board of Commissioners to act and certify the Petition to the Board of Elections would have been a special meeting because it was not a regular meeting that had been scheduled in advance. R.C. 121.22(F). The meeting had to be called on short notice. Therefore, a 24-hour advance notice to the news media was required. *Id.* The Judge’s Decision was received by the Board of Commissioners one day too late.

In *Stoll*, the Supreme Court of Ohio stated that election laws must be strictly applied, and a board of elections abuses its discretion when it fails to do so. *Stoll*, ¶ 32. In *State ex rel. Vickers v. Summit County Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, 777 N.E.2d 830 (“*Vickers II*”), the Supreme Court of Ohio expounded upon the importance of meeting deadlines for a county charter amendment being proposed by a group of petitioners. It stated:

Relators did not file their petition with council until the next-to-last day before the constitutional deadline for the county council to pass a resolution placing the charter amendment issue on the November 5, 2002 election ballot, and *the county council delivered the petition to the board of elections to verify the signatures on that same day*. According to the clerk of the county council, this delivery was made without delay in order to facilitate timely action by the council. *The board, however, did not transmit the petition back to the county council until after the deadline had passed*. There is also no evidence that when they filed their petition on September 5, relators requested that county council act by September 6, 2002, to place the proposed charter amendment on the November 5, 2002 general election ballot.

Id., ¶ 23 (emphasis added). Here, Petitioners should have told Judge McCarthy they needed him to certify his Decision by July 14, 2015, in order for the Board of Commissioners to act by the following day.

As it did in *Stoll*, the Supreme Court in *Vickers II* emphasized the importance of strict compliance with election laws. It stated: “‘The settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.’ *State ex rel. Commt. for the Referendum of Lorain Ordinance No. 77-01*, 96 Ohio St. 3d 308, 2002 Ohio 4194, 774 N.E.2d 239, at P49. Neither R.C. 3501.38(J) nor R.C. 3599.36 expressly permits merely substantial compliance, so they require strict compliance.” *Id.*, ¶ 32. The Supreme Court stated: “We deny the writ. Relators have not acted with the requisite diligence to have the charter amendment issue placed on the November 5, 2002 general election ballot . . .” *Id.*, ¶ 33.

In this case, Petitioners likewise failed to exercise due diligence to ensure the Judge’s Decision would be certified and delivered to the Board of Elections and Commissioners by July 14, 2015, so that the Commissioners could provide the required 24-hour notice of their special meeting at which they intended to comply with the July 15, 2015, deadline. Petitioners did not act diligently when the Board of Elections voted 4-0 against the Petition. The Board of Elections voted and certified the Petition to the Board of Elections as invalid on Monday, July 6, 2015. Petitioners did nothing for three days, from Monday, July 6, until Thursday, July 9, at which time counsel for Petitioners sent an email to the Athens County Prosecutor requesting, pursuant to R.C. 304.94, that the Board of Elections “proceed to establish the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures in an action before the court of common pleas in the county.” Petitioners had one or more representatives present at the Board

of Elections meeting on Monday, July 6, 2015. Had Petitioners acted promptly and made their request immediately to the Board of Elections on the afternoon of Monday, July 6, 2015, just after they had learned the results of the vote, the court would have had much more flexibility, and the Petitioners could have managed the time issues more effectively. Likewise, after waiting overnight to confer with their attorney (whose office is in Toledo, Ohio), they or their attorney could have made the request on Tuesday, July 7, 2015, and the court would have had sufficient time assist the Board of Elections with its decision as required by R.C. 307.94 and then certify its decision by Tuesday, July 14, 2015. Petitioners had another option. They could have filed a protest with the Ohio Secretary of State, R.C. 307.94, with very little chance they would miss a deadline. They instead chose the option with very tight time parameters and failed to manage them properly.

“Substantial performance” is not found in R.C. 307.94. Therefore, strict compliance with the time deadlines in R.C. 307.94 was required. In *State ex rel. Carberry v. City of Ashtabula*, 93 Ohio St.3d 522, 2001-Ohio-1625, 757 N.E.2d 307, the Supreme Court of Ohio stated:

We have consistently required relators in election cases to act with the utmost diligence. Relators here did not act with the diligence required in election matters. “It is well established that in election-related matters, *extreme diligence and promptness are required.*”

¶ 25 (citations omitted) (emphasis added). Accordingly, Petitioners had to ensure the Judge’s Decision would be received by the Board of Commissioners by July 14, 2015, so that the Commissioners would be able to certify the Petition back to the Board of Elections by the July 15, 2015, deadline. Petitioners failed to do that, and the statutory deadline passed as a result. The requirements of the law have not been met. Pursuant to the holdings of the Supreme Court

of Ohio in *Vickers II* and *Stoll*, which require strict compliance with election laws, the Petition is not qualified to be placed on the November 3, 2015, ballot. It should be certified as invalid.

The second basis for disqualifying the court's decision and certifying the Petition as invalid is that the procedure set forth in R.C. 307.94 requires the common pleas court to act in an advisory role without a case, controversy or administrative appeal before it. These deficits violate Article IV, Section 4(B), of the Ohio Constitution, which states: "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." Although the procedure in common pleas court specified by R.C. 307.94, wherein the Athens County Board of Elections pursued a determination regarding validity of the Petition following a request from Petitioners' Representatives, may appear at first glance to be "review of proceedings of administrative officers and agencies as may be provided by law," it was not. The Board of Elections is an arm of the Ohio Secretary of State. Administrative appeals from decisions of state agencies are governed by R.C. 119.12. An appeal from a quasi-judicial proceeding⁹ of the Board of Elections would be taken under the second paragraph. The first sentence states: "Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county." A different common pleas court is specified in R.C. 307.94. The "party adversely affected" would have been Petitioners, but no appeal was filed by them. An appeal would have been taken pursuant to the first sentence of the fourth paragraph of R.C. 119.22, which states: "Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and

⁹ If the Board of Elections hearing on July 6, 2015, was not conducted as a quasi-judicial hearing, which may have been the case, Petitioners would have had no right of appeal under any circumstances. See *Rankin-Thoman, Inc. v. Caldwell*, 42 Ohio St.2d 436, 329 N.E.2d 686, Syllabus ¶ 1 (1975).

stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law.” That is not what Petitioners did. Their attorney simply sent an email to the Athens County Prosecutor and requested that the Board of Elections establish its decision in the Athens County Court of Common Pleas. The attached email has none of the attributes of an administrative notice of appeal. The Board of Elections commenced the common pleas court action, not Petitioners, who would have been the “aggrieved party.” Additionally, “[w]ithin thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case.” R.C. 119.22. That type of formal certification was never made. There was insufficient time. The common pleas court proceeding specified in R.C. 307.94 was not a “review of proceedings of administrative officers and agencies as may be provided by law” for which jurisdiction is afforded by Article IV, Section 4(B), of the Ohio Constitution. The General Assembly had something else in mind when it drafted R.C. 307.94.

Section 4(B) also gives the common pleas court original jurisdiction over “all justiciable matters.” The proceeding before the common pleas court requested by the Board of Elections pursuant to R.C. 307.94 did not involve a justiciable controversy. “An actual controversy is a genuine dispute between adverse parties. . . . It is more than a disagreement; the parties must have adverse legal interests.” *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 10 (citations omitted). “To be justiciable, a controversy must be grounded on a present dispute, not on a possible future dispute.” *Id.*, ¶ 10 (citation omitted). R.C. 307.94 did not require the Board of Elections and Petitioners to meet in court. Indeed, it did not require Petitioners to be a part of the proceeding at all. That is why Attorney Lodge, in his email to

Prosecutor Blackburn, expressed Petitioners’ intent to intervene in the proceeding before Judge McCarthy. Petitioners were allowed by R.C. 307.94 to do one thing—make a request, which they did. Thereafter, as provided in R.C. 307.94, “the board of elections [had to] proceed to establish the validity or invalidity of the petition . . . before the court of common pleas in the county.” There was no controversy at all. That Judge McCarthy allowed Petitioners to intervene is irrelevant. What is important is the language of R.C. 307.94. The R.C. 307.94-authorized court proceeding was neither a case nor a controversy. It was not justiciable. It was not an Article IV proceeding under the constitutional power of the common pleas court. Article IV must prevail.

R.C. 307.94 requires the common pleas court to act as an arm of the Office of the Ohio Secretary of State by making a decision for and on behalf of the Board of Elections. Thus, it commands a judicial officer to act in an executive role. Alternatively, R.C. 307.94 requires a judicial officer to act when Article IV jurisdiction is absent. Either way, R.C. 307.94 violates the constitutional doctrine of separation of powers. “The separation-of-powers doctrine represents the constitutional diffusion of power within our tripartite government. The doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.” *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114. Accordingly, the unanimous decision of the Athens County Board of Elections certifying the Petition as invalid should be reinstated.

B. Claim No. 2: Numerous Provisions in the Petition Are Beyond the Scope of the Explicit and Implied Authorizations For a County Charter Found in Article X, Sections 3 and 4, of the Ohio Constitution and Therefore Are Prohibited.

1. Parts of the Petition Affected:

First: Preamble (if the Preamble is deemed to have substantive effect), 3rd Paragraph, Line 5: “and the power to articulate and protect fundamental rights free from preemption by other levels of government”.

Second: Preamble (if the Preamble is deemed to have substantive effect), 4th Paragraph, Lines 2 through 4: “to elevate the consent of the governed above administrative dictates and preemptions that serve special privileges rather than general rights, to secure fundamental rights, and to end the violation of those rights by private and public entities”.

Third: Section 1.01, Lines 1 through 4: “Rights Unalienable, Self-Executing, and Enforceable. All rights delineated and secured by this Charter are inherent, fundamental, irrevocable, unalienable, and shall be self-executing and enforceable against private and public entities. Every resident of the County of Athens shall be secure in these rights, and may bring an action to enforce these rights.”

Fourth: Section 1.02, Lines 3 and 4: “The rights of the people, as secured by this charter, shall not be limited, infringed, or abridged by any law, judicial ruling, preemption, regulation, process, permit, license, Charter, or delegation of privilege or authority.”

Fifth: Section 1.05, Lines through 4: “Right to Assert the Right of Self-Government. The people of the County of Athens possess the right to use their local government to make law, and the making and enforcement of law by the people through a municipal corporation or any other institution shall not eliminate, limit, or reduce their sovereign right of local, community self-government.”

Sixth: Section 1.06, Lines 1 to 3: “Right to Municipal Autonomy. The residents of every municipality (incorporated City, Village, and Township) in the County of Athens shall retain the right to local self-government and other rights as secured by this Charter.”

Seventh: Section 1.07, Line 5: “recall”.

Eighth: Section 1.08, Lines 1 through 2: “along with ecosystems within the County”.

Ninth: Section 1.09, Lines 1-3: “Rights of Nature. Ecosystems within the County of Athens, including, but not limited to, rivers, streams, wetlands, and aquifers, possess the right to exist, flourish, and naturally evolve, free from activities prohibited by this Charter and other local enactments.”

Tenth: Section 1.10, Lines 1 through 2: “along with ecosystems within the County”.

Eleventh: Section 1.11, Lines 1 through 5: “Right to Govern Corporate Activities. As corporations are chartered and licensed by the State in the name of the people, and as all political power is inherent in the people, the people of this County retain the power to make laws, rules, and regulations directly, or through their local representatives, to deny the rights, powers, privileges, immunities, or duties of corporations that act within the County when those corporate rights, powers, privileges, immunities, or duties conflict with the rights of the people.”

Twelfth: Section 1.12, Lines 1 through 12: “Rights Secured against Corporations. As corporations are created and empowered to act through the State’s issuance of charters, licenses, and permits, and thus are creatures of the State and state actors, corporations and other business entities that violate rights secured by this Charter or other local enactment, or seek to violate those rights or enactments, shall not be deemed to be “persons” to the extent that such treatment would interfere with the rights, or protections of rights, secured by this Charter or other local enactments, nor possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights enumerated for people and nature by State and federal constitutions, this Charter, or other local enactments. “Rights, powers, privileges, or immunities” shall include standing to challenge this Charter or other local enactments, the power to assert state or federal preemptive laws in an attempt to overturn this Charter or other local enactments, and the power to assert that the people of the County lack the authority to adopt this Charter or other local enactments. In addition, no permit, license, privilege, charter, or other authority issued by any state, federal, or international entity shall be deemed valid within the County if it limits or reverses the rights, prohibitions and regulations secured by this Charter or enacted by the County to protect rights.”

Thirteenth: Section 1.13, Line 4: “and natural”.

Fourteenth: Section 1.14, Line 2: “and natural”.

Fifteenth: Section 1.15, Lines 1 through 4: “Rights against Eminent Domain. All residents of the County of Athens have the right to hold private property without threat of expropriation or taking by corporate entities for purposes of private gain rather than public use. The power of taking private property shall not be delegated. The taking of private property for development and transportation of oil and gas resources and/or waste products by corporations for profit does not constitute public use.”

Sixteenth: Section 2.01, Lines 1 through 2: “Prohibitions Necessary to Protect Rights. It shall be unlawful for any private or public entity to violate the rights recognized and secured by this Charter and its amendments, by engaging in the activities herein enumerated and activities as may be further provided by ordinance or resolution by the County Commissioners, by the people through initiative, or by Charter amendment. Accordingly, it shall be unlawful for any private or public entity to:

Section 2.01.1. Deposit, store, treat, inject, dispose of, or process wastewater, produced water, "frack" water, brine or other substances, chemicals, or by-products that have been

used in, or result from, the extraction of shale gas and oil by high-volume horizontal hydraulic fracturing, on or into the land, air or waters of the County of Athens. However, this prohibition shall not include wastewater produced in the County of Athens by conventional shallow vertical drilling methods.

Section 2.01.2. Engage in the procurement or extraction of any water from any source, including public water sources, within the County of Athens for use in high-volume hydraulic fracturing for extraction of shale gas and oil.”

Seventeenth: Section 3.01, 2nd Paragraph, Lines 2 and 3: “provided that general law does not violate the rights of county residents, their County Charter, or other unalienable rights”.

Eighteenth: Section 3.01, 2nd Paragraph, Line 6: “and natural”.

Nineteenth: Section 3.01, 3rd Paragraph, Line 2: “or by Charter amendment by the people”.

Twentieth: Section 4.02, 1st Paragraph, Lines 4 through 6: “provided that all powers and duties respecting initiative or referendum petitions by general law shall be ministerial and mandatory and shall be exercised by the County Commission or its designee.”

Twenty-First: Section 4.02, 1st Paragraph, Line 6: “The power of recall shall be exercised in the manner of an initiative as herein defined.”

Twenty-Second: Section 5.02, 1st Paragraph, Line 6: “protect rights established by this Charter”.

2. **Reasons:**

“In construing constitutional provisions the court must apply the same general rules governing the construction of statutes, mindful, however, of the limitation that in such construction a strict rather than a liberal construction should be had . . .” *Shryock v. Zanesville*, 92 Ohio St. 375, 383, 110 N.E. 937 (1915). “When a charter form of government attempts to exercise powers exceeding those conferred by the Ohio Constitution and the Revised Code, it lacks authority to do so.” *State ex rel. O’Connor v. Davis*, 139 Ohio App.3d 701, 705, 745 N.E.2d 494 (9th Dist. 2000).

There are three bases upon which this claim of invalidity for failure to meet the requirements of the law is advanced. The first is based on the maxim *expressio unius est exclusio alterius*, which means “expression of one thing is the exclusion of another.” BLACK’S

LAW DICTIONARY, AT 692. The Proposed County Charter includes provisions that are beyond the scope of Article X, Section 3, of the Ohio Constitution. The second basis is that the Proposed County Charter includes provisions for which the county does not have specific powers to propose and implement. The third basis is that the Proposed County Charter directly conflicts with the obligations of the county that are required by Article X, Section 3.

a. Expressio Unius Est Exclusio Alterius. In construing the Ohio Constitution, the Supreme Court of Ohio has applied the maxim *expressio unius est exclusio alterius*. *State ex rel. Giovanello v. Lowellville*, 139 Ohio St. 219, 222, 39 N.E.2d 527 (1942). “[T]he maxim *expressio unius est exclusio alterius* has direct application. It means “expression of one thing is the exclusion of another.” BLACK’S LAW DICTIONARY, AT 692 (rev. 4th ed. 1968). “That maxim has peculiar application to any statute which in terms limits a thing to be done in a particular form, and in such case it necessarily implies that the thing shall not be done otherwise. That maxim finds its chief use as an aid in ascertaining the whole scope of a law.” *Cincinnati v. Roettinger*, 105 Ohio St. 145, 152, 105 Ohio St. 145 (1922). Here, the tight-knit group of items being considered are set forth explicitly in Article X, Section 3, of the Ohio Constitution. They have been explored above as the “shall” requirements and the “may” permissions. Each expressly or by implication concerns what may be included in a county charter. Section 3 therefore “in terms limits a thing to be done in a particular form,” and “it necessarily implies that the thing shall not be done otherwise.”

All of the “Parts of the Petition Affected,” which have been identified above, are not authorized to be included in the Proposed County Charter. As a result, the Petition does not meet the requirements of the law, and it should be certified as invalid.

b. Provisions for Which the County Lacks Authority.

Each of the “Parts of the Petition Affected” set forth above is beyond the authority of a county. Consider first the fundamental rights that the Proposed County Charter purportedly confers on Athens County residents. References to “fundamental rights are found in the following “Parts of the Petition Affected”: First, Second, Third, Fourth Seventeenth and Twenty-Second.

Fundamental rights are found in state and the federal constitutions. They also are recognized by state supreme courts and the United States Supreme Court. For example, “[f]undamental rights have been defined by the United States Supreme Court as ‘those fundamental liberties that are implicit in the concepts of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.’ . . . The court has also found a fundamental right in ‘those liberties that are deeply rooted in this Nation's history and tradition.’” *State v. Benson*, 81 Ohio App.3d 697, 701, 612 N.E.2d 337 (4th Dist.1992) (quoting *Moore v. East Cleveland*, 431 U.S. 494 (1977) and *Palko v. Connecticut*, 302 U.S. 319 (1937)). The Supreme Court of Ohio often recognizes fundamental rights found in the Ohio Constitution. *See, e.g., Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 331, 1996-Ohio-137, 662 N.E.2d 287 (“The Ohio Constitution recognizes the fundamental right to trial by jury in Section 5, Article I”). There is no room within the law of Ohio for a county that can create, recognize and protect fundamental rights, whatever the source of those rights. Not even the General Assembly can create a fundamental right. Those rights have roots in the English common law tradition that long predate the birth of our nation.

Just as the attempts to create fundamental rights now and in the future through the Proposed County Charter are void, so too are efforts to protect them from preemption or

otherwise, which are found in the First, Second, Third, Fourth, Sixteenth, Seventeenth, and Twenty-Second “Parts of the Petition Affected”. The causes of action that the Proposed County Charter allegedly gives to Athens County residents are particularly problematic. They are found in the Second, potentially Fifth, and Sixteenth “Parts of the Petition Affected”. They are not well-defined and would appear to take on whatever meaning an Athens County plaintiff would desire to give them. There is no Ohio authority for the county to create that type of potential liability for any person, whether natural or fictitious. The creation of new torts that are actionable within Athens County but cannot be alleged in a court outside of Athens County certainly would conflict with Ohio’s general laws. They would be void.

Unlike the fundamental freedoms that we possess by virtue of the state and federal constitutions, which protect us from overreaching and wrongful actions on the part of the state and federal governments, the fundamental rights that the Proposed County Charter allegedly provides to the Athens County residents also protect those residents from allegedly wrongful actions of private citizens. There is no authorization anywhere for such an extension of a fundamental right, and its presence in governmental documents such as the Proposed County Charter likely would violate the fundamental rights of those accused. It also would conflict with the general laws of this state. This alarming extension of the fundamental rights concept is found in the Second, Third, Eleventh, Twelfth, and Sixteenth “Parts of the Petition Affected”.

Many of the “Parts of the Petition Affected” attempt to elevate the Proposed County Charter and ordinances adopted pursuant thereto above the Ohio general law and even the Ohio Constitution. In addition to the creation of fundamental rights already discussed, these would include the First, Second, Fourth, Fifth, Eleventh, Twelfth, Fifteenth, Sixteenth, Seventeenth, and

Twenty-Second “Parts of the Petition Affected”. Since all of those would violate Ohio’s general laws, they are void.

In the Sixth “Parts of the Petition Affected”, the Proposed County Charter purports to empower the creation and continued existence of municipal corporations. In Ohio, municipal corporations are created pursuant to authorization in Article XVIII of the Ohio Constitution. This attempt to exercise the state’s powers would be void. Likewise, the purported rights to change the charters of corporations and other business entities empowered and created by the State of Ohio and to strip such entities of rights they possess under the federal and state constitution and federal and state laws would have no effect whatsoever since a county in Ohio cannot claim those powers. Such void provisions are in the Eleventh and Twelfth “Parts of the Petition Affected”.

In the United States and in Ohio, people have rights. There is no authorization anywhere for the purported rights in the Proposed County Charter to be given to ecosystems and nature. These attempts are found in the Eighth, Ninth, Tenth, Thirteenth, Fourteenth, and Eighteenth “Parts of the Petition Affected”. All such attempts are void.

In the Twelfth “Parts of the Petition Affected”, the Proposed County Charter asserts that the state and all corporations and similar business entities, as creatures of the state, are essentially one and the same. Thus, it declares that all corporations are “state actors” in all that they do. That would open all such entities to liability for federal and state constitutional torts whenever they are sued in court. Determining whether an entity is a state actor currently is a very difficult undertaking. This would violate not only state general law but also federal and state constitutional law.

In the Seventh and Twenty-First “Parts of the Petition Affected”, claims are made with respect to the right of recall. The right of recall is not granted by Article X of the Ohio Constitution. It would appear that non-charter county electors have no right of recall at all, just as they have no rights of initiative and referendum. Therefore, the only sources of a right of recall are the powers of a municipality granted by the state’s general law, which is available to a charter county through Article X, Section 3, of the Ohio Constitution. The general laws pertaining to municipalities cannot be changed in a county charter. The inclusion of recall in Section 1.07 (the Seventh “Parts of the Petition Affected”) must not conflict with general law. If it does, that portion of Section 1.07 would be void. Also, Section 4.02 (the Twenty-First “Parts of the Petition Affected”) includes the following sentence: “The power of recall shall be exercised in the manner of an initiative as herein defined.” That sentence would be void. The general law pertaining to municipalities includes a procedure for recall. The recall procedure would have to be followed, and it could not be modified in the county charter to resemble the procedure for initiative.

Eminent domain is a right and power of the state. The state can extend that right to political subdivisions, but it still remains the right and power of the state. The Fifteenth “Parts of the Petition Affected” would change the state’s rights with respect to eminent domain, something a political subdivision cannot do. There is no authority for this in Article X, Section 3. That “Parts of the Petition Affected” would be void.

Section 3.01 (the Nineteenth “Parts of the Petition Affected”) includes the words “by Charter amendment by the people.” If that wording is intended to refer to the manner in which charter amendments are to be adopted as set forth in Article X, Section 4, of the Ohio Constitution, then it is perfectly acceptable. If it instead is intended to create a right in the people

to initiate charter amendments by petition, which would be placed directly on the ballot without being referred to the charter commission, the language would violate Article X, Section 4, and it would be void.

The Twentieth “Parts of the Petition Affected” addresses the manner in which initiative and referendum petitions, authorized by Article X, Section 3, of the Ohio Constitution, would be treated under the general laws pertaining to municipal corporations, as modified by the Proposed County Charter. It includes the following sentence: “The provisions of general law relating to such right applicable to municipalities in effect at the time of the adoption of this Charter shall govern the exercise of such right in the County of Athens, provided that all powers and duties respecting initiative or referendum petitions by general law shall be ministerial and mandatory and shall be exercised by the County Commission or its designee.” As worded, this language may be effective so long as the Board of Elections is not included. If the intent is to include the Board of Elections, which is an arm of the Ohio Secretary of State, such an attempt probably would be void because it would have impact outside of the county.

Section 2.01.1, which is found in the Sixteenth “Parts of the Petition Affected” and is an attempt to ban injection wells, likely is void pursuant to the decision of the Supreme Court of Ohio in *State ex rel. Morrison v. Beck Energy Corp.*, 2015-Ohio-485 (Ohio Feb. 17, 2015). Since Section 2.01 is a zoning regulation, it will be discussed in more detail below. If the Proposed County Charter becomes effective, the filing of a lawsuit by an aggrieved party (likely an injection well owner or operator) in state or federal court would be inevitable. To the extent the plaintiff could prove federal constitutional torts, there would be a high probability that the county would have to pay sizable legal fees and expenses incurred by the plaintiff.

The stripping of the rights of corporations and other business entities, which are found primarily in the Twelfth “Parts of the Petition Affected”, almost guarantee that if the county should be sued, the suit would be filed in federal court. Once constitutional torts are proven, the probability of the plaintiff collecting legal fees and expenses would be quite high.

Each and every one of the “Parts of the Petition Affected” discussed above is a direct departure from the requirements of the law and a violation of the general laws of Ohio. Just one such violation would justify a certification of the Proposed County Charter as invalid. As is addressed in the next Claim, these departures from the requirements of the law would all but destroy the ability of the county to function.

c. Provisions that Directly Conflict with Article X, Section 3.

Specifically, this section is about that portion of Article X, Section 3, of the Ohio Constitution that states: “Every such charter shall . . . provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.” Because of this requirement, a municipal charter will always be simpler and possess broader authority than will a county charter. The realm of discretion enjoyed by the commissioners or council members of a charter county is small indeed, even with a charter. The Proposed County Charter would have the Athens County Board of Commissioners serving many masters at once. The result could be chaos at the worst and enormous increased tensions at the best. Each and every one of the “Parts of the Petition Affected” listed above conflicts directly with the constitutional requirement that the “charter shall . . . provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.” As a required constitutional requirement, it must prevail over all portions of the Proposed County Charter that would interfere with its execution. That interference is so pervasive that the Proposed County Charter

cannot stand. It must be certified as invalid for the reason that it does not conform to the requirements of the law.

C. **Claim No. 3: The Proposed County Charter Unlawfully Attempts to Combine a County Charter with an Elector Initiative.**

1. ***Parts of the Petition Affected:*** The entire Proposed County Charter.
2. ***Reasons:*** Except for the unacceptable provisions identified above,

Articles III, IV, and V of the Proposed County Charter contain provisions that may be included in a county charter. The unacceptable provisions essentially represent an unauthorized initiative, otherwise not permitted, that Petitioners have tried to include in the Proposed County Charter. There are problems with this. The quoted text is not allowed by Article X, Sections 3 and 4, of the Ohio Constitution. Electors in a non-charter county have no power or right of initiative. Once a county charter is adopted, those electors will have no power of initiative that will allow them to have charter amendments placed on the ballot. All charter amendments must go through a charter commission. Article X, Section 4. Perhaps Petitioners are claiming that a county charter has the same stature and can claim the broad range of powers that a municipality has available through a charter, and that is why the unauthorized provisions have been included. The two types of charters are not equal. The Petitioners may believe that by claiming all of the powers available to a municipality under the Ohio Constitution, the county charter can become the equivalent of a municipality charter. That would never be possible without forming the entire county as a municipality, which is not being attempted here. Non-charter municipalities have all of the powers available under the Ohio Constitution and the general laws. Charter municipalities have all of the powers available to them under the Ohio Constitution and their charters. Such powers are those that a non-charter municipality receives. There are no powers given the county to propose an elector initiative with a county charter. The attempt to do so here

must fail. It does not comply with the requirements of the law and, therefore, should be certified as invalid.

D. Claim No. 4: Sections 1.08, 1.09, 1.10, 1.13, 1.14, 2.01.1, 2.01.2 and 3.01 Are Unauthorized Zoning Regulations.

1. Parts of the Petition Affected: Sections 1.08, 1.09, 1.10, 1.13, 1.14, 2.01.1, 2.01.2 and 3.01.

2. Reasons: “Zoning ordinances have reference to the use of land, not personal property, nor the persons who own land.” 10 O.JUR. 3D, Buildings, Zoning and Land Controls § 84, at 284 (1995) (footnotes omitted). “The right of the individual to use and enjoy his private property is not unbridled, but is subject to the legitimate exercise of the local police power. Zoning regulations are a valid exercise of the police power. They are adopted and enforced pursuant to such power under which government may enact law in furtherance of the public safety, health, morals, or general welfare.” *Id.* § 86, at 287 (footnotes omitted).

The power to plan and zone or regulate land use belongs to the state. The Ohio Constitution, Article II, § 1, vests the state’s legislative power, which includes the police power, in the General Assembly. Through its constitution and enabling statutes, Ohio has delegated most of its planning and police power authority to regulate land use to the local level. In recent years, the state has enacted statutes which address land use issues of statewide concern and, in effect, take back some of the delegated power. These statutes reflect, for example, a greater concern for the environment by regulating the location of hazardous waste facilities and for disempowered groups by regulating the location of group homes for the disabled and day care facilities. The statutes include full or partial preemption of local regulatory systems.

OH. PLAN. & ZONING L. § 3:1 (2014 ed.) (footnote omitted). Even for a charter government, zoning powers fall within the police powers, and a local government’s exercise of those powers cannot conflict with general law.

The Ohio Supreme Court has ruled that the enactment of zoning laws by a municipality is an exercise of the “police power,” rather than an exercise of the power of “local self-government” as granted by the home rule amendment; the phrase “not in conflict with general laws” in Ohio Constitution, Article XVIII, § 3 applies to the “police power.” Under home rule, municipalities may enact their own police power measures, such as zoning and subdivision regulations, but these measures cannot conflict with the general law of the state. Where there is conflict, it must be related to the same subject matter and must be specific and not implied.

OH. PLAN. & ZONING L. § 3:2 (2014 ed.) (footnotes omitted).

Two provisions, 2.01.1 and 2.01.2, which control the use of land and land resources, appear to be the primary reasons for the Proposed County Charter. By definition, they are zoning regulations that have not been developed in the usual and accepted manner. Section 2.01.1 prohibits oil and gas wastewater injection wells, an activity regulated and permitted by ODNR. See R.C. 1509.22. Section 2.01.2 prohibits the use of fresh water for oil and gas related activities. These provisions probably resemble forbidden spot zoning instead of normal zoning regulations that are a part of a uniform development plan. The only zoning available in unincorporated Athens County at this time is county rural zoning, which requires a zoning commission study of the proposed zoning, which is to be presented as a comprehensive plan to the county commissioners for acceptance. Once accepted by the commissioners, the electors in the unincorporated parts of the county must vote. The zoning goes into effect only in those townships in which a majority of the electors vote in favor of the zoning plan. Townships also can adopt zoning, and it is more the norm in unincorporated areas than is county rural zoning. The zoning regulations in Sections 2.01.1 and 2.01.2 would also apply within municipalities—something that the county government simply cannot achieve. Even if the county should adopt a charter and assume all municipal powers, any attempt by the county to adopt zoning regulations

that would be effective within municipalities would be problematic. Recently in *Morrison*, the Supreme Court stated:

Under the city's ordinances, a state permit holder cannot begin "any excavation" or "drill a well for oil, gas, or other hydrocarbons" without fully complying with local provisions. . . . Because [the oil and gas operator] obtained a valid state permit in accordance with R.C. Chapter 1509, the city cannot "extinguish privileges arising thereunder through the enforcement of zoning regulations."

. . .

. . . We hold that the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3, does not allow a municipality to discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state has permitted under R.C. Chapter 1509.

Id., ¶¶ 28, 34 (citations omitted).

Sections 1.08, 1.09, 1.10, 1.13, 1.14, and 3.01 also are attempts at zoning. These sections, which concern the control of ecosystems and nature, are attempts to control the use of land and nature. Rights cannot be granted to land and nature, but uses of land and nature can be controlled. That control is a type of zoning. The comments above pertaining to Sections 2.01.1 and 2.01.2 apply to these sections as well.

Article X, Sections 3 and 4, of the Ohio Constitution do not authorize zoning regulations to be included in the county charter. Zoning regulations usually are the result of meticulous planning and require a complex development code to be adopted by electors. The zoning provisions in the Proposed County Charter are not authorized. Sections 2.01.1 and 2.01.2 directly conflict with general law. The charter's regulations have not been adopted in

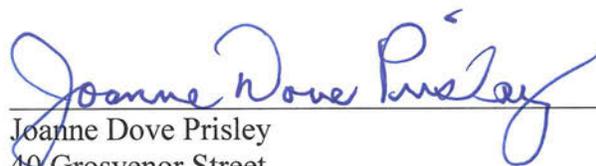
accordance with county rural zoning or any zoning act set forth in Ohio's general law.¹⁰ Their presence in the Proposed County Charter does not meet the requirements of the law and requires the county charter to be certified as invalid.

VIII. CONCLUSION

The Petition and Proposed County Charter are fatally defective. They cannot be repaired at this late date. They should not be thrust upon the Athens County Board of Commissioners and the residents of Athens County. The damage that the Proposed County Charter would do to the Athens County government would be immeasurable should the Proposed County Charter be adopted. Years and significant expense would be required to repair that damage.

For the foregoing reasons, Protestor Prisley respectfully requests that the Petition and Proposed County Charter be certified as invalid. Thank you for your kind attention to this Protest.

Respectfully submitted,



Joanne Dove Prisley
40 Grosvenor Street
Athens, Ohio 45701
Protestor

July 29, 2015

Respectfully submitted,



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July 29, 2015

¹⁰ Prospective zoning regulations regulating oil and gas activities were upheld in *Smith Family Trust v. City of Hudson Bd. of Zoning & Bldg. Appeals*, 9th Dist. Summit No. 24471, 2009-Ohio-2557.

ATTACHMENTS

- Exhibit A: Petition for Submission of Proposed County Charter
- Exhibit B: Certificate of Registration for Joanne Dove Prisley, dated July 22, 2015
- Exhibit C: Athens County Board of Elections Certification Letter, dated July 6, 2015
- Exhibit D: Email from Terry Lodge to Keller Blackburn, dated July 9, 2015
- Exhibit E: Decision and Opinion of Judge George McCarthy, filed July 15, 2015
- Exhibit F: Athens County Board of Commissioners Resolution, dated July 23, 2015

PETITION FOR SUBMISSION OF PROPOSED COUNTY CHARTER

Constitution of Ohio, Article X, Sections 3 and 4; Revised Code §§ 307.94, 307.95, 307.96, 3501.38, 3513.261.

To be filed with the board of county commissioners not later than 110 days before the date of a general election; or in the alternative, to be filed with the county board of elections not later than 130 days before the date of a general election.

NOTICE – Whoever knowingly signs this petition more than once, signs a name other than his own, or signs when not a legal voter, is liable to prosecution.

To the Board of County Commissioners of the County of Athens, Ohio:

We, the undersigned, qualified electors of the County of Athens, Ohio, respectfully petition the Board of County Commissioners to forthwith provide by Resolution, for the submission to the electors of said county, the question of adopting a county charter in the form attached to this petition, that question being: “SHALL THE ATTACHED COUNTY CHARTER BE ENACTED?”

CHARTER OF THE COUNTY OF ATHENS, OHIO

We, the people of the County of Athens, Ohio, by this Charter secure the right of all County residents to participate in local government, which right is presently unavailable to residents under the statutory form of County government.

The Ohio Constitution, Article I, Section 2 declares that “*All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary . . .*” By this Charter, we exercise this right.

We hereby declare that we deem it necessary to alter the current County government in order to institute one that will guarantee to all of the people their equal protection and benefit. We secure for ourselves and for our successors the right of self-determination, by establishing a County government that provides for initiative and referendum rights, the exercise by the people of the County through their local representatives of all powers vested in but not limited to municipalities, and the power to articulate and protect fundamental rights free from preemption by other levels of government. Therefore, in accordance with Article X, Section 3 of the Ohio Constitution, as well as our inherent right of local, community self-government, we form this Charter so that the people in all incorporated and unincorporated parts of the county may exercise all powers including, but not limited to, those vested by the Constitution and laws of Ohio in home rule municipalities.

We, the people, adopt this home rule Charter to secure the right of local, community self-government for all residents of the County, to elevate the consent of the governed above administrative dictates and preemptions that serve special privileges rather than general rights, to secure fundamental rights, and to end the violation of those rights by private and public entities.

Article I—COMMUNITY BILL OF RIGHTS (Community Rights)

Section 1.01 Rights Unalienable, Self-Executing, and Enforceable. All rights delineated and secured by this Charter are inherent, fundamental, irrevocable, unalienable, and shall be self-executing and enforceable against private and public entities. Every resident of the County of Athens shall be secure in these rights, and may bring an action to enforce these rights.

Section 1.02 Rights Retained by People. The enumeration of rights in this Charter and elsewhere shall not be construed as a limitation upon rights of the people of the County of Athens, and rights not enumerated are retained by the people. The rights of the people, as secured by this charter, shall not be limited, infringed, or abridged by any law, judicial ruling, preemption, regulation, process, permit, license, Charter, or delegation of privilege or authority.

Section 1.03 Governmental Legitimacy. All governments in the United States owe their existence to the people of the community that those governments serve, and governments exist to secure and protect the rights of the people and those communities. Any system of government that becomes destructive of those ends is not legitimate, lawful, or constitutional.

Section 1.04 Right of Local, Community Self-Government. The people of the County of Athens possess both a collective and individual right of self-government in their community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.

Section 1.05 Right to Assert the Right of Self-Government. The people of the County of Athens possess the right to use their local government to make law, and the making and enforcement of law by the people through a municipal

corporation or any other institution shall not eliminate, limit, or reduce their sovereign right of local, community self-government.

Section 1.06 Right to Municipal Autonomy. The residents of every municipality (incorporated City, Village, and Township) in the County of Athens shall retain the right to local self-government and other rights as secured by this Charter. The adoption of this Charter shall not preempt the exercise of power by the people within any municipality in the County, and in case of conflict between the exercise of powers granted by this Charter and the exercise of powers by municipalities, the powers of the municipality shall prevail within its jurisdiction.

Section 1.07 Right to Untainted Elections, Initiative, Referendum, and Recall. Elections shall be free and equal, and no power or association, civil or military – including chartered corporations – shall at any time interfere to prevent or influence the free exercise of the right of suffrage or the outcomes of elections. The people at all times retain the right to exercise direct democratic action, including participation in democratic decision-making by initiative, referendum, and recall.

Section 1.08 Right to Clean Air, Water, and Soil. All residents of the County of Athens, along with ecosystems within the County, possess the right to clean air, water, and soil.

Section 1.09 Rights of Nature. Ecosystems within the County of Athens, including, but not limited to, rivers, streams, wetlands, and aquifers, possess the right to exist, flourish, and naturally evolve, free from activities prohibited by this Charter and other local enactments.

Section 1.10 Right to be Free from Chemical Trespass. All residents of the County of Athens, along with ecosystems within the County, possess the right to be free from chemical trespass by toxic substances.

Section 1.11 Right to Govern Corporate Activities. As corporations are chartered and licensed by the State in the name of the people, and as all political power is inherent in the people, the people of this County retain the power to make laws, rules, and regulations directly, or through their local representatives, to deny the rights, powers, privileges, immunities, or duties of corporations that act within the County when those corporate rights, powers, privileges, immunities, or duties conflict with the rights of the people.

Section 1.12 Rights Secured against Corporations. As corporations are created and empowered to act through the State's issuance of charters, licenses, and permits, and thus are creatures of the State and state actors, corporations and other business entities that violate rights secured by this Charter or other local enactment, or seek to violate those rights or enactments, shall not be deemed to be "persons" to the extent that such treatment would interfere with the rights, or protections of rights, secured by this Charter or other local enactments, nor possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights enumerated for people and nature by State and federal constitutions, this Charter, or other local enactments. "Rights, powers, privileges, or immunities" shall include standing to challenge this Charter or other local enactments, the power to assert state or federal preemptive laws in an attempt to overturn this Charter or other local enactments, and the power to assert that the people of the County lack the authority to adopt this Charter or other local enactments. In addition, no permit, license, privilege, charter, or other authority issued by any state, federal, or international entity shall be deemed valid within the County if it limits or reverses the rights, prohibitions and regulations secured by this Charter or enacted by the County to protect rights.

Section 1.13 Right to a Sustainable Community. All residents of the County of Athens possess the right to a sustainable community, which includes, but is not limited to, the right to establish local laws establishing policies and prohibitions concerning energy, agriculture, water, construction, transportation, and other activities in order to further secure this right, and the right to be free from activities that may adversely impact the rights of human and natural communities.

Section 1.14 Right to Own Property. Each of the residents of the County of Athens possess a right to own property, subject to the rights and privileges of human and natural communities as recognized by this Charter, other local enactments, or by state and federal law.

Section 1.15 Rights against Eminent Domain. All residents of the County of Athens have the right to hold private property without threat of expropriation or taking by corporate entities for purposes of private gain rather than public use. The power of taking private property shall not be delegated. The taking of private property for development and transportation of oil and gas resources and/or waste products by corporations for profit does not constitute public use.

ARTICLE II—PROTECTION OF RIGHTS

Section 2.01 Prohibitions Necessary to Protect Rights. It shall be unlawful for any private or public entity to violate the rights recognized and secured by this Charter and its amendments, by engaging in the activities herein enumerated and activities as may be further provided by ordinance or resolution by the County Commissioners, by the people through initiative, or by Charter amendment. Accordingly, it shall be unlawful for any private or public entity to:

Section 2.01.1. Deposit, store, treat, inject, dispose of, or process wastewater, produced water, "frack" water, brine or other substances, chemicals, or by-products that have been used in, or result from, the extraction of shale gas and oil by high-volume horizontal hydraulic fracturing, on or into the land, air or waters of the County of Athens. However, this prohibition shall not include wastewater produced in the County of Athens by conventional shallow vertical drilling methods.

Section 2.01.2. Engage in the procurement or extraction of any water from any source, including public water sources, within the County of Athens for use in high-volume hydraulic fracturing for extraction of shale gas and oil.

ARTICLE III—COUNTY BOUNDARIES, POWERS, AUTHORITIES, RESPONSIBILITIES

Section 3.01 Name, Boundaries and Powers. The County of Athens, as its boundaries now are, or hereafter may be, shall be a body politic representative of and directly responsible to the residents of this county to be known by the name of "County of Athens" with all the powers, authorities, and responsibilities granted by this Charter and by general law, including but not limited to all or any powers vested in municipalities by the Ohio Constitution or by general law.

The County of Athens is responsible within its boundaries for the exercise of all powers vested in, and the performance of all duties imposed upon, counties and County officers by general law, provided that general law does not violate the rights of county residents, their County Charter, or other unalienable rights. In addition, the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter, including, but not limited to, the concurrent exercise of all or any powers vested in municipalities by the Ohio Constitution or by general law. The County may create or recognize greater protections for human and natural communities than provided by state law.

All such powers shall be exercised and enforced by ordinance or resolution of the County Commissioners, through exercise of the initiative and referendum powers by the people, or by Charter amendment by the people.

When not prescribed by the Charter or by amendment to this Charter, by ordinance or resolution of the County Commissioners, or by ordinance enacted by the people, such powers shall be exercised in the manner prescribed by general law.

Section 3.02 Powers Limited. This Charter does not empower the County to exercise exclusively any municipal powers nor to provide for the succession by the County to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township. In case of conflict between the exercise of powers granted by this Charter and the exercise of powers by municipalities or townships granted by the Constitution or general law, the exercise of powers by the municipality or township shall prevail. The County shall have power to levy only those taxes that counties are by general law authorized to levy.

Section 3.03 Construction. The powers of the County under this Charter shall be construed liberally in favor of the County, and the specific mention of particular powers in this Charter shall not be construed as limiting in any way the general powers granted under this Charter. The rules for statutory construction contained in the Ohio Revised Code shall govern the interpretation of the provisions of this Charter.

ARTICLE IV—FORM OF GOVERNMENT AND ELECTIONS

Section 4.01 County Officers, Duties, Powers, and Manner of Election. The offices and duties of those offices, as well as the manner of election to and removal from County offices, and every other aspect of county government not prescribed by this Charter, or by amendments to it, shall be continued without interruption or change in accord with the Ohio Constitution and the laws of Ohio that are in force at the time of the adoption of this Charter and as they may subsequently be modified or amended.

Section 4.02 Initiative, Referendum and Recall. The right of initiative and referendum is reserved to the people of the County on all matters that the County may now or hereafter be authorized to control by legislative action. The provisions of general law relating to such right applicable to municipalities in effect at the time of the adoption of this Charter shall govern the exercise of such right in the County of Athens, provided that all powers and duties respecting initiative or referendum petitions by general law shall be ministerial and mandatory and shall be exercised by the County Commission or its designee. The power of recall shall be exercised in the manner of an initiative as herein defined.

Section 4.03 Charter Amendment. Proposed amendments to this Charter shall be submitted to the electors of the County in the manner provided by the Ohio Constitution, Article X.

ARTICLE V—CONTINUANCE OF GOVERNMENT

Section 5.01 Pending Matters. All rights, claims, orders, contracts, and legal administrative proceedings shall continue except as modified pursuant to this Charter, and in each case shall be maintained, carried out, or dealt with by the County department, office, or agency as shall be appropriate under this Charter.

Section 5.02 Laws in Force. All County resolutions, orders and regulations that are in force when this Charter becomes fully effective are repealed only to the extent that they are inconsistent with the effective operation of this Charter or of ordinances or resolutions enacted pursuant hereto. All laws relating to or affecting the County or its officers, agencies, departments, or employees that are in force when this Charter becomes fully effective are superseded to the extent that they are inconsistent or interfere with the effective operation of this Charter or of ordinances or resolutions enacted pursuant hereto. The authority and power to enforce county laws, protect rights established by this Charter, and prosecute offenders shall not be abridged.

ARTICLE VI—SEVERABILITY

Section 6.01 Severability of Sections or Subsections. The provisions of this Charter are severable. If any court decides that any section, subsection, clause, sentence, part, or provision of this Charter is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, subsections, clauses, sentences, parts, or provisions of the Charter.

We hereby designate the following persons as a committee to represent the petitioners in all matters relating to this petition or its circulation:

NAME	RESIDENCE
Sally Jo Wiley	3050 Glen Finnan Drive Albany, Ohio 45710 (Lee Township)
Austin Babrow	12667 N. Peach Ridge Rd Athens, OH 45701 (Dover Township)
Andrea Reik	8474 Terrell Rd. Athens, OH 45701 (Canaan Township)
Michael O'Brien	1492 Old Rte 33 Shade, OH 45776 (Lodi Township)
Richard E. Hogan	2767 State Route 56 New Marshfield, Ohio 45766 (Waterloo Township)

Signatures on this petition must be from only one county and must be written in ink.

	SIGNATURE	VOTING RESIDENCE ADDRESS STREET AND NUMBER	CITY, VILLAGE OR TOWNSHIP	COUNTY	DATE OF SIGNING
1.					
2.					
3.					

	SIGNATURE	VOTING RESIDENCE ADDRESS STREET AND NUMBER	CITY, VILLAGE OR TOWNSHIP	COUNTY	DATE OF SIGNING
4.					
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	SIGNATURE	VOTING RESIDENCE ADDRESS STREET AND NUMBER	CITY, VILLAGE OR TOWNSHIP	COUNTY	DATE OF SIGNING
24.					
25.					
26.					
27.					
28.					
29.					
30.					

CIRCULATOR STATEMENT – Must be completed and signed by circulator.

I, _____, declare under penalty of election falsification that I
(Printed Name of Circulator)
 reside at the address appearing below my signature; that I am the circulator of the foregoing petition containing _____ signatures; that I witnessed the affixing of every signature; that all
(Number)
 signers were to the best of my knowledge and belief qualified to sign; that every signature is to the best of my knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code.

**WHOEVER COMMITS ELECTION
 FALSIFICATION IS GUILTY OF A
 FELONY OF THE FIFTH DEGREE**

(Signature of Circulator)

(Permanent Residence Address)

(City or Village, State and Zip Code)

_____ Ohio _____ Petition for the submission of a proposed county charter	_____ Filed _____, _____ _____	Board of County Commissioners Or County Board of Elections
---	---	--

**Certificate of Registration
ATHENS COUNTY OHIO**

COUNTY ID #: 8573

NAME: JOANNE DOVE PRISLEY
RESIDENCE: 40 GROSVENOR ST
CITY: ATHENS OH 45701

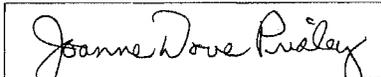
PARTY: D - DEM
REG. DATE: 02/08/63

STATUS: A - ACTIVE VOTER
ACTIVITY: 11/04/14

PRECINCT: 0014/1 ATHENS 3-4

VOTING HISTORY:

Vtd Election Type	Vtd Election Type	Vtd Election Type
D 05/05/15 PS	X 11/04/14 G	D 05/06/14 P
X 11/05/13 G	D 05/07/13 PS	X 11/06/12 G



THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND ACCURATE COPY OF RECORDS
ON FILE WITH THE BOARD OF ELECTIONS.



CLERK



DATE

Helén Walker
Chair

Debra L. Quivey
Director

Penny L. Brooks
Deputy Director
(pbrooks@athensoh.org)

Athens County Board of Elections
15 South Court St., Room 130
Athens, Ohio 45701
(740) 592-3201
Fax (740) 592-3262

Aundrea S. Carpenter-Colvin
Member

Kate McGuckin
Member

Kenneth E. Ryan
Member

July 6, 2015

To the Athens County Commissioners,

Pursuant to ORC 307.94, we, the Athens County Board of Elections have completed our examination of the petition for submission of Proposed County Charter filed in our office June 24, 2015 and have determined that although the petition contained sufficient valid signatures, the petition is not valid. Upon review and in consultation with the Athens County Prosecutor we find that the petition is not a valid charter as it does not structurally change the form of government in Athens County as it purported. Because the petition does not create a valid charter form of government we find that the petition is not valid.

Very truly yours,

Helén Walker
Aundrea S. Carpenter-Colvin
Kenneth E. Ryan
Kate McGuckin

RECEIVED

JUL 06 2015

Athens County Commissioners

From: Terry Lodge [<mailto:tlodge50@yahoo.com>]
Sent: Thursday, July 09, 2015 10:56 PM
To: Keller Blackburn
Cc: athens@ohiosecretaryofstate.gov; James Kinsman; Tish O'Dell; Elizabeth Dunne; Daniel E. Brannen Jr; Ben Price
Subject: Re: Request for court action, Petition for proposed county charter

Thank you, I have. I've reproduced Sect. 307.94 and highlighted the part of it we're relying on. I wonder if you might elaborate on your response, please.

307.94 Petitioning for election on adoption of county charter.

Electors of a county, equal in number to ten per cent of the number who voted for governor in the county at the most recent gubernatorial election, may file, not later than one hundred ten days before the date of a general election, a petition with the board of county commissioners asking that the question of the adoption of a county charter in the form attached to the petition be submitted to the electors of the county. The petition shall be available for public inspection at the offices of the county commissioners during regular business hours until four p.m. of the one hundred eleventh day before the election, at which time the board shall, by resolution, certify the petition to the board of elections of the county for submission to the electors of the county, unless the signatures are insufficient or the petitions otherwise invalid, at the next general election.

Such electors may, in the alternative not later than the one hundred thirtieth day before the date of a general election, file such a petition with the board of elections of the county. In

such case the board of elections shall immediately proceed to determine whether the petition and the signatures on the petition meet the requirements of law and to count the number of valid signatures and to note opposite each invalid signature the reason for the invalidity. The board of elections shall complete its examination of the petition and the signatures and shall submit a report to the board of county commissioners not later than the one hundred twentieth day before the date of the general election certifying whether the petition is valid or invalid and, if invalid, the reasons for invalidity, whether there are sufficient valid signatures, and the number of valid and invalid signatures. The petition and a copy of the report to the board of county commissioners shall be available for public inspection at the board of elections. If the petition is certified by the board of elections to be valid and to have sufficient valid signatures, the board of county commissioners shall forthwith and not later than four p.m. on the one hundred eleventh day before the general election, by resolution, certify the petition to the board of elections for submission to the electors of the county at the next general election. If the petition is certified by the board of elections to be invalid or to have insufficient valid signatures, or both, the petitioners' committee may protest such findings or solicit additional signatures as provided in section 307.95 of the Revised Code, or both, or request that the board of elections proceed to establish the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures in an action before the court of common pleas in the county. Such action must be brought within three days after the request has been made, and the case shall be heard forthwith by a judge or such court whose decision shall be certified to the board of elections and to the board of county commissioners in sufficient time to permit the board of county commissioners to perform its duty to certify the petition, if it is determined by the court to be valid and contain sufficient valid signatures, to the board of elections not later than four p.m. on the one hundred eleventh day prior to the general election for submission to the electors at such general election.

A county charter to be submitted to the voters by petition shall be considered to be attached to the petition if it is printed as a part of the petition. A county charter petition may consist of any number of separate petition papers. Each part shall have attached a copy of the charter to be submitted to the electors, and each part shall otherwise meet all the requirements of law for a county charter petition. Section 3501.38 of the Revised Code applies to county charter petitions.

The petitioners shall designate in the petition the names and addresses of a committee of not fewer than three nor more than five persons who will represent them in all matters relating to the petition. Notice of all matters or proceedings pertaining to such petitions may be served on the committee, or any of them, either personally or by certified mail, or by leaving it at the usual place of residence of each of them.

Amended by 128th General Assembly File No.29, HB 48, §1, eff. 7/2/2010.

Effective Date: 08-22-1995

From: Keller Blackburn <keller.blackburn@athenscountyprosecutor.org>

To: Terry Lodge <tjlodge50@yahoo.com>

Cc: "athens@ohiosecretaryofstate.gov" <athens@ohiosecretaryofstate.gov>; James Kinsman <cjkinsey@gmail.com>; Tish O'Dell <tish@celdf.org>; Elizabeth Dunne <edunnelaw@gmail.com>; Daniel E. Brannen Jr <dbrannen@brannenlawllc.com>; Ben Price <benprice@celdf.org>

Sent: Thursday, July 9, 2015 10:42 PM

Subject: Re: Request for court action, Petition for proposed county charter

I have your email. Please reread your statutes.

Keller Blackburn

This message was originated on my iPhone, please excuse any spelling and grammar errors.

On Jul 9, 2015, at 4:26 PM, Terry Lodge <tjlodge50@yahoo.com> wrote:

Ms. Quivey and Mr. Blackburn:

Please review the attached letter and respond at your very earliest convenience as to the actions that will be taken by the Board of Elections. I have also reproduced it in this email.

Thank you.

Terry J. Lodge, Esq.
419 205 7084

July 9, 2015

Debra Lee Quivey, Director
Athens County Board of Elections
via email only to athens@ohiosecretaryofstate.gov

Keller Blackburn Esq.
Prosecutor of Athens County
via email only to keller.blackburn@athenscountyprosecutor.org

Re: Petition for Submission of Proposed County Charter

Dear Ms. Quivey and Mr. Blackburn:

I represent the Committee which represents the qualified petitioners who signed the "Petition for Submission of Proposed County Charter" which was recently submitted to the Board and rejected as invalid. The Committee consists of Sally Jo Wiley, Austin Babrow, Andrea Reik, Michael O'Brien and Richard E. Hogan.

On their behalves, I hereby request, pursuant to O.R.C. § 307.94, that the Athens County Board of Elections proceed to establish the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures in an action before the Athens County Court of Common Pleas within the time prescribed by statute.

We believe that the Board's conclusion that the petition "does not structurally change the form of government in Athens County as it is purported" is not supported by law and is arbitrary.

I ask that Mr. Blackburn please notify me directly, as soon as convenient, of the timing for the filing of the request in court. We intend to intervene and provide evidence and legal authority in support of the validity of the Petition.

Thank you very much.

For the Committee,

/s/ Terry J. Lodge
Terry J. Lodge

cc: Sally Jo Wiley, Austin Babrow, Andrea Reik, Michael O'Brien, Richard E. Hogan

<Athens BOE demand.pdf>

FAXED

FILED
ATHENS COUNTY, OHIO

JUL 15 2015

[Signature] CLERK
OF COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS, ATHENS COUNTY, OHIO

In the Matter of a Petition for
Election on Adoption of County
Charter filed June 24, 2015,
with the Athens County Board of
Elections

Case No. 15CI0130

Judge George P. McCarthy

**DECISION; JUDGMENT
ENTRY; CERTIFICATION TO
ATHENS COUNTY BOARD
OF COMMISSIONERS**

This case involves the application of Ohio law to a certain petition for an election by Athens County voters on the adoption of a charter form of county government. Applicable time constraints have not allowed for the Court's preparation of a full, comprehensive written opinion on the matter. However, the Court has endeavored to express the rationale for its judgment at the oral hearing held on July 15, 2015.

The following procedural history is relevant herein. Pursuant to R.C. 307.94, certain petitioners requested the Athens County Board of Elections to place a county charter petition on the ballot for the November 3, 2015, general election. The petitioners, for all intents and purposes, are represented by a statutory five-member committee, comprised of Sally Jo Wiley, Austin Babrow, Andrea Reik, Michael O'Brien, and Richard E. Hogan. See R.C. 307.94.

Although the Board of Elections found the petition had sufficient valid signatures, it decided the petition did not otherwise meet the requirements of Ohio law. The Court finds that the Athens County Board of Elections conducted due diligence in reaching its decision in part by consulting with the Athens County Prosecutor's Office and also by having substantive discussion on the issue.

Acting through attorney Terry J. Lodge, the petitioners' committee protested the Board's finding of invalidity and requested the Board to proceed with a court action "to establish the validity or invalidity of the petition[.]" See R.C. 307.94.

On July 13, 2015, the Board complied with the committee's request by filing the instant case, and the Court conducted a preliminary hearing in the matter the same day. The Court notes that due to the time constraints with the Board of Elections, the Court has had two only days to hear evidence and rule on this case of first impression before it since receiving the case file.

Present at the initial hearing were Athens County Prosecuting Attorney Keller J. Blackburn, along with Deputy Board of Elections Director Penny L. Brooks. Neither petitioners nor a representative for the petitioners were present, nor was there an indication that they had been served with a copy of the certification. The Court had concerns of petitioners' due process rights not being afforded to them without notice of the proceedings occurring. Therefore, on the Court's own motion the Court recessed so that any members of the petitioners' group or committee could be found so that they could be made part of the proceedings.

Five individuals representing the petitioners who were located came before the Court for the hearing. The group included petitioners' committee member Andrea Reik. The committee's counsel, attorney Lodge, was not present, nor is there any indication that he or petitioners had notice of the initial hearing. The Court and those present discussed the procedural status of the case, the possibility of an additional oral hearing, and the necessity of deciding the matter expeditiously per the time-line set forth in R.C. 307.94.¹ The prosecutor advised he sought a legal

¹ R.C. 307.94 directs that the case "be heard forthwith by a judge *** whose decision shall be certified to the board of elections and to the county commissioners in sufficient time to permit the board of county commissioners to perform its duty to certify the petition, if it is determined by the court to be valid *** , to the board of elections not later than four p.m. on the one hundred eleventh day prior to the general election for submission to the electors at such general election." The County Prosecutor accurately notes that the

opinion from the Ohio Attorney General's Office but did not expect a response in the time given. Consequently, the Court set the matter for additional oral hearing on July 15, 2015, at 9:00 a.m. to allow petitioners to contact their counsel and organize any response they might have.

On July 15, 2015, the Court resumed its hearing on the matter. Present in Court were Assistant Prosecutor Glenn Jones on behalf of the Board of Elections. Also present was Attorney C. James Kinsman on behalf of petitioners. Also present was Attorney Terry Lodge who appeared by phone with the parties' and Court's approval. Additional argument was heard from both parties by the Court.

Pursuant to R.C. 307.94, the Court's function is to determine whether the invalidity of the subject petition has been established. The Court has found little guidance regarding the matter. Additionally, the Court finds itself short on time for a more meaningful discussion and review of the matter. However, the Court proceeds to render its decision due to the time constraints.

In making its decision, the Court reviewed the record which includes the certification by the Board of Elections concerning the county charter petition, the county charter petition, the audio recording of the meeting concerning the board of elections decision, the signatures on the petition, the memorandum filed by the petitioners on the morning of the hearing, as well as oral argument by the parties.

The Court appreciates that the instant case, although a decision must be made with haste, involves an important issue. The issue of determining whether a charter style of government should replace the existing form of local government is not a development taken lightly. In the Court's mind it rises to the level of constitutional importance because of the impact it will have on

111-day provision effectively requires this Court to decide the matter on or before Wednesday, July 15, 2015, just two days after receiving the case.

the citizens of the county. It is a matter that affects not only the petitioners and their supporters, but those citizens who live throughout Athens County and likely others as well. So the Court takes this matter seriously and treats the issues with the utmost importance.

The Court recognizes that the government is entrusted with administering laws and rules in a fair, unbiased and meaningful way. Such administration should reflect confidence in the public's perception that government is properly carrying out its function in all the areas it addresses. One of those areas dealt with here is whether the petition for a charter form of government should be permitted to be placed on the next general election ballot for the voters to consider. For the reasons set forth in this decision, the Court rules in the affirmative.

Pursuant to R.C. 307.94, the Court's sole function is to determine whether the Athens County Board of Elections has established the invalidity of the subject petition.² The Court in reaching its decision relies in part upon an Ohio Attorney General's Opinion that sets forth that Ohio law allows a county, "though properly adopted charter provisions, to restructure its government with respect to both the form of county government and its offices," so long as the charter provides for the exercise of all powers and the performance of all duties imposed by statute on counties and county officers." 2001 Ohio Op. Atty. Gen. 2-112. The Court finds that such a threshold is a minimum standard which has been met by the petitioners in this instance.

The Board's decision is set forth in full as follows:

July 6, 2015

² The Court reiterates that the Board found the petition contained a sufficient number of valid signatures. But this does not end the inquiry. Rather, the plain language of R.C. 307.94 makes clear that the petition itself, apart of from the signature requirement, must "meet the requirements of law." For example, the Board may find a petition "invalid or to have insufficient valid signatures, or both" R.C. 307.94 (Emphasis added). Thus, although a petition contains the required signatures, it may still be invalid for some other reason.

To the Athens County Commissioners,

Pursuant to ORC 307.94, we, the Athens County Board of Elections have completed our examination of the petition for submission of Proposed County Charter filed in our office June 24, 2015 and have determined that although the petition contained sufficient valid signatures, the petition is not valid. Upon review and in consultation with the Athens County Prosecutor we find that the petition is not a valid charter as it does not structurally change the form of government in Athens County as it purported. Because the petition does not create a valid charter form of government we find that the petition is not valid.

Four Board members signed the decision. Clearly, the Board's conclusion is that the proposed charter did not "structurally change" the form of Athens County government.

In Ohio, county charter government is matter of constitutional law. Specifically, Article X, Section 3 of the Ohio Constitution states as follows:

The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of power vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon. In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. ***These provisions allow a county, "though properly adopted charter provisions, to restructure its government with respect to both the form of county government and its offices," so long as the charter provides for the exercise of all powers and the performance of all duties imposed by statute on counties and county officers." 2001 Ohio Op. Atty. Gen. 2-112.

Having so considered the matter in the allotted time provided, the Court finds that the

petition, per the Board of Election, contains sufficient valid signatures, and further that the petition appears to be facially valid. See Article X, Section 3 of the Ohio Constitution; R.C.

307.94. The Court finds no reason to withhold the petition from voter consideration. The Court finds that it has not been established to be invalid in other respects within the meaning of R.C.

307.94. Therefore, the Court finds that the petition is valid and should be placed upon the ballot for the voters' contemplation.

Accordingly, the Court holds that the petition is valid and contains sufficient valid signatures, and this decision is hereby certified to the Board of County Commissioners for Athens County pursuant to R.C. 307.94.

The Court notes that its holding deals only with the petition's validity to proceed to submission to Athens County electors and that its holding should not be interpreted as a statement of support for, or against, the ballot measure. The Court expresses no opinion on the substance of the petition, other than in its current form it is technically sufficient for voter consideration.

IT IS SO ORDERED.



Judge George P. McCarthy

This is a judgment or final order, which may be appealed. The Clerk, pursuant to Civ.R. 58(B), shall serve notice of the judgment and its date of entry upon the journal on all parties who are not in default for failure to appear. Within three (3) days after journalization of this entry, the Clerk is required to serve notice of the judgment pursuant to Civ.R. 5(B) and shall note the service in the appearance docket.

cc: Keller J. Blackburn, Athens Co. Pros., for the Athens County Board of Elections
Athens County Board of Elections
Athens County Board of Commissioners
Terry J. Lodge Esq. & C. James Kinsman, attorneys for Petitioners

JOURNALIZED
JUL 15 2015
FINAL APPEALABLE
ORDER

Athens County Commissioners



15 South Court St.
Athens, Ohio 45701
(740) 592-3219
Visit us at our website:
co.athensoh.org

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JUL 23 2015

**ATHENS COUNTY
BOARD OF ELECTIONS**

JoAnn Sikorski
Clerk/Admin. Assistant
jsikorski@athensoh.org
Telephone (740) 592-3292
Fax (740) 594-8010

Charlie Adkins
cadkins@athensoh.org
Chris Chmiel
cchmiel@athensoh.org
Lenny Eliason, MPA
leliason@athensoh.org

July 23, 2015

Penny Brooks, Deputy Director
Board of Elections

RE: Proposed County Charter

A motion was made by Mr. Chmiel and seconded by Mr. Adkins certifying the Petition for Charter back to the Board of Elections, as required by section 307.94 O.R.C..

The roll being called upon for adoption, the vote resulted as follows: Mr. Eliason, yea; Mr. Adkins, yea; Mr. Chmiel, yea.

I, JoAnn Sikorski, Clerk for the Board of County Commissioners of Athens County, Ohio, certify that the foregoing is a true and correct copy of a resolution adopted by said Board July 23, 2015 appears in the Commissioners' Journal 102.

JoAnn Sikorski
Clerk, Board of Commissioners
Athens County, Ohio



The Board of Athens County Commissioners is an Affirmative Action employer and does not discriminate for reasons of race, gender, age, religion or disability.



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Receipt for Cash, Petitions or Resolutions * 3665

Office of the Board of Elections, Athens County, Ohio 7/29, 2015
Received of Joanne Prisley & Michael Hollingsworth

- Declaration of Candidacy Petitions for the office of _____, of the _____ party
- Nominating Petitions for the office of _____
- Local Option Petition Filing Fee Paid: \$ _____
- Referendum Petition Subdivision: _____
- Initiative Petition Number of Signatures: _____
- Part - Petitions: _____

DESCRIPTION — PURPOSE, RATE, DATE OF ELECTION, ETC.

- TAX LEVY — _____
- BOND ISSUE — _____
- CHARTER AMENDMENT — _____
- OTHER — 2-ORG Protest of Pet. for Subm. Co. Charter

OTHER CASH RECEIVED \$ _____ FOR _____

BOARD OF ELECTIONS, By [Signature] (SIGNED)