

**IN THE SUPREME COURT OF OHIO**

STATE ex rel. CORNERSTONE : CASE NO. 2015-2092  
DEVELOPERS, LTD., :  
 :  
Relator, : **ORIGINAL ACTION in**  
 : **Mandamus**  
v. : **and Prohibition**  
 :  
GREENE COUNTY BOARD OF :  
ELECTIONS, *et al.*, :  
 :  
Respondents. : **Expedited Election Case Under**  
 : **S.C. Prac. R. 12.08**

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**REPLY BRIEF OF RESPONDENT GREENE COUNTY BOARD OF  
ELECTIONS**

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## STATEMENT OF THE CASE AND FACTS

On October 28, 2015, the Greene County Board of Elections (GCBOE) received from the Sugarcreek Township Board of Trustees, Resolution No. 2015.10.19.07 (which declared the necessity for levying a tax exceeding the ten mill limitation and authorized request of county auditor to provide certain information pursuant to R.C. 5705.03(B)), along with proposed ballot language and a Certificate of Estimated Property Tax Revenue prepared by the Greene County Auditor. (See Attached, Respondent GCBOE Ex. A)

Pursuant to R.C. 505.39, a board of township trustees has the authority to levy a tax in the township or fire district to provide protection against fire and for equipment and materials in support of that purpose. Thus, the Sugarcreek Township Board of Trustees is clearly the taxing authority of the political subdivision that may submit the question of a tax levy for fire protection to the voters pursuant R.C. 5705.19. The issue in dispute is whether Sugarcreek Township may create a fire district by excluding the City of Centerville contained within the township under R.C. 505.37(C). The Greene County Board of Elections is not a proper party in this dispute.

Respondent Greene County Board of Elections submits that it is a creature of statute and as such, it is without power to exercise any jurisdiction beyond that conferred by statute. R.C. 3501.11(V) reads that each Board of Elections shall give approval to ballot language for any local question or issue, and transmit the ballot language to the secretary of state for the secretary of state's final approval. R.C. 5705.03(B)(3) provides that if a county board of elections receives a certification of a tax levy to be submitted to the electors, the county board of elections shall not submit the question of the tax to the electors unless a copy of the county auditor's certification

accompanies the resolution or ordinance the taxing authority certifies to the board. Thus, the only clear legal duty of the Board of Elections in the instant matter is to approve the ballot language, ensure the inclusion of the county auditor's certification, and include the measure on the ballot. It is not within the purview of any board of elections in Ohio to tell the political subdivisions what questions they may and may not submit to the voters or pass judgment on those issues.

Relators are seeking relief in the form of mandamus and prohibition against the Greene County Board of Elections. It is the position of the Board that neither extraordinary writ is proper in this case against the Greene County Board of Elections.

## ARGUMENT

### PROPOSITION OF LAW NO. 1:

#### I. **A WRIT OF PROHIBITION WILL NOT ISSUE WHERE A BOARD OF ELECTIONS IS NOT ABOUT TO EXERCISE JUDICIAL OR QUASI-JUDICIAL DISCRETION.**

To establish that a relator is entitled to a writ of prohibition against a county board of elections, the relator must demonstrate that (1) the board of elections is about to exercise quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-333, 881 N.E.2d 1214, ¶ 28. Except in the rare case where a court is about to act despite a patent and unambiguous lack of jurisdiction, Prohibition will not lie unless all three prerequisites are met. *State ex rel. Dayton v. Kerns* (1977), 49 Ohio St. 2d. 295, 297; *State ex rel Smith v. Court* (1982), 79 Ohio St. 2d 213, 215-216. The Relator is not entitled to a Writ of Prohibition, as it has failed to establish all three required elements.

It is well settled that a board of elections does not act in a judicial or quasi-judicial capacity in certifying matters to the ballot. *State ex rel. Scherach v. Lorain Cty. Bd. of Elections*, 123 Ohio St. 3d 245, 2009-Ohio-5349. Clearly, GCBOE has not acted in a quasi-judicial capacity in this matter. The GCBOE has only approved the ballot language, confirmed the inclusion of the certificate from the Greene County Auditor, and certified the matter to the ballot in this case. Even if certifying matters to the ballot were some form exercising quasi-judicial discretion, the Relator has failed to establish

that the Board of Elections is unauthorized to act. To the contrary, the GCBOE has the clear legal duty to submit questions to the electors if they are properly presented by the political subdivisions.

Relator argues that the GCBOE is about to engage in quasi-judicial discretion when it hears the protest filed by Relators on January 8, 2016 at 5:12 PM. Counsel for the GCBOE can find no statute or case law which would give the Board of Elections authority to hear a protest on a tax levy. R.C. 3513.05 provides for a board of elections to hear protests against the candidacy of any person. R.C. 4305.14 provides for the filing of a protest of a Local Option on sale of beer. R.C. 3501.39 defines unacceptable petitions. However, this matter is not on the ballot pursuant to a petition or a local option, but pursuant to a resolution and certification. Moreover, Relator submitted a letter entitled "Objection," not a request for a protest hearing. Relator has provided no authority in its objection that a Board of Elections has to consider its legal claims. While it does have the authority to investigate irregularities, that is regarding irregularities in the elections and petitions themselves, not the legal authority of a political subdivision. Moreover, the Board of Elections will not meet until 4:00 pm on January 19, 2016, which will be after this merit brief is submitted to the Court, so counsel is unable to determine what, if anything, will come of this "Objection." Not only is counsel concerned that the GCBOE does not have the authority to hear the petition, counsel is concerned that the Objection is not timely filed. Even if the Court were to construe the Tax Levy to be like a Local Option or Issue, protests against those petitions must be filed not later than 4:00 pm of the 74<sup>th</sup> day before the primary election. It would have to have been filed by 4:00 pm on January 4, 2016. As of the filing of this brief, the GCBOE has not decided that it will hold a hearing on said objection.

Relator now calls into question whether the fire levy was properly presented to the Board of Elections because Sugarcreek did not submit its Resolution to Proceed (No. 2016.01.08.01) until January 8, 2016, which is outside the time frame of R.C. 5705.03(B). Again, it is not in the purview of a board of elections to determine what matters can legally go to the voters. For instance, a candidate with a felony conviction may be ineligible to hold the office he or she seeks, but that person may still be included on the ballot. It would be up to the candidate to remove the disability prior to taking the office. If the person does not, then the subdivision would follow the procedures for vacancy or quo warranto can be filed. See R.C. 2961.01. Thus whether a convicted felon may be a candidate for office is not a matter for a Board of Elections.

The Boards of Election must look to the public policy as pronounced by this Court to make any judgment calls. This Court has held that the public policy which favors free competitive elections, outweighs the arguments for absolute compliance with each technical requirement in forms, where in fact, the only omission cannot possibly mislead any elector, and where there is sufficient substantial compliance to permit the board of elections to determine the matter to be valid. *State ex rel Stern v. Board of Elections* (1968), 14 Ohio St. 2d 175

It is the position of the GCBOE that it is unclear that R.C. 5705.03 mandates a two-resolution process. It is a two-step process, but whether two resolutions are actually required appears to be a matter of first impression. The two-resolution process is a guideline that is the preferred manner by the current Secretary of State, and has not been addressed by previous Secretaries of State. Other jurisdictions in Greene County use a single resolution, despite the fact that the Board of Elections has given those jurisdictions the Secretary of State's guidelines. In this case, Resolution No.

2015.10.19.07 reads in item number 4 that the Township Fiscal Officer was authorized to submit the Resolution to the Greene County Auditor, and then if necessary to the Greene County Board of Elections. This may be sufficient to satisfy the requirements of R.C. 5705.03. The Board of Elections received the issue from Sugarcreek Township on October 28, which would have been clearly within the time frame. Moreover, the Board of Elections may only refuse to submit the question if the Resolution is not accompanied by the certification of the County Auditor. R.C. 5705.03(B)(3). The statute does not read that failure to submit the Resolution to Proceed would prevent inclusion on the ballot. In this case, the Relator has failed to show that putting the matter on the ballot is clearly unauthorized by law.

Lastly, the Relator has known or has had the opportunity to know about the proposed fire levy since October 19, 2015. The Relator has an adequate remedy in the course of law by way of injunction or declaratory judgment against Sugarcreek Township. In fact, the parties are in litigation in the Greene County Court of Common Pleas Case No. 2015 CV 0760. The fact that Relator failed to pursue this matter more expeditiously in the Court of Common Pleas does not give rise to a claim in Prohibition.

The Board of Elections has not exercised quasi-judicial authority, has not exercised any power that is clearly unauthorized by statute, and Relators have an adequate remedy against the parties that have aggrieved them. Thus, a writ of prohibition will not lie in this case against GCBOE.

PROPOSITION OF LAW NO.2:

- II. A RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS WHERE IT FAILS TO ESTABLISH A CLEAR LEGAL RIGHT TO THE RELIEF REQUESTED, A CORRESPONDING CLEAR LEGAL DUTY TO ACT, AND THE LACK OF AN ADEQUATE REMEDY AT LAW.

Mandamus has been codified in Chapter 2731 of the Revised Code. To be entitled to a writ of mandamus, relator must establish (1) a clear legal right to the relief requested – that the levy be removed from the ballot; (2) a corresponding clear legal duty on the part of the board of elections and its members to remove the levy from the ballot; and (3) the lack of an adequate remedy in the ordinary course of law. *State ex rel. Duncan v. Portage County Board of Elections*, 117 Ohio St. 3d 116, 2007-Ohio-5346, ¶8. The Board of Elections submits that its duty and the relator's right to have the tax levy removed from the ballot is anything but clear. Further, as previously mentioned, Relator has an adequate remedy in the ordinary course of law.

While Relator may have a valid claim against Sugarcreek Township, the GCBOE is without jurisdiction to determine whether that claim is valid. That determination must be made by a court of law. Relator argues that because Sugarcreek Township made some legal arguments in prior litigation in front of this Court, that those legal arguments are somehow binding upon the Township to provide fire and EMS service to Relator's property. Those arguments may be construed to be some form of admission or may be binding upon the Township, but that determination is certainly outside the purview of the GCBOE. This Court's opinion in *Sugarcreek Township v. City of Centerville*, 133 Ohio St. 3d 467, 2012-Ohio-4649, speaks for itself, and GCBOE submits that this Court previously did not decide the issue of whether Sugarcreek Township *must* provide Fire and EMS Service to the property annexed by the City of Centerville in

that case. Accordingly, the Relator cannot demonstrate that it has a clear legal right to the relief requested.

Moreover, Relator has failed to demonstrate that the GCBOE has a clear legal duty to remove the levy from the ballot. If this Court finds that two-resolutions must be passed in order to submit a levy to the electors, then there may be a legal duty to remove the levy from the ballot. However, that duty is not clear at this time as this is a case of first impression, and the GCBOE has always operated under its past practice of submitting the question to the electorate as long as the certificate of the auditor is included. Accordingly, Relator has failed to demonstrate that GCBOE has a clear legal duty to remove the tax levy from the ballot.

Lastly, R.C. 2731.05 provides that a writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of law. Given that there is litigation presently pending in the Greene County Court of Common Pleas between the parties, there is an avenue whereby Relator could seek relief from the proper party, Sugarcreek Township. Relators could seek injunctive relief or declaratory judgment that would settle the issue of which jurisdiction must provide fire service. As previously mentioned, Relator knew or had the opportunity to know of the creation of the Sugarcreek Township Fire District and the Township's intent to seek a levy since October 19, 2015. There would have been ample time to get a temporary injunction to prevent Sugarcreek from putting this on the ballot. The fact that Relator has not exhausted all legal remedies will not give rise to mandamus. Accordingly, Relator has failed to establish all three elements required to grant a writ of mandamus.

## CONCLUSION

In conclusion, the Relator has failed to establish the requisite elements that would entitle it to a Writ of Prohibition or a Writ of Mandamus. Accordingly, the Greene County Board of Elections has followed the laws as passed by the Ohio General Assembly, and the matter must be dismissed.

Respectfully submitted,  
OFFICE OF THE GREENE COUNTY  
PROSECUTING ATTORNEY

By: /s/ Elizabeth A. Ellis

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer and Affirmative Defenses of Respondent Greene County Board of Elections was served by electronic mail or by facsimile transmission on January 19<sup>th</sup>, 2016, upon the following:

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