

IN THE SUPREME COURT OF OHIO

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

RELATOR'S REPLY BRIEF

Joseph L. Trauth (0021803)
Michael T. Cappel (0079193)
Sophia R. Jannace (0095931)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 579-6515
Fax: (513) 579-6457
jtrauth@kmklaw.com
mcappel@kmklaw.com
sjannace@kmklaw.com

Of Counsel:

Charles M. Miller (0073844)
cmiller@kmklaw.com

***Counsel for Relator
Cornerstone Developers, Ltd.***

Elizabeth A. Ellis (0074332)
Civil Division Chief
Greene County Prosecutor's Office
61 Greene St., Suite 200
Xenia, Ohio 45385
Phone: (937) 562-5250
Fax: (937) 562-5258
eellis@co.greene.oh.us

***Counsel for Respondents
Greene County Board of Elections***

Michael DeWine (0009181)
Ohio Attorney General
Jordan S. Berman (0093075)
Sarah E. Pierce (0087799)
Assistant Attorneys General
Ohio Attorney General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Phone: (614) 466-2872
Fax: (614) 728-7592

***Counsel for Respondent
Jon Husted, Ohio Secretary of State***

Scott A. Liberman (0058432)
Steven E Bacon (0059926)
Altick & Corwin Co., L.P.A.
One South Main Street, Suite 1590
Dayton, Ohio 45402
Phone: (937) 223-1201
Fax: (937) 223-5100
liberman@altickcorwin.com
bacons@altickcorwin.com

Of Counsel:

Robert F. McCarthy (0083829)
Bricker & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
rmccarth@bricker.com

***Counsel for Respondent
City of Centerville***

Stephanie R. Hayden (0082881)
Assistant Prosecuting Attorney
Greene County Prosecutor's Office
61 Greene Street, Suite 200
Xenia, Ohio 45385
Phone: (937) 562-5250
Fax: (937) 562-5258
shayden@co.greene.oh.us

***Counsel for Respondent
Sugarcreek Township***

TABLE OF CONTENTS

	<i>Page</i>
INTRODUCTION	1
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	
A. Sugarcreek Township Failed to Timely Pass a Resolution to Proceed to Ballot.....	2
B. Whether Sugarcreek Township is Authorized to Impose the Proposed Tax Must be Established in Advance of the Levy Being Placed on the Ballot	8
C. Cornerstone’s Complaint is Not Barred by Laches	10
D. Both the Secretary of State and Board of Elections Admit that They are Exercising Judicial or Quasi-Judicial Power	12
E. Cornerstone is Entitled to a Writ of Mandamus and has No Adequate Remedy at Law..	14
CONCLUSION.....	16
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

Page

Cases

Beck v. Cincinnati, 162 Ohio St. 473, 476, 124 N.E.2d 120 (1955)..... 14

In re Contest of Election Held on Stark County Issue 6, 132 Ohio St. 3d 98; 2012-Ohio-2091;
969 N.E.2d 1172 5, 14

State ex rel. Burech v. Belmont County Bd. of Elections, 19 Ohio St. 3d 154, 484 N.E.2d 153
(1985)..... 16

State ex rel. Carrier v. Hilliard City Council, Ohio Supreme Court No. 2015-2061,
Slip Opinion No. 2016-Ohio-155 (January 19, 2016) 11

State ex rel. Choices for South-Western City Sch. v. Anthony, 108 Ohio St. 3d 1,
2005-Ohio-5362; 840 N.E.2d 582 4, 15

State ex rel. Citizens for Open, Responsive & Accountable Gov't. v. Register,
116 Ohio St. 3d 88, 2007-Ohio-5542, 876 N.E.2d 913 7

State ex rel. Doner v. Zody, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235 15

State ex rel. Ebersole v. Del. County Bd. of Elections, 140 Ohio St. 3d 487,
2014-Ohio-4077, 20 N.E.3d 678..... 10, 15

State ex rel. Fuller v. Medina Cty. Bd. of Elections, 97 Ohio St.3d 221, 2002-Ohio-5922,
778 N.E.2d 37 10

State ex rel. Gilbert v. Cincinnati, 125 Ohio St.3d 385, 2010-Ohio-1473, 928 N.E.2d 706..... 15

State ex rel. Husted v. Brunner, 123 Ohio St.3d 288, 2009 Ohio 5327, 915 N.E.2d 1215 15

State ex rel. Monroe v. Mahoning Cty. Bd. of Elections, 137 Ohio St.3d 62, 2013-Ohio-4490,
997 N.E.2d 524 10

State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections,
135 Ohio St. 3d 162, 2013-Ohio-36, 985 N.E.2d 441 4

State ex rel. Owens v. Brunner, 125 Ohio St. 3d 130, 2010-Ohio-1374, 926 N.E.2d 617 15

State ex rel. Ross v. Crawford County Bd. of Elections, 125 Ohio St. 3d 438, 2010-Ohio-2167,
928 N.E.2d 1082, ¶ 15 15

State ex rel. Williams v. Brown, 52 Ohio St.2d 13, 15, 368 N.E.2d 838 (1977) 15

Statutes

R.C. § 3501.05 13
R.C. § 3501.11 5
R.C. § 505.37 9, 13
R.C. § 507.04 7
R.C. § 5705.03 passim
R.C. § 5705.19 passim

Other Authorities

Ohio Ballot Questions and Issues Handbook passim

INTRODUCTION

Sugarcreek Township's Resolution to Proceed for Ballot, Resolution 2016.01.08.01, was passed 23 days late. The levy should not appear on the ballot. Neither primary Respondent, the Secretary of State or the Board of Elections, contests this. The Secretary of State even submitted his pertinent handbook that requires removal of the ballot measure. The Board of Elections also admits that the Secretary of State requires the Resolution to Proceed be filed before the 90th day prior to the election. Yet, the Board of Elections refuses to remove the levy because the Board of Elections claims to lack authority to do so. The Secretary of State admits to the authority to review Resolution 2016.01.08.01 for timeliness and statutory compliance, but claims to have delayed action because of the pendency of this case.¹ As it often does, it now falls upon this Court to compel them to act. Accordingly, writs should issue.

On the merits, Sugarcreek Township admits the fire district was created to exclude Cornerstone. It does not deny that deterring future annexation was the second primary purpose. Nor does it submit any evidence of the need to exclude the territory that is within the City of Centerville. Clearly, the creation of the Replacement Fire District was ultra vires and void.

Relator filed this suit soon after the Board of Elections placed the levy on the ballot. The Secretary of State and Sugarcreek Township fault Cornerstone for not bringing this suit prior to the Board of Elections acting and claim laches.² However, there was no basis for an elections suit until the Board of Elections acted. It is the Board of Elections' action from which this claim

¹ Either primary respondent could moot this case by acting independently to remove the patently fatally flawed levy. Each has failed to so act even though the Secretary claims that ballots must be finalized by January 30.

² Laches is equitable. Relator attempted to work with Sugarcreek to have court resolution of its authority to create the fire district long ago so that there would not be an open question when the levy went to ballot (if it could). However, Sugarcreek refused to cooperate and disingenuously denied its intention to create the fire district. Thus it was Sugarcreek's inequitable actions which have left these issues unresolved.

springs. Moreover, there was not even a resolution to proceed from the Township until after this case was filed. The clock commenced with the Board of Elections' action. The Board of Elections' action was within the window for expedited treatment of election cases. Relator could not have filed this action outside the expedited case period. No Respondent has demonstrated any harm. Accordingly, equity demand that the writs issue.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

A. Sugarcreek Township Failed to Timely Pass a Resolution to Proceed to Ballot

The procedural facts are undisputed: Sugarcreek Township did not pass a resolution to proceed to the ballot until January 8, 2016. Until the resolution to proceed was passed, the Township had not certified the tax levy for the illegal fire district to the Board of Elections. The Secretary of State did not consider “the ballot issue in question [ready] for administrative review until January 8, 2016.” (*See* Sec. of State Merit Brief, at p. 2). This is because the resolution to proceed must be included in “the entirety of the materials necessary to conduct the administrative review of the Sugarcreek Township fire district levy local ballot issue.” Sugarcreek Township failed to certify the levy until long after the December 16, 2015 deadline required by R.C. § 5705.19.

1. Every Party, Except the Township, Agrees Two Resolutions Were Required

Critically, the Secretary of State did not contest the legal significance of the failure to timely certify the resolution. Rather, the Secretary observed, “In fact, Respondent did not even receive the ballot language at issue until January 8, 2016” (*See* Sec. of State Merit Brief, at p. 4). Additionally, the Secretary submitted as evidence his *Ohio Ballot Questions and Issues Handbook*. The Handbook describes the procedural requirements of R.C. § 5705.03(B) thusly, “As illustrated below, the order in which a taxing authority completes the statutory procedural

requirements for having a tax levy placed on the ballot is ‘resolution – certification – resolution – certification.’” (See Handbook at 2-9; Sec. of State Evidence, Exh. 2, p. 9). The Handbook goes on to clearly require (1) a resolution of necessity certified to the auditor, (2) certification by the County Auditor of the amount to be generated by the proposed millage, (3) a resolution to proceed, and (4) certification of the “**resolution or ordinance to proceed** to the proper board of elections in a manner and within the time prescribed by [the Revised Code].” (*Id.* at 2-9 – 2-11) (emphasis added). It was the January 8, 2016 Resolution to Proceed for Ballot that is required to be certified to the Board of Elections by December 16, 2015. This did not happen. Thus the tax levy was not timely submitted.

Respondent City of Centerville thoroughly explained the purpose of the two resolution process required by R.C. §§ 5705.03 (B) and 5705.19. (See Centerville Merit Brief, at pp. 7-17). In short, the taxing authority cannot decide to place a levy on the ballot until after it receives the auditor’s certification of the levy millage and revenue. The only method by which the Township can act is by resolution. Thus, the Township needed to pass a resolution to proceed after receiving the auditor’s certification.

For its part, the Board of Elections admitted that “Sugar creek 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).” (See BOE Merit Brief, at p. 8).³ Oddly, its very next sentence is “Again, it is not in the purview of a board of elections to determine what matters can legally go to the voters.” (*Id.*) So, according to the Board of Elections, even though the Resolution to Proceed was untimely, the Board of Elections is powerless to so determine. This statement by the Board

³ The Board of Elections submitted its brief 13 minutes beyond the deadline and the Court ordered it stricken *sua sponte*. However, the brief still appears on the docket, so Relator feels compelled to address it.

of Elections fully demonstrates the need for the issuance of a writ. The Board of Elections refuses to act where there is a clear obligation for it to allow only timely submitted levies on the ballot. But it is clear that a board of elections is obligated to reject late filed levies. *See State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St. 3d 162, 2013-Ohio-36, 985 N.E.2d 441 (considering whether the deadline was met); *see also State ex rel. Choices for South-Western City Sch. v. Anthony*, 108 Ohio St. 3d 1, 2005-Ohio-5362; 840 N.E.2d 582 (holding Board of Elections properly removed levy reduction measure from ballot after Board made legal determination that reducing a levy to 0 mills was a repeal, not a reduction). There is no mechanism, according to the Board of Elections, for it to remove the levy from the ballot. This refusal to act shows the need for a writ from this Court.

The Ohio Ballot and Questions Handbook confirm that the Secretary of State and Board of Elections are obligated to review the submitted resolution for statutory compliance. “If the comment on the returned proposed ballot language is ‘consult prosecutor or consult legal counsel,’ the language cannot be approved ***because the supporting resolution, ordinance or petition was deficient for some reason, and accurate ballot language cannot be determined.*** This information should be conveyed to the board members. It is up to each board of elections to determine whether a particular issue remains on the ballot and/or to determine what action, if any, is necessary to address the situation.” (See Handbook at 1-10 – 1-11, Sec. of State’s Evidence, Exhibit 2) (emphasis in original). The Handbook specifically states that it is the duty of both the Board of Elections and the Secretary to review the resolution for statutory deficiencies.

If the resolution is fatally deficient (because of language, timing of submission, or otherwise), the Board of Elections has the power “to determine whether a particular issue

remains on the ballot.” (*Id.*) Boards of elections have a duty to “[p]erform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state.” R.C. § 3501.11(P). Here, the Secretary of State is legally obligated to reject the ballot language and advise the Board of Elections accordingly. The Board of Elections is obligated to remove the levy from the ballot as failing to comply with applicable election laws.

2. *Despite Belatedly Passing a Resolution To Proceed, Sugarcreek Township Incorrectly Argues The Resolution To Proceed is Superfluous.*

Despite passing the Resolution to Proceed for Ballot at a special session held exclusively for that purpose, Sugarcreek Township argues that R.C. § 5705.03(B) does not require two resolutions. It argues that the singular resolution passed on October 19, 2015 accomplished both the certification to the auditor and a decision to proceed with the levy. There are two problems with this argument. First, it does not follow the statutory procedure requiring a decision to proceed must occur only after receiving certification from the auditor. Second, the resolution in question, Resolution 2015.10.19.07, does not attempt to authorize the 5.3 mill levy to proceed to the ballot, even if doing so was statutorily permitted.

The requirement for two resolutions has been articulated in Relator’s Merit Brief, in Centerville’s Merit Brief, in the Secretary of State’s Handbook, and above. It will not be repeated here. The statute requires the Resolution to Proceed for Ballot to follow the certification from the auditor. “[I]n cases involving tax levies . . . all procedural steps are conditions precedent to the validity of the election.” *In re Contest of Stark Cty. Issue 6*, 132 Ohio St. 3d 98, 2012-Ohio-2091, ¶13, 969 N.E.2d 1172. Thus, Sugarcreek’s contention that a second resolution was not required is legally incorrect. Sugarcreek Township does not even attempt to explain why it passed the Resolution to Proceed for Ballot on January 8, 2016, after this case was initiated, if doing so was unnecessary. Its silence is deafening.

3. *The Resolution to Request Auditor Certification Did Not Contain a Decision to Proceed to Ballot.*

Assuming both R.C. §§ 5705.03(B)(1) and (B)(3) could be accomplished in a single resolution, Sugarcreek Township failed to do so here. Resolution 2015.10.19.07 is entitled “In re: Resolution Declaring the Necessity for Levying a Tax Exceeding the Ten Mill Limitation and Authorizing Request of County Auditor to Provide Certain Information Pursuant to Ohio Revised Code Section 5705.03(B).” (See Relator’s Evidence, Exhibit 9). The Title suggests a singular purpose to the resolution: to certify the need for a levy to the auditor to request his certification of the levy millage and proceeds. The final “whereas” paragraph confirms this “WHEREAS, prior to making a determination of the necessity for a levy, the Township is required to certify a request to the County Auditor for certain information.” (*Id.*) Thus, the whereas clause confirms that a separate resolution would be used, indeed the Resolution admits that it “is required” to proceed to the ballot.

There are only five operative provisions of Resolution 2015.10.19.07. The first declares the need for a levy. The second requests certification from the auditor. The third states the levy would be additional and its duration. The fourth authorizes the Fiscal Officer to certify a copy of the resolution to the auditor “and if necessary, the Greene County Board of Elections.” (See Relator’s Evidence, Exhibit 9). The fifth self-servingly declares that open meeting laws were followed.

No provision of Resolution 2015.10.19.07 declares the Township’s intent to proceed. At best, the fourth paragraph ambiguously authorizes the Fiscal Officer to certify the resolution to the Board of Elections “if necessary.” But that begs the question, necessary for what? The stated purpose of the resolution and that paragraph was to request information from the auditor. Does the “if necessary” clause mean that certification to the Board of Elections should happen if

necessary to fulfill this purpose? Who decides if doing so is necessary? Is this provision supposed to impliedly charge the Fiscal Officer with reviewing the auditor's certification and deciding whether the revenue generated by the levy would be sufficient? It does not state so.

Even if it did, a Fiscal Officer is not statutorily empowered with the authority to decide whether to proceed to ballot. *State ex rel. Citizens for Open, Responsive & Accountable Gov't. v. Register*, 116 Ohio St. 3d 88, 2007-Ohio-5542, ¶ 31, 876 N.E.2d 913 (“the township fiscal officer has no duty . . . to certify resolutions that were not actually passed by a township board of trustees.”) A fiscal officer's duties are administrative and include “keeping an accurate record of the resolutions a board of trustees adopts in carrying out its business at meetings.” *Id.* at ¶ 30; R.C. § 507.04. However, the fiscal officer is not authorized to make decision on behalf of the trustees or to alter those decisions. *Id.* Rather, the certification of a resolution by a fiscal officer “is purely a ministerial act.” *State ex rel. Bd. of Ed. v. Foster*, 54 Ohio App. 366, 367, 7 N.E.2d 658 (App. Ct., 1936). Even if the Township could have passed a resolution to proceed to ballot prior to receiving the auditor's certification, Sugarcreek Township did not do so.

4. *Even the 2016 Resolution to Proceed for Ballot is Invalid.*

Assuming for the sake of argument that the Court would consider *sua sponte* whether the passing of the Resolution 2016.01.08.01 on January 8, 2016 constituted substantial compliance,⁴ multiple factors would preclude such a finding here. First, passing the required Resolution to Proceed for Ballot over three weeks after the deadline to certify the same could not possibly be considered substantially compliant. Second, Resolution 2016.01.08.01 doesn't comply with R.C. §§ 5705.03 (B) and 5705.19.

⁴ No party has asserted that passing Resolution 2016.01.08.01 constituted substantial compliance.

Resolution 2016.01.08.01 resolves only “that this Resolution to Proceed for Ballot is hereby adopted and that this Resolution shall take effect and be in force from and after the earliest time provided by law.” (See Relator’s Evidence, Exhibit 12). Resolution 2016.01.08.01 fails to state any of the substantive requirements of a resolution to proceed to ballot, including:

1. “that the amount of taxes that may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision and that it is necessary to levy a tax in excess of that limitation,” (R.C. § 5705.19);
2. the purpose, (R.C. § 5705.19);
3. “specify the amount of the increase in rate that it is necessary to levy,” (R.C. § 5705.19);
4. “the purpose of that increase in rate,” (R.C. § 5705.19);
5. “the number of years during which the increase in rate shall be in effect” (R.C. § 5705.19);
6. “the rate of the tax levy, expressed in mills for each one dollar in tax valuation as estimated by the county auditor,” (R.C. § 5705.03(B)(3)); or
7. that the Resolution be certified, “accompanied by a copy of the county auditor's certification, to the proper county board of elections in the manner and within the time prescribed by the section of the Revised Code governing submission of the question.” (R.C. § 5705.03(B)(3)).

Not only does the Resolution to Proceed for Ballot not strictly comply with the statutory requirements, it does not substantially or even partially comply with either R.C. §§ 5705.03(B)(3) or 5705.19. No attempt is made in the Resolution to Proceed For Ballot to describe the levy at all. Resolution 2016.01.08.01 cured nothing.

B. Whether Sugarcreek Township is Authorized to Impose the Proposed Tax Must be Established in Advance of the Levy Being Placed on the Ballot

The Secretary of State contends that whether the proposed tax is legally permitted to be imposed is a question that can be answered after the election. While this is a true statement, it is not true that this issue can be addressed *only* after the election. In fact, the Secretary’s Handbook

states, “The taxing authority may seek approval of a tax that the taxing authority *is authorized to levy* and which is not already being collected.” (See Handbook, 2-5, Sec. of State’s Evidence, Exhibit 2, p. 8). Determining whether the purported fire district is a legitimate political subdivision is a necessary predicate to the presentation of a tax for the purported fire district.

Sugarcreek’s argument for the validity of the Reduced Fire District is that no prior fire district existed. However, this is not accurate. While the Township’s current fire services is purportedly provided by a township fire department, it does not serve the entire Township. The current fire service excludes coverage for the portions of the Township incorporated into Bellbrook and Kettering. Thus, it is not true that the existing services are provided Township-wide.

The Township incorrectly argues that it “has the power to create a fire district with whichever portions of the township it deems within their (sic) judgment as in need of fire protection.” (See Sugarcreek Twp. Merit Brief, at p. 9, n.1). This is not true. The statute requires that before a district can be created it be found to be “expedient and necessary to guard against the occurrence of fires or to protect the property and lives of the citizens against damages resulting from their occurrence.” R.C. § 505.37(C). Here, the purpose stated on the record was to prevent annexation. The implicit purpose was to remove Cornerstone because of the Centerville TIF. In the very first sentence in Sugarcreek’s Factual Background, the Township admits that removal of “fire and EMS services to the Cornerstone development” is the *raison d’être* of the Reduced Fire District. (See Sugarcreek Twp. Merit Brief, at p.4).⁵ The purpose is invalid. The fire district is invalid. Without a valid fire district, there can be no levy.

⁵ The Township asserts without citation to the record, or even an affidavit, that there would be “rising costs” associated with the development. However, as discussed in Relator’s Merit Brief at p. 11, the Township Fire Chief testified to the contrary.

C. Cornerstone's Complaint is Not Barred by Laches

Both Secretary of State and Sugarcreek Township argue that Cornerstone's Complaint for Writ of Mandamus and/or Prohibition should be barred by the doctrine of laches. (See Sec. of State Merit Brief, at p. 11; Sugarcreek Merit Brief, at p. 17). The essence of their argument is that the Sugarcreek Township Trustees vote to pass Resolution 2015.10.19.07 requesting the Green County Auditor's certification on October 19, 2015 should have precipitated this election complaint. However, it is undisputed that Cornerstone filed this action within seven days after Respondent Greene County Board of Election certified the 5.3 mill levy for the proposed Replacement Fire District. (See Sec. of State Merit Brief, at p. 11). See *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St. 3d 487, 2014-Ohio-4077, ¶¶ 25-26, 20 N.E.3d 678 (Holding seven day period between board of election action and filing of complaint with intervening holiday and weekend is not unreasonable).

Laches may bar relief in an election-related matter only if the person seeking relief fails to act with the "utmost diligence." *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 137 Ohio St.3d 62, 2013-Ohio-4490, 997 N.E.2d 524, ¶ 30, quoting *State ex rel. Fuller v. Medina Cty. Bd. of Elections*, 97 Ohio St.3d 221, 2002-Ohio-5922, 778 N.E.2d 37, ¶ 7. The elements of a laches defense are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 1995-Ohio-269, 656 N.E.2d 1277 (1995). The problem with the Secretary of State's and Sugarcreek Township's arguments is that there was no unreasonably delay or lapse of time in asserting a right, as Resolution 2015.10.19.07 did not actually authorize a ballot levy nor place the levy on the ballot. Cornerstone absolutely acted with the utmost diligence once the Board of Elections acted. There was nothing from which to object, or to institute an original action, until

the Board of Elections improperly certified the 5.3 mill tax levy on December 22, 2015. The Township had not even passed a resolution to proceed to ballot.

Resolution 2015.10.19.07 requests that the Greene County Auditor “certify to the Sugarcreek Township Board of Trustees the total current tax valuation of Sugarcreek Township (unincorporated areas only) and the dollar amount of revenue that would be generated by the following additional Fire District tax levy: a) 5.3 mill.” (*See* Relator’s Evidence, Exhibit 9). Notably, Resolution 2015.10.19.07 does not state Sugarcreek Township’s desire to proceed and place a 5.3 mill tax levy on the ballot. (*Id.*) Based on the plain language of Resolution 2015.10.19.07, there was nothing from which Cornerstone could object or to begin the time to institute an original action – Sugarcreek Township was only requesting the Greene County Auditor to certify the amount that would be generated by a 5.3 mill tax levy. The Township did not act after receiving the Auditor’s certification. It was not until December 22, 2015, when the Greene County Board of Election improperly certified a 5.3 mill tax levy without a resolution from Sugarcreek Township that it intended to proceed to place the tax levy on the ballot, that Cornerstone could act.

Cornerstone promptly filed its Original Action for Writ of Mandamus and/or Prohibition on December 29, 2015. Cornerstone acted with the utmost diligence in bringing the instant action within seven calendar days (including the intervening Christmas holidays and four business days) of the Board of Election’s certification of the 5.3 mill tax levy to fund the Replacement Fire District. *See State ex rel. Carrier v. Hilliard City Council*, Ohio Supreme Court No. 2015-2061, Slip Opinion No. 2016-Ohio-155 (January 19, 2016) (rejecting the defense of laches when there was an eight day delay between rejection of a proposed charter amendment petition and filing of mandamus action). Astonishingly, Sugarcreek Township then highlighted

the absence of an earlier triggering event by passing Resolution 2016.01.08.01 on January 8, 2016, which finally requested the Greene County Board of Elections to proceed and place “this Fire District Levy on the March 15, 2016 ballot.” (*See* Relator’s Evidence, Exhibit 12). Thus, there is no evidence that Cornerstone did not act with the utmost diligence required in election cases, or that there was an unreasonable delay or lapse of time in asserting a right. Laches is not a proper defense to this action.

The Secretary of State’s position regarding laches is disingenuous considering the Secretary of State begins his brief by claiming that this case was filed prematurely. “Relator attempts to control the *outcome* of [the Secretary of State’s] duties before Respondent even has time to act.” (*See* Sec. of State Merit Brief, at p. 1, emphasis in original). The Secretary of State states that “Respondent has yet to perform his administrative review of the ballot language in question. Indeed Relator filed this original action before Respondent even received notice of this ballot issue.” (*Id.*) The Secretary of State further claims that he did not receive the ballot language at issue until January 8, 2016, and “[a]s Respondent has not yet had a chance to exercise its discretion,” Cornerstone allegedly can not show that it entitled to extraordinary relief. (*Id.*, pp. 4-5). The Complaint cannot be simultaneously premature and barred by laches. In truth, the Complaint was timely filed.

D. Both the Secretary of State and Board of Elections Admit They Are Exercising Judicial or Quasi-Judicial Power

Both Secretary of State and Board of Elections claim that they are not proper parties to this action, as they will not exercise judicial or quasi-judicial power when reviewing the 5.3 mill tax levy. (*See* Sec. of State Merit Brief, p. 5; *see also*, Board of Elections Merit Brief, p. 4, stricken). But these arguments belie admissions in the Respondents’ Merit Briefs.

Specifically, the Secretary of State claims that he is “not tasked under Ohio law with placing or removing local ballot issues on ballots.” (*See* Sec. of State Merit Brief, p. 5). Despite this contention, the Secretary of State admits multiple times in his Merit Brief that “Respondent is currently reviewing the ballot language of the proposed issue and weighing whether to give approval in accordance with R.C. § 3501.05(J).” (*See* Sec. of State Merit Brief, p. 2; *see also* “Respondent did not receive the ballot issue before the original complaint in this action was filed and, to date, has not completed his administrative review of the ballot language.” *Id.*, p. 3).

R.C. § 3501.05(J) provides that Secretary of State shall: “give ***final approval*** to ballot language for any local question or issue approved and transmitted by boards of elections under section 3501.11 of the Revised Code.” (Emphasis added). If the Secretary of State was merely reviewing the compliance of the ballot language, it would not take more than a month after the Board of Elections’ certification of the 5.3 mill tax levy, or 14 days from the time the Secretary of State considered the file complete upon its receipt of Resolution 2016.01.08.01 on January 8, 2016, for this review. Instead, the time passage is indicative that the Secretary of State is conducting a quasi-judicial review of the merits of Cornerstone’s claims: (1) that the 5.3-mill tax levy was not properly certified to the Greene County Board of Resolutions according to the two-resolution process outlined in R.C. § 5705.03(B)(1) and (3); (2) that R.C. § 505.37(C) vests municipalities with sole authority to remove incorporated territory from a township fire district; (3) that “deterring annexations” is not a proper purpose in reducing fire and EMS services through the creation of the Replacement Fire District; and (4) Sugarcreek Township may not remove services subject to a TIF. Furthermore, although the Greene County Board of Elections’ Merit Brief was stricken as untimely, the Board of Elections also admitted that it was considering

holding a hearing on Cornerstone’s objections. (See Board of Elections Merit Brief, p. 7, stricken). These reviews and hearings are the hallmarks of quasi-judicial exercise.

Furthermore, the Secretary of State’s position that it has no legal duty to keep unlawful issues off the ballot is simply untrue. The Ohio Supreme Court has long held that “in cases involving tax levies and bond issues, ‘the form of the ballot and all procedural steps are conditions precedent to the validity of the election.’” *In re Contest of Stark Cty. Issue 6*, 132 Ohio St. 3d 98; 2012-Ohio-2091; 969 N.E.2d 1172, citing *Beck v. Cincinnati*, 162 Ohio St. 473, 476, 124 N.E.2d 120 (1955). In this matter, the Board of Elections somehow ignored the fact that Resolution 2015.10.19.07 did not authorize them to place a tax levy on the ballot, but only asked the Greene County Auditor to certify the amount of revenue from a 5.3 mill tax levy. The Board of Elections then certified the 5.3 mill tax levy on December 22, 2015 without a Sugarcreek Township resolution to proceed to ballot. That Resolution to Proceed to Ballot, Resolution 2016.01.08.01, was not approved until January 8, 2016. By then, R.C. § 5705.19’s ninety-day requirement for resolutions to be certified to the board of elections had passed. Accordingly, both the Secretary of State’s review and the Board of Elections’ review/hearings should come to the same conclusion – the 5.3-mill tax levy proposed by Sugarcreek Township is procedurally flawed and should not appear on the March 15, 2016 ballot.

E. Cornerstone is Entitled to a Writ of Mandamus and has No Adequate Remedy at Law

Secretary of State and Sugarcreek Township further argue that a Writ of Mandamus is improper, claiming that Cornerstone has an adequate remedy at law – either in the form of seeking an injunction, or challenging the ballot issue if approved by the electorate. (See Sec. of State Merit Brief, p. 8-9, Sugarcreek Township Merit Brief, p. 7). Both arguments fail to recognize that the Board of Elections and Secretary of State are abusing their discretion by

certifying a procedurally flawed tax levy to the ballot. *Compare with State ex rel. Choices for South-Western City Sch. v. Anthony*, 108 Ohio St. 3d 1, 2005-Ohio-5362; 840 N.E.2d 582 (Holding that the board of elections properly removed a levy reduction measure from the ballot after the board of elections made legal determination that reducing a levy to 0 mills was a repeal, not a reduction). And the only time a board of elections can perform its duties is *before* an election. Therefore, a case is ripe prior to the election and need not wait until after the citizens vote. *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St. 3d 487, 2014-Ohio-4077, ¶ 44, 20 N.E.3d 678.

“The purpose of mandamus is to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.” *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 15, 368 N.E.2d 838 (1977). A writ of mandamus should be granted if the relator has demonstrated a clear legal right to the relief prayed for, that respondents are under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 53, 958 N.E.2d 1235, *citing State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 15. Such a demonstration is predicated upon whether the respondent “engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions.” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009 Ohio 5327, ¶ 9, 915 N.E.2d 1215.

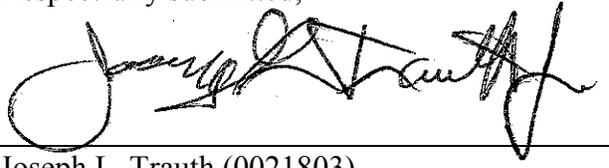
Due to the proximity to the election – March 15, 2016 – Cornerstone has necessarily established that it lacks an adequate remedy in the ordinary course of law. *State ex rel. Ross v. Crawford County Bd. of Elections*, 125 Ohio St. 3d 438, 2010-Ohio-2167, 928 N.E.2d 1082, ¶ 15; *see also State ex rel. Owens v. Brunner*, 125 Ohio St. 3d 130, 2010-Ohio-1374, 926 N.E.2d 617, ¶ 25 (because of proximity of election, relator established that he lacked an adequate

remedy in the ordinary course of law). In fact, the Secretary of State claims that the ballot must be finalized by January 30, 2016. (*See* Secretary of State Merit Brief, p. 12). Cornerstone could not file for an injunction in the Greene County matter, because Resolution 2015.10.19.07 did not actually request that a 5.3-mill tax levy for the Replacement Fire District be placed on the ballot. Instead, Resolution 2015.10.19.07 only requested that the Greene County Auditor certify the amount of revenue from a 5.3-mill tax levy. Cornerstone has also established that the Board of Elections and Secretary of State abused their discretion and clearly disregarded R.C. § 5705.19 and R.C. § 505.37 by refusing to remove the unlawful levy from the March 15, 2016 Ballot. *See State ex rel. Burech v. Belmont County Bd. of Elections*, 19 Ohio St. 3d 154, 484 N.E.2d 153 (1985) (allowing a writ of mandamus regarding the placement of a issue on the ballot as the issue did not comply with statutory requirements). Furthermore, neither the Board of Elections nor Secretary of State are party to the Greene County case. Their actions could not be challenged there.

CONCLUSION

For the foregoing reasons, Relator Cornerstone Developers, Ltd., respectfully requests a Writ of Mandamus ordering the Greene County Board of Elections and the Ohio Secretary of State to remove the 5.3 mill tax levy to fund the Replacement Fire District from the March 15, 2016 ballot, and a Writ of Prohibition preventing the Greene County Board of Elections and the Ohio Secretary of State from placing the 5.3 mill tax levy to fund the Replacement Fire District on the March 15, 2016 ballot.

Respectfully submitted,



Joseph L. Trauth (0021803)
Michael T. Cappel (0079193)
Sophia R. Jannace (0095931)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Phone (513) 579-6515
Fax (513) 579-6457
jtrauth@kmklaw.com
mcappel@kmklaw.com
sjannace@kmklaw.com

Of Counsel:
Charles M. Miller (0073844)
cmiller@kmklaw.com

***Counsel for Relator
Cornerstone Developers, Ltd***

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by electronic mail this 22nd day of January, 2016:

Elizabeth A. Ellis (0074332)
Civil Division Chief
Greene County Prosecutor's Office
61 Greene St., Suite 200
Xenia, Ohio 45385
Phone: (937) 562-5250
Fax: (937) 562-5258
ellis@co.greene.oh.us

***Counsel for Respondents
Greene County Board of Elections***

Scott A. Liberman (0058432)
Steven E Bacon (0059926)
Altick & Corwin Co., L.P.A.
One South Main Street, Suite 1590
Dayton, Ohio 45402
Phone: (937) 223-1201
Fax: (937) 223-5100
liberman@altickcorwin.com
bacons@altickcorwin.com

Of Counsel:

Robert F. McCarthy (0083829)
Bricker & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
rmccarth@bricker.com

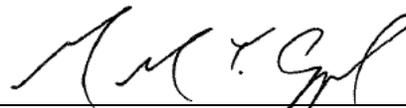
***Counsel for Respondent
City of Centerville***

Michael DeWine (0009181)
Ohio Attorney General
Jordan S. Berman (0093075)
Sarah E. Pierce (0087799)
Assistant Attorneys General
Ohio Attorney General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Phone: (614) 466-2872
Fax: (614) 728-7592

***Counsel for Respondent
Jon Husted, Ohio Secretary of State***

Stephanie R. Hayden (0082881)
Assistant Prosecuting Attorney
Greene County Prosecutor's Office
61 Greene Street, Suite 200
Xenia, Ohio 45385
Phone: (937) 562-5250
Fax: (937) 562-5258
shayden@co.greene.oh.us

***Counsel for Respondent
Sugarcreek Township***



Michael T. Cappel (0079193)