Supreme Court of Ohio Clerk of Court - Filed May 13, 2016 - Case No. 2016-0614

Case No. 2016-0614

IN THE SUPREME COURT OF OHIO

STATE EX REL. PAUL L. JACQUEMIN, et al.,
Relators,

v.

UNION CTY. BD. OF ELECTIONS,
Respondent.

Original Action in Prohibition and Mandamus

MERIT BRIEF OF RELATORS PAUL L. JACQUEMIN AND MARY M. JACQUEMIN

Donald J. McTigue (0022849)
J. Corey Colombo (0072398)
Derek S. Clinger (0092075)
McTigue & Colombo LLC
545 East Town Street
Columbus, Ohio 43215
Phone: (614) 263-7000
Facsimile: (614) 263-7078
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com

Laura M. Comek (0070959)
Laura M. Comek Law LLC
300 E. Broad Street, Suite 450
Columbus, Ohio 43215
Phone: (614) 221-0717
Facsimile: (614) 221-1278
laura@comeklaw.com

Counsel for Relators

Thayne D. Gray (0059041)
Assistant Prosecuting Attorney
Union County Prosecutor's Office
221 West Fifth Street, Third Floor
Marysville, Ohio 43040
Phone: (937) 645-4190
tgray@co.union.oh.us

Counsel for Respondent

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I. INTRODUCTION

This is an original election matter challenging Respondent Union County Board of Elections' ("Respondent" or "Board") decision to deny Relators' protest and failure to adhere to legal requirements as spelled out by this Court for township zoning referendum petitions. The basis for Relators Paul L. Jacquemin and Mary M. Jacquemin ("Relators") protest is that the summary contained on the Petition for Zoning Referendum on Jerome Township Resolution 15-167 ("Referendum Petition") contains material omissions and is misleading and inaccurate due to the following clear facial defects: (1) it omits that part of the land was re-zoned for "mixed use"; (2) it omits one of the three parcel numbers that were re-zoned by the amendment; (3) it omits that the resolution imposed additional conditions on the applicant; (4) it omits that Jacquemin Farms will continue to operate on a portion of the site; (5) it incorrectly describes the zoning classifications of the zoning change; (6) it inaccurately describes the location of the re-zoned land; (7) it inaccurately identifies the owners of land; (8) it contains a misleading description of the shape of the land area; and (9) it omits any reference to the December 22, 2015 memorandum that modifies the application.

The Board's denial of Relators' protest means that the Board will submit the question on the referendum of the Trustee's approval of Resolution 15-167 to the electors at the November 8, 2016 general election. The action taken by the Board was made without regard to the evidence presented and in clear disregard of R.C. §519.12(H).

For the reasons that follow, Relators are entitled to the requested writ of prohibition and/or writ of mandamus.

II. STATEMENT OF FACTS AND CASE

The Court possesses jurisdiction over the subject matter of this action and over Respondent pursuant to Section 2, Article IV of the Ohio Constitution and Chapter 2731 of the Ohio Revised Code. [See, Joint Stipulations ¶1]. Relators are the owners of the property located at 7347 Hyland-Croy Road, Plain City, Ohio, 43064, whose property was included in the subject rezoning application, and are the protestors against the Referendum Petition. [See, Complaint, Jacquemin Affidavit ¶2]. Respondent Board is the duly established and acting election authority for Union County, Ohio, pursuant to Ohio Rev. Code §3501.06. [See, Joint Stipulations ¶3].

Relators have acted with the utmost diligence in bringing the instant action; there has been no unreasonable delay or lapse of time in asserting their rights herein and, further, there is no prejudice to Respondent. See, e.g., *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995). [See, Complaint, Jacquemin Affidavit ¶3]. Further, Relators lack an adequate remedy in the ordinary course of law. [See, Joint Stipulations ¶5].

On May 26, 2015, Relators and Schottenstein Real Estate Group executed a Zoning Application, a proposal to amend the zoning classification of 60.43 acres of three parcels of land, two owned by Relators (Parcel Nos.1700310380000 and 1700310381000) and one owned by Arthur and Elizabeth Wesner (Parcel No. 1700310360000), in Jerome Township, Union County, Ohio, from Rural Residential to Mixed Use Planned Development. The application was filed with the Township on May 26, 2015. [See, Complaint, Jacquemin Affidavit ¶5; Zoning Application, Exhibit 4].

On December 23, 2015, the Jerome Township Board of Trustees convened a public hearing on the rezoning request regarding Relators' and Arthur and Elizabeth Wesners' property. At the conclusion of the hearing, the Jerome Township Trustees voted 2-1 to adopt Resolution 15-167. [See, Joint Stipulations ¶7; December 23, 2015 Jerome Township Board of Trustees Meeting Minutes, including Resolution 15-167, Exhibit 2].

Resolution 15-167 states as follows, with emphasis supplied:

> The Jerome Township Trustees hereby enter into record a Resolution adopting and modifying the recommendation of the Jerome Township Zoning Commission. It is recognized that the applicant filed a Preliminary Zoning Plan Application for a **Mixed Use** Planned Development (PUD #15-120).
>
> It is recognized by the Trustees that the application meets the requirements of the Jerome Township Comprehensive Plan and further the applicant and co-applicants have agreed to make substantial financial contributions to the needed road improvements. The application further meets the needs of the Township regarding senior housing and care and multi-unit housing in accordance with future needs as presented to the Township by the Mid Ohio Regional Planning Commission (MORPC) and other independent studies.
>
> It is agreed that after passage, the applicant or their representatives will negotiate with Township representatives in good faith the following terms of passage to be presented in text upon such time the Final Development Plan is presented for approval.
>
> 1. Terms and conditions of any Joint Economic Agreements or Tax Incremental Financing agreements as needed for the Final Development Plan and also reimburse Jerome Township and agreed upon expenses in the execution of these documents should they be necessary.

> 2. Applicant and or their legal representative shall enter into an agreement in the Final Development Plan as an agreement that will include negotiated reimbursement to Jerome Township for additional necessary costs incurred for the service of Fire and EMS protection for the proposed development until such time tax revenue is generated at projected build out.
>
> 3. Negotiate in good faith with any other terms and conditions as necessary in the text of the Final Development Plan.
>
> Jerome Township further reserves the right to negotiate further terms of the Final Development Plan beyond the scope of this resolution.
>
> Amended portion of the resolution is to include the modifications as presented by the Applicant/Developer in their memorandum dated December 22, 2015.

(Emphasis supplied)[See, Joint Stipulations ¶8; December 23, 2015 Jerome Township Board of Trustees Meeting Minutes, including Resolution 15-167, Exhibit 2].

Resolution 15-167 incorporated a December 22, 2015 memorandum, which was not attached to the Referendum Petition. [See, Complaint, Jacquemin Affidavit ¶8; December 22, 2015 memorandum, Exhibit 5].

On January 20, 2016, a group of petitioners filed the Referendum Petition with a Jerome Township representative seeking to submit the adoption of Resolution 15-167 to the electors of Jerome Township. [See, Joint Stipulations ¶10; Sample Petition, Exhibit 3]. The summary on the first page of each Part-Petition states as follows:

> A Zoning amendment approving rezoning an irregular "L" shaped site of approximately 60.43 acres Between the West side of Hyland Croy Road and the East side of US 33 from U-1 Rural District to P.U.D. Planed *(sic.)* United Development for Parcels 17-0031038000 and 17-0031038100 known as the "Jacquemin Farms."
> The P.U.D. Planed *(sic.)* Unit Development (Res. 15-167) provides for approximately 300 Residential Units and a 250 Bed Adult Living Facility (See Development Site Map –

> Exhibit #2 and Plot Map – Exhibit #3.) The Nearest intersection being Hyland Croy Road and SR 161 – Post Road.
> All as more fully described and identified in the attached:
> 1) The Record of Proceedings of Jerome Board of Trustees Public Hearing of December 23, 2015 (Exhibit #1)
> 2) "Jacquemin Farms. Vicinity "Site" Map (exhibit #2
> 3) Development Plot Map (exhibit #3)

[See, Joint Stipulations ¶11; Sample Petition, Exhibit 3].

On February 4, 2016, Relators filed a Protest Against Petition for Zoning Referendum on Jerome Township Resolution 15-167 ("Protest") with Respondent. [See, Joint Stipulations ¶12; February 4, 2011 Protest, Exhibit 1]. On February 9, 2016, a second protest was filed by Arthur and Elizabeth Wesner, who also own land subject to Resolution 15-167, which set forth additional protest grounds that are not part of this Court action. [See, Joint Stipulations ¶13].

On March 4, 2016, at its regular board meeting, Respondent decided not to certify the Referendum Petition until a protest hearing could be conducted. [See, Joint Stipulations ¶14]. On March 23, 2016, the Board Director set April 12, 2016 as the date for the protest hearing. [See, Joint Stipulations ¶15]. On April 6, 2016, Relators filed a Pre-Hearing Brief with Respondent, providing additional legal arguments in support of their protest. [See, Joint Stipulations ¶16].

On April 12, 2016, Respondent held a quasi-judicial hearing on the two protests in which Respondents' counsel, protestors Arthur and Elizabeth Wesner's counsel, and Referendum Petition representatives were present. Respondent heard sworn testimony and accepted exhibits from the parties at the hearing, which were entered into the record. [See, Joint Stipulations ¶17]. At the conclusion of the hearing on the protests,

Respondent Board members voted 3-1 to certify the Referendum Petition and place the issue on the November 8, 2016 general election ballot. [See, Joint Stipulations ¶18].

On April 21, 2016, Relators filed the pending Complaint in Original Action for Writ of Prohibition and/or Writ of Mandamus. On April 22, 2016, Relators filed a Motion to Expedite. On April 28, 2016, the parties filed a joint motion to set a briefing schedule. On May 6, 2016, the Court granted the Motion to Expedite, granted an alternative writ, and set the briefing schedule for presentation of evidence and filing of briefs pursuant to S.Ct.Prac.R. 12.05. On May 6, 2016, Respondent filed an Answer.

III. ARGUMENT

A. Standard of Review

1. Prohibition

A writ of prohibition will issue where the officers against whom the writ is sought have exercised or are about to exercise quasi-judicial power, the exercise of such power is unauthorized by law, and the refusal to grant the writ will result in injury for which no other adequate remedy exists. *State ex rel. Starner v. DeHoff*, 18 Ohio St.3d 163, 164 (1985).

The proximity of the election establishes the lack of an adequate remedy in the ordinary course of law. *State ex rel. Greene v. Montgomery Cty. Bd. of Elections*, 121 Ohio St.3d 631, 2009-Ohio-1716, 907 N.E.2d 300, ¶ 10.

As for the remaining requirements, "[i]n extraordinary actions challenging the decisions of the Secretary of State and boards of elections, the standard is whether the Board engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions." *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d

216, 2002-Ohio-5923, 778 N.E.2d 32, ¶ 11. Relators claim that the Respondent Board abused its discretion and clearly disregarded applicable law by ruling that the Referendum Petition met the requirements of Ohio Rev. Code §519.12. The Referendum Petition summary contains material omissions, and is misleading and inaccurate due to several clear facial defects.

2. **Mandamus**

To be entitled to a writ of mandamus, relators must establish that (1) they have a clear legal right for their protest to be granted and for the Referendum Petition to not be certified, (2) respondents have a corresponding legal duty to grant the protest, and (3) relators possess no adequate remedy in the ordinary course of law. *State ex rel. Ebersole v. Powell*, 141 Ohio St.3d 9, 2014-Ohio-4078 (*citing Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 54 (1994)). Because of the proximity of the November 8, 2016 election, Relators lack a remedy in the ordinary course of law. *State ex rel. Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶ 27.

B. Election Laws Are Mandatory and Require Strict Compliance

The underlying Protest raised serious issues regarding the failure of the Referendum Petition to comply with mandatory statutory provisions. Unlike the right of referendum and initiative in municipalities, there is no constitutional basis or right with respect to a township zoning referendum. The right to present a township zoning referendum exists *solely by virtue of the statutory enactment* of the General Assembly in R.C. §519.12.

The standard that applies to the application of election laws has been set forth many times by this Court. "The settled rule is that election laws are mandatory and

require strict compliance *** Substantial compliance is acceptable only when an election statute expressly permits it." *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St.3d 167, 169 (1992); *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 294-95 (1995); *State ex rel. Burech v. Belmont Cty. Bd. of Elections*, 19 Ohio St.3d 154 (1985); *State ex rel. Senn v. Bd. of Elections*, 51 Ohio St. 173, 174 (1977).

Any rule of construction that referendum provisions are to be liberally construed so as to permit rather than preclude the exercise of the power cannot be employed to override statutory requirements. *East Ohio Gas Co. v. Wood Cty. Bd. of Elections*, 83 Ohio St.3d 298, 301 (1998); *Christy v. Summit Cty. Bd. of Elections*, 77 Ohio St.3d 35, 40 (1996); *Markus v. Trumbull Cty. Bd. of Elections*, 22 Ohio St.2d 197, 200 (1970)([E]ven under the most liberal construction, the record in this case indicated that the petitions circulated * * * were prepared in a manner which failed to meet the petition form requirements contained in R.C. §519.12, and that the petitions could have misled those persons who signed them.).

C. <u>The Board Abused Its Discretion and Acted in Clear Disregard of Ohio Law by Failing to Apply Ohio Rev. Code §519.12(H), Which Requires a Brief Summary That is Accurate and Not Misleading, Ambiguous or Inaccurate and Does Not Contain Material Omissions That Could Confuse or Mislead the Average Person</u>

If petitioners had simply cut and pasted Resolution 15-167 into the Referendum Petition summary section then the Relators' protest and this court action would not have been needed. Instead, the Referendum Petition summary only included two out of three parcels subject to the rezoning, only listed one of the two property owners, and wrongfully informed signers of the nearest intersection to the property, among other

glaring errors and omissions. In short, the Referendum Petition summary was in fact ambiguous, misleading, inaccurate, and contained material omissions which could confuse or mislead the average person. In addition, the Referendum Petition summary contained select information outside of Resolution 15-167 which created a further deficiency. By including only a portion of the information about the subject rezoning, but omitting other essential information about the rezoning, the petitioners deceived electors about the nature of the zoning amendment. *See, East Ohio Gas Co. v. Wood Cty. Bd. of Elections*, 83 Ohio St.3d 298, 301-302 (1998). In this matter, the petitioners chose not to duplicate the exact language of Resolution 15-167, but instead "cherry picked" and mischaracterized certain aspects of the resolution and minimized or omitted altogether several other favorable aspects of the resolution.

Ohio Rev. Code §519.12(H) provides, in relevant part, with emphasis supplied:

> The proposed amendment, if adopted by the board, shall become effective in thirty days after the date of its adoption, unless, within thirty days after the adoption, there is presented to the board of township trustees a petition . . .
>
> * * *
>
> **Each part of this petition shall contain** the number and the full and correct title, if any, of the zoning amendment resolution, motion, or application, furnishing the name by which the amendment is known and **a brief summary of its contents**. In addition to meeting the requirements of this section, each petition shall be governed by the rules specified in section 3501.38 of the Revised Code.

By choosing to summarize Resolution 15-167 in language other than that employed by the Board of Township Trustees, petitioners' language must satisfy the applicable test in R.C. § 519.12(H). This provision requires each part of a referendum on a township zoning amendment to contain a "brief summary" of the amendment's contents

that "must be accurate and unambiguous; otherwise the petition is invalid and the subject resolution will not be submitted for vote." *State ex rel. Gemienhardt v. Delaware Cty. Bd. of Elections*, 109 Ohio St.3d 212, 218-219 (2006). Thus, "if the summary is misleading, inaccurate, or contains material omissions which would confuse the average person, the petition is invalid and the subject resolution will not be submitted for vote." *Id.* at 219. Petition signers may rely upon the summary language instead of wading through pages of exhibits attached to the petition before deciding whether to sign the Referendum Petition. *Id*. at 221. In the case of this Referendum Petition, each Part-Petition has six pages of exhibits attached containing approximately 1,350 words. [See, Part-Petition Sample, Exhibit 3].

Further, election laws related to petitions must be strictly construed. *State ex rel. Esch v. Lake Cty. Bd. of Elections*, 61 Ohio St.3d 595 (1991). The above standard is an objective one. It does not depend upon subjective evidence that persons were misled or confused by the petition. *Olen Corp. v. Franklin Cty. Bd. of Elections*, 43 Ohio App. 3d 189, 193 (10th Dist. 1988). The summary attached to the Referendum Petition contained nine clear facial defects.

1. **The Referendum Petition summary omits that the land was re-zoned for mixed use as set forth in the Resolution.**

The first fatal defect is that the Referendum Petition summary omits that the land was re-zoned for mixed use. This Court has explained that the summary must "apprise the reader of the present zoning status of the land and of the precise nature of the requested change." *Shelly & Sands, Inc. v. Franklin Cty. Bd. of Elections*, 12 Ohio St.3d 140, 142 (1984). Moreover, the Court has held that it would be a material omission to

exclude the "permitted, conditional, and prohibited uses and developmental standards in a zoning amendment." *Gemienhardt,* 109 Ohio St.3d at 220.

The Referendum Petition summary does not apprise the reader of the precise nature of the requested change. The summary states that "[t]he P.U.D. Planed [*sic*] Unit Development (Res.15-167) provides for approximately 300 Residential Units and a 250 Bed Adult Living Facility." Although it is true the rezoning allows for these residential uses, the summary entirely omits the fact that the rezoning also provides for retail, office, institutional and agricultural uses.[1] Indeed, Resolution 15-167 refers to the PUD as a "Mixed Use" Planned Development—not merely a residential development as implied by the inclusion of only residential units and facilities. These other uses were an important aspect of Resolution 15-167. The omission of this aspect misleads signers as to the precise nature of the zoning amendment. Here the petitioners chose not to include the term used in the Resolution and instead went outside the Resolution and selectively included information.

Further, the summary is misleading not just because it omits the fact that the land was re-zoned for mixed use as stated in the Resolution, but because it implies that the land was re-zoned only for residential purposes. This Court has repeatedly held that it is misleading for a summary to include *only some* of the proposed uses for re-zoned land, but exclude others. *State ex rel. McCord v. Delaware Cty. Bd. of Elections*, 106 Ohio St.3d 346, 356-57 (2005)("The summary is thus misleading because it suggests that only the uses that were included in the summary . . . were included in the new resolution. . . . Citizens could have avoided this deception by either including all of the material

[1] Further, in fact, only 125, not 250, adult living units will be constructed. [See, April 12, 2016 hearing transcript, p. 45].

proposed uses set forth in the development agreement or excluding all of the uses"); *East Ohio Gas Company v. Wood Cty. Bd. of Elections*, 83 Ohio St.3d 298, 301-02 (1998) ("this ambiguity results from the inclusion of only that portion of East Ohio's stated reason indicating its desire to develop its property for industrial purposes and the omission of the remaining portion emphasizing that these industrial uses would be in accordance with the planned industrial district requirements, i.e., subject to township oversight and control.") The summary's inclusion of the language about the residential units and the adult living facility and its exclusion of the retail, office, and agricultural uses is a material omission. The average person reading the summary would have no idea that the land was also re-zoned for other uses–they would only know that it was re-zoned to allow for 300 residential units and a 250-bed adult living facility, i.e., residential use. Thus, the inclusion of one aspect of the amendment, and the exclusion of another, is a fatal defect.

A reference in the petition summary to attachments which more completely and accurately explain the precise nature of the change cannot cure an omission. In *Gemienhardt*, this Court explained that although a circulator attached the full text of the relevant zoning amendments to the petition, this would not cure a material omission because "petition signers could have justifiably relied upon [the] summary language instead of wading through the tens of pages [of attachments] before deciding whether to sign the petition." *Gemienhardt*, 109 Ohio St.3d at 221.

The developer's representative, Don Hunter, testified that the various uses allowed by the Township Trustee's approval of Resolution 15-167 greatly exceeded residential uses when he stated the following:

Q: Okay, and specific to this application, this rezoning, what are the approved uses?

HUNTER: Well, the approved uses in this application are – one of them is the existing farm market operations of the Jacquemin family and then associated retail that goes with that. Another one would be the multi-family residential component and then another use would be what, is called senior living or it's the – I have to look.

Q: Adult living?

HUNTER: Adult living facility. ALF is a commonly known term. So, just to summarize, this particular zoning has a series of commercial uses that are retail and office that are allowable. It has the then second use would be the farm market operations of the Jacquemin family. The third use would be the multi-family what's termed residential and then the fourth use would be the adult living facility.

Q: And isn't there, also, a fifth use which is agriculture?

HUNTER: Yes, it is. That is a fifth use.

Q: Because agricultural can stand by itself whether you have a farm market store or not?

HUNTER: That is correct.

* * *

Q: . . . Do you see any reference in this summary to agricultural use?

HUNTER: None at all.

Q: Do you see any reference to the farm market use?

HUNTER: None at all.

Q: Do you see any reference to other retail use?

HUNTER: None at all and there's, also, I mean, our zoning allows office uses, also, So, there could be an office within that zoning and that's not referenced either in the commercial districts.

> * * *
>
> Q: Now, within the body of this [Resolution 15-167], in the first Paragraph, do you see that it refers to this being a mixed use Planned Development?
>
> HUNTER: Yes, I see that.
>
> Q: And then going back to the summary on the first page, is the word mixed use, does it appear anywhere?
>
> HUNTER: No, it does not.
>
> * * *
>
> [BOARD MEMBER] LEMASTER: . . . How much of this 60-some acres is going to be set aside for agricultural space for the farm market?
>
> * * *
>
> HUNTER: The answer is 12 acres.

[See April 12, 2016 hearing transcript, pp. 57-58, 65, 67].

Paul Jacquemin, one of the land owners, testified as follows:

> Q: What commercial activity – new commercial activity would you expand on?
>
> JACQUEMIN: Which I mentioned before, we would look at putting a coffee shop, a bakery and, possibly down the road, a restaurant. This is very typical of what farm markets do. They gradually expand their business from selling fruits and vegetables to bakery is usually the most common thing and then a lot of times they'll expand into a restaurant and I'm using it as an opportunity to continue with my family being active in the business and as a full time business. . . .

[See April 12, 2016 hearing transcript, p. 141].

In rejecting Relators' protest ground 1, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the

referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

2. The Referendum Petition summary omits one of the three re-zoned parcels.

The second fatal defect is that the Referendum Petition summary includes only two of the three re-zoned parcels in its description. It is undoubtedly misleading, inaccurate, and a material omission to exclude significant portions of the affected parcels of land from the summary, and as explained above, it is further misleading to include some crucial aspects of the amendment, but exclude others. *See McCord*, 106 Ohio St.3d at 356-57; *East Ohio Gas Company*, 83 Ohio St.3d at 301-02.

Resolution 15-167 re-zones Parcels 17-0031038000, 17-0031038100, and 17-0031036000. However, the Referendum Petition summary inexplicably refers only to Parcels 17-0031038000 and 17-0031038100 as being re-zoned by the amendment. Not including a re-zoned parcel is a material omission. Indeed, the summary also references the owners of the two parcels included in the summary, i.e. the Jacquemins, but makes no mention of the Wesners, the owners of the third parcel not included in the summary. The Jacquemins own 47.316 acres subject to the rezoning, and the Wesners own 13, plus or minus, acres subject to the rezoning. [See, Zoning Application, Exhibit 4; Union County Auditor information, Exhibit 8]. Accordingly, the Wesners own approximately one-fifth of the land subject to the rezoning. Therefore, the summary's inclusion of two re-zoned parcels, and omission of the third re-zoned parcel, is a fatal defect.[2]

[2] The Resolution itself does not set forth the parcel numbers, but all three are referenced in the December 23, 2015 Jerome Township Board of Trustees meeting minutes and the Zoning Application. [See, Exhibits 2 and 4 respectively]. This is another instance where the petitioners chose to include additional details from outside the Resolution, but did so selectively.

The Petitioner's representative Andrew Diamond, acknowledged at the April 12, 2016 hearing that the Referendum Petition summary only contained two of the three parcels. When Mr. Diamond was questioned about an email he had sent to the City of Dublin, which summarized this issue, he testified as follows:

> Q: . . . Mr. Diamond, you admit that there are only two of three parcels listed in your summary in this email.
>
> DIAMOND: That's correct.
>
> * * *
>
> BOARD MEMBER PARROTT: Mr. McTigue says, if you're going to list parcel numbers, why don't you list them all or, I mean, put part of the third? If you're going to do that, why didn't you put all three? Was that [an] oversight?
>
> DIAMOND: It may be an oversight. I can't answer that question. I don't have a good answer for that.

[See April 12, 2016 hearing transcript, pp. 34, 226].

The developer's representative, Don Hunter, testified about the fact that the zoning application, the subject of Resolution 15-167, contained three parcel numbers.

> Q: And we have three parcel numbers on the next line and rather than read the whole parcel number, we have one that ends with 8,000 and one that ends in 8,100. Those two parcels are owned by the Jacquemins. Correct?
>
> HUNTER: Yes.
>
> Q: And then the parcel that's 6,000, that is the Wesner's property. Correct?
>
> HUNTER: Yes, it is.
>
> * * *
>
> Q: Is there anything in [the Referendum Petition summary] providing the parcel number for the Wesners' property?

HUNTER: No.

[See April 12, 2016 hearing transcript, pp. 54, 60].

Jerome Township Zoning and Development Committee member Jeffrey Rymer gave testimony about the Referendum Petition summary omitting a parcel number as follows:

> Q: . . . Are you aware that only two of the three parcel numbers were listed on the Petition?
>
> RYMER: I had heard something like that, however, I can't – I can't fathom how – how it could go forward.
>
> Q: Please elaborate.
>
> RYMER: I mean, I mean, I have properties and I know that you have lot numbers and I know you have information at the County Recorder's and County Auditor's office and that is a matter of record and that is the footprint or the fingerprint of anything you want to do regarding real property.
>
> Q: Would you say that it's an error to only include two of the three parcels that were rezoned as part of this application?
>
> RYMER: It would be grievous error.
>
> * * *
>
> Q: So, Mr. Rymer, if you were handed a copy of the Referendum Petition and you wanted to do some research on it and it only had two of the three parcels, would you be able to get the information you need to understand that Petition from the summary?
>
> RYMER: Well, no, not from that summary.

[See April 12, 2016 hearing transcript, pp. 129-130, 136].

Ultimately, Board member Parrott voted against certifying the Petition to the ballot, and stated the following:

> PARROTT: The fact that it involves three parcels and they're listed by number but only two parcel numbers, I have trouble with that. I just think if somebody sees that and it's presented to them, they're going to say, well, does this mean the other one is not involved or does this — why was that one left out? And I know you said it was only half of it but anyway I have a problem with it when it gets to misleading, the fact that the third parcel was not included would make a person think the zoning had not been changed on that property and to me that's not correct. And so, I have some problems with that . . .

[See April 12, 2016 hearing transcript, pp. 233-234].

In rejecting Relators' protest ground 2, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

3. The Referendum Petition summary omits that the Resolution imposed additional conditions on the applicant.

The third fatal defect is that the Referendum Petition summary omits that Resolution 15-167 requires the applicants to negotiate with Jerome Township for several important terms and conditions. Again, this Court has held that "material omissions which would confuse the average person" are fatal to a petition. *Gemienhardt*, 109 Ohio St.3d at 219. Resolution 15-167 requires the applicant to (1) negotiate terms and conditions of any Joint Economic Agreements or Tax Incremental Financing agreements as needed; (2) enter into an agreement to reimburse Jerome Township for additional necessary costs incurred for the service of Fire and EMS protection for the proposed development; and (3) negotiate any other terms and conditions as necessary in the text of

the Final Development Plan. These requirements are a significant portion of the resolution itself. Without such information in the summary, the average reader could be confused as to who would bear responsibility for the additional costs related to the proposed development, such as Fire and EMS protection. This ambiguity would mislead average readers into opposing the amendment and signing the Petition.

The developer's representative, Don Hunter, testified that the three conditions imposed by the Jerome Township Trustees were a critically important aspect of Resolution 15-167 when he stated the following:

> Q: Okay, and would it be accurate to say that these three conditions are conditions of the rezoning that the Trustees approved here with this Resolution?
>
> HUNTER: Absolutely accurate.
>
> Q: And going back to the front page, the summary, do you see any reference in the summary to any of these three conditions?
>
> HUNTER: None at all.
>
> Q: And so, these are three conditions imposed by the Township to which you agreed?
>
> HUNTER: Yes, we did.
>
> Q: And let's look at these three conditions. The first one, explain to us, briefly, what this entails. In other words, what are you agreeing to?
>
> HUNTER: Well, we're agreeing to work with the Township to assist them in two ways. To provide any Joint Economic Agreements or Tax Incremental Financing Agreements. What's important to understand is that the Township Trustees had asked us. They said this is an important piece of property. Their communication to us is that the current property taxes that all 60 acres pay are about $12,000 a year. When we would build out and develop our properties and make the investments of brick

and mortar, then the real property taxes are going to go up dramatically is not strong enough of a word. We would – instead of the 60 acres paying annually $12,000 a year in property taxes, they would pay almost One point Six Million Dollars in property taxes. So what the Township wanted to be able to do was to have the ability to utilize those tax revenues either for some form of economic development or to help with the other aspect of – so there's a couple of key aspects here. One is property tax revenues going from $12,000 a year, approximately, to almost One point Six Million Dollars a year.

The other aspect point is for a Joint Economic Agreement. What that means is that townships don't have the ability in Ohio to levy an income tax on wage earners. So, if you're employed in the City of Marysville, for example, Marysville – doesn't matter where you live. It matters where you work. Marysville, I think it's one-and-a-half percent of your income would go to the City of Marysville.

What is meant by Joint Economic Agreement here is it's an economic development tool that the State of Ohio has granted to townships that allow them to levy an income tax on wage earners within the development and one of the things that's important is that, you know, there's commercial aspects hereof the commercial property rezoning. The Villas of St. Therese has significant employment and so what this meant was that we would sit down as part of the Final Development Plan approval and work with the Township officials to help them use economic development tools to further the Township interest.

* * *

Q: Briefly explain why – what a Tax Incremental Financing Agreement is and why that's important here?

* * *

HUNTER: It just captures the increase in taxes from the developed property so that the Township can use them for public purpose.

Q: And –

HUNTER: Like roads, that type of thing.

Q: How is that different than, you know, just a straight up property taxes?

HUNTER: Um, the property tax – straight up property taxes will go to a variety of different agencies, school districts, different public bodies that receive property taxes and what a TIF does, it allows the Township to take the increment, the increase, the increase from 12,000 to One point Six Million and take a portion of that for doing public projects like roads.

Q: Okay, but it's public projects like roads related to this development. Correct?

HUNTER: Well, it could be to this development but it could be to the entire area.

* * *

Q: Okay. Now, moving to paragraph number 2, just briefly explain what's being agreed to here.

HUNTER: Okay. There was a concern on the part of the Township Trustees that the development would get out ahead of the property taxes paid to the fire department. Set in reverse that taxes are paid in arrears. They're paid a year late. They were in discussions with us. They wanted us to pay the $180,000 in fire property taxes early. In essence, give the Township a loan and then, maybe, do other things to help the fire department. So this paragraph covers the discussions and our agreement to work with the Township Trustees to help create revenue streams for the fire department.

Q: And, in terms of the various economic issues raised by paragraphs one and two, would those have been important information to include in the summary for would-be signers of the Petition?

HUNTER: I think so. Absolutely. One of the reasons I think it's very important was that there were a lot of discussion about Hyland-Croy roadway improvements. And many people – there were people from within the area and from outside the area. For instance, the City of Dublin

> took a position against this project and one of the reasons the City of Dublin took a position against this project was their claim that our property would not pay its fair share for roadway improvements. So, this particular paragraph is a direct result of addressing those, what we consider to be, false claims and positions and so this was put in writing as a commitment so that, when we went to Final Development Plan, that there was a commitment on our part to work with the Township financially down the road.

[See April 12, 2016 hearing transcript, pp. 69-71, 73-75].

In rejecting Relators' protest ground 3, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

4. The Referendum Petition summary omits that Jacquemin Farms will continue to operate on the site.

The fourth fatal defect is that the Referendum Petition summary omits that Jacquemin Farms will continue to operate on a portion of the site. Again, this Court requires that the summary "apprise the reader of the present zoning status of the land and of the precise nature of the requested change." *Shelly & Sands*, 12 Ohio St.3d at 142. In *Shelly & Sands*, this Court found a petition summary was ambiguous and misleading because it failed to inform the reader that the operation of a sand and gravel quarry would continue, regardless of the results of the referendum. *Id.* at 142. Here, the language of the Referendum Petition summary states that the land "known as Jacquemin Farms" would be re-zoned for "300 Residential Units and a 250 Bed Adult Living Facility." In other words, the summary implies that that Jacquemin Farms will cease to operate its business on any portion of the site. However, Jacquemin Farms will continue to operate as a fruit and vegetable farm, and as a farmer's market. Jacquemin Farms will continue

to offer patrons the opportunity to pick their own produce in the field and to purchase fresh fruits, vegetables, and other farm-related products at the Jacquemin Farms retail farm market. Jacquemin Farms is a well-respected and beloved fixture in the community, having been in business for approximately 30 years. [See April 12, 2016 hearing transcript, pp. 65-66, 139]. The omission that Jacquemin Farms will continue to operate on the site misleads readers who may wish to see Jacquemin Farms continue to operate as both a farm and a farmer's market.[3]

In rejecting Relators' protest ground 4, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

5. The Referendum Petition summary incorrectly describes the zoning classifications of the zoning change.

The fifth fatal defect is that the Referendum Petition summary incorrectly describes the zoning classifications of the zoning change. The summary states that land area would be rezoned "from U-1 Rural District to P.U.D. Planed [*sic*] Unit Development." This is simply wrong. The meeting minutes explain that the land area would be re-zoned from RU (Rural Residential District) to PD (Planned Development District).

Gary Smith, Jerome Township Zoning inspector, testified that there were some differences between "PUD" and "PD" after changes were made the Township's Zoning

[3] This is another example where the petitioners went outside the Resolution and cherry picked information to put in the summary.

Code in 2015. Mr. Smith testified as follows in response to Board members Parrott's and Lemaster's questions:

> PARROTT: Here's the question, Mr. Smith. If a resident of Jerome Township is presented a Petition that says the current — the old zoning was U-1 rural district and it's being changed after December 23rd of 2015 to PUD, Planned Unit Development, but it's – actually, was currently R-U rural residential district and actually changed to PD, Planned Development District, is there a sufficient difference or it that one in the same thing?
>
> SMITH: Um, there is a difference. The biggest difference would be in the changes from the PUD to the Planned Development. The change from the U-1 to the R-U was mostly just a title change.
>
> PARROTT: Okay.
>
> SMITH: The change – the Township did make modifications to the PUD when it adopted the new PUD in April, so they are substantially similar but there are some updates to PD, when it changed from PUD to PD.
>
> PARROTT: If I'm given a Petition and says changing to PUD and it didn't actually change to PUD. If changed to PD. Is that something different? I guess that's the question.
>
> SMITH: Well, there is no PUD in effect in the Township.
>
> PARROTT: Because it was done away with in April of 2015?
>
> SMITH: That's correct.
>
> * * *
>
> LEMASTER: Can you give us an example of what changed in the codes?
>
> SMITH: We probably would have updated the – well, I know we've updated some of the policies in terms of how a Planned Development is filed and approved. I know we made some changes in the organization of the overall – the

> overall district in terms of how you read through that section of the code. Like, we moved some of the sections earlier in the Planned Development code and some of the previous sections. We added some additional strength to certain types of language. For instance, we added some more language in for the Conservation Development District. Some other things. I could kind of go through it bit-by-bit but I would have to have the two to kind of compare.

[See April 12, 2016 hearing transcript, pp. 195-196, 197].

Ultimately, Board member Parrott voted against certifying the Petition to the ballot, and stated the following:

> PARROTT: I think I had some problems. I think I indicated that but, when you talk about inaccurate, I have a lot of problems when the Referendum Petition that was presented to the citizens of the Township that it said it was U-1 when it was not U-1 and when it says that it's PUD when it was actually PD.
>
> I think you have to tell them exactly what the correct zoning was that was changed, if they want to Referendum.
> .

[See April 12, 2016 hearing transcript, p. 233].

In rejecting Relators' protest ground 5, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

6. The Referendum Petition summary inaccurately describes the location of the rezoned property.

The sixth fatal defect is that the Referendum Petition summary inaccurately describes the nearest intersection to the re-zoned land. The summary did not need to identify an intersection since the Resolution does not include one, but because it did, the information must be "accurate and unambiguous." *Gemienhardt*, 109 Ohio St.3d at 218-

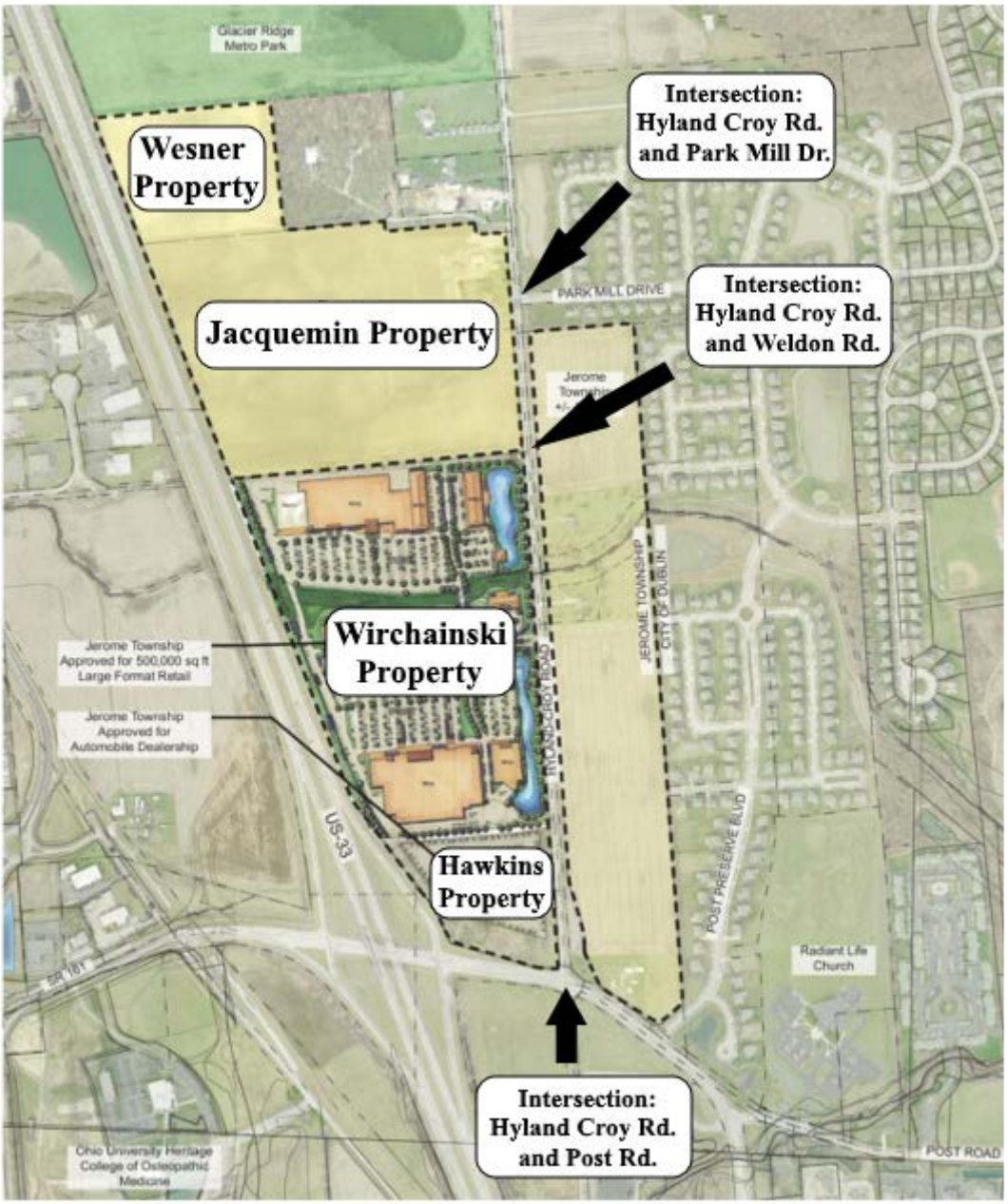
219. The summary states that the "**nearest** intersection [is] Hyland Croy Road and SR 161 – Post Road." (Emphasis supplied). However, the intersection of Hyland-Croy Road and SR 161-Post Road is over a half-mile south of the re-zoned parcels, and there are several other parcels of land located in between. In fact, two intersections actually border the affected area: the intersection of Hyland-Croy Road and Weldon Road is located at the southeast corner of the parcels, and the intersection of Hyland-Croy Road and Park Mill Drive is located on the eastern border of the parcels. This inaccurate description of the "closest intersection" misleads readers as to the true location of the re-zoned parcels which may have been the difference between an individual agreeing or declining to sign the Petition. Further, the intersection listed in the Referendum Petition summary borders a different set of parcels, the Wirchainskis and Hawkins parcels, which were the subject of a highly controversial rezoning for "big box" retail. This would have been confusing to Petition signers because the Wirchainski and Hawkins parcels are not yet developed, but rather are still farmland, and it is difficult to distinguish where those properties end and where the Jacquemin's farmland begins. Finally, there is not actually an intersection of "Hyland Croy Road and SR 161 – Post Road" as Hyland-Croy Road and SR 161 do not intersect to form an intersection. Accordingly, the inaccurate description of the parcels' location is a fatal defect.

As detailed herein, the developer's representative, Don Hunter, explained the history of the properties and the property owners along the west side of Hyland-Croy Road as well as the proximity of three different intersections in relation to the proposed rezoning. [See April 12, 2016 hearing transcript, pp. 51-53, 61-62, 63-64, 95]. A map is

provided to illustrate the location of the properties and the proximity of intersections described by Mr. Hunter:

Illustrative Map of Subject Rezoning

in relation to other properties and intersections



The Petitioner's representative Andrew Diamond, stated the following at the April 12, 2016 hearing:

> Q: . . . Okay, and you admit that the closest intersection to the subject property is actually Park Mill Drive and not Post Road at 161. Is that correct?
>
> DIAMOND: I believe so.

[See April 12, 2016 hearing transcript, pp. 34-35].

The developer's representative, Don Hunter, testified about what was in fact the nearest intersection, and that Hyland-Croy Road does not even intersect with State Route 161 when he stated the following:

> Q: Okay, and Park Mill Drive intersects with Hyland-Croy Road. Correct?
>
> HUNTER: Yes, it does.
>
> Q: And it intersects right were the Jacquemin Farms' property is located. Correct?
>
> HUNTER: Not only where the Jacquemin Farms' property is located, it's right at their home. So, the road goes right – you know, I'm familiar with it because it's right there at their house.
>
> Q: Okay, and the Park Mill Drive road or drive seems to go – goes east here and seems to go into a fairly large subdivision or multiple subdivisions
>
> HUNTER: I think there's seven to eight subdivisions within the immediate area that are east, yes.
>
> Q: And are you aware of whether or not this intersection is a significant intersection for access to those subdivisions?
>
> HUNTER: Yes, I am aware of it and it is a significant intersection.
>
> * * *

Q: . . . Does State Route 161 ever intersect with Hyland-Croy Road?

HUNTER: No.

* * *

HUNTER: So, [State Route 161] runs in parallel with US 33. Never goes further east to touch Post Road at the intersection of Hyland-Croy.

* * *

Q: Okay, what is the nearest intersection?

HUNTER: There are two intersections that are a part of the development or adjacent to the development. That would be the intersection of Park Mill Drive and then the intersection of Weldon Road – I'm sorry, Park Mill Drive and Hyland-Croy would be one intersection. Another intersection would be Weldon Road and Hyland-Croy Road.

* * *

Q: So, with respect to the description in the summary of the nearest intersection being Hyland-Croy and 161-Post Road, is that accurate?

HUNTER: It is not.

Q: Is it potentially misleading to signers of the Petition?

HUNTER: I think it would be very misleading.

Q: And why?

HUNTER: Well, I think this map helps illustrate the properties that are adjacent to that [Hyland Croy and Post Road] intersection. Those are well known properties in the area. The Wirchainski property has been and John Wirchainski has been and his property have been in the paper a great deal. There's a lot of publicity and knowledge within the general community about the Wirchainski property, and so, I think, I think you could – if you were just a person reading this Petition, you could be

confused because you heard information about the Wirchainski property and you might think that this Petition is referring to that particular property.

* * *

Q: And, currently, the Wirchainski's property and the Hawkin's property are not developed. Correct?

HUNTER: Correct.

Q: So, despite the fact that this map [Exhibit 20] has buildings on it and ponds and retention ponds and what not, this is actually just all open fields?

HUNTER: Yeah. For instance, if you were driving north along Hyland-Croy and looking to your left, to the west, it's hard to distinguish the properties because they're all – they look like seamless farm fields.

Q: Right, seamless farm fields starting down at – well, we already said this is not 161, but if we got to Hyland-Croy Road, and Post Road and just going north then on Hyland-Croy Road, this looks like seamless farm fields. Correct?

HUNTER: Yes, it does.

Q: And so, it's very possible that if people, in their mind, in their mind they can locate, approximately, where 161 and Hyland-Croy and Post Road are in relation to each other, they might conclude that that's where the Jacquemin Farms' property is located. Correct?

HUNTER: Yes.

Q: And they might conclude that that's what's being rezoned under this zoning application?

HUNTER: Yes.

Q: And that wouldn't be true?

HUNTER: Correct, it would be false.

* * *

> Q: . . . [F]rom the southeast corner of the area being rezoned, okay, down to, let's say, the Post Road, Hyland-Croy intersection, what's the distance from the corner of the property down to that intersection?
>
> HUNTER: It's in the neighborhood of a half mile to three-quarters of a mile.

[See April 12, 2016 hearing transcript, pp. 51-53, 61-62, 63-64, 95].

Paul Jacquemin, one of the land owners, testified as follows:

> Q: Now, you're aware that the Petition, Referendum Petition in this case says that the closest intersection to the property that's being developed says the nearest intersection being Hyland-Croy Road and State Route 161-Post Road. Is that an accurate statement?
>
> JACQUEMIN: I would say that's inaccurate.
>
> Q: What is the nearest intersection?
>
> JACQUEMIN: Hyland-Croy Road and Park Mill Drive.
>
> Q: And how far away is the intersection of Hyland-Croy Road and, at least, Post Road?
>
> JACQUEMIN: It's one-half mile.
>
> * * *
>
> Q: . . . Park Mill Drive is a fairly major intersection in terms of being a main entryway into multiple housing complexes. Correct?
>
> JACQUEMIN: Yes, correct.

[See April 12, 2016 hearing transcript, pp. 143-144, 145-146].

In rejecting Relators' protest ground 6, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

7. **The Referendum Petition summary inaccurately identifies the owners of the land by omitting the owners of one of the parcels.**

The seventh fatal defect in the Referendum Petition summary is that it inaccurately identifies owners of the affected land area. The summary did not need to identify the owners of the land because they are not named in the Resolution, but because it did, the information must be "accurate and unambiguous." *Gemienhardt,* 109 Ohio St.3d at 218-219. The summary states that the affected land area is "known as 'Jacquemin Farms.'" However, only a part of the affected land is known as "Jacquemin Farms" – the part that is owned by Paul and Mary Jacquemin. The other part of the land subject to the rezoning is owned by Arthur and Elizabeth Wesner and is not known as "Jacquemin Farms." This is misleading to the average reader as it suggests that only Jacquemin Farms was re-zoned by the amendment, when in fact, this is only one part of the affected land area. Accordingly, this inaccurate description of the land area is a fatal defect.

The developer's representative, Don Hunter, testified about the landowners whose property was subject to Resolution 15-167:

> Q: Okay. And so, you've already indicated that the map shows that this rezoning is for, approximately, 60 acres. It actually is on the application form as well, right, 60.43 acres
>
> HUNTER: Yes, right here. Yes, it is.
>
> Q: So, of the acreage, how much is owned by the Jacquemins and how much is owned by the Wesners?
>
> HUNTER: Approximately, 48, 49 acres are owned by the Jacquemin family and, approximately, 11 plus acres are owned by the Wesner family.
>
> * * *

> Q: Is there any reference at all to the Wesner property [in the Referendum Petition summary]?
>
> HUNTER: No.
>
> Q: And the Wesner property is, at least, what? At least, one-sixth of 60 acres and they're 11, a little over one-sixth–
>
> HUNTER: Yes.[4]

[See April 12, 2016 hearing transcript, pp. 54, 60-61].

In rejecting Relators' protest ground 7, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

8. The Referendum Petition summary includes a misleading description of the shape of the rezoned property.

The eighth fatal defect in the Referendum Petition summary is the extraneous and misleading description of the land area as an "irregular 'L' shaped site." The summary did not need to describe the shape of the re-zoned land, but because it did, the description must be "accurate and unambiguous." *Gemienhardt*, 109 Ohio St.3d at 218-219. Including extraneous information in the petition that causes it to be confusing or misleading is a basis for rejecting the petition. *State ex rel. Schultz v. Cuyahoga Cty. Bd. of Elections*, 50 Ohio App. 2d 1 (8th Dist. 1976), *aff'd* 48 Ohio St.2d 173. This description of the land does not appear in the resolution or the meeting minutes, and it takes a considerable amount of imagination to see the supposed "L-shape." This

[4] In fact, the Wesners own over one-fifth of the land subject to the re-zoning. The Jacquemins own 47.316 acres of the 60.43 acres subject to the re-zoning, and the Wesners own the remaining property. [See, Zoning Application and Union County Auditor information, Exhibits 4 and 8 respectively].

description is entirely inaccurate. Moreover, the summary of the re-zoned land as "irregularly" shaped in the very first sentence of the summary seems intended to mislead the average person into thinking this zoning amendment is inherently flawed. Therefore, the misleading description of the land area is a fatal defect.

Jerome Township Zoning and Development Committee member Jeffrey Rymer gave testimony about this description:

> Q: So, if this statement gave someone the impression that there was something irregular about the property, do you think that would be erroneous or misleading.
>
> RYMER: Well, I suppose it could be misleading to someone. Absolutely.

[See April 12, 2016 hearing transcript, pp. 131-132].

In rejecting Relators' protest ground 8, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

9. The Referendum Petition summary omits any reference to the December 22, 2015 memorandum that modifies the original application.

The ninth fatal defect in the Referendum Petition summary is that it fails to reference the December 22, 2015 memorandum that is specifically referenced in Resolution 15-167. Said memorandum modifies the original application and includes important provisions regarding the zoning and uses of the affected land area. Accordingly, this is a material omission that misleads the average reader as to the precise nature of the requested change.

The developer's representative, Don Hunter, testified about the importance of the December 22, 2015 Memorandum to the terms of Resolution 15-167 when he stated:

> HUNTER: Well, the summary does not contain all the information that's relevant. We, um, we modified zoning in a letter to the Trustee's dated December 22nd. We identified a specific user for the adult living facility and stipulated that that user – we identified the user as the Roman Catholic Diocese and Retirement Community Corporation and that they would develop a facility that's called the Villas at St. Therese. We then, specifically, called [culled]*(sic.)* down that facility would be comprised of 75 independent living units and 50 assisted living units. And that's very important for a number of reasons because we put that commitment in writing to the Trustees based upon questions that they hand asked us and, therefore, it's not accurate to say that the adult living facility be (*sic*.) 250 beds. It would be half that size.
>
> * * *
>
> Q: . . . I want to direct your attention to the very last paragraph before the vote was recorded. It says, "Amended portion of the Resolution is to include the modifications as presented by the applicant slash developer in their memorandum dated December 22, 2015." Are you familiar with that memorandum?
>
> HUNTER: Yes, I am.
>
> Q: And the way this is worded here, that memorandum is being incorporated into the approved zoning?
>
> HUNTER: Absolutely, it is.
>
> Q: And, if you flip back to the cover page in the summary, do you see any reference to the incorporation of that memorandum?
>
> HUNTER: None at all.
>
> Q: Even by reference to the date of the memorandum or to the subject matter?
>
> HUNTER: None at all.

[See April 12, 2016 hearing transcript, pp. 64-65, 75-76](Mr. Hunter details the importance of the December 22, 2015 memorandum to Resolution 15-167 in the hearing transcript, pp. 76 - 81, including his statement on p. 77 that "what we're doing here is we're answering specific questions about what the use is going to be.").

In rejecting Relators' protest ground 9, Respondent Board abused its discretion and acted in clear disregard of Ohio Rev. Code §519.12(H) requirements that the referendum petition summary must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions.

IV. CONCLUSION

As demonstrated above and at the April 12, 2016 hearing, the Referendum Petition summary contains material omissions and factual inaccuracies which could have confused or misled signers of the Petition. The petitioners offered no justification for these omissions and inaccuracies and the Respondent Board did not fulfill its duty to ensure that the Petition summary complies with this Court's standards.

For the reasons above, the Relators respectfully request this Court: (a) issue a Writ of Prohibition prohibiting Respondent from certifying the Referendum Petition and placing the issue upon the ballot for the November 8, 2016 General Election; (b) issue a Writ of Mandamus ordering Respondent to sustain Relators' protest; (c) assess the costs of this action against Respondent; (d) award Relators' their attorneys' fees and expenses; and (e) award such other relief as may be appropriate.

Respectfully submitted,

s/ J. Corey Colombo_____
Donald J. McTigue (0022849)
J. Corey Colombo (0072398)
Derek S. Clinger (0092075)
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
Phone: (614) 263-7000
Facsimile: (614) 263-7078
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com

Laura M. Comek (0070959)
LAURA M. COMEK LAW LLC
300 E. Broad Street, Suite 450
Columbus, Ohio 43215
Phone: (614) 221-0717
Facsimile: (614) 221-1278
laura@comeklaw.com

Counsel for Relators
Paul L. Jacquemin and Mary M. Jacquemin

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via regular U.S. Mail and electronic mail upon the following this 13th day of May, 2016:

Counsel for Respondent Union County Board of Elections:

Thayne D. Gray, Esq. (tgray@co.union.oh.us)

J. Corey Colombo_____
J. Corey Colombo (0072398)

APPENDIX OF CITED STATUTORY AUTHORITY

519.12 Zoning amendments.

(A)

(1) Amendments to the zoning resolution may be initiated by motion of the township zoning commission, by the passage of a resolution by the board of township trustees, or by the filing of an application by one or more of the owners or lessees of property within the area proposed to be changed or affected by the proposed amendment with the township zoning commission. The board of township trustees may require that the owner or lessee of property filing an application to amend the zoning resolution pay a fee to defray the cost of advertising, mailing, filing with the county recorder, and other expenses. If the board of township trustees requires such a fee, it shall be required generally, for each application. The board of township trustees, upon the passage of such a resolution, shall certify it to the township zoning commission.

(2) Upon the adoption of a motion by the township zoning commission, the certification of a resolution by the board of township trustees to the commission, or the filing of an application by property owners or lessees as described in division (A)(1) of this section with the commission, the commission shall set a date for a public hearing, which date shall not be less than twenty nor more than forty days from the date of the certification of such a resolution, the date of adoption of such a motion, or the date of the filing of such an application. Notice of the hearing shall be given by the commission by one publication in one or more newspapers of general circulation in the township at least ten days before the date of the hearing.

(B) If the proposed amendment intends to rezone or redistrict ten or fewer parcels of land, as listed on the county auditor's current tax list, written notice of the hearing shall be mailed by the township zoning commission, by first class mail, at least ten days before the date of the public hearing to all owners of property within and contiguous to and directly across the street from the area proposed to be rezoned or redistricted to the addresses of those owners appearing on the county auditor's current tax list. The failure of delivery of that notice shall not invalidate any such amendment.

(C) If the proposed amendment intends to rezone or redistrict ten or fewer parcels of land as listed on the county auditor's current tax list, the published and mailed notices shall set forth the time, date, and place of the public hearing and include all of the following:

(1) The name of the township zoning commission that will be conducting the hearing;

(2) A statement indicating that the motion, resolution, or application is an amendment to the zoning resolution;

(3) A list of the addresses of all properties to be rezoned or redistricted by the proposed amendment and of the names of owners of those properties, as they appear on the county auditor's current tax list;

(4) The present zoning classification of property named in the proposed amendment and the proposed zoning classification of that property;

(5) The time and place where the motion, resolution, or application proposing to amend the zoning resolution will be available for examination for a period of at least ten days prior to the hearing;

(6) The name of the person responsible for giving notice of the hearing by publication, by mail, or by both publication and mail;

(7) A statement that, after the conclusion of the hearing, the matter will be submitted to the board of township trustees for its action;

(8) Any other information requested by the commission.

(D) If the proposed amendment alters the text of the zoning resolution, or rezones or redistricts more than ten parcels of land as listed on the county auditor's current tax list, the published notice shall set forth the time, date, and place of the public hearing and include all of the following:

(1) The name of the township zoning commission that will be conducting the hearing on the proposed amendment;

(2) A statement indicating that the motion, application, or resolution is an amendment to the zoning resolution;

(3) The time and place where the text and maps of the proposed amendment will be available for examination for a period of at least ten days prior to the hearing;

(4) The name of the person responsible for giving notice of the hearing by publication;

(5) A statement that, after the conclusion of the hearing, the matter will be submitted to the board of township trustees for its action;

(6) Any other information requested by the commission.

(E) Within five days after the adoption of the motion described in division (A) of this section, the certification of the resolution described in division (A) of this section, or the filing of the application described in division (A) of this section, the township zoning commission shall transmit a copy of it together with text and map pertaining to it to the county or regional planning commission, if there is such a commission.

The county or regional planning commission shall recommend the approval or denial of the proposed amendment or the approval of some modification of it and shall submit its recommendation to the township zoning commission. The recommendation shall be considered at the public hearing held by the township zoning commission on the proposed amendment.

The township zoning commission, within thirty days after the hearing, shall recommend the approval or denial of the proposed amendment, or the approval of some modification of it, and submit that recommendation together with the motion, application, or resolution involved, the text and map pertaining to the proposed amendment, and the recommendation of the county or regional planning commission on it to the board of township trustees.

The board of township trustees, upon receipt of that recommendation, shall set a time for a public hearing on the proposed amendment, which date shall not be more than thirty days from the date of the receipt of that recommendation. Notice of the hearing shall be given by the board by one publication in one or more newspapers of general circulation in the township, at least ten days before the date of the hearing.

(F) If the proposed amendment intends to rezone or redistrict ten or fewer parcels of land as listed on the county auditor's current tax list, the

published notice shall set forth the time, date, and place of the public hearing and include all of the following:

(1) The name of the board of township trustees that will be conducting the hearing;

(2) A statement indicating that the motion, application, or resolution is an amendment to the zoning resolution;

(3) A list of the addresses of all properties to be rezoned or redistricted by the proposed amendment and of the names of owners of those properties, as they appear on the county auditor's current tax list;

(4) The present zoning classification of property named in the proposed amendment and the proposed zoning classification of that property;

(5) The time and place where the motion, application, or resolution proposing to amend the zoning resolution will be available for examination for a period of at least ten days prior to the hearing;

(6) The name of the person responsible for giving notice of the hearing by publication, by mail, or by both publication and mail;

(7) Any other information requested by the board.

(G) If the proposed amendment alters the text of the zoning resolution, or rezones or redistricts more than ten parcels of land as listed on the county auditor's current tax list, the published notice shall set forth the time, date, and place of the public hearing and include all of the following:

(1) The name of the board of township trustees that will be conducting the hearing on the proposed amendment;

(2) A statement indicating that the motion, application, or resolution is an amendment to the zoning resolution;

(3) The time and place where the text and maps of the proposed amendment will be available for examination for a period of at least ten days prior to the hearing;

(4) The name of the person responsible for giving notice of the hearing by publication;

(5) Any other information requested by the board.

(H) Within twenty days after its public hearing, the board of township trustees shall either adopt or deny the recommendations of the township zoning commission or adopt some modification of them. If the board denies or modifies the commission's recommendations, a majority vote of the board shall be required.

The proposed amendment, if adopted by the board, shall become effective in thirty days after the date of its adoption, unless, within thirty days after the adoption, there is presented to the board of township trustees a petition, signed by a number of registered electors residing in the unincorporated area of the township or part of that unincorporated area included in the zoning plan equal to not less than eight per cent of the total vote cast for all candidates for governor in that area at the most recent general election at which a governor was elected, requesting the board of township trustees to submit the amendment to the electors of that area for approval or rejection at a special election to be held on the day of the next primary or general election that occurs at least ninety days after the petition is filed. Each part of this petition shall contain the number and the full and correct title, if any, of the zoning amendment resolution, motion, or application, furnishing the name by which the amendment is known and a brief summary of its contents. In addition to meeting the requirements of this section, each petition shall be governed by the rules specified in section 3501.38 of the Revised Code.

The form of a petition calling for a zoning referendum and the statement of the circulator shall be substantially as follows:

"PETITION FOR ZONING REFERENDUM

(if the proposal is identified by a particular name or number, or both, these should be inserted here) .....

A proposal to amend the zoning map of the unincorporated area of ..... Township, ... County, Ohio, adopted .....(date)..... (followed by brief summary of the proposal).

To the Board of Township Trustees of ..... Township, ... County, Ohio:

We, the undersigned, being electors residing in the unincorporated area of ..... Township, included within the ..... Township Zoning Plan, equal to not less than eight per cent of the total vote cast for all candidates for governor in the area at the preceding general election at which a governor was elected, request the Board of Township Trustees to submit this amendment of the zoning resolution to the electors of ..... Township residing within the unincorporated area of the township included in the ..... Township Zoning Resolution, for approval or rejection at a special election to be held on the day of the primary or general election to be held on .....(date)....., pursuant to section 519.12 of the Revised Code.

Street Address Date of Signature or R.F.D. Township Precinct County Signing .....

STATEMENT OF CIRCULATOR

I, ...(name of circulator)....., declare under penalty of election falsification that I am an elector of the state of Ohio and reside at the address appearing below my signature; that I am the circulator of the foregoing part petition containing .....(number)..... signatures; that I have witnessed the affixing of every signature; that all signers were to the best of my knowledge and belief qualified to sign; and 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.

.....

(Signature of circulator)

.....

(Address of circulator's permanent residence in this state)

.....

(City, village, or township, and zip code)

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

The petition shall be filed with the board of township trustees and shall be accompanied by an appropriate map of the area affected by the zoning proposal. Within two weeks after receiving a petition filed under this section, the board of township trustees shall certify the petition to the board of elections. A petition filed under this section shall be certified to the board of elections not less than ninety days prior to the election at which the question is to be voted upon.

The board of elections shall determine the sufficiency and validity of each petition certified to it by a board of township trustees under this section. If the board of elections determines that a petition is sufficient and valid, the question shall be voted upon at a special election to be held on the day of the next primary or general election that occurs at least ninety days after the date the petition is filed with the board of township trustees, regardless of whether any election will be held to nominate or elect candidates on that day.

No amendment for which such a referendum vote has been requested shall be put into effect unless a majority of the vote cast on the issue is in favor of the amendment. Upon certification by the board of elections that the amendment has been approved by the voters, it shall take immediate effect.

Within five working days after an amendment's effective date, the board of township trustees shall file the text and maps of the amendment in the office of the county recorder and with the county or regional planning commission, if one exists.

The failure to file any amendment, or any text and maps, or duplicates of any of these documents, with the office of the county recorder or the county or regional planning commission as required by this section does not invalidate the amendment and is not grounds for an appeal of any decision of the board of zoning appeals.

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

Effective Date: 08-28-2001; 12-20-2005; 06-01-2006; 2008 HB562 09-22-2008