

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

**BRIEF OF AMICUS CURIAE
DIOCESAN RETIREMENT COMMUNITY CORP.
IN SUPPORT OF
RELATOR PAUL L. JACQUEMIN, ET AL.**

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Ohio Constitution and Statutes

Ohio Rev. Code § 519.12 3, 6, 8, 9, 10

I. INTERST OF AMICUS CURIAE

Diocesan Retirement Community Corp. (“DRCC”) is an Ohio nonprofit corporation. The purpose of DRCC is to construct and operate residences with independent and assisted living units for the elderly. The purpose of DRCC is achieved through the operation of two Ohio nonprofit corporations, The Villas at Saint Therese Independent Living, Inc., and The Villas at Saint Therese Assisted Living, Inc. DRCC is the sole member of the two Villas.

DRCC is affiliated with the Roman Catholic Church which conducts its mission within the Diocese of Columbus, an area covering 23 counties in Ohio with a Catholic population approaching 300,000 and served by 106 local parishes. An integral part of the mission of the Catholic Church is to provide for the needy, which includes providing independent and assisted living for the elderly. DRCC operates to fulfill this mission.

DRCC presents this brief upon its shared interest with Relator Paul L. Jacquemin et al. in the development of Catholic affiliated senior living facilities in central Ohio. Senior living facilities are as much a part of the mission of the Catholic Church as education and charity. These facilities allow elderly members of our parishes to remain in the community where they have established roots or allow entire families to reconnect in central Ohio as a unit, when relocated here for jobs or other opportunities. With the projected increased population of elderly Ohioans, senior living facilities are essential to promote families, communities, and faith in central Ohio.

The need for senior living facilities has been well recognized. Ohio is home to more than 11.5 million people. Of these, almost 2.3 million (19.8 percent) are over 60; more than 1.1 million (9.9 percent) are over 70; and more than 474,000 (4.1 percent) are over 80. Ohioans over 60 are projected to have the highest rate of population growth in the next 15 years and are projected to constitute over a quarter of the overall population by 2030.¹

This case presents an important opportunity for this Honorable Court to uphold Ohio referendum law, and at the same time recognize the important work underlying this case, which is squarely presented in Ohio's aging population.

II. STATEMENT OF FACTS AND CASE

Amicus Curiae DRCC refers to and accepts the procedural and factual background as set forth in the Merit Brief filed by Relators Paul L. Jacquemin, et al. on May 13, 2016.

III. ARGUMENT

Amicus Curiae DRCC joins in support of the Relators' request for a writ of prohibition or writ of mandamus. The Respondent's failure to grant the Relator's protest of the Referendum Petition was an abuse of discretion and the Relators lack any adequate remedy for their injury.

Pursuant to Ohio Rev. Code § 519.12(H), a referendum petition must contain a brief summary of the zoning amendment resolution. The summary provided in the

¹ U.S. Department of Health and Human Services, Administration on Aging, Ohio - Policy Academy State Profile.

Referendum Petition contained errors, inaccuracies and material omissions that would confuse an average person. Most significant of the failures, the summary omitted one (1) of the three (3) re-zoned parcels, included an inaccurate and misleading description of the nearest intersection to the re-zoned land, and omitted information that the property was rezoned for mixed-use.

The Relators protested the Referendum Petition on basis of these grounds, among others. The Respondent should have accepted the Relators' protest due to the Referendum Petition's material omissions, inaccuracies, and misleading statements.

A. Failure to include one of the three re-zoned parcels in the Referendum Petition's summary was a material omission.

Jerome Township Resolution 15-167 rezoned two parcels owned by Relators (Parcel Nos. 17-0031038000 and 17-0031038100) and a third parcel owned by Arthur and Elizabeth Wesner (Parcel No. 17-0031036000). However, the Referendum Petition summary stated that only Parcels 17-0031038000 and 17-0031038100 were rezoned by the amendment. The omission of the third parcel from the summary was materially inaccurate and misleading.

The average person has a general understanding of tax parcel identification numbers. They have looked up property in the auditor's records by these numbers and have paid property taxes on these numbers. Tax parcel identification numbers are found on every recorded document involving real property, including deeds and liens. Some properties may not have an address, but they will always have a tax

parcel identification number. Tax parcel identification numbers are the simplest and most accurate way to locate property.

It is an obvious error that the summary of the Referendum Petition would only include tax parcel identification numbers for two of the three re-zoned properties. No one signing the Referendum Petition solely upon review of the summary could know that Parcel 17-0031036000 was subject to the Referendum Petition. What is more, the circulators of the Referendum Petition did not themselves know that the Wesners' property was subject to the referendum.

Peter Anthony Desocio was a circulator of the Referendum Petition and testified that he did not have any knowledge about the Wesners or where their property was located, despite the fact that the Wesners' property was subject to the very petition that he was circulating:

Q: ... I wondered if you understand what happens if the Petition goes on the ballot and is successful, do you understand what then happens in terms of development for this property?

A: No, I do not.

Q. Do you know who the Wesners are?

A: No, I do not.

Q: Do you know where their property is located?

A: No, I do not.

[See April 12, 2016 hearing transcript, p. 175].

Kevin Barney was another circulator of the Referendum Petition and also testified that he did not have any knowledge about the Wesners or where their property was located:

Q: Do you know who Mr. and Mrs. Wesner are?

A: I do not, no.

Q: Do you know where their property is located?

A: Not prior to this meeting I didn't know, this hearing.

[See April 12, 2016 hearing transcript, p. 163].

Fatema Baumgartner was another a circulator of the Referendum Petition and also testified that she did not have any knowledge about the Wesners or where their property was located:

Q: Ma'am, I just have one question for you. Do you know who the Wesners are?

A: The Wesners, I do not.

Q: Do you know where their property is located?

A: Exactly, I do not.

[See April 12, 2016 hearing transcript, p. 188].

It should be noted, there was no other evidence offered during the hearing of the Board of Elections, *sub judice*. There was no other evidence for the Board to consider. So, akin to proving a negative, the above testimony reflects that even the circulators didn't KNOW the correct property at issue and had no idea WHERE that property was located.

Any reasonable person, who reviewed this petition summary and tried to google or research records on line would STILL not have the correct area, because of the ABSENT parcel information. The summary didn't even give a reasonable person the chance to find the correct information.

The citizens of Jerome Township were not given full and accurate information about the area being rezoned in the summary of the Referendum Petition. The circulators could not provide full and accurate responses to questions about the subject property because the petitioners themselves did not have full knowledge. Ohio Rev. Code § 519.12(H) requires that the Referendum Petition summary must be accurate and unambiguous, not ambiguous, misleading, inaccurate, or contain material omissions. The Respondent should have found that the omission of the third property, the Wesners' property, from the summary, and the circulators' ignorance, to be fatal to the Referendum Petition. The Respondent has abused its discretion in certifying the Referendum Petition.

B. Inaccurate description of the nearest intersection to the re-zoned land in the Referendum Petition's summary was materially misleading.

The Referendum Petition summary states that the "nearest intersection [is] Hyland Croy Road and SR 161 - Post Road." 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 (and at least 50 acres) between that section of Hyland-Croy Road and the intersection of Hyland-Croy Road and Park Mill Drive (located on the eastern border of the parcels).

This inaccurate description is significant because the property that is actually located at the corner of Hyland-Croy Road and SR 161 - Post Road is zoned differently and has been well known in the community for prior legal wrangling in the context of eminent domain. The developer's representative Don Hunter testified that the property located at this intersection is known as the Wirchainski property and it has been in the paper a "great deal." [See April 12, 2016 hearing transcript, p. 62]. Monsignor Joseph Hendricks testified that property located at this intersection is zoned for big box retail such as Target and Best Buy. [See April 12, 2016 hearing transcript, p. 44]. Jerome Township Zoning and Development Committee member Jeffry Rymer testified that the description was "misleading" and that the property at that intersection is a "sore spot for the community." [See April 12, 2016 hearing transcript, p. 132].

It cannot go without saying again - the testimony cited above is the only evidence in the record offered to the Board of Elections during the April 12, 2016, hearing regarding this issue. As a matter of evidence, there was nothing else for the Board to consider, except the testimony offered by Relators.

The description in the Referendum Petition's summary was inaccurate and materially misled the citizens of Jerome Township to believe that the re-zoned property was located at the notorious intersection of Hyland-Croy Road and SR 161 - Post Road, and carrying all of the negative connotations that followed. When, in reality, the re-zoned property was located over half-mile north at the low intensity intersection of Hyland-Croy Road and Weldon Road.

This mischaracterization and inaccurate description is another fatal flaw of the Referendum Petition. Respondent abused its discretion and acted in clear disregard of the Ohio Rev. Code § 519.12(H) requirements that the Referendum Petition summary must not be inaccurate, misleading, or contain material omission.

Taken together, the failure to properly describe the location of the property, and then absent ALL the property, there is as much as a half-mile difference in the area/stretch where this zoning was to occur. Based on these descriptions, an average person could not specifically know where to point on a map. IN FACT, the petition circulators didn't know where all the property was – how would a summary or a circulator adequately describe something they didn't know themselves? This is a material omission that Ohio law precludes because it would mislead the average petition signer.

C. **The omission to describe the re-zoned property as mixed-use in the Referendum Petition's summary was materially inaccurate and misleading.**

The Referendum Petition summary stated that the property was re-zoned for development of 300 residential units and a 250-bed adult living facility. The Referendum Petition summary omitted, however, the fact that the property was actually rezoned for mixed-use. In addition to residential uses, the property would also be for commercial and institutional uses. [See April 12, 2016 hearing transcript, p. 42].

The Jerome Township Land Use Plan calls for this particular property to be zoned and used for mixed-use. The Relators re-zoned the property in accordance

with the Land Use Plan. It is materially inaccurate and misleading to omit this fact in the Referendum Petition's summary.

Following the law of the State of Ohio matters. Working to develop property in accordance with community land use plans is well recognized and encouraged by the law. Here the Relators did just that. The failure to state the zoning correctly as mixed use, itself is an error. Further it is an error that sends a message that the development doesn't comply with Jerome Township's own comprehensive plan – which it does.

These errors taken individually or together create a misleading summary of the Referendum Petition. Respondent abused its discretion and acted in clear disregard of the Ohio Rev. Code § 519.12(H) requirements that the Referendum Petition summary must not be inaccurate, misleading, or contain material omission.

D. The failure of the Referendum Petition summary to disclose that the adult living facility was to be developed by the Diocesan Retirement Community Corp. was a material omission.

The Referendum Petition summary should have stated that the DRCC was the developer of the adult living facility. Having cited the Relators and the Developer, this omission was significant in the given context. This is information that would have been relevant to the citizens of Jerome Township. See Exhibit 1, Affidavit of Bonnie Boeshart Roberts. Ms. Roberts swears that she would not have signed the Referendum Petition had she known that the Roman Catholic Diocese of Columbus was involved in this project. Such material omission should have been a fatal error to the Referendum Petition.

IV. CONCLUSION

The facts produced at the Board of Elections hearing held April 12, 2016, revealed that the Referendum Petition summary was inaccurate and contained material omissions that would confuse or mislead an average person, in violation of Ohio Rev. Code § 519.12(H). For the reasons above, *Amicus Curiae* DRCC respectfully request that this Court issue a Writ of Prohibition prohibiting respondent from certifying the Referendum Petition and issue a Writ of Mandamus ordering Respondent to sustain Relator's protest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2016, I served a copy of the foregoing brief on the following persons by email.

/s/ Robert G. Schuler, Esq.
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AFFIDAVIT

Now comes the Affiant, having been sworn with penalty of perjury, and hereby states the following:

1. I have personal knowledge of the facts contained herein.
2. My name is Bonnie Boeshart Roberts, and I live at 8530 Mallard Circle, Plain City, Ohio.
3. In January 2016, I was asked to sign the referendum petition for the Jacquemin Farms development.
4. While told that there was information available, I was not provided with names of the developer or land owners, other than the Jacquemins, known only by the commonly associated reference of the project as "the Jacquemin development".
5. I have not seen a site plan and do not know exactly where the planned development would be located along Hyland Croy Road.
6. I would not have signed the petition if the petitioners would have disclosed (so that I would have known) the Roman Catholic Diocese of Columbus, Diocesan Retirement Community Corporation was the group planning the Senior Housing component of the development.

FURTHER, AFFIANT SAYETH NAUGHT.

Bonnie Boeshart Roberts

Before me, a Notary Public in and for the State of Ohio, personally appeared the Affiant, *Bonnie Boeshart Roberts*, who acknowledged that she did sign the foregoing and that the same was her free act and deed. In testimony whereof, I have hereunto set my hand and official seal in Franklin County, Ohio on this 13th day of May, 2016.

Sherry Castle

Notary Public

My commission expires: 02/06/2017



SHERRY CASTLE
 Notary Public, State of Ohio
 My Commission Expires 02-06-2017