

IN THE SUPREME COURT OF OHIO

STATE EX REL. PAUL L. JACQUEMIN,)
AND)
STATE EX REL. MARY M. JACQUEMIN,)
RELATORS,)
v.)
UNION COUNTY BOARD OF ELECTIONS,))
RESPONDENT.)

CASE No. 2016-0614

ORIGINAL ACTION IN
PROHIBITION AND MANDAMUS

MERIT BRIEF OF RESPONDENT UNION COUNTY BOARD OF ELECTIONS

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INTRODUCTION

This original elections matter began with a grass-roots action by a group of Jerome Township citizens to engage in the process to obtain the ultimate and important goal of a voted expression of the will of the electorate on Resolution 15 – 167 of the Jerome township trustees. Those citizens circulated the referendum petition over a few days in the 3rd week of January 2016 and collected 320 total signatures. Respondent Union County Board of Elections, ultimately, determined that there were 251 valid signatures on the referendum petition, that only 135 valid signatures were required, and that the referendum petition satisfied the criteria for a valid petition under Revised Code section 519.12(H).

Relators bring this action to challenge the decision of the Board of Elections.

STATEMENT OF FACTS

Relator's statement of facts is accurate and substantially complete. Respondent provides the following additional facts.

The final hearing on the Zoning Application before the Jerome Township Trustees convened at 8.00 a.m. on December 23, 2015. Joint Ex. 2; April 12, 2016 Hearing Transcript, p. 118. Robert Caldwell, Jerome Township Fiscal Officer, testified that the citizens had requested a copy of the meeting minutes and Resolution "very soon after the hearing," but were finally made available to the requestor "not until several weeks later." April 12, 2016 Hearing Transcript, p. 118. Mr. Caldwell went on to explain why there had been a delay of more than 20 days to respond to the request for the minutes. Id.

The December 22, 2015 Memorandum incorporated into Resolution 15-167 was not set out verbatim, attached to, or made a part of the record of the Jerome Township Trustees

December 23, 2015 meeting other than by reference. Joint Ex. 2; See also April 12, 2016 Hearing Transcript, p. 122.

ARGUMENT

Standard of Review

Respondent embraces election laws as mandatory provisions that typically require strict compliance. Respondent endeavors to adhere to the proposition that a liberal construction of referendum provisions cannot override statutory requirements. Nevertheless, Respondent urges a return to an intentional reflection on the statutory requirements actually contained in Revised Code §519.12(H) and the analytical approach as set out by this Court.

If not the root, one of the early statements by this Court on the sufficiency of a referendum on a township rezoning under Revised Code §519.12 was in *Markus v. Trumbull County Board of Elections*, 22 Ohio St. 2d 197 (1970). While the courts “strive to nurture and preserve the integrity of the right of referendum,” the courts also have an obligation to determine that the petitions circulated were prepared in the manner required by law and that the petitions would not “have substantially misled those persons who signed them.” *Marcus v. Trumbull County Board of Elections*, 22 Ohio St. 2d 197, 200, 259 N.E.2d 501, 503 (1970) (emphasis added).

Through the years, the focus seems to have shifted from a discerning assessment of whether the realistic effect of the referendum petition is to “substantially mislead” the registered voters who live in the very township of the proposed rezoning to cataloguing the number of discrepancies between the trustees’ resolution and the referendum statement. The emphasis on those discrepancies disrespects the intelligence and awareness of those who sign the referendum

petition; that is, registered voters, the very same registered voters who are subject to serve as fact finders on juries in cases involving complex fact patters whether in criminal or civil cases.

Respondent acknowledges that discrepancies Relators noted in the protests, inquired into during the hearing, and argue before this Court exist. However, it should not be enough simply to tote up the variances from the zoning amendment resolution and proclaim that the referendum petition is defective because it does not mirror the trustees' work. The Relators have the burden to demonstrate that on an objective basis the referendum petition could have "substantially misled" the persons who signed it.

Response to Relator's Argument

1. Alleged Omission of "mixed-use" rezoning in the Referendum Petition.

The Referendum Petition adequately describes the nature of the rezoning when compared to the statement in the Resolution by the Jerome Township Trustees. Resolution 15-167, itself, does not specifically state that the subject properties were to be rezoned for "mixed use" or any other particular use. Resolution 15-167 opens with the statement that "the Jerome Township Trustees hereby enter into record a Resolution adopting and modifying the recommendation of the Jerome Township Zoning Commission." Joint Ex. 2, p. 3, first paragraph. Nothing in Resolution 15-167 sets out or further describes what the Jerome Township Zoning Commission recommended as to the rezoning of the subject properties.

Resolution 15-167 does refer to the rezoning application as seeking a "Mixed Use Planned Development," but the Resolution does not specifically describe the rezoning that was granted as being for "mixed use." This Court previously has not penalized township electors for not including a more clear statement of the underlying legislative action than is contained in the

resolution itself. *C.V. Perry & Co. v. Licking County Bd. of Elections*, 94 Ohio St. 3d 442, 2002-Ohio-1369 (2002). The Court should not begin to do so now.

The statement in the Referendum Petition the planned unit development under Resolution 15-167 provides for residential units and an adult living facility reflect the uses actually described in the Resolution. Contrary to Relators' suggestion, the only statement in Resolution 15-167 as to specific land uses is that "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." Joint Ex. 2, p. 3, second paragraph.

While the Relators may have presented other information to the Township Trustees about retail, office, and agricultural uses proposed for the Jacquemin Farms project under the rezoning, Relators did not get those statements into the text of Resolution 15-167. The Referendum Petition is not deficient because it does not include information missing from Resolution 15-167. Moreover, the testimony of Mr. Hunter and Mr. Jacquemin at the protest hearing before the Union County Board of Elections about the range of uses proposed for the Jacquemin Farms project does not serve to supplement the contents of Resolution 15-167 itself. The description of the rezoning in the Referendum Petition must be measured against the contents of Resolution 15-167 as adopted by the Jerome Township Trustees. By that standard, the Referendum Petition is an accurate reflection of the land uses mentioned in Resolution 15-167 and does not substantially mislead the average voter in Jerome Township as to the issue to be presented for an expression of the will of the electorate.

Respondent did not abuse its discretion as to this point.

2. Failure to include the Permanent Parcel Number for one of three rezoned parcels in the Referendum Petition.

There is no dispute but that the Referendum Petition includes the permanent parcel number for only two of the three tax parcels of land that are the subject of the rezoning. But that should not be the end of the inquiry. The essential question is whether the average voter in Jerome Township would have been confused or substantially misled by that omission.

In assessing whether potential for confusion or misdirection by the omission of one of three permanent parcel numbers from the Referendum Petition, it is appropriate to consider the Referendum Petition as whole, and permanent parcel numbers in particular.

First, does an average person know the permanent parcel number for the place where she or he lives or works? Would the average person be able to locate or identify any parcel of land with only the permanent parcel number? Relators submitted no evidence that having all three permanent parcel numbers in the Referendum Petition would have made the location of the subject property any more clear to the average person.

Second, the Referendum Petition did correctly state that size of the area to be rezoned as being 60.43 acres. Each part petition of the Referendum Petition also included a copy of a vicinity map that correctly showed the entire parcel to be rezoned. The accurate statement of the total area to be rezoned and an accurate location map of the land to be rezoned provide more useable information to an average person about the issue that was the subject of the Referendum Petition. Respondent could properly conclude that such accurate, useful information more than overcomes any speculative harmful effect from the omission of the permanent parcel number of one part of the land to be rezoned.

Respondent did not abuse its discretion as to this point.

3. Alleged Omission “that the Resolution imposed additional conditions.”

The Referendum Petition summary does not mention any “additional conditions.” However, the nature and extent of the asserted “additional conditions” are not so significant as to substantially mislead an average person from a reasonable understanding of the issue presented in the Referendum Petition.

The only “additional condition” with any fixed substance was that the “applicant and co-applicants have agreed to make substantial financial contributions to the needed road improvements.” Joint Ex. 2, p. 3, second paragraph. On its face that “additional condition” in Resolution 15-167 leaves open more questions than it answers. The “additional condition” clarifies only that there will be a contribution to road improvements. The Resolution does not provide any information about actual amount of the “substantial contribution.” The Resolution does not provide any information about which road improvements are to be funded by the “substantial contribution.” The Resolution does not state how the “substantial contribution” would be made: a gift or contribution directly to the Township; through a TIF, which would only redirect, not increase, tax dollars the property owner would be paying; through infrastructure improvements made by the developer. Moreover, as beneficial as road improvements might be, they have no direct bearing on the zoning or land use issues that were the subject of the Referendum Petition.

The remaining matters that Relators submit as “additional conditions” can be distilled down to a “requirement” to negotiate, or talk, about joint economic agreements or tax incremental financing agreements; reimbursement for public safety costs for the proposed development; and “other terms and conditions” of a development plan. Relators suggest that

these omissions could confuse an average person as to who would be responsible for such matters.

A careful reading of what Resolution 15-167 reveals that it actually obligates the applicant only to negotiate. The Resolution does not impose any substantive action or financial obligation as to those matters. Moreover, at least one of the items listed for negotiation (tax increment financing) is not a matter that requires any agreement from the rezoning applicant.

The Referendum Petition did not omit any “additional condition” that is significant in the context of zoning permissions or restrictions to be submitted for a determination by the expressed will of the electorate.

Respondent did not abuse its discretion as to this point.

4. The Alleged Omission as the Continued Operation of Jacquemin Farms.

Again, the claimed deficiency in the Referendum Petition must be considered in the context of Resolution 15-167. The text of Resolution 15-167, itself, does not include the words “Jacquemin Farms.” The text of Resolution 15-167, itself, does not mention continued agribusiness of any sort – whether farm stand or growing activities. As noted above, the only land use activities identified in Resolution 15-167 are senior housing and care and multi-unit housing. The Referendum Petition is not deficient because it does not include what the Township Trustees themselves omitted.

The Referendum Petition also included, as an exhibit, a “zoning plan” drawing submitted by the applicant for “Jacquemin Farms in Jerome Township.” Respondent’s Ex. A, p. 8. That preliminary plan was attached to each part petition circulated and was available to any person who was presented with the Referendum Petition. The preliminary zoning plan showed a wide range of potential uses for the entire area described as “Jacquemin Farms.” While agricultural

activity was not specifically excluded, there is no place on that plan that is readily identifiable as being devoted to agricultural activity.

The Referendum Petition does not improperly, or unfairly, omit referring to continue agribusiness activity on the property to be rezoned.

Respondent did not abuse its discretion as to this point.

5. Misnomer of Zoning Classifications

The Referendum Petition does not use the zoning district designations that were in effect when Resolution 15-167 was adopted. The Referendum Petition used the zoning district designations that appear on the vicinity map the rezoning applicant submitted with its rezoning application, under a previous version of the Jerome Township Zoning Code. See, Respondent's Ex. A, p. 7. That vicinity map was attached to and circulated with each part petition that made up the Referendum Petition.

The differences between the old and the new zoning district designations were not so great as to be likely to lead any reasonable person to be confused about the nature of the zoning change that Resolution 15-167 would bring about. The previous zoning classification for the subject property was "U-1 Rural; the new designation for the same district is "R-U." When asked, if the U-1 residential district and the R-U residential district were "one in the same thing," Gary Smith, the Jerome Township Zoning Inspector, testified, "They are." April 12, 2016 Hearing Transcript, p 193-194. The previous zoning classification for a planned unit development was "PUD"; the new designation for that district is "PD." When asked if PUD, Planned Unit Development, the same thing, or identical to PD, Planned Development District, Mr. Smith responded, "Yes, same thing." April 12, 2016 Hearing Transcript, p. 194. When asked about a resident of Jerome Township being presented with a the designations of Planned

Unit Development or Planned Development, Mr. Smith said that the two designations are “similar” and “somewhat interchangeable” April 12, 2016 Hearing Transcript, p. 196.

Based on this testimony of the Jerome Township Zoning Inspector, Respondent did not abuse its discretion in concluding that the Referendum Petition’s use of the zoning district designations that appeared in the application for rezoning while not the current designation were not likely to cause a reasonable voter in Jerome Township to be substantially misled about the nature of the issue in the Referendum Petition.

Respondent did not abuse its discretion as to this point.

6. Location of the Rezoned Property

The record before the Respondent supports its conclusion that the property location information in the Referendum Petition is not substantially misleading to the average voter in Jerome Township.

The Referendum Petition provided two different ways for persons considering the petition to locate the subject property. As Relators note, there was a verbally description of Hyland Croy Road and SR 161 – Post Road being the “nearest intersection” to the “Jacquemin Farms” planned unit development. The Referendum Petition also depicted the site location on the same vicinity map the applicant attached to the rezoning application. Respondent’s Ex. A, p. 7 and 8.

The Respondent also heard testimony from Paul Jacquemin regarding how the location of his property was described in the Referendum Petition. Mr. Jacquemin, among other witnesses, testified that there were other street intersections that were more proximate to his property than the Hyland Croy Road and S.R. 161 – Post Road intersection. However, Mr. Jacquemin also testified that he, himself, would give directions to Jacquemin Farms by referring to the

intersection of Hyland Croy Road and S.R. 161-Post Road. April 12, 2016 Hearing Transcript, p. 145.

Relators failed to present any substantial evidence that the description of the location of the Jacquemin Farm project was likely to substantially mislead an average voter in Jerome Township in considering the Referendum Petition.

The Respondent did not abuse its discretion on this point.

7. Identity of Owners of the Land.

The Referendum Petition does not misidentify the owners of the property proposed for rezoning. The Referendum Petition does not identify any owner of the property. Rather, the Referendum Petition refers to “Jacquemin Farms” (quotation marks original) to identify the project in the same way as the project was identified on the exhibits taken from the rezoning application presented to Jerome Township. Respondent’s Ex. A, p. 7 and 8. To the extent that the two owners of the different parcels were identified, their names appear on the vicinity map in connection with the land that each own.

The Relators did not present any substantial evidence that a reasonable voter in Jerome Township was likely to be misled substantially about the issue presented in the Referendum Petition by referring to the project using the only name that had been associated with it instead of adding the name of a minority interest owner/participant into the mix.

Respondent did not abuse its discretion on this point.

8. Shape of the Property.

The description of the shape of the land to be rezoned as an “irregular L” is neither confusing nor misleading because it is accurate. As shown on the vicinity map attached to the Referendum Petition the Jacquemin Farm project site is “L”-shaped. See Respondent’s Ex. A, p.

7. The project site can be described as having two axes. One axis is longer than the other, as in the letter “L.”

Depending on the perspective from which one views the project site, it reasonably can be described as being an “irregular L.” If viewed from the perspective of U.S. 33 as the “base,” the “L” shape of the site has been rotated 180 degrees on the axis perpendicular to U.S. 33.

Alternatively, if one views the site from the perspective of U.S. 33 being adjacent to the vertical axis of the “L,” the shape can be described as “irregular” in that the base axis is much wider or thicker than the corresponding vertical aspect.

Regular or irregular; L-shaped or otherwise, Relators have not demonstrated that the average voter in Jerome Township considering the Referendum Petition would speculate that the proposed rezoning was “irregular” or flawed because of the geometric description of the land to be rezoned.

Respondent did not abuse its discretion on this point.

9. Omission of Reference to the December 22, 2015 Memorandum.

The omission any reference to the December 22, 2015 Memorandum is not fatal to the Referendum Petition. While Relators, themselves, emphasize the importance of the contents of the Memorandum, it was not important enough for the Jerome Township Trustees to include it as a part of the minutes of the action on the rezoning. Joint Ex. 2. Nor was the content of the Memorandum important enough for Relators to elicit testimony from either of the Jerome Township officials (a member of the zoning commission and the zoning inspector) who attended the April 12, 2016 Protest Hearing as to its significance. Nor was the content of the Memorandum important enough to the Jerome Township Trustees to warrant either more than overnight consideration of it or a passing mention in the last line of Resolution 15-167.

Resolution 15-167 itself gives absolutely no indication of how the December 22, 2015 Memorandum modified the original application. It is not reasonable to conclude that the average voter in Jerome Township was substantially misled by the lack of any reference to it in the Referendum Petition.

Respondent did not abuse its discretion on this point.

CONCLUSION

The determination of whether a zoning referendum petition complies with the statutory requirements demands more than an superficial accounting or listing of ways that the petition summary departs from what might be the most clear presentation of the question. The determination should not devolve into a game of “gotcha.”

The process should give due respect to the citizens of Jerome Township who have signed the Referendum Petition. Registered voters of Jerome Township; the same folks we trust to sit on the juries in our Court of Common Pleas. We tell those citizens of Jerome Township who serve on a jury not to leave their common sense at the door. We trust that they won't. And they don't.

The voters of Jerome Township deserve the same degree of respect and trust in assessing whether the Referendum Petition presented to them on the question of the rezoning for the

Jacquemin Farms Planned Development was so deficient that it substantially misled them as to the effect of their act.

Respondent respectfully requests that this Court deny Relator's requests and dismiss the complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Merit Brief of Respondent Union County Board of Elections was served upon Donald J. McTigue, McTigue & Colombo LLC, 545 East Town Street, Columbus, Ohio 43215, and upon Laura M. Comek, Laura M. Comek law LLC, 300 East Broad Street, Suite 450, Columbus, Ohio 43215, counsel for Relators, by ordinary U.S. mail on May 27, 2016



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