

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

**REPLY BRIEF OF RELATORS
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I. INTRODUCTION

The following points are addressed herein as rebuttal:

A. Respondent Union County Board of Elections (“Respondent” or “Board”) abused its discretion and acted with utter disregard of Ohio law when it disregarded the many (9) and serious misleading, ambiguous, and inaccurate statements in the summary of the Petition for Zoning Referendum on Jerome Township Resolution 15-167 (“Referendum Petition” or “Petition”). Additionally, the summary contained serious and numerous material omissions that did confuse and mislead average persons.¹ It would be a significant and serious departure from this Court’s long standing precedent and common sense minimum thresholds for petition summaries to uphold the Board’s decision in this case. Not only would a decision from this Court in that regard forever change the landscape of signature gathering in Ohio, including a “free for all” relative to the accuracy of information provided, but it would mark a distinct break point from basic procedural safeguards established to protect property owners rights.

B. The context and real parties of this case should not go unnoticed.

At the heart of the case are two families, longtime property owners, Relators Paul and Mary Jacquemin (“Relators”) and Arthur and Elizabeth Wesner. As discussed below, one of the most significant errors in this case is the failure of the summary to correctly acknowledge the property owners and their intended uses for the property.

Further, two entities, the Diocesan Retirement Community Corp. (the “Church”) and Ohio Home Builders Association (the “OHBA”), filed amicus briefs in support of Relators which

¹ Even Board member Cook admitted during the hearing that he was confused by the summary and references. Only upon hearing testimony did he resolve his confusion to place the matter on the ballot.

illustrate that many others are impacted by this defective petition summary. The Church stated that it plans to “construct and operate residences [Villas at Saint Therese] with independent and assisted living units for the elderly” on the property which would allow senior individuals of all faiths or no faith “to remain in the community where they have established roots . . .” [Church Amicus Brief, p. 1]. The proposed 75 independent living units and 50 assisted living units (1/3 of which will be dedicated to memory care) will be a much needed benefit to the greater community; but the defective petition summary containing misinformation and omissions may deprive the community of these benefits, which are needed because of the population growth in the area. Similarly, the OHBA, a 4,500 member trade association, said the Board’s decision “would set dangerous precedent for future development” . . . “given the material omissions and facial defects in the summary.” [OHBA Amicus Brief, pp. 1-2].

C. The group of petitioners led by Mr. Andrew Diamond, amicus in this case, omitted material information from the summary, erred in their summary details, failed to disclose all parties in the summary – and circulated their petition anyway. At the protest hearing, the petitioners admitted the errors with utter disregard for the law and the rights of these property owners. At the protest hearing, Mr. Diamond responded that one of the errors “may be an oversight” and “I don’t have a good answer for that [the omission].” [See April 12, 2016 hearing transcript, p. 226]. All information in Mr. Diamond’s Amicus Brief is after-the-fact rationale to justify their efforts. This should not be permitted.

D. Three members of the Board, with little to no explanation, adopted the petitioners’ position that a petition summary is “*close enough*” even though it: omitted the names of one of the two sets of property owners; omitted one of the three parcel numbers, claimed the subject property was nearest to an intersection one half mile away where unrelated and highly

controversial rezoning was recently approved; and “cherry picked” only certain aspects of the rezoning, among other fatal defects.

How many errors can a board of elections choose to ignore? Notably, similar types of errors would result in a property owner’s zoning application being rejected by a governmental body. Similar errors would result in all kinds of other wayward results. No deed would transfer and no tax would be paid if we all used wrong or omitted parcel information!

The same should result when petitioners use a summary containing misleading, ambiguous, inaccurate statements and omissions. Instead, the Board majority overlooked the errors in the petition summary at the protest hearing, and suggested multiple times in its Merit Brief that the petition exhibits can be relied upon to clear up any confusion left by the summary.

What is the point of the Ohio Rev. Code 519.12(H) legal requirement to include a “brief summary” if a petition signer must review the attachments to understand the nature of the referendum?

Again, how many errors and omissions in the summary are allowed before it is found to be fatally flawed? In this case, any one of the cited 9 protest grounds standing alone should have been enough to invalidate the Petition. However, the combination of multiple errors rises to the level of being egregious.

There are many adverse consequences that flow from allowing a zoning referendum to proceed to the ballot when it originates from defective petitions. The petition stays the development, which would benefit the larger community, until at least the general election, which in this case is approximately ten months after the zoning was to take effect. It also leads to an expensive campaign for the property owners and developers involved to correct the record from the misinformation that was provided to voters by the petition summary. There is also a

risk that the zoning may be overturned because of the misleading information in the petition. This is how there is real world harm to property owners' rights caused from defective and misleading petition summary language.

A petition, and its summary, is a legal document presented to petition signers for their consideration and must be accurate. Relators request this Court to continue to apply common sense interpretations of petition summary requirements as detailed by the Court in such cases as *East Ohio Gas Co. v. Wood Cty. Bd. of Elections*, 83 Ohio St.3d 298 (1998) and *State ex rel. Gemienhardt v. Delaware Cty. Bd. of Elections*, 109 Ohio St.3d 212 (2006). The Court should not adopt a new standard that petition summaries fit in the same category as horseshoes and hand grenades. For that reason, Relators respectfully request the Court to grant Relators' request for a writ of prohibition or mandamus and to overturn Respondent Board's decision, which was made without regard to the evidence presented and is in clear disregard of Ohio Rev. Code §519.12(H).

II. ARGUMENT

A. Respondent Board Advocates for the Court to Depart From Its Long-Standing Interpretation of Ohio Rev. Code §519.12(H) -- Which is a Tacit Acknowledgment that the Petition Summary is Problematic.

Respondent Board admits the errors. “[The Board] acknowledges that discrepancies Relators noted in the protests, inquired into during the hearing, and argue (*sic.*) before this Court exist.” [Board's Merit Brief, p. 3]. The Board further admits that “Respondent [Board] embraces election laws as *mandatory* provisions that typically require strict compliance” but soon after states “[n]evertheless, Respondent urges a return to an intentional reflection of the statutory requirements actually contained in Revised Code §519.12(H) . . .” [Board's Merit Brief, p. 2](Emphasis supplied). These statements are more than tacit acknowledgments by the Board that this Referendum Petition summary is problematic and would not survive the Court's

standards regarding petition summaries and the Board's beef is with the Court's standards. Otherwise, the Board would be requesting the Court to apply its long standing case law precedent regarding petition summaries to the facts of this case.

The Board cited only two cases in its Merit Brief for general propositions of law, but did not address the cases cited by Relators which are analogous to the specific facts in the pending case, i.e. when petitioners summarize only certain aspects of a resolution, but exclude other aspects of a resolution. For example, Relators cited *East Ohio Gas Co.*, 83 Ohio St.3d at 301, a case in which the petitioners included only part of a property owner's stated reasons for the rezoning in the petition summary, but excluded others, which the Court determined was an ambiguity which would deceive the voters. Similarly, Relators also cited *Gemienhardt*, 109 Ohio St.3d at 212, in which the Court held that a petition summary, which need not contain the exact wording of the resolution, was inaccurate and contained material omissions that could have misled or confused petition signers about the precise nature and effect of the township zoning resolution because it included only six of the thirteen amendments.

Ironically, and in a similar regard, the Referendum Petition petitioners in this case: included only one set of property owners, but excluded another set; included two parcel numbers, but excluded another parcel number; and importantly, only summarized one of the uses (residential) that would be permitted by the rezoning, but excluded several others uses (retail, office, and agricultural) that would be permitted.

The Board states "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." [Board's Merit Brief, p. 3]. However, in the pending case, any one of the 9 protest grounds identified by Relators standing alone should be a fatal defect to the

Referendum Petition summary. However, the combination of errors and omissions makes the summary language especially egregious. For example, the summary included a reference to the Jacquemin Farms property, but failed to include Arthur and Elizabeth Wesner (ground 7), who are property owners of 13.114 acres of the 60.43 acres, which by itself was a fatal flaw. But that omission in combination with the fact that the summary included the Relator Jacquemins' two parcel numbers but omitted the Wesners' parcel number (ground 2) even further establishes that the summary is fatally flawed. And further still, the summary stated the "nearest intersection" was one that was a half mile away when at least one major intersection touched the rezoned area (ground 6), which should have been just another nail in the coffin.

For another example, the summary contains a fatal flaw because it omits that part of the land was re-zoned for "mixed use" (ground 1). Instead, the summary states the resolution "provides for approximately 300 Residential Units and a 250 Bed Adult Living Facility. . . ." However, since the petitioners choose to specifically identify certain residential uses permitted by the resolution, the summary should have also included the specific retail, office, and agricultural uses that would also be permitted by the Resolution. This fatal flaw coupled with the fact that the summary omits that Jacquemin Farms will continue to operate on the site (ground 4) is even more egregious and yet another nail in the coffin to the petition summary. Because of the "cherry picking" of some facts and not others in the Referendum Petition summary, petition signers could be misled to believe that the retail and agricultural uses of Jacquemin Farms would cease to exist and would be replaced entirely with residential uses. This is simply not true.

This Court should not depart from its longstanding precedent regarding petition summaries, as requested by the Board. The Court has considered similar petition summaries and

determined that if petitioners choose to use different language from the resolution for the summary, the chosen language must be accurate, and not ambiguous, misleading, inaccurate, or contain material omissions. The petitioners fell below this basic threshold, and Respondent Board should have ruled as such.

B. Property Owners' Rights Do Matter.

The Board attempts to play to the Court's sympathies about petitioners' rights to place issues on the ballot. The Board stated, "The process should give due respect to the citizens of Jerome Township who have signed the Referendum Petition." [Board's Merit Brief, p. 12]. Similar comments were made at the protest hearing, where Board member Steele said, "[W]hat's truly important is that the groups of people and citizens are active. As a member of the Board of Elections, I like people to be active." [Hearing Transcript, p. 231].

These Board comments reflect a complete failure to recognize that all the owners of property here, including Arthur and Elizabeth Wesner, also have substantial rights as the property owners. There is a Fifth Amendment to the Constitution for a reason. Relators and the Wesners had to follow all the rules to rezone their property from the time they filed their zoning application on May 26, 2015 to the time they gained the Township Trustee's approval on December 23, 2015.

As stated herein, the Wesners own 13.114 acres of the 60.43 acres subject to the rezoning. However, the Wesners' neighbors and fellow Jerome Township residents would not know based on the summary that the petition being circulated involved their land because their names and parcel number were not even included in the summary, but the summary only named the Jacquemin property. This is despite the fact the Wesners owned over a 1/5 of the subject property.

Even more egregious, several of the witnesses testified at the protest hearing stated that they did not know who the Wesners are or where their property is located:

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

[PETITION CIRCULATOR] BARNEY: I do not, no.

Q: Do you know where their property is located?

BARNEY: No.

* * *

Q: I'm sorry, if I asked you this already. You don't know who the Wesners are, do you?

[PETITION CIRCULATOR] DESOCIO: No.

Q: You don't know where their property is located?

DESOCIO: I don't know the property by their name, no, I do not.

* * *

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

[PETITION CIRCULATOR] BAUMGARTNER: The Wesners, I do not.

Q: Do you know where their property is located?

BAUMGARTNER: Exactly, I do not.

[Hearing Transcript, p. 163, 182, 188].

The property owners involved in this case do matter. Relators have been residents in Jerome Township for 30 years –they are foundational members of the community. They have farmed their land for all these years, selling U-Pick strawberries in the spring and summer and pumpkins in the fall, as well as other produce. It is the Relators and the Wesners that have seen development come to the edges of their property from the north, east, south, and west. Because

of the redevelopment around them, they decided to pursue a rezoning for their property that would be in full compliance with Jerome Township's Comprehensive Plan calling for their land to be mixed use.

This is not just a case about the rights for citizens to vote on development issues. This case is as much about the property owners and their ability to protect their rights under Ohio law. Their rights can only be infringed upon when fellow township residents properly follow legal requirements to place an issue on the ballot. Indeed, property rights are protected under the Ohio Constitution, but there is no constitutional right to file a zoning referendum petition. Such right exists solely by statute. The statutory requirements and the standards applied by this Court balance these competing rights and if the rules are not followed then the balance is upset. In this case, petitioners fell dreadfully short of the minimum standards for petition summaries, and Respondent Board should have rejected the petition for that reason.

C. Petition summaries exist for a reason.

Ohio Rev. Code 519.12(H) states, in relevant part, that "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. . ." The "brief summary" requirement exists for a reason. Presumably, a summary is required under Ohio law so petition signers can be provided with a concise overview of the township trustee's resolution. The summary contains the essential information that the petition signers must be able to rely on to decide whether to sign a petition. The summary is often all that is reviewed when a circulator appears on a person's front porch with a stack of documents on a clip board and the petition signer has a handful of seconds to review and decide whether to sign before returning to their children's needs and food cooking on the stove.

The Board relies heavily upon the attachments to Referendum Petition to resolve discrepancies and omissions in the Petition summary. As to the Petition summary failing to include the Wesner's parcel number (ground 2), the Board suggests “. . . the Referendum Petition also included a copy of a vicinity map that correctly showed the entire parcel to be rezoned.” [Board's Merit Brief, p. 5]. As to the Petition summary failing to include that Jacquemin Farms would continue to operate (ground 4), the Board states, “That preliminary plan was attached to each part petition circulated and was available to any person who was presented with the Referendum Petition.” [*Id.* at p. 7]. As to the Petition summary omitting the Wesners as property owners (ground 7), the Board states, “To the extent that the two owners of different parcels were identified, their names appear on the vicinity map in connection with the land that each own.” [*Id.* at 10].

The Board is admitting that without the aid of the attachments, the Referendum Petition summary has a problem. This defeats the purpose of a summary if petition signers are expected to make sense of all the attachments, maps and fine print. The summary should be exactly what that word means, a “summary” of the resolution itself. 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. Similar in this case, the various attachments to the Petition can not salvage the fatal defects and omissions in the summary itself.

D. Respondent Board Members' Comments Reflect No Recognized Legal Justification for their Decision at the Protest Hearing.

At the protest hearing, Board member Parrott voted to not certify the issue to the ballot and provided a well-reasoned explanation. However, the other three Board members voted to deny the Relators' protest and certify the issue to the ballot, and did not address the serious omissions in the Petition summary.

Board member Steele said, in relevant part, "The fact that the Petition circulators did get things done in a short amount of time and have many more signatures than needed, I kind of think that they have done their due diligence." [Hearing Transcript, pp. 231-232]. Mr. Steele did not specifically address any of the protest grounds. The reasoning for his decision suggests that he believes that the number of signatures on a petition should take precedence over the legal requirements for what must be contained in the summary. This is a clear disregard of the law.

Board member Lemaster said, "Being a lay person and reading through the Petitions, looking at the maps, I clearly understood what parcels of land they were petitioning for the ballot. I also feel that they have met their legal burden to be able to take the matter to the people of Jerome Township." [*Id.* at 232]. Ms. Lemaster did not specifically address any of the protest grounds. Rather it is apparent that she found that the summary was deficient without resorting to reading through the various attachments and that including the attachments solved the problem. This is a clear disregard of the case law.

Board member Cook said, "I want to thank everybody for coming. Very informative. I was a little confused on the PUD and the PD that the Township presented to us. Also, I was a little confused on the parcels. Those—not all three of them being listed on the front end of this but your Township Zoning Inspector explained that pretty well. So, I think, I believe that—are

we going to go ahead and make a vote on this yet? And Bob, you go ahead. Yeah, that's everything." Mr. Cook basically did not address any of the protest grounds. For the grounds he did briefly address, he acknowledged he was confused about the zoning classification and the parcel number being omitted, but he was satisfied after hearing testimony from the Township Zoning Inspector. Unfortunately, those petition signers did not have the same luxury of having witnesses fill in the missing information.

The public comments of the Board members illustrate that they could not justify the omissions on the summary, put an emphasis on the number of signatures collected, and needed to rely on documents and witness testimony outside of the summary to arrive at their decision.

E. Respondent Board's Merit Brief Provides Post Hac Arguments Which Also Do Not Justify Their Decision.

The Board provided post hac arguments to each of the nine protest grounds, which Relators will now respond to in turn as to why the Board abused its discretion.

As ground 1 (omission of "mixed uses"), the Board incorrectly stated, "Resolution 15-167, itself, does not specifically state that the subject properties were to be rezoned for 'mixed use' or any other particular use." [Board's Merit Brief, p. 3]. This is simply wrong. As the Board later notes the Resolution states, "It is recognized that the applicant filed a Preliminary Zoning Plan Application for a **Mixed Use** Planned Development." [*Id.*; Joint Exhibit 2](Emphasis supplied). Regardless, the Board can not justify why it was acceptable for petitioners to identify a very specific use which would be allowed by the Resolution (300 Residential Units and a 250 Bed Adult Living Facility) without providing the other specific uses that would also be allowed by the Resolution (retail, office, and agricultural). This Court has held that it is misleading for a summary to include only some of the proposed uses for re-zoned land, but exclude others. *See e.g., State ex rel. McCord v. Delaware Cty. Bd. of Elections*, 106

Ohio St.3d 346, 356-57 (2005)(holding citizens could have avoided deception in the summary by either including all of the material proposed uses or excluding all of the uses).

As to ground 2 (omission of one of the three parcel numbers), the Board states “[t]here is no dispute but (*sic.*) that the Referendum Petition includes the permanent parcel number for only two of the three tax parcels of the land that are the subject of the rezoning” [Board’s Merit Brief, p. 5]. The Board suggests that the vicinity map attached to the map shows the parcel to be rezoned, but an attachment (which by the way does not include the parcel number) can rectify the omission in the summary. Relators would have needed to include this parcel number to gain zoning approval so it should have been included in the summary since the other parcel numbers were included. Additionally, the petitioners felt it was important enough to include two of the parcel numbers in the summary so it is unclear why those parcel numbers are no longer important. As to why a parcel number was omitted, the organizer of the petition effort Andrew Diamond could only offer, “It may be an oversight. I can’t answer that question. I don’t have a good answer for that.” [Hearing Transcript, p. 226]. Perhaps petition signers would want to look up the parcel numbers listed in the summary before signing the petition. If they were to do so in this case, they would not see any reference to the Wesner’s property since their parcel number was omitted.

As to ground 3 (omission of Resolution’s additional conditions), the Board states the nature and extent of the additional conditions in the summary are not so significant to substantially mislead an average person. [Board’s Merit Brief, p. 6]. The Board next concedes that there is one condition with “fixed substance” and that is that the “applicant and co-applicants have agreed to make substantial financial contributions to the needed road improvements.” [*Id.*] This condition is clearly important to petition signers who may otherwise oppose using taxpayer

dollars to pay for improvements. Relators further dispute that none of the other conditions are significant. The three conditions in the Resolution account for about half of the Resolution language itself. [Joint Exhibit 2, p. 3]. Accordingly, the conditions must have been of serious importance to the Township Trustees for them to be listed in the Resolution itself. At the very minimum, petitioners should have referenced in the summary that the rezoning was subject to conditions imposed by the Township Trustees.

As to ground 4 (continued operation of Jacquemin Farms), the omission that Jacquemin Farms would continue to operate is significant in the context of how the summary was worded. Petitioners chose to specifically reference Jacquemin Farms, and the subsequent sentence said the zoning would allow for “300 Residential Units and a 250 Bed Adult Living Facility,” but did not indicate that Jacquemin Farms would continue to operate its agricultural and retail uses. Petitioners could have done this by design because it was well established at the hearing that Jacquemin Farms is a beloved fixture in the community especially during the fall season. [See, e.g. Hearing Transcript, pp. 139-140]. The message the summary sent to petition signers is that this zoning will take away Jacquemin Farms and replace it with only residential units. It is not true that Jacquemin Farms will cease to exist and it is not true that the zoning will be limited to residential units. Further, the Board once again suggests that the preliminary plan attached to the Referendum Petition could have cleared this up for Petition signers. [Board’s Merit Brief, p. 7]. However, this again defeats the purpose of a summary.

As to ground 5 (zoning classifications were incorrect), the Board acknowledges that “[t]he Referendum Petition does not use the zoning district designations that were in effect when Resolution 15-167 was adopted” but said the “differences between the old and new zoning district designations were not so great.” [*Id.* at p. 8]. The Board selectively cited to Jerome

Township Zoning Inspector Gary Smith's testimony. [*Id.* at p. 8-9]. Mr. Smith actually testified that there are differences between the old "PUD" classification and new "PD" classification. [See Hearing transcript, pp. 195-196, 197] For example, in response to Board member Lemaster's question about what changed in the codes, he said:

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.

[*Id.* at 197].

As to ground 6 (location of the rezoned property), petitioners chose to identify a "nearest intersection" in the summary but selected one a half mile away from the rezoned property that was not in fact the nearest intersection for Relators' property included in the rezoning. The Board once again suggests that petition signers could have reviewed the vicinity map attached to the Petition. [Board's Merit Brief, p. 9]. But again, this is not the correct legal standard under the case law. Several witnesses testified that the "nearest intersection" listed in the summary was a half mile away and that there is another prominent intersection that abuts the rezoned area. The Board also referenced Relator Paul Jacquemin's testimony that he would use the same intersection selected by petitioners when giving directions to his property. [*Id.* at pp. 9-10]. However, referencing one intersection as part of directions to get to a location is not the same as stating that it is the nearest intersection. Further, what the Board's argument misses is that the directions that the Jacquemins provide to get to their property do not end at the Hyland Croy-

Post Road intersection, but go on to explain that you must then go a half a mile down Hyland-Croy Road to get to the property — something the summary does not state when it misstates “the nearest intersection.”

As to ground 7 (omission of Wesners as land owners), petitioners chose to identify the Jacquemin property, but failed to identify the Wesner property which accounts for over one-fifth of the area to be rezoned. The Board once again suggests that Referendum Petition signers could have learned this from the attached vicinity map. [Board’s Merit Brief, p. 7]. First, attachments can not rectify an omission in a petition summary. Second, the vicinity map referenced by the Board does not contain the property owners’ names. [Petition with Vicinity Map, Joint Exhibit 3, p. 7].

As to ground 8 (shape of the property), the Board claims the “description of the shape of the land to be rezoned as an ‘irregular L’ is neither confusing nor misleading because it is accurate.” [Board’s Merit Brief, p. 10]. But, Relators’ point with this description is that the lead sentence to the summary suggests “irregularity” when such a description of the subject property did not appear in the Resolution and was not needed in the summary.

As to ground 9 (omission of reference to December 22, 2015 memorandum), the Board downplays the significance of the December 22, 2015 memorandum that was incorporated by reference into the Resolution. [Board’s Merit Brief, pp. 11-12]. The Board criticizes Relators for not eliciting testimony from two Township witnesses about the significance of the memorandum. [*Id.*]. However, the developer’s representative Don Hunter testified at length about the significance of the memorandum to gaining the Township’s approval of the rezoning [Hearing Transcript, pp. 64-65, 75-76]. Additional testimony would have been cumulative. Further, the Resolution speaks for itself as it states, “Amended portion of the resolution is to

include the modifications as presented by the Applicant/Developer in their memorandum dated December 22, 2015.” [Joint Exhibit 2, p. 3]. The memorandum was significant enough to the Township Trustees to reference it in the Resolution. At the very minimum, the petitioners should have stated in the summary that the Resolution incorporated a memorandum.

F. Amicus Curiae Andrew Diamond’s Brief has limited value to the Court’s consideration

Amicus curiae Andrew Diamond also filed a brief in support of the Respondent Board. However, his commentary either mimics the Board’s brief or has limited value to the Court’s consideration.

Mr. Diamond states that the “Union County Board of Elections recognized that the intent of the referendum petition was to allow the Jerome Township voters to become active participants in determining the future of their township.” [Amicus Brief, p. 6]. However, this is the intent of every referendum petition that is filed. But Ohio law must be followed in order for this to happen.

Mr. Diamond introduces topics unrelated to this case in his Brief, Sections A and B, including whether Jerome Township complied with public records laws pursuant to Ohio Rev. Code §149.43 and allowed for adequate public inspection of the relevant documents in advance of the zoning hearing pursuant to Ohio Rev. Code §519.12(F)(5). [Amicus Brief, pp. 7-9]. These points themselves are misleading because many of the errors in the summary were facts widely available to petitioners for a long period of time. Parcel numbers are contained in the Township records (all 3, not just 2). As well, the May 26, 2015 zoning application that listed the property owners’ names (ground 7) and parcel numbers (ground 2) and the nearest intersection (ground 6) had been in existence for 6 months, and the Union County Auditor’s official web site

contains similar information. [Joint Exhibit 4]. There was simply no credible excuse to omit these basic items or to make incorrect statements in the summary.

In Section C, Mr. Diamond next argues semantics whether the proposed development will have 250 beds or 125 units. [Amicus Brief, pp. 9-10]. Mr. Diamond completely misses the Relators' point that the petitioners hand-picked certain very specific residential uses to include in the summary, and made no reference to other primary uses that were approved by the Township Trustees, which the Court has said is not permissible in *State ex rel. McCord*, 106 Ohio St.3d at 346. This Court's precedent precludes such cherry-picking of information to sway signatures.

In Section D, Mr. Diamond proceeds to make an unusual argument that since only 13.114 of Wesners' 22.777 acre parcel are included in the rezoning, that that parcel number can somehow be omitted. [Amicus Brief, p. 10]. This is post-hac rationalization and does not justify omitting a parcel number that accounts for over a fifth of a rezoning proposal. Certainly, if the applicants had omitted the parcel number, then that land would have not been considered in the zoning application.

In Section E, Mr. Diamond states that petitioners did not list the Wesners as property owners in the summary because their name did not appear in the Resolution. [Amicus Brief, p. 11]. However, the Jacquemins' name did not appear in the Resolution either, and petitioners chose to include that property owner in the summary. Mr. Diamond's reliance on *State ex rel. Rife v. Franklin County Bd. of Elections*, 70 Ohio St.3d 632 (1994) is misplaced. *Rife* stands for the proposition that a petition summary does not need to include information outside of the Resolution. However, in more recent and applicable cases such as *State ex rel. Gemienhardt*, 109 Ohio St.3d at 220, the Court states that when petitioners choose to summarize the resolution in language other than that used in the resolution, it can not be misleading, inaccurate, or contain

material omissions that will confuse the average person. The petitioners in the pending matter made it misleading to only identify one of two property owners.

In Section F, Mr. Diamond essentially makes the same arguments that the Board does about the petitioners using the incorrect zoning classifications. [Amicus Brief, pp. 12-13]. Relators responded to this argument in this Brief in Section II (E) (ground 5).

In Section G, Mr. Diamond addresses the petitioners' decision to include an intersection that is 1/2 mile away and to call it "the nearest intersection." [Amicus Brief, p. 14]. Mr. Diamond cites directions to the Jacquemins' property that he did not introduce into evidence. However, these directions state "Go down Hyland-Croy approximately 1/2 mile." Petitioners did not include the caveat that what they labeled as the "nearest intersection" was 1/2 mile away. In fact, if one travels to what petitioners identified as the nearest intersection, they will be at someone else's property.

In Section H, Mr. Diamond is critical of the reproduction of the sample Referendum Petition that was attached to the Complaint. [Amicus Brief, p. 15]. First, it is important to note that this is how the exhibit was provided by the Court reporter. Second, this exhibit became joint exhibit that was agreed to by the Respondent Board. Third, as argued throughout this Brief, the attachments to the petition summary no matter how cleanly reproduced can not save a faulty petition summary.

III. CONCLUSION

As demonstrated above, at the April 12, 2016 hearing and Relators' Merit Brief, 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 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,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via regular U.S. Mail and electronic mail upon the following this 3rd day of June, 2016:

Counsel for Respondent Union County Board of Elections:

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s/ J. Corey Colombo
J. Corey Colombo (0072398)