

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* SENSIBLE NORWOOD
and AMY G. WOLFINBARGER

Relators,

v.

HAMILTON COUNTY BOARD OF
ELECTIONS

Respondent.

* Case No: 2016-1277

*

* ORIGINAL ACTION IN MANDAMUS

* EXPEDITED ELECTION CASE

* PURSUANT TO S.CT.PRAC.R. 12.08

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**MERIT BRIEF OF RELATORS SENSIBLE NORWOOD AND AMY G.
WOLFINBARGER**

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Relators Sensible Norwood and Amy G. Wolfenbarger (“Relators”) hereby set forth their merit brief in support of the allegations of the Verified Complaint for Writ of Mandamus.

I. SUMMARY

The Hamilton County Board of Elections (“Respondent”) voted unanimously against certifying for the ballot Relators’ “Sensible Norwood Marijuana Decriminalization” Initiative Petition (hereinafter “Sensible Norwood Initiative”). In doing so, Respondent failed to perform its mandatory duty to certify and submit the initiative issues to the ballot for a vote by the City of Norwood electorate as required by law.

Relators obtained a sufficient number of valid signatures to place the Sensible Norwood Initiative on the November 8, 2016 general election ballot. The Respondent refused to certify the issues for the ballot on the purported grounds that (1) the Ordinance contained in the Sensible Norwood Initiative unlawfully enacts local felonies in conflict with state law and (2) the Ordinance is, in part, administrative rather than legislative. The Respondent lacks the legal authority to determine whether the Ordinance contained in the Sensible Norwood Initiative conflicts with state law. Moreover, the Respondent misapplied *State ex. rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, and the limited “gatekeeping” function recognized by this Court, when it refused to certify the initiative issues. Finally, assuming *arguendo* that Respondent’s argument were supported by law, the offending sections of the Ordinance are severable and do not require exclusion of the whole.

Accordingly, the Respondent abused its discretion in refusing to certify the Initiative for the November 8, 2016 general election. Respondent had a clear legal duty to certify the Initiative for the ballot. Relators had a clear legal right to have the Ordinance contained in the

Sensible Norwood Initiative placed on the ballot. Because the Respondent's action occurred within 90 days of the general election Relators are without an adequate remedy at law and are, therefore, entitled to a writ of mandamus.

II. STATEMENT OF FACTS

Relator Sensible Norwood is a local ballot issue Political Action Committee formed under Chapter 3517 of the Revised Code. Compl. ¶3. Realtor Amy G. Wolfinbarger is a resident and elector of the City of Norwood and the founder of Sensible Norwood. Compl. ¶4. Sensible Norwood was created for the purpose of sponsoring an Sensible Norwood Initiative proposing an Ordinance entitled "The Sensible Marihuana Ordinance" to decriminalize marihuana in the City of Norwood, and to circulate Initiative Petitions with the intent to submit the Ordinance to Norwood voters for their approval or rejection at the upcoming general election on November 8, 2016. Compl. ¶3; Exhibit 1.¹ Relator Wolfinbarger also serves on the five-member committee designated under Section 731.34 of the Revised Code to represent the petitioners of the Sensible Norwood Initiative proposing the Ordinance. Compl. ¶4.

On February 24, 2016 Sensible Norwood presented a certified copy of the Sensible Norwood Initiative to the City of Norwood Auditor, pursuant to Section 731.32 of the Revised Code, to bring the Ordinance before the Norwood electorate in the November 8, 2016 general election. *See* Compl. at ¶7; Cert. Copy of Initiative Petition, Exhibit 1; Feb. 22, 2016 cover letter, Exhibit 2. Sensible Norwood, its committee members, and supporters thereafter began to circulate petitions in Norwood to obtain signatures of qualified voters in the City of Norwood. Compl. ¶8.

¹ Citations to Exhibits correspond to the Exhibits 1 through 9 as set forth in the "Evidence of Relators Sensible Norwood and Amy G. Wolfinbarger" filed contemporaneously with the Court this date.



Pursuant to Section 731.28 of the Revised Code, Sensible Norwood was required to gather 381 signatures. Compl. ¶9. On July 20, 2016, Sensible Norwood and its committee presented 21 petitions containing a total of 645 signatures to the City of Norwood Auditor. See Compl. ¶10; July 20, 2016 cover letter, Exhibit 3. On August 1, 2015 the City of Norwood Auditor delivered to the Respondent the Initiative Petition that was filed with the Auditor's Office on February 22, 2016 and all of the original petitions that were filed with the Auditor's Office by Sensible Norwood on Wednesday July 20, 2016. See Compl. ¶11; August 1, 2016 cover letter, Exhibit 4. The Respondent verified 465 signatures on the petitions as valid, 84 more signatures than the necessary 381. Compl. ¶12.

On August 2, 2016, the City of Norwood Auditor sent a letter to the Respondent certifying the sufficiency and validity of the Initiative Petition. See Compl. ¶13; August 2, 2016 cover letter, Exhibit 5. The August 2, 2016 letter requested "that the Board of Elections submit the proposed ordinance contained in the Initiative Petitions for the approval or rejection of the electors of the City of Norwood at the General Election on November 8, 2016." *Id.*

On August 16, 2016, Respondent held a Special Meeting to consider, among other matters, the Sensible Norwood Initiative. Prior to the meeting, the Hamilton County Prosecutor's Office provided Respondent a legal opinion arguing against certifying the issues for the ballot. Because the legal opinion had not been made available to the proponents of the Sensible Norwood Initiative prior to the meeting the Respondent tabled the issue without taking any action on the Sensible Norwood Initiative. See Compl. ¶15; Copy of draft of August 16, 2016 Board of Elections meeting minutes, Exhibit 6; Copy of transcript of August 16, 2016 Board of Elections meeting, Exhibit 7.

Respondent scheduled a Special Meeting for August 22, 2016 for the sole purpose of considering the Sensible Norwood Initiative. Compl. ¶16. On August 22, 2016 Respondent heard from Realtor Amy G. Wolfenbarger and supports of Sensible Norwood. Assistant Hamilton County Prosecutor David T. Stevenson also addressed the Respondent and argued against placing the Sensible Norwood Initiative on the ballot on the theories that the Initiative Petition was outside the authority granted to electors by the Constitution and because the Initiative Petition was administrative, not legislative, in nature. Compl. ¶17; Copy of draft of August 22, 2016 Board of Elections meeting minutes, Exhibit 8; Copy of transcript of August 22, 2016 Board of Elections meeting, Exhibit 9. At the conclusion of the meeting Respondent voted unanimously not to certify the Sensible Norwood Initiative on the ballot for the November 8, 2016 general election “because it attempts to create a new felony law which is beyond the power of the City of Norwood to enact and because it includes administrative directives instructing the Norwood police and city attorney how to enforce existing Ohio law.” Compl. ¶18; Exs. 8 & 9.

The Respondent removed the Sensible Norwood Initiative from the ballot. Relators filed their original action in mandamus in the Ohio Supreme Court on August 29, 2016.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Hamilton County Board of Elections (“Respondent”) must certify and place on the November 8, 2016 ballot the Ordinance contained in the Sensible Norwood Initiative because the Relators obtained a sufficient number of valid signatures and because the Sensible Norwood Initiative is legally valid. The Respondent lacks a legal justification for its refusal to certify the Sensible Norwood Initiative for the ballot. The Respondent thus has a duty to place the legally sufficient and valid Sensible Norwood Initiative on the ballot.

First Proposition of Law

The Supreme Court has original jurisdiction to hear an action in mandamus in an expedited election matter.

The Constitution of the State of Ohio and the Ohio Revised Code give original jurisdiction to the Supreme Court to hear actions in mandamus. Ohio Const. Art. IV, §2; R.C. §2731.02. An election matter is considered to be an expedited matter when the action is filed within 90 days of the election. S. Ct.Prac.R. 12.08. The Sensible Norwood Initiative would have appeared on the November 8, 2016 general election ballot. Ninety days prior to the election is August 10, 2016. The Respondent's August 22, 2016 vote not to certify this matter for the ballot and this original action in mandamus occurred within 90 days of the November 8, 2016 election. Accordingly, due to the proximity of the November 8, 2016 general election at which the Sensible Marihuana Ordinance will be voted on by the Norwood electorate, this Court has original jurisdiction to hear this expedited election matter pursuant to S.Ct.Prac.R. 12.08.

Second Proposition of Law

A writ of mandamus shall issue when there is a clear legal duty to perform the action mandated and there is no adequate remedy at law. Relators lack an adequate remedy at law.

To be entitled to the writ of mandamus, Relators must establish a clear legal right to certification of the Sensible Norwood Initiative on the November 8, 2016 general election ballot, a corresponding clear legal duty on the part of the board of elections to certify the initiative issue, and the lack of an adequate remedy in the ordinary course of the law. *See State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶33 *citing State ex rel. Gemienhardt v.*

Delaware Cty. Bd. of Elections, 109 Ohio St.3d 212, 2006-Ohio-1666, 846 N.E.2d 1223, ¶ 29. This Court has consistently held that because of the proximity of the November election, within 90 days of the filing of this action, Relators lack an adequate remedy in the ordinary course of law. *Id.* at ¶33 citing *State ex rel. Canales–Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, ¶10; *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶¶ 43-46.

Third Proposition of Law

The power of the initiative is guaranteed to the people.

The right of the initiative is one of the most sacred and fundamental rights of the People. The Constitution of the State of Ohio protects this fundamental right by guaranteeing to the people the right to pass municipal legislation by initiative. *See* Ohio Const. Art. II, §1f. Section 1f of Article II of the Ohio Constitution provides:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

“By its very terms, Section 1f, Article II is not a ‘self-executing’ provision.” *Buckeye Community Hope Found. v. Cuyahoga Falls*, 81 Ohio St.3d 559, 692 N.E.2d 997 (1998). To carry Section 1f, Article II into effect, the General Assembly has enacted legislation covering municipal initiative and referendum matters. *Id.*; O.R.C. 731.28 through 731.41. Section 731.28 provides in part:

When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, certify the text of the proposed ordinance or measure to the board of elections. The auditor or clerk shall retain the petition.

The board shall submit such proposed ordinance or measure for the approval or rejection of the electors of the municipal corporation at the next succeeding general election, occurring subsequent to seventy-five days after the certifying of such initiative petition to the board of elections.

O.R.C. §731.28 requires a board of elections to submit proposed ordinances to the electors at the first general election occurring more than seventy-five days after certification by the auditor. *See also* O.R.C. §3501.11(K) (conferring on boards of elections authority to review the sufficiency and validity of petitions in a limited sense).

The power of the initiate is a check by the people against the power of the legislature.

This Court has long recognized the power reserved to the people:

This and other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed.

State ex rel. Sharpe v. Hitt, 155 Ohio St. 529, 535, 99 N.E.2d 659 (1951) citing *State ex rel. City of Middletown v. City Comm. of City of Middletown*, 140 Ohio St. 368, 44 N.E.2d 459 (1942).

Fourth Proposition of Law

A citizen driven ordinance that repeals and replaces sections of the City of Norwood's criminal code to decriminalize marihuana constitutes legislative action.

“The electors of a municipality may by the initiative enact a measure conflicting with or repealing legislation previously passed by the municipal council, so long as the subject of such initiative ordinance is within the powers of the municipality to control by legislative procedure.” *State ex rel. Sharpe v. Hitt*, 155 Ohio St. 529, 99 N.E.2d 659 (1951), paragraph three of the syllabus. However, this power of the initiative is not absolute--the power

guaranteed to the people is expressly limited to acts of legislative authority. See Ohio Const. Art. II, §1f; *Buckeye Community Hope Found. v. Cuyahoga Falls*, 81 Ohio St.3d 559, 692 N.E.2d 997 (1998). That is “actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to [initiative or] referendum proceedings.” *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 22, (emphasis added).

Whether the action of a legislative body is legislative or administrative depends on:

whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence.

Donnelly v. Fairview Park, 13 Ohio St.2d 1, 233 N.E.2d 500 (1968), paragraph two of the syllabus. “[A]n act or resolution which merely carries out the policy or purpose already declared by the legislative body’ is an administrative action that is not subject to initiative.” *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶44, quoting 5 McQuillin, *The Law of Municipal Corporations* (3d Rev.Ed.2004) 411, Section 16:54.

Moreover, [a]ctions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. In addition, “an act or resolution constituting a declaration of public purpose and making provision for the ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body.

Id. at ¶44 quoting 5 McQuillin, *The Law of Municipal Corporations* (3d Rev.Ed.2004) 407, 411 Section 16:54 (internal citations omitted).

The Sensible Norwood Initiative affects legislative action that “is of a permanent and general nature.” *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd.*

of Elections, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶ 45. The Ordinance seeks to repeal the following Sections of the Norwood Municipal Code:

- Section 501.99 entitled “Penalties for Misdemeanors;”
- Section 513.01 entitled “Definitions;”
- Section 513.02 entitled “Gift of Marihuana;”
- Section 513.03 entitled “Drug Abuse: controlled substance possession or use;”
- Section 513.05 entitled “Permitting drug abuse;”
- Section 513.06 entitled “Illegal cultivation of Marihuana;”
- Section 513.08 entitled “Illegally dispensing drug samples;”
- Section 513.12 entitled “Drug paraphernalia;” and
- Section 333.01 entitled “Driving or physical control while under the influence; evidence”

The Ordinance further seeks to replace those repealed sections with newly enacted Sections as follows:

- Section 501.99 entitled “Penalties for Misdemeanors;”
- Section 513.01 entitled “Definitions;” and
- Section 513.15 entitled “Marihuana Laws and penalties”

The purpose and effect of the Ordinance, if enacted, would be to fully decriminalize marihuana in the City of Norwood by removing all fines, penalties, jail time, driver’s license suspensions and criminal, civil and collateral penalties arising therefrom. Therefore, the Initiative makes the legislative decision regarding the City of Norwood’s criminal code respecting marihuana. *Cf. Citizen Action*, at ¶45. Put another way, the “initiative does not



simply execute any preexisting ordinance,” but “is legislative in nature because it creates a new law” decriminalizing marihuana in the City of Norwood. *Id.* at ¶46.

The Respondent does not appear to dispute that the Ordinance is a proper *subject* for a citizen initiative. Nor does the Respondent appear to dispute that, on balance, the Ordinance is of a “legislative nature.” However, the Respondent here refused to place the Sensible Norwood Initiative on the ballot because “it includes administrative directives instructing the Norwood police and city attorney how to enforce existing law.” *See* Copy of draft of August 22, 2016 Board of Election meeting minutes, Exhibit 8; Copy of transcript of August 22, 2016 Board of Election meeting, Exhibit 9. Specifically, Respondent based its decision not to certify the issue for the ballot on the proposed Norwood Municipal Code Section 513.15(m) which provides:

(m) No Norwood police officer, or his or her agent, shall report the possession, sale, distribution, trafficking, control, use, or giving away of marihuana or hashish to any other authority except the Norwood City Attorney; and the City Attorney shall not refer any said report to any other authority for prosecution or for any other reason.

See Exhibit 1, Section 2, pg. 12.

Section 513.15(m) is part and parcel of the proposed newly enacted law that would decriminalize marihuana in Norwood. The Respondent has not disputed (and cannot dispute) that the Ordinance as a whole is legislative in nature, enacting new laws to decriminalize marihuana. Section 513.15(m) is not designed to carry out the policy or purpose already declared by the legislative body. Rather, it is clearly intended to (1) further the purpose of the newly enacted legislation decriminalizing marihuana and (2) repudiate prior legislation.

Moreover, the Respondent has misapplied this Court’s limited recognition of Respondent’s gatekeeping function. In determining whether an Initiative Petition is

permissible within the scope of Section 1f, Article II of the Ohio Constitution, this Court traditionally looks to the enactment to be repealed or amended by the proposed ordinance to determine whether the enactment is legislative or administrative. *See, e.g., State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529. Here, the enactment to be amended or repealed is sections of Norwood's criminal codes. Enactment of Norwood's criminal code was purely legislative. Thus, an ordinance that seeks to repeal and amend portions of Norwood's criminal code--and not merely to execute or administer the current code--is legislative in nature. This is true even if one subpart of the proposed legislation contemplates administration of the newly enacted law.

Oberlin Citizens illustrates this point. There, the Oberlin Codified Ordinances required a developer to enter into a construction agreement with the City in order to assure the construction and installation of all public improvements in the proposed development were to the satisfaction of the City. 106 Ohio St.3d at ¶24-26. Pursuant to this provision, the Oberlin Council passed an Ordinance (the ordinance subject to the petition) that approved a construction development agreement for the construction of a Wal-Mart. *Id.* at ¶2. The Ordinance approving the construction development agreement was passed in conformance with the previously cited Oberlin Code that required such agreements prior to the construction of any public improvements. *Id.* at ¶2-3, 24-26. The citizen petitioners sought to repeal the new Ordinance by initiative petition. *Id.* at ¶6. This Court determined that the new ordinance was not subject to petition because it was only executing the legislation already in place. *Id.* at ¶31

Thus, *Oberlin* instructs that the court is to look at the ordinance to be *affected* by the proposed petition to determine if the petition can go forward. If the ordinance subject to the



petition is one that is legislative then the citizens have the right to place the petition on the ballot. If the affected ordinance is administrative (executing or enforcing an already enacted legislation) then the citizen petition cannot be placed on the ballot. As noted above, the law to be affected here are sections of Norwood's criminal code. The affected law is purely legislative. Therefore, since the law subject to the petition is one that is legislative then the citizens have the right to place the Sensible Norwood Initiative on the ballot.

Fifth Proposition of Law

The Sensible Norwood Initiative was legally valid and sufficient to be placed on the ballot.

The Sensible Norwood Initiative was legally valid and sufficient to be placed on the ballot by Respondent. Respondent concedes that the Relators timely obtained the minimum number of valid signatures to place the Ordinance on the ballot. *See* Respondent's Answer at ¶¶9-11, 13. The City of Norwood Auditor certified to the Respondent the validity and sufficiency of the Sensible Norwood Initiative and requested that it be placed on the ballot. Contrary to its legal duty, the Respondent failed to certify the Sensible Norwood Initiative to the ballot on the basis that the Ordinance was substantively illegal or unconstitutional because it creates a new felony law that the City of Norwood could not enact. Respondent's arguments are premature and cannot support enjoining the submission of the Ordinance to the ballot.

It is well-established, and this Court recently reaffirmed, that "[a]ny claims alleging the unconstitutionality or illegality of the substance of the proposed ordinance, or actions to be taken pursuant to the ordinance when enacted, are premature before its approval by the electorate." *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 716 N.E.2d 1114 (1999); *see also State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835

N.E.2d 1222; *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419; *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, (“Insofar as the board's claim could be construed as a challenge to the constitutionality or illegality of the substance of the initiative, that challenge is premature before the proposed legislation is enacted by the electorate.”). Indeed, this Court need not and does not address such challenges “because it does not bar an election on the proposed initiative ordinance.” *Id.* at 6. For example, in *State ex rel. N. Main St. Coalition v. Webb*, the village clerk refused to submit a proposal to the Board of Elections because the clerk believe that the proposed ordinance unlawfully conflicted with current law.

This Court issued a writ stating:

In effect, Webb's claim that the proposed ordinance might, if enacted, violate R.C. 5501.31 by unilaterally changing the location of ODOT's grade-separation project without ODOT's approval is an attack on the legality or effectiveness of the ordinance instead of a challenge to the propriety of its submission to the voters. These claims are premature before the ordinance is passed by the electorate.

Webb, at ¶38 citing *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6, 716 N.E.2d 1114 (1999).

So too here, the Respondent’s challenge to the Ordinance is not ripe. “The proper time for an aggrieved party to challenge the constitutionality of the charter amendment is after the voters approve the measure, assuming they do so.” *State ex rel. Ebersole v. Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶13. If the electorate enacts the Ordinance, and if the City of Norwood believes that such an enactment conflicts with Ohio’s general laws, then it can seek to enjoin the statute. But Respondent exceeds its authority by determining whether a proposed ordinance conforms or conflicts with Ohio law before it is placed on the ballot.

Only a court, after an ordinance is enacted by the electorate, can determine whether an ordinance conflicts or conforms with Ohio law. Respondent lacks the judicial or quasi-judicial authority to make such a determination. In doing so, Respondent has exceeded its authority contrary to law and abused its discretion.

Sixth Proposition of Law

The Respondent Board of Elections had a clear legal duty to place the initiative issue on the ballot.

Pursuant to Section 731.28 of the Ohio Revised Code, Relators were required to gather the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation. *See* R.C. 731.28. The twenty-one petitions submitted on behalf of Relators contained 645 signatures to the City of Norwood Auditor. Compl. ¶10. The Respondent verified 465 signatures on the petitions as valid, 84 more signatures than the necessary 381. Compl. ¶12. On August 2, 2016, the City of Norwood Auditor sent a letter to the Respondent certifying the sufficiency and validity of the Initiative Petition to the Respondent. Compl. ¶12; Exhibit 5. Respondent concedes that the Relators timely obtained the minimum number of valid signatures to place the Ordinance on the ballot. *See* Respondent's Answer at ¶¶9-11, 13.

Where the Relators have complied with the necessary preliminary steps of an initiative statute or ordinance, the initiative shall be placed before the electors on the ballot. R.C. §731.28. The Sensible Norwood Initiative contained sufficient signatures and was sent to the Respondent to be placed on the ballot. The Respondent was without any legal basis to fail to certify the Sensible Norwood Initiative for the ballot. Accordingly, the Respondent had a clear legal duty to place the initiative on the ballot and Relators had a clear legal right to have the Sensible Norwood Initiative placed on the ballot.

Seventh Proposition of Law

The Respondent abused its discretion and disregarded applicable law when it failed to certify the Sensible Norwood Initiative for the November 8, 2016 ballot and its decision should be vacated.

“In extraordinary actions challenging the decision of a board of elections, the applicable standard is whether the board engaged in fraud, corruption, abuse of discretion, or clear disregard of statutes or pertinent law.” *State ex rel. Valore v. Summit Cty. Bd. of Elections*, 87 Ohio St.3d 144, 145, 718 N.E.2d 415 (1999). Thus, a writ of mandamus may issue, vacating a decision by a board of elections, if the board’s decision “resulted from ... abuse of discretion, or clear disregard of applicable law.” *State ex rel. Stine v. Brown Cty. Bd. of Elections*, 101 Ohio St.3d 252, 2004-Ohio-771, 804 N.E.2d 415, ¶12 quoting *State ex rel. Commt. for Referendum of Lorain Ord. No. 77-01 v. Lorain Cty. Bd. of Elections*, 96 Ohio St.3d 308, 2002-Ohio-4194, 774 N.E.2d 239, ¶23; *State ex rel. Rife v. Franklin Cty. Bd. of Elections*, 70 Ohio St.3d 632, 633-634, 640 N.E.2d 522 (1994). An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable attitude. *State ex rel. Hamilton Cty. Bd. of Commrs. v. State Emp. Relations Bd.*, 102 Ohio St.3d 344, 2004-Ohio-3122, 810 N.E.2d 949, ¶17. Respondent abused its discretion and clearly disregarded applicable law in its determination that the Sensible Norwood Initiative constitutes administrative action and that the Initiative conflicts with Ohio law.

The Ohio Supreme Court directs that board of elections and courts should err in favor of the power reserved to the people:

[P]rovisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object sought to be attained should be promoted rather than prevented or obstructed.



Christy v. Summit Cty. Bd. of Elections, 77 Ohio St.3d 35, 40, 671 N.E.2d 1 (1996); *State ex rel. Sharpe v. Hitt*, 155 Ohio St. 529, 535, 99 N.E.2d 659 (1951). To do otherwise is an abuse of discretion and in clear disregard of applicable law.

Here, the petitions contained a sufficient number of valid signatures. The topic of the Sensible Norwood Initiative was for a valid, legislative purpose. The Respondent Hamilton County Board of Elections ignored the applicable law relating to initiated legislation, the test for administrative versus legislative action, and the obligation to liberally construe initiative text in favor of presenting an issue to the voters. Moreover, the Respondent abused its discretion and exceeded its lawful authority in refusing to certify the Sensible Norwood Initiative for ballot due to a perceived conflict with Ohio law. The Respondent's decision should be vacated.

Eighth Proposition of Law

The Respondent abused its discretion in not certifying the Sensible Norwood Initiative for the ballot where the Initiative Petition contains a severability clause.

The Sensible Norwood Initiative is a valid, legislative enactment that should be certified for the ballot. However, assuming *arguendo* that any portion of the Initiative is administrative or conflicts with Ohio law, the Respondent abused its discretion by not certifying the Initiative Petition for the ballot because the Initiative Petition contains a severability clause that saves the remainder of the proposed Ordinance.

Respondent does not object to the entirety of the Sensible Norwood Initiative, nor could it. Rather, Respondent has parsed out certain subsections of the proposed Ordinance to support its refusal to place the Initiative Petition on the ballot. There does not appear to be any case authority for the Respondent's parsing out subsections to attack, as a whole, an otherwise

legitimate legislative scheme. The Ordinance as a whole is a legitimate legislative action. The Ordinance contains a “Severability” clause that provides:

(r) Severability. The sections of this ordinance are severable. The invalidity of a section shall not affect the validity of the remaining sections. Invalid sections shall be revised to the minimum extent necessary to maintain validity and enforceability.

Exhibit 1, Sec.2, pg. 12 (Proposed Ordinance Section 513.15(r)). Thus, to the extent that any portion of the Ordinance is unenforceable, the remainder of the ordinance can and should still be enforced. However, the Respondent has usurped the role of the courts by determining that portions of the Ordinance are unenforceable. In doing so, the Respondent has exceeded its authority and removed from the courts both (1) the initial decision of whether the ordinance, if enacted, is enforceable, and (2) if portions are not enforceable, if the remainder of the ordinance is enforceable by virtue of the severability clause. As this Court has noted, a severability clause can save an ordinance where one or more sections are struck down; but such a determination cannot be made until after the electorate has voted on the matter. *See Citizen Action*, 115 Ohio St. 3d at ¶52-53. Accordingly, the Respondent has abused its discretion.

Ninth Proposition of Law

Laches is not a valid affirmative defense to bar Relators’ action.

It is anticipated that the Respondent will raise the affirmative defense of laches to preclude consideration of the merits of this action. Laches is not applicable here.

Relators acknowledge that extreme diligence and the promptest of actions are required in election cases. *State ex rel. White v. Franklin Cty. Bd. of Elections*, 65 Ohio St.3d 45, 49, 600 N.E.2d 656 (1992). Relators employed the requisite diligence when Relators filed this action five business days (seven total days) after the Respondent’s August 22, 2016 board

meeting. In *Citizens Action*, this Court refused to find a seven-day delay in filing a mandamus action to be unreasonable. 115 Ohio St.3d at ¶¶30-31. Nor can Respondent claim any prejudice in its ability to defend against Relators' claims as a result of any perceived delay. *Id.* at ¶31. Laches should not bar this Court from considering Relators' claims.

REQUEST FOR ATTORNEY'S FEES

Tenth Proposition of Law

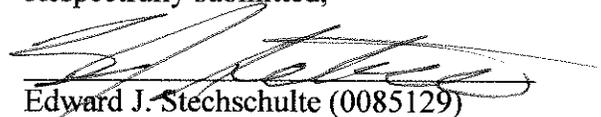
Relators are entitled to attorney's fees when the Respondent abused its discretion and disregarded applicable law when it failed to certify the initiated ordinance for the ballot.

In Ohio, the general rule is that absent a statute allowing attorney fees as costs, the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed acted in bad faith. *State ex rel. Chapnick v. E. Cleveland City School Dist. Bd. of Edn.*, 93 Ohio St.3d 449, 452, 755 N.E.2d 883 (2001). Here, the Respondent acted in bad faith in refusing to certify the initiative issues for the ballot. The Respondent lacked a reasonable basis to refuse to certify the Sensible Norwood Initiative Petition for the ballot. In its refusal to act in accordance with Ohio law, Respondent acted in bad faith. Accordingly, Relators are entitled to attorney fees incurred in this action.

CONCLUSION

For all the reasons set forth herein, Relators pray that this Court grant a writ of mandamus, ordering the Respondent Hamilton County Board of Elections to place the Sensible Norwood Initiative on the November 8, 2016 ballot for consideration by the voters of the City of Norwood, Hamilton County, Ohio and for an Order granting Relators' their attorney's fees.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Relators Sensible Norwood and Amy G. Wolfinbarger was served by e-mail at dave.stevenson@hcpros.org and cooper.bowen@hcpros.org this 12th day of September, 2016, upon the following counsel:

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