

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, <i>ex rel.</i>)	CASE NO. 2022-0995
LYNN A. CLARK)	
)	
Relator,)	Original Action in
)	Mandamus Elections Case
-vs.-)	
)	
CITY OF TWINSBURG, <i>et al</i>)	
)	
Respondents.)	

MERIT BRIEF OF RELATOR

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I. INTRODUCTION

Relator Lynn A. Clark (“Clark”) seeks a writ of mandamus to compel the City of Twinsburg (“Twinsburg”), Shannon Collins, in her official capacity as the Twinsburg Clerk of Council (“Clerk Collins”), and Matt Vazzanna in his official capacity as Twinsburg Law Director (“Director Vazzanna”) to transmit a certified copy of Resolution No. 57-2022 and Clark’s referendum petition to the Summit County Board of Elections at least nineteen days before the next general election on November 8, 2022.

II. STATEMENT OF FACTS

On June 14, 2022, the Twinsburg City Council convened to approve or deny the Twinsburg Planning Commission’s recommendation for approval Project Gumbo final site plan, with a plan for a building with a height of 45 feet. Exhibit 1. Twinsburg Ordinance § 1181.09, states:

(a) Following action by the Planning Commission, the application shall be submitted to Council for final action. Council, by majority vote, may confirm the recommendation of the Planning Commission for approval of the site plan, or confirm the recommendation of the Planning Commission for denial of the site plan. Council action which differs from the recommendation of Planning Commission shall not take effect unless approved by five members of Council. Failure of Council to act by the next scheduled meeting following ninety (90) days, exclusive of summer vacations and holidays, of the Planning Commission's action, or an extended period of time as may be agreed upon, shall, at the election of the applicant, be deemed a denial of the final development plan.

Instead of confirming or denying the Planning Commission’s recommendation under Twinsburg Ordinance § 1181.09, the Twinsburg Council passed Resolution No. 57-2022, which subjected confirmation of the Planning Commission’s recommendation for approval of the site plan to a condition:

That the Planning Commission’s action of approving the Final Site Plan for Project Gumbo on May 16, 2022, attached hereto and incorporated herein as “Exhibit A”, be and the same hereby is confirmed by this Council with the condition that the project’s building height shall not exceed thirty five feet. Exhibit 2. Resp. Answer ¶ 6.

On June 27, 2022, a committee of four Twinsburg residents consisting of Ms. Suzanne Clark, Ms. Marcella Gaydosh, Ms. Laurie Facsina, and Relator Clark (collectively, the “Petitioners”) filed notice with Clerk Shannon Collins, regarding their intent to circulate a referendum petition to place Resolution No. 57-2022 on the November 8, 2022 ballot. Exhibit 3. Resp. Answer ¶ 7. Shortly thereafter, on July 13th, 2022, the Petitioners filed the petition with the Council Clerk signed by over ten percent of the electors who voted for governor at the most recent general election for the office of governor in Twinsburg requesting Resolution No. 57-2022 be placed on the November 8, 2022 ballot. Exhibit 4. Resp. Answer ¶ 8.

Yet, on July 21, 2022, Respondents Collins and Vazzana sent Petitioners a Memorandum stating that Collins refused to transmit a certified copy of the text of Resolution No. 57-2022 to the Summit County Board of Elections even if the petition had signatures of over ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in Twinsburg. Exhibit 5; Answer ¶ 9. In the letter, Respondents argued Resolution No. 57-2022 was an administrative not legislative action and not subject to referendum under Article II, § 1f of the Ohio Constitution. Respondent Collins, following the advice of Law Director Vazzana, has refused to send a certified copy of the text of Resolution No. 57-2022 to the Summit County Board of Elections within 10 days as required. Answer ¶ 9.

In summation, based on Respondents’ answer there appears to be no factual dispute, except whether Exhibit 1 is the final site plan for Project Gumbo, but a legal dispute over whether Resolution No. 57-2022 was a legislative action or, failing that, whether the Twinsburg Charter and Ohio Constitution allow for referendum of administrative action.

III. LAW

For a writ of mandamus to issue, the party seeking the writ must establish a clear legal right to the relief sought, a corresponding clear legal duty by a government official, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Morris v. Stark Cty. Bd. of Elections*, 143 Ohio St. 3d 507, 510 (2015). A party seeking a writ of mandamus must prove entitlement to the writ by clear and convincing evidence. *Id.*

Article II § 1f of the Ohio Constitution states, “[t]he 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.” Subsequent Ohio case law has interpreted this section to hold legislative actions subject to referendum, whereas administrative actions are not. *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 4 (1968). The crucial test for differentiating between the two is “whether the action taken was one making a law, or executing or administering a law already in existence.” *Id.* If it is an administrative action, then it may be subject to an administrative appeal under R.C. § 2506. If it is a legislative action, then it may be subject to referendum under Article II, § 1f of the Ohio Constitution and R.C. § 731.29, which states:

when a petition, signed by 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, is filed with the city auditor or village clerk within thirty days after any ordinance or other measure is filed with the mayor or passed by the legislative authority of a village, ... such auditor or clerk shall, after ten days, and not later than four p.m. of the ninetieth day before the day of election, transmit a certified copy of the text of the ordinance or measure to the board of elections.

Article XVIII, § 3 of the Ohio Constitution states, “[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” To

exercise these powers of local self-government, Article XVIII, § 7 of the Ohio Constitution requires the municipality to first “frame and adopt or amend a charter for its government.” To adopt a charter, the electors of a municipality must petition for and gain approval 2/3s of its members to appoint a commission to frame a charter. *Id* at § 8. Once the commission is elected, it may then draft a charter which must then be approved by majority of the municipalities electors before coming into effect. *Id*.

On May 6, 1998, the Ohio Supreme Court in *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St. 3d 559 (1998), faced whether a municipal charter may allow a referendum on “any ordinance or resolution” without the legislative or administrative action distinction found in Article II, § 1f of the Ohio Constitution. *Id* at 559. The Court held in a 4 - 3 decision that Article XVIII, § 7 of the Ohio Constitution gave charter cities the power to frame and adopt their own self-government with no limitation, including Article II, § 1f. *Id* at 566. It concluded, “the people of Cuyahoga Falls have spoken through their charter, and we will not disturb their clear intentions.” *Id* at 566. Upon a motion for reconsideration, the Ohio Supreme Court reversed its decision on July 16, 1998 by a margin of 4 - 3 with Justice Stratton changing her vote in a separate concurring opinion. *Buckeye Cmty. Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539 (1998). In that new decision, the Ohio Supreme Court held municipalities, chartered or not, could not exceed the powers delegated to them by Article II, § 1f of the Ohio Constitution. *Id* at 544.

Like the Cuyahoga Falls Charter in *Buckeye*, § 9.02 of the Twinsburg Charter states, “the electors of this City shall have the power to approve or reject at the polls ***any ordinance or other measure enacted by Council*** by referendum petition...” Thus, the same constitutional issue in *Buckeye* is before the Court.

IV. ARGUMENT

Relator is entitled to a writ of mandamus ordering Clerk Collins to transmit a certified copy of Resolution No. 57-2022 and the referendum petition to the Summit County Board of Elections nineteen (19) days before the next general election on November 8, 2022.

1. Proposition of Law No. 1: Resolution No. 57-2022 exceeded Twinsburg Council's executive powers and is therefore a legislative action subject to referendum under the Twinsburg Charter and the Ohio Constitution.

The crucial test for differentiating between legislative and administrative actions is “whether the action taken was one making a law, or executing or administering a law already in existence.” *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 4 (1968). The legal question before the Court is twofold: (1) did Twinsburg Council exceed its executive power under Twinsburg Ordinance § 1181.09 by passing Resolution No. 57-2022; and (2) if so, does that make Resolution No. 57-2022 a legislative action?

A. Twinsburg Council exceeded its administrative authority under Ordinance Section 1181.09 by passing Resolution No. 57-2022.

On May 16, 2022, Twinsburg Planning Commission recommended the final site plan for Project Gumbo be approved, even though the building height exceeded thirty-five (35) feet. On June 14, 2022, Twinsburg Council passed Resolution No. 57-2022, which states:

WHEREAS, after considering public testimony, the applicant requested to reduce the height of their project so that the project's building height does not exceed thirty five feet; and

WHEREAS, this Council wishes to confirm the Planning Commission's approval of the Final Site Plan for Project Gumbo with the condition that the project's building height not exceed thirty-five feet without the later receipt of a conditional use permit regarding the same.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Twinsburg, County of Summit and State of Ohio:

SECTION I: That the Planning Commission’s action of approving the Final Site Plan for Project Gumbo on May 16, 2022, attached hereto and incorporated herein a “Exhibit A”, be and the same hereby is confirmed by this Council **with the condition that the project’s building height shall not exceed thirty five feet.**

Resolution No. 57-2022 shows the Twinsburg Council, in reaction to public testimony, altered the Project Gumbo final site plan to reduce the building height to under thirty-five (35) feet. Instead of denying the Planning Commission’s recommendation to approve the site plan on these grounds so the applicant could reapply to Planning Commission with a new site plan, the Twinsburg Council conditioned its approval on the building height not exceeding thirty-five feet.

A court's objective when construing a statute, such as an ordinance, is to give effect to the legislature's intent by first looking into the statutory language. *State v. Bryant*, 160 Ohio St. 3d 113, 116 (2020). “If the statutory language is clear and unambiguous, we apply it as written, giving effect to its plain meaning.” *Id.* The plain meaning of Twinsburg Ordinance § 1181.09 creates a process whereby the Twinsburg Council has the executive power to confirm or deny the Twinsburg Planning Commission’s recommendation to approve or deny a site plan presented to it. It is a binary decision: to confirm or not. Nowhere in Ordinance § 1181.09 does it provide the Twinsburg Council power to allow an applicant to change his site plan after approval by the Planning Commission, nor does it allow Twinsburg Council to condition its confirmation of the Planning Commission’s recommendation. If Twinsburg Council wanted to restrict the site plan’s building height to less than thirty-five (35) feet under its executive power under Ordinance § 1181.09, then it should have denied the Planning Commission’s recommendation on those grounds. The applicant could have then altered the site plan and reapplied to the Planning Commission for approval. Instead, Twinsburg Council acted beyond its own executive power.

B. Resolution No. 57-2022 exceeds Twinsburg Council’s executive power and is therefore legislative action.

The Ohio Supreme Court in *Donnelly* sought to draw a clear line between legislative and administrative action by simply stating, “if, then, the action of a legislative body creates a law, that action is legislative, but if the action of that body consists of executing an existing law, the action is administrative.” *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 4 (1968). Thus, *Donnelly* creates a distinction based on the classic differences between legislative power (i.e., creates law) and executive power (i.e., executes law). Since a municipal council can exercise both legislative and executive power, this case presents a novel question: Is an executive action with a legislative component subject to referendum?

This question may be more approachable by analogy. In the federal context, if a federal executive agency acts outside of powers delegated by Congress it illegally subsumes legislative power in violation of separation of powers principles. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022). In the state context, “the [Ohio] Governor has such power as has been conferred by the Constitution and by the Legislature,” so the Ohio Governor may not act beyond powers conferred upon him by either. *State ex rel. S. Monroe & Son Co. v. Baker*, 112 Ohio St. 356, 371 (1925). If executive power is not conferred by a constitution or legislature, then an executive exercising such power encroaches on the legislature’s power.

Ordinance § 1181.09 confers executive power on Twinsburg Council to confirm or deny Planning Commission recommendations. No more, no less. By adding power to condition confirmation of Planning Commission recommendations like it did Resolution No. 57-2022, Twinsburg Council moved beyond the narrow executive powers conferred by ordinance and exercised legislative power conferred by § 311 of the Twinsburg Charter, which states “all the

legislative power of the City and the determination of all matters of policy shall be vested in the Council.”

The Twinsburg Council exceeded its executive powers by placing a condition on its confirmation of the Planning Commission’s recommendation, thus making Resolution No. 57-2022 a legislative action, subject to referendum under the Twinsburg Charter and the Ohio Constitution. Therefore, this Court ought to grant Relator’s writ of mandamus ordering Clerk Collins to transmit a certified copy of Resolution No. 57-2022 and the signed referendum petition to the Summit County Board of Elections, so it may appear on the November 8, 2022 ballot.

2. Proposition of Law No. 2: Even if Resolution No. 57-2022 is an administrative action, the Twinsburg Charter and the Ohio Constitution allow it to be subject to referendum.

The Ohio Supreme Court’s closely held second decision in *Buckeye* ought to be reexamined because it is out of step with prevailing constitutional theory. The Court’s original decision holding Article XVIII, § 7 of the Ohio Constitution gave charter cities the power to frame and adopt for its government with no limitation, including Article II, § 1f is technically correct, whereas the reconsidered decision misunderstands constitutional theory.

In the first *Buckeye* decision, this Court argued that, before the adoption of Article XVIII (i.e., the Home Rule Amendment) in 1912, municipalities “could exercise only those powers delegated to them by the General Assembly.” *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St. 3d 559, 562 (1998). Municipalities were solely subject to the State of Ohio and its Constitution. The first *Buckeye* decision then cited a contemporary Ohio Supreme Court,, which described how the Home Rule Amendment made it so the “sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state full and complete

political power in all matters of ‘local self-government’.” *Perrysburg v. Ridgway*, 108 Ohio St. 245, 255 (1923). The word “delegated” refers to the self-rule powers, such as “local police, sanitary and other similar regulations,” that these municipalities would gain upon becoming charter cities. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St. 3d 559, 562 (1998). The word “sovereign people” refers to the unlimited right of electors to form their own local self-government with sovereign power independent of the State of Ohio. *Id.*

The second *Buckeye* decision confuses constitutional theory because it conflates self-rule with self-government: the former delegated by the sovereign people of the State of Ohio and therefore subject to the limitations by the Ohio Constitution; the latter derived from the sovereign people of the charter city. The *Buckeye* decision stated “Section 1f, Article II ... is the sole constitutional source for referendum and initiative powers” for regular and charter municipalities. *Buckeye Cmty. Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539, 543 (1998). This holding ignores municipal electors’ separate sovereignty and the constitutional procedure by which they framed and adopted their charter. *Id.* If a sovereign people adopt a written constitution forming a government, that is the constitutional source for that government’s referendum and initiative powers. Simply put, the Home Rule Amendments allowed charter cities to frame and adopt their own constitutional authority independent of the State of Ohio Constitution; therefore, making Article II, § 1f of the Ohio Constitution inapplicable to them.

Here, Section 9.02 of the Twinsburg Charter is the constitutional source for the Relator’s right to file a petition that subjects Resolution No. 57-2022 to a referendum. The Twinsburg Charter reserves the right of “the electors of this City” to have the “power to approve or reject at the polls any ordinance or other measure enacted by Council” so long as a “referendum petition [is] submitted to the Clerk of Council in accordance with the provisions of the Constitution or

laws of Ohio.” This provision does not differentiate between legislative or administrative action; therefore, whether Resolution No. 57-2022 is either is immaterial. The Relator, along with the Petitioners, are Twinsburg electors who properly exercised constitutional power under the Twinsburg Charter to submit a referendum petition to Clerk Collins. Therefore, this Court ought to grant Relator’s writ of mandamus ordering Clerk Collins to transmit a certified copy of Resolution No. 57-2022 and the signed referendum petition to the Summit County Board of Elections, so it may appear on the November 8, 2022 ballot.

V. CONCLUSION

Twinsburg Council exceeded its executive power in Resolution No. 57-2022; therefore, it utilized legislative power subject to referendum under Article II, § 1f of the Ohio Constitution and R.C. § 731.29. Alternatively, the Twinsburg Charter’s independent sovereign constitutional authority allows for Twinsburg Council’s legislative and administrative actions to be subject to referendum, despite Article II, § 1f of the Ohio Constitution. Thus, Relator is entitled to a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 22nd day of August 2022, a copy of the foregoing ***Relator's Merit Brief*** was filed electronically. A copy of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. The undersigned further certifies that a copy of the foregoing has been served by e-mail upon:

/s/ Warner Mendenhall
Warner Mendenhall, 0070165