

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.)	

REPLY BRIEF OF RELATOR

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I. INTRODUCTION

Respondents' arguments fail because: (1) Relator's claims were brought promptly under the procedure designed to hear claims like this; (2) Respondents do not contest that Twinsburg Council acted outside its administrative authority; (3) *Buckeye Cmty. Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539 (1998) (hereinafter "*Buckeye II*") was a closely held decision that can be reconsidered in an expedited election case; (4) Relator's procedural claims do not have an adequate remedy at law; and (5) the jurisdictional priority rule is inapplicable to the dispute at hand.

II. LAW AND ARGUMENT

Relator is entitled to a writ of mandamus.

1. Relator's claim is not barred by laches.

R.C. § 731.29 requires a municipal clerk to transmit a referendum petition to the county 10 days after receiving it, which would have been July 23, 2022. A relator gains standing to bring a mandamus action when a public official violates a clear legal duty. Despite Respondents' arguments, a relator does not gain standing to file a mandamus when a public official merely threatens to evade a clear legal duty. Therefore, Law Director Vazzana's statements before July 23, 2022 are irrelevant because Relator Clark could not respond until Clerk Collins violated her duty to transmit the petition on July 23, 2022.

Despite Law Director Vazzana's prior statements that Resolution 57-2022 was not subject to referendum, Relator Clark wait for Clerk Collins violation of her ministerial duty. This Court has held that it is an abuse of a clerk or law director's "limited discretionary authority" to refuse a to certify a petition's "sufficiency and validity based upon a judicial or quasi-judicial determination that the subject matter of [an ordinance] was administrative rather than

legislative.” *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St. 3d 481, 484 (2005). Also see *State ex rel. Langhenry v. Britt*, 151 Ohio St. 3d 227, 230 (2017) (stating “when reviewing the sufficiency of a petition, municipal legislative officials have limited discretion to assess matters of form and no authority to review matters of substance such as the legality of the proposed measure”). Only after Respondents abuses their limited discretion and failed to transmit the petition did Relators have standing to sue on August 11, 2022.

Finally, Respondents are not prejudiced by this expedited election proceeding. The opposite is true. If Relator Clark filed and served her complaint under the ordinary rules of civil procedure at the earliest possible date when she gained standing (i.e., July 23, 2022), then Respondent would have had to answer by August 23, 2022. Since that date would have been within the 90 days before an election, the Supreme Court would have ordered the same expedited briefing schedule as provided for in S.Ct.Prac.R. 12.08, but on tighter timeline. It is not Relator Clark’s fault that Twinsburg Council passed Resolution 57-2022 close to an election. The Ohio Supreme Court does not accept this as a reason to bar cases for laches. *State ex rel. Nauth v. Dirham*, 161 Ohio St. 3d 365, 369 (2020) (“election date for a valid referendum petition is not a matter of the proponents' choosing.”).

Relator’s claims are not barred by laches and Respondents’ contrary arguments misunderstand or misstate the nature of a mandamus proceeding.

2. Twinsburg Council acted outside its administrative authority.

Respondents contend Relator’s argument emphasizes form over substance when arguing whether Resolution 57-2022 is legislative or administrative in contravention to the Ohio Supreme Court’s ruling in *Donnelly v. Fairview Park*, 13 Ohio St.2d 1 (1968) and *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539 (1998).

Under *Donnelly* and *Buckeye II*, it is settled law that approval of site plan is an administrative act. Relator Clark does not dispute that Twinsburg Council would have acted in an administrative capacity in approving the Project Gumbo site plan as originally intended. The distinguishing factor from *Donnelly* and *Buckeye II* is that Twinsburg Council exceeded its administrative authority under Twinsburg Ordinance § 1181.09 by applying a condition to its approval of the Project Gumbo site plan.

Respondents' additional facts provided in their Merit Brief show how Twinsburg Council and its Law Director's disregard for the law led to Twinsburg Council acting outside its administrative authority. First, the Project Gumbo site plan proposed a 45-foot building height, which the Twinsburg Planning Commission approved and Twinsburg Council was about to approve until Relator's counsel pointed out that they were applying the incorrect zoning height restriction. *Vazzana Aff.*, ¶13. The Twinsburg Law Director researched the matter and found Twinsburg used the wrong height restriction since 2014 in violation of a court order. *Vazzana Aff.*, ¶12, 14. Upon discovering this, the proper administrative action under Twinsburg Ordinance § 1181.09 was for the Twinsburg Council to follow its zoning laws by rejecting the Twinsburg Planning Commission's approval of a building height exceeding 45 feet.

If Twinsburg Council approved the Project Gumbo site plan despite its building height violation, then it would have been an administrative act subject to reversal in an administrative appeal. If Twinsburg Council denied the Project Gumbo site plan, then the applicant could have revised its site plan and resubmitted it for Planning Commission approval. Instead, the Twinsburg Council added a condition to Twinsburg Council's approval of the site plan in contravention of Twinsburg Ordinance § 1181.09, which only provides for approval or denial. This creates a grey zone in which an administrative appeal would not apply because a court lacks

any basis to adjudicate an action taken outside the scope of the law being executed. This is why it is a legislative act in form and substance. Twinsburg Council used its legislative discretion to approve the Project Gumbo site plan in a manner that exceeded its administrative role.

3. *Buckeye II* may be reconsidered in an expedited election case.

Buckeye II is a unique case for reconsideration because the Ohio Supreme Court could revisit *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St. 3d 559 (1998) (hereinafter “*Buckeye I*”). Relator Clark adds a reason to revisit *Buckeye I*--that the charter drafting and adoption process creates a source of constitutional authority through an act of popular sovereignty independent of the Ohio Constitution. Despite Respondents claim, Relator Clark’s contention is that this constitutional theory finds support in this Court’s original understanding of the Home Rule Amendments in 1923. *Perrysburg v. Ridgway*, 108 Ohio St. 245, 255 (1923) (“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’”).

Thus, if the Ohio Supreme Court restored its original understanding of the Home Rule Amendments as found in *Perrysburg* re-aligning Ohio law with the original constitutional theory, it could simply readopt the reasoning in *Buckeye I*.

4. Relator Clark has no other adequate remedy at law.

Given Relator Clark’s propositions, he had no other adequate remedy at law. If this Court reconsiders *Buckeye II* and finds Clerk Collins has a constitutional duty independent of the Ohio Constitution under the Twinsburg Charter to transmit Resolution 57-2022 and Relator Clark’s referendum petition to the Summit County Board of Elections, regardless of it being an administrative or legislative act, then an expedited election mandamus is the only legal recourse

Relator Clark has to enforce that legal duty before the November 8 election. If this Court finds Resolution 57-2022 is a legislative act, then an administrative appeal will fail.

Respondents argue Relator Clark implicitly admitted Resolution 57-2022 is an administrative act because he filed an administrative appeal. The standard for determining what is an administrative act is in *Donnelly*; Relator Clark's later actions do not affect that determination. Rather, since administrative appeals have strict filing deadlines, Relator Clark filed an administrative appeal to preserve a legal remedy if this Court rejects Relator's propositions of law. Thus, to determine if Relator has an alternative remedy at law, this Court must address Relator's propositions of law.

5. Judicial priority rule is inapplicable to the case at hand.

The Summit County Court of Common Pleas has jurisdiction over the administrative appeal, but it would not have jurisdiction over this expedited elections case. The Ohio Supreme Court through S.Ct.Prac.R. 12.08 is the only legal remedy for expedited writs of mandamus in election cases. The Ohio Rules of Civil Procedure do not provide for an expedited writ of mandamus case schedule for common pleas courts, nor do Ohio's Appellate Rules of Procedure. This Court is the only one capable of giving a final, non-appealable decision within 90 days of an election. Therefore, Respondents' argument that the judicial priority rule obligates Relator Clark to litigate an election related complaint for a writ of mandamus in common pleas court is spurious. The Ohio Supreme Court is the proper venue to adjudicate Relator Clark's propositions of law before the November election – not the Summit County Court of Common Pleas.

V. CONCLUSION

Respondents' procedural arguments (i.e., laches, alternative adequate remedy, and judicial priority rule) are inapplicable to this dispute; therefore, Relator Clark respectfully requests this Court adopt one or both propositions of law and grant Relator Clark a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 29th day of August 2022, a copy of the foregoing ***Relator's Reply 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:

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