

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Lynn A.
Clark

Relator

v.

Summit County Board of
Elections.

Respondents

Original Action (Expedited
Election Case S.Ct.Prac.R.
12.08)

Supreme Court Case No.
2022-1174

Answer of Intervening Respondent City of Twinsburg

Brouse McDowell LPA
Irving B. Sugerman (0020607)
(Lead Counsel)
388 S. Main St., Ste. 500
Akron, OH 44311
(330) 434-7516
Fax (330) 253-8601
ibsugerman@brouse.com

Matthew G. Vansuch (0079328)
6550 Seville Dr., Ste. B
Canfield, OH 44406
(330) 533-6195
Fax (330) 533-6195
mvansuch@brouse.com

Counsel for Intervening Respondent

Warner D. Mendenhall III (0070165)
Logan Trombley (0096858)
190 N. Union St., Ste. 201
Akron, OH 44304
(330) 535-9160
Fax (330) 762-3423
warner@warnermendenhall.com
logan@warnermendenhall.com

Counsel for Relator

John F. Galonski (0061792)
Summit County Prosecutor's Office
53 University Ave., 7th Floor
Akron, OH 44308
(330) 643-8379
Fax (330) 643-8708
galonski@prosecutor.summitoh.net

*Counsel for Respondent Summit County Board of
Elections*

ANSWER

For their Answer to the Petition, Intervening Respondent City of Twinsburg states as follows:

1. The first sentence of ¶1 merely describes the nature of this action as an original action for mandamus. Answering further, Intervening Respondent admits the second sentence of ¶1 and that the original action was filed 49 days before the pending election on November 8, 2022 so that this original action is subject to S.Ct.Prac.R. 12.08.

2. Intervening Respondent admits the allegations in ¶2.

3. In response to the allegations in ¶3, Intervening Respondent admits that the Twinsburg City Council met for a caucus and in regular session on June 14, 2022 at which one of the agenda items for consideration was Resolution 57-2022 “A Resolution confirming the Planning Commission’s approval of the final site plan for Project Gumbo date stamped received May 10, 2022; and declaring an emergency.” Further answering, Intervening Respondent admits that one of the documents attached to the Petition is a certified copy of Resolution 57-2022 adopted by Twinsburg City Council and approved by the Mayor on June 21, 2022. Intervening Respondent denies the remaining allegations in ¶3 and notes that not all of the documents attached to the Petition are marked as exhibits or are stamped with an exhibit number.

4. In response to the allegations in ¶4, Intervening Respondent admits that Twinsburg Codified Ordinances Section 1181.09 provides, in its entirety, as follows:

(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.

(b) In its review of the site plan, Council shall consider the same factors and criteria as established for Planning Commission review.

5. In response to the allegations in ¶5, the text of Section 1181.09 speaks for itself, and Intervening Respondent denies the remaining allegations in ¶5.

6. In response to the allegations in ¶6, the text of Section 1181.09 speaks for itself, and Intervening Respondent denies the remaining allegations in ¶6.

7. In response to the allegations in ¶7, the text of Section 1181.09 speaks for itself, and Intervening Respondent denies the remaining allegations in ¶7.

8. In response to the allegations in ¶8, Intervening Respondent admits that, on June 14, 2022, Twinsburg City Council passed Resolution 57-2022, that one of the documents attached to the Petition is an accurate copy of Resolution 57-2022 passed by Twinsburg City Council and approved by the Mayor on June 21, 2022, and that Section I of the operative section of Resolution 57-2022 provides as follows:

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 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.

(emphasis in original) Intervening Respondent denies the remaining allegations in ¶8 and notes that not all of the documents attached to the Petition are marked as exhibits or are stamped with an exhibit number.

9. Intervening Respondent admits the allegations in ¶9.

10. Intervening Respondent admits the allegations in ¶10.

11. Intervening Respondent admits the allegations in ¶11.

12. Intervening Respondent admits the allegations in ¶12.

13. Intervening Respondent admits the allegations in ¶13.

14. Intervening Respondent admits the allegations in ¶14 but notes that not all of the documents attached to the Petition are marked as exhibits or are stamped with an exhibit number.

15. The first and second sentences in ¶15 merely describe the legal standard and burden of proof in a mandamus proceeding and no response is required.

16. The statements in ¶16 merely describe and quote from this Court's holding in *Donnelly v. Fairview Park*, 13 Ohio St.2d 1, 4 (1968), and no response is required.

17. The statements in ¶17 contain Relator's legal interpretations of this Court's holding in *Donnelly v. Fairview Park*, 13 Ohio St.2d 1, 4 (1968), and no response is required. To the extent one is required, Intervening Respondent denies the allegations.

18. Intervening Respondent admits the first sentence in ¶18. With respect to the second sentence in ¶18, the text of Section 1181.09 speaks for itself, and Intervening Respondent denies the remaining allegations in ¶18.

19 In response to the allegations in ¶19, Intervening Respondent admits that, on June 14, 2022, Twinsburg City Council passed Resolution 57-2022, that one of the documents attached to the Petition is an accurate copy of Resolution 57-2022 passed by Twinsburg City Council and approved by the Mayor on June 21, 2022, and that Section I of the operative section of Resolution 57-2022 provides as follows:

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 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.**

(emphasis in original) Intervening Respondent denies the remaining allegations in ¶19 and notes that not all of the documents attached to the Petition are marked as exhibits or are stamped with an exhibit number.

20. Intervening Respondent denies the allegations in ¶20.

21. Intervening Respondent admits that the first sentence of ¶21 accurately quotes from Section 9.02 of Twinsburg's Charter and that the text of Section 9.02 speaks for itself but denies the remaining allegations in ¶21.

22. Intervening Respondent denies the allegations in ¶22, specifically denying that Clerk Collins transmitted the referendum petition and a certified copy of Resolution 57-2022 to the Summit County Board of Elections because Resolution 57-2022 is subject to referendum. Clerk Collins timely transmitted the referendum petition and a certified copy of Resolution 57-2022 to the Board on September 6, 2022 because, on September 2, 2022, this Court ordered her to do so in Case No. 2022-0995. Further answering, when fulfilling this Court's mandate, Clerk Collins specifically requested a hearing with the Board on the issue of whether Resolution 57-2022 was subject to referendum. A true and accurate copy of Clerk Collins' letter and attachments thereto is attached as Exhibit A.

AFFIRMATIVE DEFENSES

23. Relator has failed to state a claim for relief.

24. Relator's claim is barred by the doctrines of waiver and laches.

25. Relator is judicially estopped from bringing this extraordinary action.

26. Relator has failed to exhaust his administrative remedies.

27. Relator does not have a clear legal right to the relief requested.

28. Relator has an adequate remedy at law.

29. Relator is not entitled to attorney's fees.

30. The Petition is defective because it has not been verified by affidavit. *See* R.C. § 2731.04.

31. Relator is not entitled to Resolution 57-2022 being placed on November 8, 2022 or November 7, 2023 general-election ballots.

Wherefore, Intervening Respondent prays that the Court deny the preemptory writ of mandamus or an alternate writ, as requested by Relator, and dismiss the Petition at Relator's cost, and that this Court grant Intervening Respondent its reasonable attorney fees and costs associated in defending against this extraordinary action. Alternatively, this Court should deny Relator's request that Resolution 57-2022 appear on the November 7, 2023 ballot.

Respectfully submitted,

/s/ Matthew G. Vansuch
Matthew G. Vansuch (0079328)
Brouse McDowell LPA

Counsel for Intervening Respondent

CERTIFICATE OF SERVICE

I certify that a copy of this *Answer* was sent by email to the counsel identified on the cover page on September 22, 2022.

/s/ Matthew G. Vansuch
Matthew G. Vansuch (0079328)
Brouse McDowell LPA

Counsel for Respondents

[1508060.3]

Twinsburg

NATURALLY BEAUTIFUL *Ohio*

September 9, 2022.

MEMORANDUM

To: Summit County Board of Elections

CC: Sam Scaffide, Mayor
City Council

From: Shannon Collins, Clerk of Council
Matt Vazzana, Law Director

Subject: State ex rel. Clark vs. Twinsburg
Referendum Petition on Council Res. No. 57-2022

2022 SEP -9 PM 3:28
SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311

On September 2, 2022, the Ohio Supreme Court ordered the City of Twinsburg "to transmit forthwith the referendum petition and a certified copy of Resolution No. 57-2022 to the Summit County Board of Elections pursuant to R.C. 731.29." *State ex rel. Clark v. Twinsburg*, Slip Opinion No. 2022-Ohio-3089, ¶22 (the "Opinion"). A copy of that Opinion is attached hereto.

On September 6, 2022, in accordance with the Opinion, I submitted to you the referendum petition (the "Referendum Petition") to place City of Twinsburg Resolution No. 57-2022 along with signatures on the petition. In the Opinion, the Supreme Court laid out the procedures for addressing the Referendum Petition:

Accordingly, the dispositive issue is whether Clark has established a right to the requested relief and whether Collins has a duty to provide it. *See Ditmars*, 94 Ohio St.3d at 474, 764 N.E.2d 971. Reading Section 9.02 of Twinsburg's charter and R.C. 731.29 together establishes the following procedure for placing a referendum on the ballot: (1) petitioners timely submit their referendum petition to Collins, the clerk of council, (2) Collins holds the petition for ten days, (3) Collins transmits the petition to the board along with a certified copy of the ordinance or measure in question, (4) within ten days, the board examines the petition, attests to the number of valid signatures on it, and returns the petition to Collins, (5) Collins certifies to the board the validity and sufficiency of the petition, and (6) the board submits the ordinance or measure to the electors at the next election occurring 90 days after Collins's certification. (Emphasis added).

Id. at ¶18. Steps (1), (2), and (3) were thereby completed.

On September 8, 2022, I received back from you the Referendum Petition with a statement attesting to the number of such electors who signed the petition (1,495) and the number of valid signatures thereon (1,196). This fulfills Step (4).

City of Twinsburg
10075 Ravenna Road, Twinsburg, Ohio 44087
Phone: 330.425.7161 www.mytwinsburg.com



Based on the Final Official Count for the November 2018 General Election that you provided to me in Step (4), the number of valid signatures exceeds ten percent of the number of electors who voted for governor at the most recent general election for the office of governor in the City of Twinsburg (8,510).

By this letter and certification, I am complying with Step (5). In so doing, I am also presenting to you the July 21, 2022 Memorandum prepared by the City of Twinsburg Law Director, Matthew Vazzana, in which he opined that Resolution No. 57-2022 is an administrative act by the City Council and, therefore, not a legislative action that is subject to the electorate's right of referendum.

The City is requesting a hearing in front of the Board of Elections to present its position before the Board exercises its statutory authority to determine whether to place Resolution No. 57-2022 on this November's ballot. *See State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶35; *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶30. As the Supreme Court stated in Oberlin, "these issues should be initially decided by the local authorities best equipped to gauge compliance with election laws — boards of elections — after petitions are certified to them by city auditors and village clerks, rather than by auditors and clerks".

Please advise us if you intend to schedule this matter for a hearing and if so the date and time thereof.

SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311

2022 SEP -9 PM 3:28

Twinsburg

NATURALLY BEAUTIFUL *Ohio*

July 21, 2022

MEMORANDUM

To: Ms. Suzanne Clark
Ms. Marcella Gaydosh
Ms. Laurie Facsina
Mr. Lynn Clark
Attorney Warner Mendenhall

CC: Sam Scaffide, Mayor
City Council
Summit County Board of Elections

From: Shannon Collins, Clerk of Council
Matt Vazzana, Law Director

Subject: Sufficiency Determination re: Referendum Petition on Council Res. No. 57-2022

2022 SEP -9 PH 3:28

SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311

The Referendum Process in Ohio

The Ohio Constitution, pursuant to Article II, Section 1f, reserves the power of initiative and referendum 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..." (Emphasis added). The Ohio Supreme Court has interpreted this Constitutional provision to exclude from the reach of referendum proceedings a City Council's administrative actions. And the Ohio Supreme Court has held this interpretation as applicable to Charter municipalities.

In *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 56 O.O.2d 6, 271 N.E.2d 864, the Ohio Supreme Court held that pursuant to Article II, Section 1f of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are authorized by law to control by legislative action. *Myers* at paragraph one of the syllabus. In *Buckeye Community Hope Foundation v. City of Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 697 N.E.2d 181, the Ohio Supreme Court held that a section of the Charter of Cuyahoga Falls that provided for voters to exercise the power of referendum on any ordinance or resolution passed by the City Council to be constitutionally invalid. *Id.* at 543. The *Buckeye* Court held that, regardless of the language contained in the Cuyahoga Falls Charter, Article II, Section 1f of the Ohio Constitution does not authorize the voters of Cuyahoga Falls to exercise the power of referendum on any ordinance or resolution by City Council. *Id.* at 543-544. The Court concluded that the Constitution permits referendum powers only on those matters that constitute legislative action. *Id.* at 544.

In *Donnelly v. Fairview Park*, the Ohio Supreme Court outlined the test for determining whether an action of a legislative body was administrative or legislative:

The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence. (1968), 13 Ohio St.2d 1, 233 N.E.2d 500, paragraph two of the syllabus.

In discussing the *Donnelly* test, the *Buckeye* Court explained that the test requires an examination of the nature of the action taken rather than the action's form. *Id.* at 544. Notably, both *Buckeye* and *Donnelly* involved situations where a city council was reviewing the recommendation of a city planning commission. And in both *Buckeye* and *Donnelly* the Ohio Supreme Court found the city council's action of reviewing the recommendation of a planning commission to be administrative and not legislative.

The Petitioner's Referendum Petition on Resolution No. 57-2022 (And Simultaneous Administrative Appeal of Resolution No. 57-2022)

On June 14, 2022, pursuant to Twinsburg Codified Ordinance Section 1181.09, City Council passed Res. No. 57-2022 to confirm the Planning Commission's action of approving the final site plan for Project Gumbo.

On June 27, 2022 a committee of four Twinsburg residents (Ms. Suzanne Clark, Ms. Marcella Gaydosh, Ms. Laurie Facsina, and Mr. Lynn Clark (collectively, the "Petitioners")) filed notice with the Twinsburg Clerk of Council of their intent to circulate a referendum petition to place Res. No. 57-2022 on the November 8, 2022 ballot.

Because Ohio law precludes an administrative act from being subject to referendum, and with a desire to save Petitioners the time and effort of circulating petitions in vain, on June 30, 2022, Twinsburg Law Director, Matthew Vazzana, notified the Petitioners (and their legal counsel, Warner Mendenhall) that Res. No. 57-2022 was an administrative act subject to an administrative appeal (versus a legislative act that would be subject to referendum). The Law Director's June 30, 2022 correspondence further confirmed with Petitioners and Mr. Mendenhall that the administrative appeal filing deadline was July 14, 2022. Mr. Mendenhall acknowledged receipt of the Law Director's notice with the reply: "Matt, Thank you for the clarification."

Thereafter, on July 14, 2022, Mr. Lynn Clark (via his attorney Warner Mendenhall's Office) filed an **administrative appeal** against Res. No. 57-2022 in the Summit County Court of Common Pleas (Case No. CV-2022-07-2332). Confusingly, however, nearly simultaneously to his filing of the aforementioned administrative appeal, Mr. Lynn Clark also filed a referendum petition to place Res. No. 57-2022 on the November 8, 2022 ballot.

Under Ohio Law, it is an accepted legal principle that a Council action cannot be subject to both the referendum process and the administrative appeal process at the same time. It is one or the other. In other words, an individual would not file an administrative appeal against a Council action if they believe the action is subject to the referendum process – and vice versa. Put more simply, Petitioner Clark's action in filing an administrative appeal against Res. No. 57-2022 on July 14, 2022 was an affirmative recognition by Petitioner Clark and his attorney, Warner Mendenhall, that Res. No. 57-2022 was not a

2022 SEP 28 11:33:28
SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311

legislative act and, therefore, was never subject to the referendum process in Ohio to begin with. Given the above, it is unknown why Petitioner Clark continued circulating his referendum petition for some two additional weeks after receiving notice from the Twinsburg Law Department (that was acknowledged by his attorney, Warner Mendenhall) that Res. No. 57-2022 was an administrative action – not a legislative action and was, therefore, not subject to the referendum process in Ohio.

Conclusion

City Council, through Res. No. 57-2022, administered a law that was already in existence – Twinsburg Codified Ordinances Section 1181.09. Res. No. 57-2022 did not enact a new law, ordinance, or regulation. Therefore, pursuant to Ohio law, Res. No. 57-2022 is an administrative action and, therefore, not subject to referendum proceedings. Consequently, it is determined that the Petition is not sufficient and Res. No. 57-2022 will not be sent to the November 8, 2022 ballot because the subject matter of the Petition is not an action that is subject to referendum proceedings. The appropriate and legal forum to address Petitioners' concerns with Res. No. 57-2022 is through the filing of an Administrative Appeal, which Petitioners and their legal counsel, Warner Mendenhall, have acknowledged through having actually already filed said appeal.

SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311
2022 SEP -9 PM 3:28

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Clark v. Twinsburg*, Slip Opinion No. 2022-Ohio-3089.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION No. 2022-OHIO-3089

THE STATE EX REL. CLARK v. THE CITY OF TWINSBURG ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Clark v. Twinsburg*, Slip Opinion No. 2022-Ohio-3089.]

Mandamus—A clerk has a mandatory, ministerial duty to transmit a petition to the board of elections for its signature verification ten days after the date on which the petition was filed—Limited writ granted.

(No. 2022-0995—Submitted August 31, 2022—Decided September 2, 2022.)

IN MANDAMUS.

Per Curiam.

{¶ 1} Relator, Lynn A. Clark, seeks a writ of mandamus ordering respondents—the city of Twinsburg, City Clerk of Council Shannon Collins, and Law Director Matt Vazzana (collectively, “the city”)—to transmit a referendum petition to the Summit County Board of Elections. The city refused to transmit the

2022 SEP -9 PM 3:28

SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311

SUPREME COURT OF OHIO

petition to the board on the ground that the measure in question was an administrative act and therefore not subject to referendum.

{¶ 2} Because Collins has a ministerial duty to transmit Clark's petition to the board, we grant a limited writ ordering her to do so. We express no opinion on whether the measure in question is an administrative act not subject to referendum.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 3} In May 2022, the Twinsburg Planning Commission recommended a final site plan for a proposed development known as Project Gumbo. The property to be developed under Project Gumbo is in an "I-2 industrial zoning district." The site plan for Project Gumbo included building heights of 45 feet.

{¶ 4} Resolution No. 57-2022, a resolution to confirm the planning commission's approval of the final site plan for Project Gumbo, was on the Twinsburg City Council's May 24, 2022 meeting agenda. During the acceptance of public comments at that meeting, an issue was raised as to whether the height of various buildings in Project Gumbo complied with Twinsburg's zoning code. Following this and other public comments concerning Project Gumbo, the council continued its consideration of Resolution No. 57-2022 until the next council meeting, which was scheduled for June 14.

{¶ 5} After the May 24 meeting, Vazzana investigated the situation and determined that the maximum height of any building in an I-2 industrial zoning district is 35 feet. Thereafter, Vazzana revised Resolution No. 57-2022 to include a stipulation that no building height in Project Gumbo would exceed 35 feet. At its June 14 meeting, the council passed revised Resolution No. 57-2022, which stated that the planning commission approved the final site plan of Project Gumbo "**with the condition that the project's building height not exceed thirty-five feet.**" (Boldface and underlining sic.)

{¶ 6} On July 13, citing "R.C. 2505 and 2506," Clark filed a notice of an administrative appeal of Resolution No. 57-2022 in the Summit County Court of

Common Pleas. That same day, Clark and three other petitioners filed with Collins a referendum petition seeking to place Resolution No. 57-2022 on the November 8, 2022 general-election ballot. On July 21, however, Vazzana advised Clark that the referendum petition would not be transmitted to the board, because Resolution No. 57-2022 was not subject to referendum.

{¶ 7} Clark commenced this action on August 11, seeking a writ of mandamus requiring the city to transmit the referendum petition and a certified copy of Resolution No. 57-2022 to the board. Respondents filed an answer, denying that Resolution No. 57-2022 is subject to referendum or that they have a clear legal duty to transmit the referendum petition to the board. The parties submitted evidence and filed merit briefs in accordance with this court's expedited schedule in S.Ct.Prac.R. 12.08. The case is now ripe for decision.

II. OVERVIEW OF REFERENDUM PROCESS

{¶ 8} Under Section 9.02 of Twinsburg's charter, the electors of the city have reserved the power to approve or reject "any ordinance or other measure enacted by Council by referendum petition submitted to the Clerk of Council in accordance with the provisions of the Constitution or laws of Ohio now or hereafter in effect." Thus, the referendum process in Twinsburg is governed by R.C. 731.29 through 731.41, except when any procedure in those statutes conflicts with the charter's provisions. *See State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 477, 764 N.E.2d 971 (2002).

{¶ 9} R.C. 731.29, the relevant statute in this case, 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

SUPREME COURT OF OHIO

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.* The auditor or clerk shall transmit the petition to the board together with the certified copy of the ordinance or measure. The board shall examine all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition. The board shall return the petition to the auditor or clerk within ten days after receiving it, together with a statement attesting to the number of such electors who signed the petition. The board shall submit the ordinance or measure to the electors of the municipal corporation, for their approval or rejection, at the next general election occurring subsequent to ninety days after the auditor or clerk certifies the sufficiency and validity of the petition to the board of elections.

(Emphasis added.)

{¶ 10} Though R.C. 731.29 specifies the city auditor or village clerk as both the official with whom to file a referendum petition and the official who has the duty to transmit the petition to the board, it is permissible for a charter municipality to designate, as Twinsburg has in its charter, a different official to fill those roles. *See Ditmars* at 477; *see also State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, 2011-Ohio-4485, 955 N.E.2d 363, ¶¶ 26-27. And in this case, the city does not dispute that Collins is the appropriate official with whom Clark had to file the referendum petition regarding Resolution No. 57-2022. The dispute in this case is whether Collins has a clear legal duty to transmit the petition to the board for an examination of the signatures.

III. ANALYSIS

A. Laches

{¶ 11} The city asserts that Clark’s request for a writ of mandamus is barred by the doctrine of laches. “Extreme diligence and promptness are required in elections-related matters.” *State ex rel. Comm. for the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, 776 N.E.2d 1041, ¶ 16. Laches will bar an action when there is (1) an unreasonable delay or lapse of time in asserting a right, (2) the absence of an excuse for the delay, (3) actual or constructive knowledge of the injury or wrong, and (4) prejudice to the opposing party. *State ex rel. Carrier v. Hilliard City Council*, 144 Ohio St.3d 592, 2016-Ohio-155, 45 N.E.3d 1006, ¶ 8. A laches defense “rarely prevails in election cases.” *State ex rel. Duclos v. Hamilton Cty. Bd. of Elections*, 145 Ohio St.3d 254, 2016-Ohio-367, 48 N.E.3d 543, ¶ 8.

{¶ 12} Clark acknowledges that on July 21, eight days after submitting the referendum petition to the city, Vazzana advised the petitioners who had submitted the referendum petition that the city would not be transmitting the petition to the board. And the city had not done so by the deadline for transmitting Clark’s referendum petition to the board under R.C. 731.29. Yet Clark waited until August 11 to file this action. The city argues that Clark’s delay caused this case to automatically become an expedited election matter under S.Ct.Prac.R. 12.08 and that the laches defense should bar relief in mandamus.

{¶ 13} Laches is not a bar to this action. A party asserting a laches defense must demonstrate that it has been *materially* prejudiced by the other party’s delay. *See State ex rel. Pennington v. Bivens*, 166 Ohio St.3d 241, 2021-Ohio-3134, 185 N.E.3d 41, ¶ 29 (denying laches defense when respondents “[did] not provide any concrete details as to how their preparation and defense [were] materially affected”). The city has made no such showing here, relying solely on the fact that this case would not have been automatically expedited had Clark filed sooner. But

SUPREME COURT OF OHIO

given the proximity of the November 8 election, it is likely that even if Clark had filed at the earliest possible time after the case ripened, we would have ordered this case to be expedited. Under these circumstances, the city has not demonstrated the material prejudice that would allow a laches defense.

B. Jurisdictional-Priority Rule Is Inapplicable

{¶ 14} The city also argues that this action is barred by the jurisdictional-priority rule. The jurisdictional-priority rule provides that as between state courts of concurrent jurisdiction, the tribunal whose power is first invoked acquires exclusive jurisdiction to adjudicate the whole issue and settle the rights of the parties. *State ex rel. Consortium for Economic & Community Dev. for Hough Ward 7 v. Russo*, 151 Ohio St.3d 129, 2017-Ohio-8133, 86 N.E.3d 327, ¶ 8. Because Clark filed an R.C. Chapter 2506 administrative appeal in common pleas court before filing this mandamus action, respondents contend that this action should be dismissed.

{¶ 15} In general, the jurisdictional-priority rule applies only when the causes of action *are the same in both cases*. *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 429, 751 N.E.2d 472 (2001). But this mandamus action and the administrative appeal in common pleas court involve different claims that seek different forms of relief. *See State ex rel. Ebsersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶ 35. The remedy Clark ultimately seeks through this mandamus proceeding is a public vote on the referendum. But an administrative appeal does not provide such a remedy: the administrative appeal could overturn Resolution No. 57-2022 as improper, but it cannot achieve Clark's goal of placing a referendum on the ballot. *See id.* Accordingly, the jurisdictional-priority rule is inapplicable.

C. Mandamus Claim

{¶ 16} To be entitled to a writ of mandamus, Clark must establish by clear and convincing evidence (1) a clear legal right to the requested relief, (2) a clear

legal duty on the part of the city to provide it, and (3) the lack of an adequate remedy in the ordinary course of law. See *State ex rel. Nauth v. Dirham*, 161 Ohio St.3d 365, 2020-Ohio-4208, 163 N.E.3d 526, ¶ 11. As to the third element, Clark lacks an adequate remedy in the ordinary course of law due to the proximity of the election, which is approximately two months away. See, e.g., *State ex rel. West v. LaRose*, 161 Ohio St.3d 192, 2020-Ohio-4380, 161 N.E.3d 631, ¶ 15 (no adequate remedy in the ordinary course of law when the election was less than two months away); *State ex rel. Finkbeiner v. Lucas Cty. Bd. of Elections*, 122 Ohio St.3d 462, 2009-Ohio-3657, 912 N.E.2d 573, ¶ 18-19 (same).

{¶ 17} The city argues that Clark has an adequate remedy to challenge Resolution No. 57-2022: an administrative appeal to the common pleas court. But the city's argument is flawed for the same reason that the jurisdictional-priority rule does not apply. As stated above, an administrative appeal under R.C. Chapter 2506 does not accomplish what Clark seeks in this action, which is a writ of mandamus ordering Collins to transmit the petition to the board and start the process of placing a referendum on Resolution No. 57-2022 on the November 8 ballot. It is therefore incorrect for the city to say that an administrative appeal is an adequate remedy to achieve what Clark wants. See *Ebersole* at ¶ 35.

{¶ 18} Accordingly, the dispositive issue is whether Clark has established a right to the requested relief and whether Collins has a duty to provide it. See *Ditmars*, 94 Ohio St.3d at 474, 764 N.E.2d 971. Reading Section 9.02 of Twinsburg's charter and R.C. 731.29 together establishes the following procedure for placing a referendum on the ballot: (1) petitioners timely submit their referendum petition to Collins, the clerk of council, (2) Collins holds the petition for ten days, (3) Collins transmits the petition to the board along with a certified copy of the ordinance or measure in question, (4) within ten days, the board examines the petition, attests to the number of valid signatures on it, and returns the petition to Collins, (5) Collins certifies to the board the validity and sufficiency of

10.15.2018
10.17.2018
10.19.2018
8.21.2018
9.14.2018
8.21.2018
10.17.2018
8.22.2018
9.14.2018
9.14.2018
10.27.2018
9.14.2018
10.24.2018
10.27.2018
8.18.2018
9.5.2018
11.1.2018
4.18.2018
4.18.2018
4.18.2018
3.15.2018
3.15.2018
3.15.2018
1.23.2018

SUPREME COURT OF OHIO

the petition, and (6) the board submits the ordinance or measure to the electors at the next election occurring 90 days after Collins’s certification. *See State ex rel. Luonuansuu v. King*, 161 Ohio St.3d 178, 2020-Ohio-4286, 161 N.E.3d 619, ¶ 4.

{¶ 19} In this case, the referendum petition never got past the first step—Collins did not transmit the petition and a certified copy of Resolution No. 57-2022 after ten days, because Vazzana advised that the measure was *administrative* and therefore not subject to referendum. *See Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998), paragraphs two and three of the syllabus. But Collins did not have the discretion to withhold the referendum petition on that ground. Under Twinsburg’s charter and R.C. 731.29, Collins had “a *mandatory, ministerial duty* to transmit the petitions to the board of elections for its signature verification after ten days had elapsed from the date the petitions were filed.” (Emphasis added.) *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 14. Collins abused her authority by refusing to transmit the referendum petition “based upon a judicial or quasi-judicial determination” that Resolution No. 57-2022 was administrative rather than legislative. *Id.* at ¶ 16; *see also State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 31 (a village clerk “improperly engaged in a judicial or quasi-judicial determination to decide the manifestly substantive issue[] of whether the ordinance proposed by relators’ initiative petition involved a subject that the village was authorized to control by legislative action”); *State ex rel. Barberis v. Bay Village*, 31 Ohio Misc. 203, 204, 281 N.E.2d 209 (C.P.1974) (“Whether any given action of a municipal council is legislative or administrative is a judicial question”) (cited with approval in *Oberlin Citizens for Responsible Dev.* at ¶ 16). We therefore grant a limited writ directing Collins to transmit the referendum petition and a certified copy of Resolution No. 57-2022 to the Summit County Board of Elections.

{¶ 20} We recognize that in a similar case, *Oberlin Citizens for Responsible Dev.*, we did not grant the relator a writ of mandamus despite finding that the city auditor had violated his clear legal duty by not transmitting a referendum petition to the board under R.C. 731.29. Instead, “given the proximity of the election,” we considered whether the measure at issue was administrative or legislative. *Oberlin Citizens for Responsible Dev.* at ¶ 20. We ultimately denied the writ because we found that the measure was administrative and therefore not subject to referendum. *Id.* at ¶ 21-31. We cautioned, however, that city officials “exceed their ministerial and limited discretionary authority * * * by deciding whether ordinances are legislative or administrative for purposes of determining whether they are subject to initiative or referendum.” *Id.* at ¶ 35.

{¶ 21} In this case, we do not address the issue whether Resolution No. 57-2022 is properly subject to referendum. In *Oberlin Citizens for Responsible Dev.*, we were faced with a tighter time frame, with the election in that case just 42 days away from the date on which we rendered our decision. In this case, the election at which Clark seeks to place Resolution No. 57-2022 on the ballot is almost one month further away than the election in *Oberlin Citizens for Responsible Dev.* Accordingly, we do not find it necessary to address whether Resolution No. 57-2022 is subject to referendum.

IV. CONCLUSION

{¶ 22} For the foregoing reasons, we grant a limited writ ordering Collins to transmit forthwith the referendum petition and a certified copy of Resolution No. 57-2022 to the Summit County Board of Elections pursuant to R.C. 731.29.

Limited writ granted.

O’CONNOR, C.J., and FISCHER, DONNELLY, STEWART, and BRUNNER, JJ.,
concur.

KENNEDY and DEWINE, JJ., concur in judgment only.

SUPREME COURT OF OHIO

Mendenhall Law Group, Warner Mendenhall, and Logan Trombley, for
relator.

Brouse McDowell, L.P.A., Irving B. Sugerman, and Matthew G. Vansuch,
for respondents.

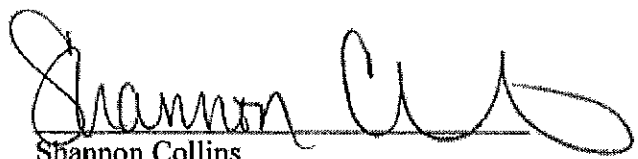
STATE OF OHIO)
)
CITY OF TWINSBURG)
COUNTY OF SUMMIT)

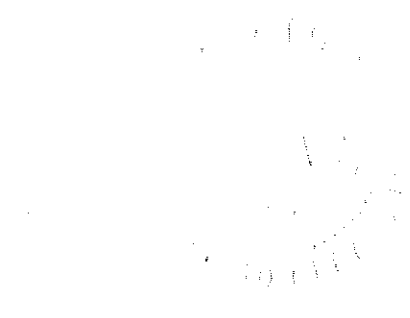
CERTIFICATION

I, SHANNON COLLINS, do hereby certify that I am the duly appointed, qualified Clerk of Council of the City of Twinsburg, Ohio, and that the attached is a true and exact copy of RESOLUTION 57-2022 adopted by Council of the City of Twinsburg at their Regular Meeting on June 14, 2022.

That publication of RESOLUTION 57-2022 will be posted in accordance with requirements stated in the City Charter. The RESOLUTION was read on the following date, April 12, 2022; and that such RESOLUTION is of record in the 2022 Legislation Records of the City of Twinsburg, Ohio.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the official seal of the City of Twinsburg, this 9th day of September, 2022


Shannon Collins
Clerk of Council



SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311
2022 SEP -9 PM 3:28

CITY OF TWINSBURG, OHIO

RESOLUTION 57-2022 - REVISED

A RESOLUTION CONFIRMING THE PLANNING COMMISSION'S APPROVAL OF THE FINAL SITE PLAN FOR PROJECT GUMBO DATE STAMPED RECEIVED MAY 10, 2022

2022 SEP -9 PM 3: 28

SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311

WHEREAS, the Planning Commission reviewed and recommended the Final Site Plan for Project Gumbo (Summit County Permanent Parcel Nos. 64-09116, 64-03583, and 64-03584) at its meeting of May 16, 2022; and

WHEREAS, Section 1181.09 of the Twinsburg Planning and Development Regulations provides for Council to review and take final action on Planning Commission's action with respect to applications for Site Plan approval; and

WHEREAS, this Council has reviewed the Planning Commission's decision, the application and associated materials, and the factors, standards, and criteria in the Twinsburg Planning and Development Regulations concerning Site Plan approval; and

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 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.**

SECTION II: It is found and determined that all formal actions of this Council concerning and relating to the adoption of this Resolution were taken in open meeting or meetings of this Council, and that all deliberations of this Council were in meetings open to the public and in full compliance with all legal requirements, including without limitations, those set forth in Section 121.22 of the Ohio Revised Code.

SECTION III: That this Resolution is not of a general or permanent nature necessitating the requirement to be read on three different days as contemplated by

§111.09(a) of the Codified ordinances of the City of Twinsburg and shall take effect and be in force from and after the earliest period allowed by law.

PASSED: 6/14/2022

APPROVED: 6/21/2022


EFFECTIVE: 7/21/2022



Sam Scaffide, President of Council


Submitted to the Mayor for approval this
14 day of June, 2022

Approved by the Mayor 6/21, 2022



Ted Yates, Mayor

ATTEST:



Shannon Collins
Clerk of Council

1st Rdg. 6/14/2022
2nd Rdg. —
3rd Rdg. —


Passed: 6/14/2022

Yes 5 No 2

2022 SEP -9 PM 3:28
SUMMIT COUNTY
BOARD OF ELECTIONS
AKRON, OH 44311

CERTIFICATE OF POSTING

I, Shannon Collins, Clerk of Council, of the City of Twinsburg, State of Ohio, do hereby certify that publication of the foregoing ordinances, resolutions was duly made by posting true copies thereof at five of the most public places in said City as determined by Section 113.42 of the Codified Ordinances of the City of Twinsburg; each for a period of fifteen days commencing on the 22 day of June, 2022



Shannon Collins
Clerk of Council
City of Twinsburg