[Cite as *In re Proposed Charter Petition*, 2019-Ohio-5445.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN RE: PROPOSED CHARTER	:	CASE NO. 18CA30
PETITION.	:	
	:	DECISION & JUDGMENT ENTRY

APPEARANCES:

Terry J. Lodge, Toledo, Ohio, and Patrick C. McGee, Athens, Ohio, for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Zachary L. Saunders, Assistant Athens County Prosecuting Attorney, Athens, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-16-19
PER CURIAM.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment that affirmed a decision of the Athens County Board of Elections, appellee herein, that declined to certify a petition to be placed on the November 7, 2017 general election ballot. The Committee of Petitioners, appellant herein,[1] assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED BY REFUSING TO HOLD THAT OHIO CONST. ART. X, § 3 PROVIDES A SEPARATE AND INDEPENDENT MEANS OF CREATING A COUNTY CHARTER FORM OF COUNTY GOVERNMENT."
> SECOND ASSIGNMENT OF ERROR:
>
> "THE BOE AND TRIAL COURT ERRED IN FAILING TO RECOGNIZE THE CONSTITUTIONAL RIGHT OF LOCAL COMMUNITY SELF-GOVERNMENT, WHICH PREVENTS

[1] Appellant's brief states that the Committee of Petitioners consists of the following individuals: Saraquoia Bryant, John Howell, and Sally Jo Wiley.

BOARDS OF ELECTIONS AND THE COURTS FROM DISQUALIFYING A PROPOSED CHARTER UNTIL THE PEOPLE HAVE VOTED UPON THEM."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN UPHOLDING PRE-ELECTION SUBSTANTIVE REVIEW AND VETO POWERS USED BY THE BOE, UNCONSTITUTIONALLY INFRINGE ON THE PEOPLE'S INHERENT RIGHT TO LEGISLATE AND TO HAVE MEANINGFUL REDRESS IN THE COURTS."

FOURTH ASSIGNMENT OF ERROR:

"HB 463 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE 'ONE-SUBJECT RULE' OF ARTICLE II, § 15(D) OF THE OHIO CONSTITUTION."

{¶ 2} In June 2017, appellant filed a Petition for Submission of Proposed County Charter and requested appellee to place the issue on the November 7, 2017 general election ballot.[2] Before appellee responded to appellant's request, appellant submitted a written objection "to any outcome from [appellee]'s scrutiny of the proposed County Charter Petition other than to place it on the November ballot for a vote of Athens County electors." Appellant asserted that appellee's "responsibility is ministerial" and includes reviewing whether the petition contains the required signatures, contains a proposed county charter form of government, and otherwise complies with the formal statutory and constitutional requirements. Appellant argued that because recent changes to the statutes that purport to permit a board of elections to review the substance of a petition are unconstitutional, appellee's duty is to merely assess the "technical adequacy of the Petition and its components."

[2] Appellant's petition lists Margaret Hummon and Richard McGinn as members of the committee, in addition to the three individuals listed in footnote 1.

{¶ 3} On July 10, 2017, appellee decided not to certify the petition. In particular, appellee determined that the petition is "not a valid charter" because it did not provide for an "elective county executive or an appointive county executive" as R.C. 302.02 mandates.

{¶ 4} Appellant then invoked R.C. 307.94 and requested appellee "to establish the validity or invalidity of the petition in an action before the Athens County Court of Common Pleas." Appellant reiterated its argument that appellee's duty when reviewing the petition "is essentially ministerial."

{¶ 5} On July 19, 2017, the trial court affirmed appellee's decision. First, the court found that the petition did not contain the required 10% of signatures. The court additionally determined that appellee's decision that the petition is "invalid for failing to provide for the appointment or election of a county executive is reasonable."

{¶ 6} On July 25, 2017, appellant filed a motion for partial relief from judgment and asserted that the trial court mistakenly found that the petition did not contain the required number of signatures. Subsequently, the trial court granted appellant's motion and amended its prior order, "nunc pro tunc, to state that [appellant] fully complied" with the signature requirement.

{¶ 7} Appellant appealed the trial court's decision.

{¶ 8} On August 21, 2017, the individuals that comprised the committee also filed a complaint for a writ of mandamus in the Ohio Supreme Court.[3] *State ex rel. McGinn v. Walker*, 151 Ohio St.3d 199, 2017-Ohio-7714, 87 N.E.3d 204. They requested a writ of mandamus to compel appellee to certify their petition to the November 2017 ballot. The *McGinn* relators

[3] The complaint for mandamus lists the Athens County relators as Richard McGinn, John Howell, Saraquoia Bryant, Sally Jo Wiley, and Margaret Hummon.

asserted that appellee could not determine the substantive merit of the petition, but rather could only review whether the petition complied with the technical requirements. The relators alleged that appellee's review "violated the people's constitutional rights to create a charter form of government as secured by Art. 1, [Section] 2 and Art. X, [Section] 3, and to ballot access in violation of the First Amendment and Art. I, [Section] 11 of the Ohio Constitution." They also asserted that the H.B. 463 amendments are unconstitutional and violate the one-subject rule.

{¶ 9} In particular, the relators argued that the proposed charter fully complies with Article X, Section 3 of the Ohio Constitution and "provides for the form of county government" and "provides for County Commissioners and an Executive Council." The relators contended that "the proposed charter explicitly designates the County Commissioners as the legislature of a chartered county government, answerable to an Executive Council." The relators further asserted that, because the petition is "valid as to form and contain[ed] the required number of signatures," appellee was "required to submit the proposed charter amendments to the electors." The relators also claimed that the amendments enacted under House Bill 463 violate "the people's constitutional rights and the separation of powers doctrine." Additionally, the relators argued that appellee's refusal to certify the petition violated their "First Amendment rights to political speech free from content-based restrictions" and "the people's right under the Ohio Constitution to propose and pass legislation."

{¶ 10} On September 21, 2017, the Ohio Supreme Court denied the writ. *Id.* at ¶ 25. The court determined that the proposed county charter "fail[ed] to provide for the exercise of all powers and duties of county government." *Id.* at ¶ 13. The court declined to consider the relator's remaining arguments.

{¶ 11} Subsequently, on August 8, 2018, we dismissed appellant's appeal for lack of a final, appealable order. Following our dismissal of the appeal, appellant filed a motion for reconsideration with the trial court. On October 30, 2018, the trial court again affirmed appellee's decision and determined that appellee's "decision that the petition was invalid for failing to provide for the appointment or election of a county executive is reasonable, in part, based upon the language in the above referenced statute and is in accordance with law." This appeal followed.

I.

{¶ 12} Before we consider the merits of appellant's appeal, we first consider appellee's contention that the Ohio Supreme Court's decision in *McGinn* renders appellant's appeal moot. Appellee contends that the Ohio Supreme Court determined that appellee justifiably refused to certify the petition and, thus, the issues appellant raises in the case sub judice are moot. Appellee argues that this court is unable to grant appellant the relief requested, when doing so would contradict the Ohio Supreme Court's decision in *McGinn*.

{¶ 13} Appellant, however, contends that its appeal is not moot. Appellant asserts that *McGinn* did not address all of the legal issues that appellant raises in the present appeal, but instead addressed only one issue: that the proposed Athens County Charter did not meet the requirements of Ohio Const. Article X, Section 3, and thus would not be certified to the November 7, 2017 ballot. Appellant posits that the Ohio Supreme Court confined its decision "solely to assessing the conformity of the Athens County Charter proposal to the requirements of Ohio Const., Article X, Section 3." Appellant thus argues that the Ohio Supreme Court did not address the other issues that it raises in the present appeal.

{¶ 14} "[T]he duty of every judicial tribunal [is] to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect." *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970); *e.g., Cyran v. Cyran*, 152 Ohio St.3d 484, 2018-Ohio-24, 97 N.E.3d 487, ¶ 9. Courts should "not * * * give opinions upon moot questions or abstract propositions, or * ** declare principles or rules of law which cannot affect the matter in issue in the case before it." *Miner v. Witt*, 82 Ohio St. 237, 238, 92 N.E. 21 (1910); *accord Fortner*, 22 Ohio St.2d at 14. Consequently, when a "case in controversy" is lacking, the case is moot and "'there will be no appellate review.'" *State ex rel. Evans v. Mohr*, 155 Ohio St.3d 579, 2018-Ohio-5089, 122 N.E.3d 1240, ¶ 5, quoting *Adkins v. McFaul*, 76 Ohio St.3d 350, 350, 667 N.E.2d 1171 (1996); *accord United States v. Sanchez-Gomez*, — U.S. —, 138 S.Ct. 1532, 1537, 200 L.Ed.2d 792 (2018) (stating that federal courts do not have jurisdiction over moot cases). Appellate courts will dismiss an appeal as moot when granting "'effectual relief'" is "'impossible.'" *Miner*, 82 Ohio St. at 238-239, quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895); *accord Drydock Coal Co. v. Ohio Div. of Reclamation*, 115 Ohio App.3d 563, 565, 685 N.E.2d 863 (4th Dist.1996).

{¶ 15} "In general, 'election cases are moot where the relief sought is to have a name or an issue placed on the ballot and the election was held before the case could be decided.'" *State ex rel. Todd v. Felger*, 116 Ohio St.3d 207, 2007-Ohio-6053, 877 N.E.2d 673, ¶ 9, quoting *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.*, 49 Ohio St.3d 102, 103, 551 N.E.2d 150 (1990), and citing *State ex rel. Bona v. Orange*, 85 Ohio St.3d 18, 21, 706 N.E.2d 771 (1999). Furthermore, the Ohio Supreme Court generally has been unwilling to find that

election cases are subject to an exception to the mootness doctrine. The court noted that an exception exists to the mootness doctrine when the "issues raised are capable of repetition yet evade review." *Todd* at ¶ 12. The exception ordinarily "applies when the challenged action is too short in duration to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.*, quoting *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 13, quoting *State ex rel. Dispatch Printing Co. v. Louden*, 91 Ohio St.3d 61, 64, 741 N.E.2d 517 (2001).

{¶ 16} In *Todd*, the court observed that "[e]lection cases are often fully litigated before the pertinent election" and noted that its rules of practice contain "an expedited evidence and briefing schedule for writ cases filed within 90 days of the pertinent election." *Id.*, citing S.Ct.Prac.R. X(9). The court determined that "petitioners in all election cases" have "a duty to act with extreme diligence." *Id.*, citing *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, 841 N.E.2d 766, ¶ 15, quoting *State ex rel. Fuller v. Medina Cty. Bd. of Elections*, 97 Ohio St.3d 221, 2002-Ohio-5922, 778 N.E.2d 37, ¶ 7 ("'Relators in election cases must exercise the utmost diligence'").

{¶ 17} The court also concluded that Todd did not act with extreme diligence. The court noted that "Todd instead waited two and one-half months after filing the mandamus action to request expedited consideration and then never again requested that the court of appeals act more promptly." *Id.* The court further pointed out that "Todd never informed the court of appeals that his claim needed to be resolved in time for placement of the corporate-powers issue on the November 2006 election ballot." *Accord State ex rel. Sawyer v. Cendroski*, 118 Ohio St.3d 50,

2008-Ohio-1771, 885 N.E.2d 938, ¶ 9 (noting that parties in election case "could have sought a more expeditious resolution by the court of appeals or requested an accelerated briefing and evidence schedule on appeal here, but neither did"). The court thus concluded that the appellate court should have dismissed Todd's mandamus action as moot. *Todd* at ¶ 13. Additionally, the court declined to consider the other issues raised on appeal. The court stated that even in election cases that it determines are moot, the court ordinarily "will not issue advisory opinions." *Id.*, citing *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, ¶ 34.

{¶ 18} In the case sub judice, during the trial court and mandamus proceedings, appellant and the individuals who comprise the committee sought to place an issue on the November 2017 ballot. On appeal, however, appellant has requested that we reverse the trial court's decision and order the issue to be placed on "the next appropriate election ballot." We question, however, whether we could grant appellant any effective relief. The Ohio Supreme Court plainly declared in *McGinn* that the petition is not valid and ruled that appellee "was justified in finding the petition[] invalid." *McGinn* at 24. Even if we may arguably agree with a portion of appellant's assignments of error, the Ohio Supreme Court already has ruled upon the petition's validity. We thus question whether we could grant appellant the requested relief: to order appellee to place the petition on the ballot of the next appropriate election ballot.

{¶ 19} We also question whether res judicata precludes appellant from challenging appellee's decision declining to certify the petition. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*,

113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6; *accord Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232–34, 118 S.Ct. 657, 663–64, 139 L.Ed.2d 580 (1998), fn.5 (citations omitted) (explaining that the term, "res judicata," traditionally describes both "claim preclusion (a valid final adjudication of a claim precludes a second action on that claim or any part of it); and (2) issue preclusion, long called 'collateral estoppel' (an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim").

> With regard to claim preclusion, a final judgment or decree rendered on the merits by a court of competent jurisdiction is a complete bar to any subsequent action on the same claim between the same parties or those in privity with them. [*Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995)], citing *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943), paragraph one of the syllabus, and *Whitehead [v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 254 N.E.2d 10 (1969)], paragraph one of the syllabus. Moreover, an existing final judgment or decree between the parties is conclusive as to all claims that were or might have been litigated in a first lawsuit. *Id.* at 382, 653 N.E.2d 226, citing *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990). "'The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.'" *Id.* at 382, 653 N.E.2d 226, quoting *Natl. Amusements* at 62, 558 N.E.2d 1178.

Brooks v. Kelly, 144 Ohio St.3d 322, 2015-Ohio-2805, 43 N.E.3d 385, ¶ 7. We further observe that for res judicata to apply, "the parties to the subsequent action must be identical to or in privity with those in the former action." *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶ 8.

{¶ 20} Issue preclusion, or collateral estoppel, "'precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action.'" *Warrensville Hts. City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 152 Ohio St.3d 277, 2017-Ohio-8845, 95 N.E.3d 359, ¶ 9, quoting *Whitehead*, 20 Ohio St.2d at 112;

accord Lowe's Home Centers, Inc. v. Washington Cty. Bd. of Revision, 154 Ohio St.3d 463, 2018-Ohio-1974, 116 N.E.3d 79, ¶ 33; *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998).

> While the merger and bar aspects of res judicata have the effect of precluding the relitigation of the same cause of action, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. "In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit." *[Whitehead]* at 112, 49 O.O.2d at 438, 254 N.E.2d at 13.

Fort Frye, 81 Ohio St.3d at 395 (citation omitted).

{¶ 21} "A judgment rendered in a mandamus action may operate as res judicata in a subsequent action which seeks to relitigate the issues decided in the mandamus action." *State ex rel. Dietrich Industries, Inc. v. Indus. Com'n of Ohio*, 35 Ohio St.3d 183, 184, 519 N.E.2d 640 (1988), citing *Garrison v. Patrick*, 145 Ohio St. 580, 62 N.E.2d 371 (1945). In *Dietrich*, for instance, the court of appeals had issued a writ of mandamus against the Industrial Commission of Ohio that directed the commission "to determine whether there was a causal relationship between the absence of proper guards and relator's injury, and if it determines that there was such a relationship to determine the amount of the award thereafter." *Id.* at 183. The commission later determined that a causal relationship existed and assessed a penalty against the employer. The employer subsequently filed a writ of mandamus in the court of appeals and alleged that the commission abused its discretion and asked the appellate court to vacate the commission's decision. The court of appeals denied the writ, and the employer appealed to the Ohio Supreme Court.

{¶ 22} On appeal, the Ohio Supreme Court determined that the doctrine of res judicata precluded the employer from challenging the commission's decision. The court noted that the employer could have appealed the appellate court's prior decision that granted the writ, but did not. The court thus concluded that the employer could not relitigate the issue. *Id.* at 184.

{¶ 23} In the case at bar, the individuals who comprise the committee (the appellant herein) previously litigated the validity of appellee's decision to decline to certify the petition. Specifically, the individuals who comprise the committee filed a writ of mandamus in the Ohio Supreme Court that requested the court to order appellee to certify the petition for placement on the November 7, 2017 ballot. However, the Ohio Supreme Court denied the writ and determined that appellee justifiably declined to certify the petition.

{¶ 24} In the present appeal, appellant attempts to again litigate the validity of appellee's decision to decline to certify the petition. Appellant, through its individual members, had the opportunity to raise all of the issues that it raises in this appeal when it litigated the writ of mandamus before the Ohio Supreme Court. In fact, the *McGinn* relators raised some of the same issues in its writ of mandamus that appellant raises in the case sub judice. We therefore believe that the doctrine of res judicata precludes appellant from attempting to again challenge appellee's decision. *See generally State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, ¶ 31 (concluding that res judicata barred successive writ action when same legal issues involved), citing *Brown v. Dayton*, 89 Ohio St.3d 245, 249, 730 N.E.2d 958 (2000) ("Whereas the first action sought to prevent a vote on the Ordinance, this action seeks to nullify the Ordinance after it has passed. * * * The exact same facts are at issue. * * * [E]ven though plaintiffs are seeking a different remedy, res judicata extinguishes their claim"); *State ex*

rel. Stacy v. Batavia Local School Dist. Bd. of Edn., 97 Ohio St.3d 269, 2002-Ohio-6322, 779 N.E.2d 216, ¶ 16 (stating that "collateral estoppel prevents parties from relitigating in a subsequent case facts and issues that were fully litigated in a previous case").

{¶ 25} Accordingly, based upon the foregoing reasons, we conclude that this appeal no longer presents a viable case or controversy and, thus, this appeal must be dismissed.

II.

{¶ 26} Additionally, assuming, arguendo, that appellant's appeal is not moot, and that res judicata does not preclude appellant's appeal, we would nevertheless find appellant's assignments of error to be without merit. All of appellant's assignments of error challenge the trial court's decision that appellee acted reasonably by declining to certify appellant's petition. "When reviewing a county-board-of-elections decision, the standard is whether the board engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions." *McGinn* at ¶ 12, citing *State ex rel. Jacquemin v. Union Cty. Bd. of Elections*, 147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759, ¶ 9.

A.

{¶ 27} In its first assignment of error, appellant asserts that the trial court erred by concluding that appellee acted reasonably by finding the petition invalid for failing to provide for the appointment or election of a county executive. Appellant asserts that the trial court and the appellee misapplied R.C. Chapter 302 and that the trial court's decision is contrary to Ohio Const. Art. X, Section 3.

{¶ 28} Appellant observes that Article X, Section 3 states that "[t]he people of any county may frame and adopt or amend a charter" and that "[e]very such charter shall provide the form of

government of the county and shall determine which of its officers shall be elected and the manner of their election." Appellant claims that the trial court and appellee

> overrode the term "form of government" in the Ohio Constitution by incorrectly applying a mere statute, [R.C.] Chapter 302, which describes an optional means of creating an "alternative form of government" pursuant to Ohio Const. Art. X, [Section] 1, by the General Assembly, and not, as provided by Article X, [Section] 3, by the people.

Appellant's Brief at 5.

{¶ 29} Appellant contends that the proposed county charter "sets forth a new form of county government" and that the Ohio Constitution does not require a particular form of county government or require the appointment of a single county executive. *Id.* Appellant thus asserts that Art. X, Section 3 and R.C. "Chapter 302 are completely distinct." *Id.* at 6.

{¶ 30} Appellee, however, argues that the proposed county charter "is facially defective" because the petition "fails to establish an alternative form of county government." Appellee's Brief at 5. Appellee contends that the petition fails "to adhere to the basic requirements of Article X of the Ohio Constitution." *Id.*

{¶ 31} Appellee additionally asserts that Article X, Section 1 guides the adoption or amendment of a charter. Appellee notes that Article X, Section 1 states: "The general assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government." Appellee claims that the general assembly thus acted within its authority when it enacted R.C. Chapter 302, which sets forth "certain criteria for alternative forms of government."

{¶ 32} We again point out that in *McGinn*, the Ohio Supreme Court considered the same petition that is at issue in the present appeal. In *McGinn*, the court noted that appellee proffered

three rationales to support its decision to decline to certify the petition:

> (1) the proposed county charters do not adequately provide for an alternative form of county government, (2) they contain provisions that are outside the initiative power because they are not within a county's authority to enact, and (3) they fail to provide for the exercise of all powers and duties of county government.

McGinn at ¶ 13.

{¶ 33} The court found the third claim "dispositive." *Id.* The court determined that the proposed charter did not satisfy Article X, Section 3 because it required one to "'look to sources outside the proposed charters to determine the form of government they purport to establish.'" *Id.* at ¶ 15, quoting *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, ¶ 23. The court further explained:

> The Athens County charter petition is nearly indistinguishable from the language we rejected in *Walker* and *[State ex rel. Coover v. Husted*, 148 Ohio St.3d 332, 2016-Ohio-5794, 70 N.E.3d 587]. The Athens County charter provides for the election of eight county officials: auditor, treasurer, prosecuting attorney, engineer, recorder, coroner, sheriff, and clerk of courts. In each case, the charter provides that the official "shall be elected, and the duties of that office, and the compensation therefore, shall continue to be determined in the manner provided by general law." This is the same language we deemed inadequate in *Coover*.

Id. at ¶ 16.

{¶ 34} In the case at bar, the trial court did not decide the matter based on the same issue as *McGinn,* but, instead, determined that the petition failed to comply with R.C. 302.02 because it fails to specify either an elective county executive or an appointive county executive. The trial court rejected appellant's argument that an executive council satisfies R.C. 302.02, and concluded that a "plain reading of R.C. 302.02 indicates that the authority of a county executive vests in an individual and not a council." Appellant, however, insists that the trial court's

interpretation conflicts with Article X, Section 3.

{¶ 35} Article X, Section 3 states, in relevant part, as follows:

> The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.

Ohio Constitution, Article X, Section 3.

{¶ 36} Article X, Section 1 further states: "The general assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government." The Ohio Constitution provides that "the powers and duties of county officers are established by the general laws of the state of Ohio," and the Constitution "does not limit the power of the General Assembly 'by general laws to provide for the * * * "government of counties"' under Section 1, Article X." *State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 704–05, 745 N.E.2d 494 (9th Dist.2000), quoting *Blacker v. Wiethe*, 16 Ohio St.2d 65, 242 N.E.2d 655 (1968), paragraph three of the syllabus.

{¶ 37} As an Ohio Attorney General opinion explains:

> The Ohio Constitution directs the General Assembly to "provide by general law for the organization and government of counties," Ohio Const. art. X, § 1, and also authorizes counties to adopt charters, Ohio Const. art. X, §§ 3 and 4. A county without a charter is a creature of statute with only those powers granted by the General Assembly. *Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582-83, 621 N.E.2d 696 (1993). A county charter, adopted under Ohio Const. art. X, § 3, must establish the form of government of the county and provide for the exercise of all powers vested in, and the performance of all duties imposed upon, counties and county officers by law.

2007 Ohio Atty.Gen.Ops. No. 2-354, 2007 Ohio Atty.Gen.Ops. No. 2007-035, 2007 WL 4916937, *5.

{¶ 38} Furthermore, in *Blacker* the Ohio Supreme Court recognized that "nothing in Article X of the Ohio Constitution * * * support[s] a reasonable conclusion that Sections 3 and 4 thereof constitute a limitation on the power of the General Assembly under Section 1 thereof by general laws to provide 'for the * * * government of counties' and for 'alternative forms of county government.'" Moreover, the Ohio Attorney General opinion states that county charters are not authorized to "adopt provisions that conflict" with the provisions of the Ohio Revised Code governing counties. 2007 Ohio Atty.Gen.Ops. No. 2-354, 2007 Ohio Atty.Gen.Ops. No. 2007-035, 2007 WL 4916937, *1.

{¶ 39} R.C. Chapter 302 applies to "alternative forms of government." R.C. 302.01 authorizes "[t]he electors of any county [to] adopt an alternative form of county government." R.C. 302.02 requires an alternative form of county government to "include either an elective county executive as provided for by section 302.15 of the Revised Code or an appointive county executive as provided by section 302.16 of the Revised Code."

{¶ 40} R.C. 302.15 states:

> In a county adopting the elective executive plan the chief executive officer shall be known as the county executive. The county executive shall be elected at the first regular county general election following the adoption of the alternative form and shall hold his office for a term of four years.

{¶ 41} R.C. 302.16 states: "In a county adopting the appointive executive plan, the county executive shall be an elector of the county and appointed by the board of county commissioners."

{¶ 42} In view of the foregoing discussion, it does not appear that appellee acted

unreasonably when it determined that appellant's petition failed to comply with R.C. 302.02. R.C. 302.02, 302.15, and 302.16 require an alternative form of county government to specify one individual to serve as the county executive and does not indicate that a group of individuals may serve as the county executive.

{¶ 43} To the extent appellant asserts that the proposed county charter does not constitute an "alternative form of government" that is not subject to R.C. Chapter 302, we observe that the trial court did not consider this particular issue. We also decline to do so in the first instance. *Portsmouth Ins. Agency v. Med. Mut. of Ohio*, 4th Dist. Scioto No. 10CA3405, 2012-Ohio-2046, 2012 WL 1623864, ¶ 86, citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (1992) (stating that "we, as an appellate court, should not first consider an argument that the trial court did not address"); *accord Neura v. Goodwill*, 9th Dist. Medina No. 11CA0052-M, 2012-Ohio-2351, 2012 WL 1925403, ¶ 19 (declining to consider issues that trial court did not); *Barnabus Consulting Ltd. v. Riverside Health Sys., Inc.*, 10th Dist. Franklin No. 07AP-1014, 2008-Ohio-3287, 2008 WL 2588579, ¶ 28 (explaining that because appellate court "is a reviewing court, we generally do not consider for the first time on appeal issues that the trial court did not decide").

{¶ 44} Accordingly, based upon the foregoing reasons, if this matter presented a viable case or controversy, we would nevertheless overrule appellant's first assignment of error.

B.

{¶ 45} In its second, third, and fourth assignments of error, appellant raises various constitutional challenges. We do not believe, however, that we needed to address the constitutional arguments.

{¶ 46} In *McGinn*, the court noted that the relators (again, the individuals comprising the committee, appellant herein) raised constitutional arguments. The court determined that its finding that appellee "had the authority to find the[] petition[] invalid under pre-H.B. 463 law" meant that the court did not need to address the constitutionality of the statutory amendments. *McGinn* at ¶ 24. The court also noted that courts will "decide constitutional issues only when absolutely necessary." *Id.*, quoting *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 48, quoting *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 7, 716 N.E.2d 1114 (1999); *accord Hall China Co. v. Pub. Utilities Commission*, 50 Ohio St.2d 206, 210, 4 O.O.3d 390, 364 N.E.2d 852 (1977), citing *State ex rel. Herbert v. Ferguson*, 142 Ohio St. 496, 52 N.E.2d 980 (1944) ("Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary.").

{¶ 47} Again, if at this juncture this matter presented a viable case or controversy, we believe that we need not consider appellant's various constitutional arguments. Instead, the conclusion that neither appellee nor the trial court acted unreasonably in determining that the petition is invalid for failing to designate a county executive would be dispositive of this appeal.

C.

{¶ 48} In summary, based upon the foregoing reasons, we conclude that, absent an exception to the mootness doctrine, the instant appeal must be dismissed because it no longer presents a viable case or controversy. Moreover, had we considered the assignments of error, in view of the foregoing reasoning we would find no merit in appellant's second, third, and fourth assignments of error.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J., Abele, J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Jason P. Smith, Presiding Judge

BY: _____
Peter B. Abele, Judge

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.