

IN THE SUPREME COURT OF OHIO

STATE EX REL. IRENE GIL-LLAMAS, et al., :
: **CASE NO. 2020-1466**
Relators, :
: **ORIGINAL ACTION IN MANDAMUS**
v. :
: **PURSUANT TO ALTERNATIVE**
SHANNON G. HARDIN, et al., : **WRIT UNDER S. CT. PRAC. R. 12.05**
: **Respondents.** :

MERIT BRIEF OF RELATORS

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I. STATEMENT OF THE CASE AND FACTS

On December 4, 2020, this action was brought in the name of the State of Ohio, on the relation of Irene Gil-Llamas, Christina L. Gonzaga, Tyrone Spence, Udell Hollins, and ProEnergy Ohio, LLC (“Relators”), who petitioned this Court for a writ of mandamus compelling the Respondents to submit Relators’ proposed Columbus City Ordinance for a vote of the electors in the May 4, 2021 Primary Election.

In their complaint, Relators invoked the jurisdiction of this Court under Article IV, Section 2(B) of the Ohio Constitution to hear original actions in mandamus. Relators also invoked the jurisdiction of this Court under R.C. 2731.02, which provides that “[t]he writ of mandamus may be allowed by the supreme court . . . and shall be issued by the clerk of the court in which the application is made . . . on the information of the party beneficially interested” (Complaint, at ¶¶1-2).

In her evidence affidavit, Irene Gil-Llamas states that she is chairperson of the committee formed by ProEnergy Ohio, LLC under Ohio Rev. Code §3519.02 to circulate a petition for the proposed Columbus City Ordinance, represent the petitioners of the proposed Columbus City Ordinance, and support its passage by the electors (Gil-Llamas Aff. [Exh. 8], at ¶6). Ms. Gil-Llamas is chairperson of the Petition Committee and a signatory of the petition. She is a resident and elector of the City of Columbus, Ohio, and is a resident and elector State of Ohio (Gil-Llamas Aff. [Exh. 8], at ¶¶6-7).

There are five additional members of the Petition Committee who are also signatories of the Charter Amendment petition. They are: Christina L. Gonzaga, Tyrone Spence, Udell Hollins, Dolores A. Williams, and Jabaridiki Gregg. When the petition for the proposed Columbus City Ordinance was circulated, each of them was a resident and elector of the City of Columbus, Ohio,

and a resident and elector State of Ohio. Dolores A. Williams died on November 25, 2020. Ms. Gil-Llamas is authorized by the members of the Petition Committee to act on their behalf and as their representative in all matters regarding the circulation, filing, and litigation of the petition (Gil-Llamas Aff. [Exh. 8], at ¶¶8-9).

Shannon G. Hardin, Rob Dorans, Elizabeth Brown, Mitchell J. Brown, Shayla Favor, Emmanuel V. Remy, and Pricilla R. Tyson are the duly elected and acting members of the Columbus City Council and have the duty to submit proposed charter amendments that are legally sufficient to a vote of the electors of the city as prescribed by Columbus City Charter Section 45-1. Ms. Gil-Llamas has acted with the utmost diligence in bringing this action, there has been no unreasonable delay or lapse of time in asserting their rights herein, and there is no prejudice to the Columbus City Council (Gil-Llamas Aff. [Exh. 8], at ¶¶4, 10).

On October 22, 2020, Ms. Gil-Llamas filed a petition, including all separate part-petitions, with the Columbus City Clerk to place the proposed Columbus City Ordinance on the May 4, 2021 Primary Election ballot. (She authenticated Exhibit 1 of Relators' Evidence as a true and correct copy of this petition.) The proposed Columbus City Ordinance authorized and directed the City Auditor to establish an Energy Conservation and Energy Efficiency Fund and a Clean Energy Education and Training Fund, to take the necessary actions to transfer \$10,000,000 from the general fund of the City of Columbus to each of these funds for a total of \$20,000,000 for the appropriate purposes; to take the necessary actions to transfer \$10,000,000 from the general fund of the City of Columbus for the purpose of funding a minority business development program; to establish a Columbus Clean Energy Partnership Fund; to take the necessary actions to transfer of \$57,000,000 from the general fund of the City of Columbus for the purpose of funding an electricity subsidy program for residents of the City of Columbus; to establish a transparency and

accountability reporting requirement for the City Auditor for all uses of such funds (Gil-Llamas Aff. [Exh. 8], at ¶¶3, 11).

Ms. Gil-Llamas received a receipt from the Columbus City Clerk for the petition that she filed on October 22, 2020. (She authenticated Exhibit 2 as a true and correct copy of this receipt.) After she filed the petition, the Columbus City Clerk delivered it to the Franklin County Board of Elections on October 29, 2020. On November 9, 2020, the Franklin County Board of Elections certified that it examined the Relators’ petition for their proposed Columbus City Ordinance and found that the petition contained 6,650 valid signatures. (Ms. Gil-Llamas authenticated Exhibit 3 as a true and correct copy of this certification.) The petition filed with the Columbus City Clerk contained a sufficient number of valid signatures under Columbus City Charter Section 43 to place their proposed Columbus City Ordinance on the May 4, 2021 Primary Election ballot (Gil-Llamas Aff. [Exh. 8], at ¶¶12-13, 17-18).

According to Columbus City Charter Section 42-2, “[e]ach petition for a proposal initiated by a citizen shall comply with the [Charter] as to form . . .” Relators’ petition satisfies the requirements of Columbus City Charter Section 42-2 governing the form of the petition because: (a) the petition is not required to mention creating a Minority Business Enterprise Clean Energy Development Fund; (b) the phrase “funding minority business programs” in Relators’ petition does not contradict its proposed creation of a Minority Business Enterprise Clean Energy Development Fund; (c) the petition does not propose the delegation of any municipal agency’s contracting authority to a private party; and (d) the petition does not propose waiving competitive bidding provisions in the Columbus City Code (Gil-Llamas Aff. [Exh. 8], at ¶¶15-16).

Columbus City Charter Section 43-1 says in relevant part that:

Upon receipt of the report regarding the validation of signatures, the city clerk shall read a summary of the same into the record. Within

fourteen days thereafter, the council shall determine the sufficiency of the petition by ordinance.

On November 16, 2020, the Columbus City Clerk read the signature validation report on the petition into the record. (Ms. Gil-Llamas authenticated Exhibit 5 as a true and correct copy of this record.) According to Columbus City Charter Section 42-11, “Council action on a petition for any proposed ordinance, referendum, or charter amendment shall be by ordinance [upon] . . . determining the legal sufficiency thereof” (Gil-Llamas Aff. [Exh. 8], at ¶¶19-21).

On November 6, 2020, the Columbus City Attorney issued a memorandum in which he wrongly opined that the petition was legally deficient (Gil-Llamas Aff. [Exh. 8], at ¶14). The memorandum warned that any action by Columbus City Council be limited to matters of form. (Ms. Gil-Llamas authenticated Exhibit 4 as a true and correct copy of this memorandum.)

On November 25, 2020, Shannon G. Hardin, Rob Dorans, Elizabeth Brown, Mitchell J. Brown, Shayla Favor, Emmanuel V. Remy, and Priscilla R. Tyson reported that they enacted legislation rejecting the petition for the proposed Columbus City Ordinance as “not legally sufficient”. (Ms. Gil-Llamas authenticated Exhibit 6 as a true and correct copy of this report.) Said legislation ordered that the proposed Columbus City Ordinance “shall not be submitted to the electors of the City of Columbus”, preventing the Franklin County Board of Elections from placing the proposed Columbus City Ordinance on the May 4, 2021 Primary Election ballot. (Ms. Gil-Llamas authenticated Exhibit 7 as a true and correct copy of this legislation.) This legislation was not limited to matters of form, but included matters of substance and made judicial or quasi-judicial determinations (Gil-Llamas Aff. [Exh. 8], at ¶¶22-24).

By enacting said legislation, Columbus City Council unlawfully invaded matters of substance and unconstitutionally engaged in judicial or quasi-judicial determinations. Columbus

City Council lacks authority to exclude the proposed Columbus City Ordinance from the May 4, 2021 Primary Election ballot (Gil-Llamas Aff. [Exh. 8], at ¶¶25-26).

In their capacity as the Columbus City Council, Shannon G. Hardin, Michael Stinziano, Elizabeth Brown, Mitchell J. Brown, Jaiza Page, Emmanuel V. Remy, and Pricilla R. Tyson have a clear legal duty under the Columbus City Charter and the Constitution and laws of the State of Ohio to submit the proposed amendment to the Columbus City Charter for a vote of the electors in the May 4, 2021 Primary Election. Ms. Gil-Llamas has a clear legal right under the Columbus City Charter and the Constitution and laws of the State of Ohio to have the proposed Columbus City Ordinance placed on the ballot for a vote of the electors in the May 4, 2021 Primary Election (Gil-Llamas Aff. [Exh. 8], at ¶¶27-28).

Relators' complaint prayed for peremptory and alternative writs of mandamus. Respondents countered with a motion to dismiss filed on December 28, 2020. On February 4, 2021, this Court denied the motion to dismiss and granted the Relators an alternative writ. This matter is now before the Court for a decision on the merits.

II. LAW AND ARGUMENT

Proposition of Law No. 1: Relators are entitled to a peremptory writ of mandamus because: (1) Relators have a clear legal right to propose a municipal ordinance by initiative, (2) Respondents have a clear legal duty to place the proposed ordinance on the ballot, and (3) Relators lack an alternate remedy at law.

A relator is entitled to a peremptory writ of mandamus if he proves by clear and convincing evidence: (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondents to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. State ex rel. Waters v. Spaeth, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, at ¶¶ 6, 13. For an alternate remedy to constitute an adequate remedy at law, it must be “complete,

beneficial, and speedy”. State ex rel. Smith v. Cuyahoga Cty. Court of Common Pleas, 106 Ohio St.3d 151, 2005-Ohio-4103, 832 N.E.2d 1206, at ¶19.

Relators lack such a remedy because they cannot appeal the Respondents’ refusal to place their proposed ordinance on the ballot. Mandamus is an appropriate remedy to correct an exercise of discretion by public officials that is not appealable. State ex rel. Ohio Liberty Council v. Brunner, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, at ¶27.

To satisfy the other requirements for a writ, the respondents must have abused their discretion or acted in clear disregard of law. State ex rel. Jacquemin v. Union Cty. Bd. of Elections, 147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759, at ¶9. In the present case, the Respondents have acted contrary to law.

Columbus City Charter Section 43-1 provides in relevant part that:

Upon receipt of the report regarding the validation of signatures, the city clerk shall read a summary of the same into the record. Within fourteen days thereafter, the council shall determine the sufficiency of the petition by ordinance. Should the council find such petition sufficient, it shall vote within thirty days to either adopt the proposed ordinance without alteration, or by ordinance forthwith order and provide for the submission of such proposed ordinance in its original form to a vote of the electors of the city.

In this context, the word “shall” is mandatory. See State ex rel. Committee for Charter Amendment Petition v. City of Avon, 81 Ohio St.3d 590, 693 N.E.2d 205 (1998). Absent a petition insufficiency, the Relators possess a right to have their proposed Ordinance to the voters.

Article II, Section 1f of the Ohio Constitution reserves to the people a right to propose municipal ordinances by initiative. It provides that: “The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.” An action is legislative if it involves

enacting a law, ordinance, or regulation. State ex rel. City of Brecksville v. Husted, 133 Ohio St.3d 301, 2012-Ohio-4530, 978 N.E.2d 157, at ¶11. In the present case, Relators’ petition proposes an Ordinance appropriating funds and creating programs underwritten by those appropriations. This is legislative action.

It is well-settled that “although the Ohio Constitution grants broad powers of local self-government to municipalities, the scope of those powers is not without limits.” Buckeye Community Hope Found. v. City of Cuyahoga Falls, 82 Ohio St.3d 539, 541, 697 N.E.2d 181, 182 (1998). Even if Article II, Section 1f of the Ohio Constitution is not self-executing, this Court has cautioned that:

both the statutory procedures enacted by the General Assembly to carry into effect Section 1f, Article II, ***and provisions enacted by charter municipalities to do the same***, must be consistent with the specific powers granted by Section 1f, Article II, since it is the sole constitutional source for referendum and initiative powers. Otherwise, the meaning of any constitutional provision that is not self-executing, and therefore requires ancillary legislation, could be altered by the words of the legislation carrying the provision into effect.

Buckeye Community, 82 Ohio St.3d at 543, 697 N.E.2d at 183 (emphasis added). That the powers set forth in Article II, Section 1f of the Ohio Constitution “shall be exercised in the manner . . . provided by law” does not mean that a municipality can obstruct the people’s right to propose ordinances by initiative. A proposed ordinance cannot be barred from the ballot by alleging that the initiative petition’s content is illegal. State ex rel. DeBrosse v. McCool, 87 Ohio St.3d 1, 6, 716 N.E.2d 1114, 1117 (1999).

A city council’s constitutional authority to review the legal sufficiency of an initiative petition is limited to matters of form and not substance, cannot involve judicial or quasi-judicial determinations, and does not permit inquiring into questions not apparent on the face of the petition

itself. State ex rel. N. Main Street Coalition v. Webb, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, at ¶30. Thus, a city council’s authority to review is limited to the sufficiency of a petition on its face and does not include an analysis of its substantive merit. State ex rel. Polcyn v. Burkhardt, 33 Ohio St.2d 7, 10-11, 292 N.E.2d 883, 885 (1973). Respondents have violated these limitations in the present case.

Columbus City Charter Section 42-11 provides in relevant part that, “No city officer may consider the subject matter of a petition when determining the legal sufficiency thereof, except as required to assure compliance with applicable provisions of this charter, general laws of the state, or ordinance of council.” According to the Columbus City Attorney, “Section 42-11 does not alter the long-established law that a city council’s constitutional authority to review the sufficiency of petitions is limited to matters of form, not substance” (Relators’ Exh. 4, at p. 2).

Nonetheless, Respondents enacted legislation rejecting Relators’ initiative petition as “not legally sufficient”, and ordered that the proposed Ordinance “shall not be submitted to the electors of the City of Columbus” (Relators’ Exh. 7, at p. 3). Respondents’ legislation justified this action by asserting that Relators’ petition “fail[ed] to meet the mandatory minimum legal requirements established by the people in the Ohio Constitution, the Ohio Revised Code and the Charter of the City of Columbus” (Relators’ Exh. 7, at p. 2).

In its preamble, Respondents’ legislation asserted that “the City Attorney has advised this Council that the aforementioned petition is not legally as sufficient as to form” (Relators’ Exh. 7, at p. 2). This does not appear again in the body of Respondents’ legislation. A preamble is not part of the legislation. State ex rel. Laughlin v. James, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145, at ¶29. See also Village of New Richmond v. Greene, 12th Dist. Clermont No. CA2003-05-045, 2004-Ohio-3540, at ¶18 (“[t]he preamble is not part of the ordinance itself”).

Under the rules of statutory construction, a court’s duty is “to give effect to the words used, not to delete words that were used or insert words that were not used.” State v. Reed, S.Ct. No. 2019-631, 2020-Ohio-4255, 2020 WL 5153707, at ¶29. The body of Respondents’ legislation asserted that the petition’s content was illegal and did not include, or limit itself to, a finding that the petition was legally insufficient as to form. Those words cannot now be inserted in an effort to construe the meaning of said legislation.

In the absence of words to the contrary, Respondents’ legislation must be construed as asserting that Relators’ petition failed to meet *substantive* legal requirements. Finding that an initiative petition fails to meet substantive legal requirements necessarily involves judicial or quasi-judicial determinations. Webb, at ¶31. Respondents’ legislation is in clear disregard of law.

Relators have a clear legal right to propose a municipal ordinance by initiative under Article II, Section 1f of the Ohio Constitution. Respondents have a clear legal duty to place the proposed ordinance on the ballot, and cannot refuse to do so because the initiative petition allegedly fails to meet substantive legal requirements. Relators cannot appeal the Respondents’ refusal to place their proposed ordinance on the ballot. Therefore, the Relators are entitled to a peremptory writ of mandamus.

a. Relators’ initiative petition did not violate Columbus City Charter Section 42-2(e).

Columbus City Charter Section 42-2 provides in relevant part that:

Each petition for a proposal initiated by a citizen shall comply with the following as to form and with general laws of the state, unless otherwise provided by this charter or ordinance of council:

- (e) The title of the proposal shall clearly and without argument describe the proposed ordinance, referendum, recall, or charter amendment, and such title shall be placed, in at least fourteen-point font, on the top of each page of a part-petition, which pages shall be numbered sequentially.

Without citing any supporting legal authorities, the Columbus City Attorney opined that Relators' initiative petition "failed to comply with paragraph (e) of Section 42-2" (Relators' Exh. 4, at p. 2).

Relators' petition did indeed comply with Columbus City Charter Section 42-2(e). A title is only required to unambiguously present the issue and not mislead electors. See State ex rel. Hazel v. Cuyahoga Cty. Bd. of Elections, 80 Ohio St.3d 165, 167-168, 685 N.E.2d 224, 226-227 (1997). The title of Relators' petition was not ambiguous or misleading by excluding an explicit reference to a Minority Business Enterprise Clean Energy Development Fund. Relators' petition does not propose the delegation of any municipal agency's contracting authority to a private party. Relators' petition does not propose waiving competitive bidding provisions in the Columbus City Code. Complaint, at ¶18.

Moreover, this issue is irrelevant. The issue is whether Respondents' legislation asserts that Relators' petition failed to meet *substantive* legal requirements. Since it does, Respondents' legislation is unconstitutional and cannot bar placing the proposed Ordinance on the May 4, 2021 Primary Election ballot.

III. CONCLUSION

For the foregoing reasons, the Relators request that this Court issue judgments, orders, and/or writs granting them the following relief:

a. A peremptory writ of mandamus ordering Respondents Shannon G. Hardin, Rob Dorans, Elizabeth Brown, Mitchell J. Brown, Shayla Favor, Emmanuel V. Remy, and Pricilla R. Tyson, acting as Columbus City Council, to submit Relators' proposed Columbus City Ordinance for a vote of the electors in the May 4, 2021 Primary Election;

- b. An order, if necessary, that Relators' petition complied with the requirements of Columbus City Charter Section 42-2(e);
- c. A judgment or order assessing the costs of this action against the Respondents;
- d. A judgment or order awarding the Relators their reasonable attorneys' fees, costs, and expenses; and
- e. A judgment or order granting the Relators such other relief that this Court deems just and proper

Respectfully submitted,

/s/Robert J. Fitrakis

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent on February 16, 2021 by electronic mail to Richard N. Coglianese, Esq. (rncoglianese@columbus.gov) and to Rebecca E. Wilson, Esq. (reewilson@columbus.gov), 77 North Front Street, 4th Floor, Columbus, OH 43215, Attorneys for Respondents.

/s/Robert J. Fitrakis

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