

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL., MIKE BURKONS,  Relator / Appellant,  vs.  CITY OF BEACHWOOD,  Respondent / Appellee.	Case No. 2021-0605  On Appeal from the Cuyahoga County Court of Appeals Eighth Appellate District  Court of Appeals No. CA-20-110139  <b>Appellant's Merit Brief</b>
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## **I. Introduction**

This case is based on a simple principle: The City of Beachwood's charter and code of ordinances contain specific provisions controlling the appointment of attorneys to represent the City, and an attorney may not represent the City unless these provisions are followed. These statutes ensure that attorneys who represent the City's interests are ultimately answerable to the City's elected officials and accountable to its taxpayers.

Relator Mike Burkons, a Beachwood resident and elected councilperson, filed this original action for a writ of mandamus compelling City officials to fulfill their clear legal duties to enforce the charter and code by terminating "special prosecutor" Stephanie Scalise, who has purported to represent the City in filing criminal charges against Burkons despite lacking the necessary authority under the charter and code to do so.

This appeal is necessary to correct the Eighth District's error in dismissing Burkons' writ action on the basis that because Burkons was a defendant in criminal proceedings that the unauthorized prosecutor had wrongly instituted, he therefore had "an adequate remedy at law by filing a motion to dismiss or to remove counsel in the trial court with a right to appeal that decision, if necessary, at the conclusion of the proceedings." **Appendix**, p. A-07, 3/24/2021 JE and Opinion, *State ex rel. Burkons v. City of Beachwood*, 8th Dist. Cuyahoga No. 110139, 2021-Ohio-950, ¶ 13.

The Eighth District's ruling must be reversed because Burkons' standing as a Beachwood taxpayer to seek a writ of mandamus exists independently of his status as a defendant wrongly charged by an unauthorized prosecutor purporting to act on behalf of the City. This Court's precedent is properly clear that citizens retain the "right to proper execution of charter ... provisions, regardless of any private or personal

benefit[.]" *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 473, 715 N.E.2d 1062, citing *State ex rel. Cater v. City of N. Olmsted*, 69 Ohio St.3d 315, 322–323, 1994-Ohio-488, 631 N.E.2d 1048; *State ex rel. White v. Cleveland*, 34 Ohio St.2d 37, 37, 295 N.E.2d 665 (1973) ("Where a statute establishes a public right and imposes upon a public officer a duty, which such officer fails or refuses to perform, any taxpayer, who, in his own name, undertakes to compel performance of such duty, regardless of personal or private motive or advantage, and successfully maintains a mandamus action, pursuant to R. C. 733.59, acts on behalf of the municipality and bestows a public benefit.").

In other words, a defendant's right to appeal the result of an unauthorized prosecution is no remedy at all for the fact that the prosecutor had no right to act on the City's behalf in the first place. Thus, here, "where the remedy sought is against an officer or board who failed to perform a duty expressly enjoined by law or ordinance," "mandamus alone is the remedy." *Fischer v. Damm*, 36 Ohio App. 515, 524, 173 N.E. 449 (8th Dist. 1930).

For these reasons, discussed fully below, Burkons therefore requests that this Court reverse the Eighth District's decision dismissing Burkons' writ action and remand to the Eighth District for further proceedings.

## **II. Standard of Review**

A court of appeals may not dismiss a mandamus action under Civ.R. 12(B)(6) unless, "after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the relator's favor, it appears beyond doubt that [the relator] can prove no set of facts entitling him to the requested writ of mandamus." *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. The Supreme Court "review[s] *de novo* a decision of the court of appeals granting a motion

to dismiss under Civ.R. 12(B)(6)." *State ex rel. Nyamusevya v. Hawkins*, 2021-Ohio-1122, ¶ 10, citing *State ex rel. Brown v. Nusbaum*, 152 Ohio St.3d 284, 2017-Ohio-9141, 95 N.E.3d 365, ¶ 10.

"In order to establish a claim in mandamus, it must be proved that there exists a clear legal duty to act on the part of a public officer or agency, and that the relator has no plain and adequate remedy in the ordinary course of the law." *State ex rel. Alford v. Willoughby Civ. Serv. Com.*, 58 Ohio St.2d 221, 223-224, 390 N.E.2d 782 (1979). Because dismissals based on the purported existence of an adequate remedy at law require "a judgment on the merits," such dismissals are "'ill-conceived'" under Civ.R. 12(B)(6). *State ex rel. Birdsall v. Stephenson*, 68 Ohio St.3d 353, 355, 1994-Ohio-520, 626 N.E.2d 946, quoting *Assn. for Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292, 1293 (1989).

Thus, "a complaint for a writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for the relator with sufficient particularity to put the respondent on notice of the substance of the claim(s) being asserted against it, and it appears that the plaintiff might prove some set of facts entitling him to relief."

*State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 95, 1995-Ohio-202, 647 N.E.2d 788.

### **III. Statement of Facts**

- A. Beachwood's charter and code provide that an attorney may not represent the city in any legal proceeding unless the representation is specifically authorized "by ordinance of Council," and Council and the Mayor are required by the charter to enforce the City's laws.**

Art. V, Section 2.3 of the Beachwood charter provides that the "Law Director ... shall represent the City in all proceedings in court or before any administrative body"

and “shall act as the City’s prosecuting attorney before the Mayor’s Court, Municipal Court, and upon appeals.” R. 1, Complaint, p. 5, ¶ 23, quoting Ex. G, p. 6. This provision also requires that “The Law Director shall perform all duties required by th[e] Charter, the Mayor, and Council and all other duties now or hereafter imposed by law upon legal counsel for cities *unless otherwise provided by Ordinance by Council.*” *Id.* (Emphasis added).

Similarly, Section 133.02 of the Beachwood code of ordinances mandates that the law director “shall represent the [City] in all proceedings in court or before any administrative board or commissions” and “perform all other duties now or hereafter imposed ... *unless otherwise provided by ordinance of Council[.]*” R. 1, Complaint, p. 6, ¶ 24, quoting Ex. G, p. 12 (Emphasis added).

Section 133.03 of the code, which specifically pertains to the “hiring of assistants or special counsel,” states that “[w]hen it becomes necessary or advisable, *in the opinion of Council*, to employ assistants and/or special counsel to assist the Law Director in the performance of h[er] duties, council may employ such assistants and/or special counsel... and agree to pay such assistants and/or special counsel such reasonable compensation *as shall be approved by Council.*” R. 1, Complaint, p. 6, ¶ 25, quoting Ex. G, p. 12 (Emphasis added).

Additionally, the charter imposes upon both council and the mayor an affirmative duty to ensure that the above provisions are enforced. *Id.*, p. 6, ¶ 26, quoting Ex. G, p. 3, Charter, Art. III, Sec. 5.3 (I) (“Council shall... make provision for: ... Such legislation, rules, and / or regulations, or other acts ... to implement the Charter”); *Id.*, quoting Ex. G, p. 5, Art. IV Sec. 4.3 (“The Mayor shall require that all laws, Ordinances, Resolutions, and Regulations are enforced.”).

B. **Conflicted attorneys in Beachwood’s law department secretly engaged Stephanie Scalise as a “special prosecutor” for Beachwood without the required Council approval, and then attempted to sanitize the unlawful engagement by a misleading request that the Shaker Heights Municipal Court approve it.**

On September 14, 2020, after Burkons was charged with one count of interfering with civil rights under R.C. 2921.45, Beachwood’s Law Department, through Assistant Law Director Nathalie Supler, filed a motion to withdraw as prosecutor from the criminal proceedings that she—despite her admitted conflict of interest—instigated against Burkons in the Shaker Heights court in Case No. 20-CRB-00722. R. 1, Complaint, pp. 7–8, ¶ 30, citing Ex. B, Ex. 2, pp. 2—3 (“[T]his motion is necessary to avoid any appearance of impropriety or a suggestion of conflicting interest.”). The motion also asked the court to appoint “Stephanie Scalise as Special Prosecutor for all matters concerning the prosecution of the above matter,” based on the misrepresentation that the City had already “engaged” Scalise, omitting the material fact that this engagement was not authorized by Council as required by the Charter and Code. *Id.*

Following Supler’s representation that the City had already engaged Scalise to act on its behalf, the Shaker court granted the motion, stating only that “Beachwood city prosecutor[’]s motion to withdraw from case is granted.” R. 1, Complaint, p. 8, ¶ 31, quoting Ex. B, Ex. 2, p. 1.<sup>1</sup>

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<sup>1</sup> While the prosecution against Burkons was originally instituted in the Shaker Heights Municipal Court (No. 20-ARW-00001), the Shaker court immediately transferred the case, *sua sponte*, to the Chardon Municipal Court (No. 20-CRB-00858), based on a finding that “it appears that a fair and impartial trial cannot be held in this court.” Burkons then sought dismissal of the case in the Chardon court because “R.C. 1901.20 provides that municipal courts have subject-matter jurisdiction in criminal matters only when the crime was committed ‘within its territory’ or ‘within the limits of its territory.’” *Cheap Escape Co. v. Haddox, LLC*, 120 Ohio St. 3d 493, 2008-Ohio-6323, 900 N.E.2d 601, ¶ 18, ¶ 22. After the Chardon court denied his motion to dismiss, Burkons sought and obtained from the 11th District Court of Appeals a permanent writ of prohibition preventing the Chardon court from continuing to unlawfully exercise

It is undisputed that the conflicted Beachwood attorneys retained Scalise to represent the City in reviewing a criminal complaint against Burkons without Council approval, and without a formal engagement agreement. *Id.*, ¶ 29, ¶ 32, citing Ex. B; See also R. 8, Beachwood's Motion to Dismiss, p. 2 ("[T]he City of Beachwood Law Department, to avoid an inherent conflict of interest, requested that University Heights Prosecutor Stephanie Scalise (who agreed to provide 'mutual aid' assistance without compensation) gather and review relevant evidence and make an independent probable cause determination of possible criminal conduct."). And it may be reasonably inferred that the conflicted Beachwood lawyers engaged Scalise precisely because they knew they could influence her into filing the baseless and politically motivated charges against Burkons, thus underscoring the importance of the charter and code provisions at issue. R. 1, Complaint, p. 7, ¶ 29, citing Ex. B, pp. 2—5.

**C. Because Beachwood officials refused to terminate Scalise's unauthorized representation of the City, Burkons sought mandamus relief on behalf of Beachwood's taxpayers to compel compliance with the City's laws governing attorney appointments.**

On October 22, 2020, Burkons served upon Diane Calta, Beachwood's Law Director, a written taxpayer demand under R.C. 733.56 and 733.59 that the City "immediately seek an injunction against or otherwise terminate 'special prosecutor' Stephanie Scalise's unauthorized representation of the City in the criminal prosecution she has instituted against Burkons currently pending in the Chardon Municipal Court (Case No. 2020-CR-B-0858)." R. 1, Complaint, p. 4, ¶ 13, quoting Ex. B, p. 1.

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jurisdiction over him. *State ex rel. Burkons v. Hon. Terri Stupica*, 11th Dist. Geauga No. 2020-G-0274, 3/22/2021 JE and opinion.

On November 2, 2020, Burkons received correspondence from attorney Kenneth Fisher, who claimed to represent Beachwood regarding Burkons' taxpayer demand, in which Fisher asserted that the "allegations against the City ... and Law Director Calta are without merit and any Taxpayer Action is without legal or factual basis," thereby making clear that the City would not take action in response to Burkons' taxpayer demand." R. 1, Complaint, p. 4, ¶ 14, quoting Ex. C, p. 3. Accordingly, on November 19, 2020, Burkons sent additional correspondence to Fisher communicating that "[b]ased on the lack of response from the City ... [Burkons] will proceed on the understanding that [his] written demand ... submitted to the Beachwood Law Director on October 22 will not be met by the City." R. 1, Complaint, p. 4, ¶ 15, quoting Ex. D. Burkons also indicated that he was "demanding under R.C. 733.56 that the Law Director file an action to enjoin Ms. Scalise's unauthorized representation of" Beachwood and "under R.C. 733.58 that the Mayor and City Council use their affirmative powers under the Charter and Code ... to immediately terminate [Scalise's] unauthorized representation ..." *Id.*

When, by November 30, 2020, Burkons had received no response from Beachwood officials, he sent a follow-up demand directly to Mayor Horwitz and Council, demanding that they fulfill their duties under the Charter to terminate Scalise's unauthorized representation of Beachwood. R. 1, Complaint, pp. 4–5, ¶ 16, citing Ex. E. Because this demand, too, went unanswered, Burkons sent a final demand, reiterating his request that Scalise's unauthorized representation of the City be terminated, and further demanding the same of Fisher, who was similarly unauthorized to represent Beachwood since Council had not authorized him by ordinance as required by the Charter and Code. R. 1, Complaint, p. 5, ¶ 17, citing Ex. F.

Because City officials have failed to fulfill their duty to enforce the charter and code by terminating Scalise's unlawful representation of Beachwood, Burkons filed this

action for a writ of mandamus to compel the same. R. 1, Complaint; R. 2, Motion for Peremptory or Alternative Writ, pp. 1–2.

D. **The Eighth District Court erroneously dismissed Burkons' complaint based on a finding that Burkons "has an adequate remedy at law to contest the appointment" by way of motion practice or appeal in the criminal proceedings instituted by the unauthorized prosecutor.**

On March 24, 2021, the Eighth District dismissed Burkons' complaint. **Appendix**, p. A-01, 3/24/2021 JE and Opinion, *State ex rel. Burkons*, 2021-Ohio-950. In its opinion, the Eighth District concluded that Burkons had "laid the necessary groundwork for a taxpayer's action by mailing a demand to the Beachwood Law Director[]," setting forth a claim that City officials have "the duty to remove [Scalise] from representing Beachwood[,"] and that Burkons, as a taxpayer, "has the right to have her removed because her actions are not authorized by Council." *Id.*, ¶ 11. The court nevertheless dismissed the complaint, relying on three inapposite opinions from quo warranto cases to support its holding that "mandamus is unavailable because there is an adequate remedy at law by filing a motion to dismiss or to remove counsel in the trial court with a right to appeal that decision, if necessary, at the conclusion of the proceedings." *Id.*, ¶ 13, *et seq.* The court added that "the procedural posture of a taxpayer's mandamus action is not a distinguishable factor; relator Burkons has an adequate remedy at law to contest the appointment." *Id.*, ¶ 15.

As explained fully below, this opinion should be reversed. Mandamus is plainly the appropriate remedy to compel compliance with Beachwood's charter and code here, and Burkons standing as a taxpayer to enforce the City's laws governing the appointment of attorneys exists independently of his status as a defendant charged by an attorney purporting to act on the City's behalf without authority to do so.

#### IV. Argument

**Proposition of Law:** A plaintiff asserting taxpayer standing under R.C. 733.59 to prevent an attorney from acting on a City's behalf without the necessary authority under the City's laws does not have an "adequate remedy at law" by virtue of his status as a defendant in a separate case who has been prosecuted by the unauthorized attorney. The right to challenge and appeal the unauthorized prosecution is no remedy at all for the fact that the prosecutor has no right to act on the City's behalf in the first place.

**A. Mandamus relief is appropriately granted when an alternate remedy will not provide the complaining party with complete relief from the harm done.**

"It is well established that in order for a writ of mandamus to issue, the relators must show ... '(1) that they have a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relators have no plain and adequate remedy in the ordinary course of the law.'" *State ex rel. Butler v. Demis*, 66 Ohio St.2d 123, 124, 420 N.E.2d 116 (1981), quoting *State ex rel. Akron Fire Fighters v. Akron*, 54 Ohio St.2d 448, 450 (1978).

"The mere existence of another remedy does not bar the issuance of a writ of mandamus." *Demis*, 66 Ohio St.2d 123, 124. Instead, to bar mandamus relief, the "available remedy must be adequate under the circumstances of the case." *State ex rel. Ohio State Racing Com. v. Walton*, 37 Ohio St.3d 246, 248, 525 N.E.2d 756 (1988). The remedy of "an appeal is inadequate if not 'complete in its nature, beneficial and speedy.'" *State ex rel. Horwitz v. Court of Common Pleas*, 65 Ohio St.3d 323, 328, 603 N.E.2d 1005 (1992), quoting *State ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St.2d 102, 104, 488 N.E.2d 883 (1986); *See also Demis*, 66 Ohio St.2d 123, 124 ("Relators may have a remedy of appeal, but such a remedy is not *adequate* under the circumstances. If [an indigent defendant] must wait for an appeal to establish their alleged right ... they will be denied the opportunity to have the attorney-client relationship of their own choosing throughout the course of the adjudication and disposition of their cases.").

Additionally, this Court has long recognized that “when a suit in mandamus seeks to require a public officer to perform the duty imposed upon such officer by law, the relator has no adequate remedy at law, unless a legal remedy other than mandamus will require the officer to perform in effect the specific act which the law requires the officer to do.” *State ex rel. Merydith Const. Co. v. Dean*, 95 Ohio St. 108, 122–123, 116 N.E. 37 (1916), citing *Babcock v. Goodrich*, 47 Cal. 488, 508 (1874) (“To supersede the remedy by mandamus, a party must not only have a specific, adequate legal remedy, but one competent to afford relief upon the very subject of his application.”).

**B. Burkons’ right as a Beachwood citizen to enforce the Beachwood Charter to ensure that only properly authorized prosecutors act on the City’s behalf exists independently from his status as a defendant who has been unlawfully charged by an unauthorized prosecutor.**

When a “city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation.” R.C. 733.59. “The word ‘taxpayer,’ as used in Section 733.59 ... contemplates and includes any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a private right of action on behalf of and for the benefit of the public[.]” *State ex rel. Nimon v. Springdale*, 6 Ohio St.2d 1, paragraph 2 of the syllabus (1966).

Mandamus relief is the proper mechanism “to force compliance with charter provisions” because, if public officials “can ignore, with impunity, the mandates of a constitution or city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely.” *State ex rel. Cater v. City of N. Olmsted*, 69 Ohio St.3d 315, 323, 1994-Ohio-488, 631 N.E.2d 1048, quoting *Cleveland ex rel. Neelon v. Locher*, 25 Ohio St.2d 49, 52, 266 N.E.2d 831 (1971). “[W]here

the question is one of public right and the object of the mandamus is to procure the enforcement of public duty, the people are regarded as the real party" in the case. *State ex rel. White v. Cleveland*, 34 Ohio St.2d 37, 40, 295 N.E.2d 665 (1973), quoting *Nimon*, 6 Ohio St.2d 1, 4; 35 OHIO JURISPRUDENCE 2D 426, Section 141.

Thus, the right to bring a taxpayer action exists independently of any personal benefit derived by the individual relator bringing the action. As this Court has repeatedly affirmed,

[w]here a statute establishes a public right and imposes upon a public officer a duty, which such officer fails or refuses to perform, any taxpayer, who, in his own name, undertakes to compel performance of such duty, *regardless of personal or private motive or advantage*, and successfully maintains a mandamus action, pursuant to R.C. 733.59, acts on behalf of the municipality and bestows a public benefit.

*White*, 34 Ohio St.2d 37, paragraph 1 of the syllabus (emphasis added); *See also Cater*, 69 Ohio St.3d 315, 323 (a taxpayer's assertion of "the public's right to the services of a public official who is purportedly performing in accordance with charter provisions ... represents action taken on behalf of the public, and is a sufficient basis upon which to institute a taxpayer action, notwithstanding that [his] motives may not have been purely philanthropic."); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 473, 715 N.E.2d 1062, citing *Cater*, 69 Ohio St.3d 315, 322–323 ("[A] taxpayer has standing as such to enforce the public's right to proper execution of city charter removal provisions, regardless of any private or personal benefit ... R.C. 733.56 through 733.61 merely codifies the public-right doctrine as to municipal corporations, and ... exists independent of any statute authorizing invocation of the judicial process.").

**C. Burkons' right to appeal the result of Scalise's unauthorized prosecution of him is no remedy at all for the fact that Scalise is barred by the City's laws from acting on the City's behalf in the first place.**

In this case, Burkons specifically requested "a writ of mandamus compelling the City, through its Mayor and Council, to terminate Stephanie Scalise's unauthorized representation of the City" on behalf of the City's taxpayers. R. 1, Complaint, p. 11, ¶ 43. Even if Burkons successfully obtained a court order removing Scalise from the underlying criminal proceedings or dismissing them altogether, the availability of such a process would not "require the [City] to perform in effect the specific act which the law requires the [City] to do." *Merydith Const.*, 95 Ohio St. 108, 122–123. Rather, Scalise's unauthorized representation would continue unabated. Thus, Burkons' right to appeal from the results of Scalise's unauthorized conduct at the conclusion of the underlying criminal proceedings cannot possibly be deemed "adequate under the circumstances of the case." *Walton*, 37 Ohio St.3d 246, 248, 525 N.E.2d 756 (1988).

**D. The cases relied upon by the Eighth District—which involve quo warranto claims, not writs of mandamus to enforce a municipality's laws—are inapposite and do not compel a different result.**

Underscoring the erroneous nature of The Eighth District's ruling, it was based primarily on three opinions from quo warranto cases that have no applicability to this matter. Appx. pp. A-07–A-08, 3/24/2021 JE and Opinion, *State ex rel. Burkons*, 2021-Ohio-950, ¶ 13–¶ 15, citing *State ex rel. Jackson v. Allen*, 65 Ohio St.3d 37, 1992-Ohio-27, 599 N.E.2d 696; *State ex rel. Johnson v. Talikka*, 71 Ohio St.3d 109, 1994-Ohio-260, 642 N.E.2d 353; *In rel. of Ohio v. Vitantonio*, 8th Dist. Cuyahoga No. 10880, 2020-Ohio-36. This is for the simple reason that none of these quo warranto cases involved a taxpayer's request for mandamus relief to enforce a municipality's laws (as Burkons has requested here), and it is well established that a private action to oust a public official

with a writ of quo warranto requires the relator to be entitled to that public office himself (a claim that Burkons has not advanced).

To wit, in *Jackson*, this Court denied a requested writ of quo warranto to remove a special prosecutor from a case in Hancock County on grounds that the special prosecutor's appointment, which was made as a result of an alleged conflict of interest by the County's previous elected prosecutor, was no longer necessary because the conflicted prosecutor was no longer in office. 65 Ohio St.3d 37, 38. In denying the writ, this Court cited its decision in *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d 1, 4, 17 OBR 1, 3, 476 N.E.2d 1019, 1021-1022 for the proposition that "*quo warranto relief* is not available if a statutory appeal procedure exists." (Emphasis added).

Importantly, in *Hanley*, this Court observed that for "a private relator" "to maintain an action in quo warranto" to remove a public official from office, "he must show" that he himself "is entitled to the office." *Hanley* at 6, citing *State ex rel. Heer v. Butterfield*, 92 Ohio St. 428, 428, 111 N.E. 279 (1915), paragraph one of the syllabus, R.C. 2733.06 ("A person claiming to be entitled to a public office unlawfully held and exercised by another may bring an action therefor by himself or an attorney at law, upon giving security for costs."). And while the basis for such a finding did exist in *Hanley* (at 6-8), this was not the case in *Jackson*, where the relator was found to be merely "trying to quash the indictments through th[e quo warranto] proceeding rather than appeal the trial court's denial of his motion to dismiss." *Jackson* at 38.

Similarly, both *Talikka* and *Vitantonio* involved efforts by criminal defendants, who were in no way entitled to hold the offices of the special prosecutors who had charged them, to have the prosecutors removed in quo warranto actions. Thus, the courts in both cases cited *Jackson* in rejecting the quo warranto claims. *Talikka*, 71 Ohio St.3d 109, 111 ("Pursuant to *Jackson*, where the appointment of a special prosecutor like

Talikka is challenged by a defendant in an underlying criminal case, *quo warranto relief is precluded* because of the available, adequate remedies of a motion to dismiss the indictment with an appeal if the motion is overruled and the defendant is convicted.”) (emphasis added); *Vitantonio*, 2020-Ohio-36, ¶ 10 (“[Relator, the underlying criminal defendant’s attorney,] has not convinced this court that it should, in the exercise of its discretion, allow her or another private attorney to seek [the special prosecutor’s] ouster. … [T]he court is not convinced that the prerequisite of the prosecuting attorney being absent, disabled, or interested in the quo warranto action has been fulfilled.”), ¶ 12 (citing *Jackson* and *Talikka*).

In short, these cases do not involve mandamus claims, and have nothing to do with a taxpayer’s right under R.C. 733.59 to enforce a municipality’s laws governing attorney appointments where that municipality’s public officials have refused to do so. There is nothing to suggest that Burkons’ standing as a taxpayer to assert a mandamus claim somehow disappears by virtue of him having been criminally charged by an unauthorized “special prosecutor”—an absurd result that would leave every Beachwood citizen except Burkons free to enforce the City’s laws. Notwithstanding this Court’s quo warranto jurisprudence, Ohio law is soundly to the contrary as discussed above. *See Section IV.B. above, citing, inter alia, White*, 34 Ohio St.2d 37, paragraph 1 of the syllabus (“[A]ny taxpayer, who, in his own name, undertakes to compel performance of [a public] duty, regardless of personal or private motive or advantage … acts on behalf of the municipality and bestows a public benefit.”).

## V. Conclusion

Burkons, like any Beachwood taxpayer, is entitled “to have [Scalise] removed because her actions are not authorized by Council.” **Appx.**, p. A-05–A-06, 3/24/2021 JE and Opinion, *State ex rel. Burkons*, 2021-Ohio-950, ¶ 8, ¶ 11. Because this entitlement

exists “regardless of personal or private motive or advantage” to Burkons as a defendant who has been criminally charged by Scalise on the City’s purported behalf pursuant to her unauthorized appointment, the Eighth District’s ruling should be reversed and this case remanded for further proceedings consistent with Ohio law.

Respectfully submitted,

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*Attorneys for Relator/Appellant*  
*Mike Burkons*

### **Certificate of Service**

On July 19, 2021, this document was filed with the Court and served upon counsel of record for Respondent / Appellee by email to Kenneth J. Fisher (kfisher@fisher-lpa.com).

*/s/ Peter Pattakos*  
*Attorney for Relator/Appellant*  
*Mike Burkons*

# **Appendix**

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

MAR 24 2021

STATE OF OHIO, EX REL.,  
MIKE BURKONS,

Relator,

No. 110139

v.

CITY OF BEACHWOOD,

Respondent.

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JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DISMISSED

DATED: March 24, 20021

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Writ of Mandamus  
Motion No. 543360  
Order No. 544797

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*Appearances:*

The Pattakos Law Firm LLC, Peter Pattakos and Rachel Hazelet; The Botnick Law Firm, LLC, Robert B. Botnick, *for relator.*

Kenneth J. Fisher Co., L.P.A., Kenneth J. Fisher, *for respondent.*

LARRY A. JONES, SR., J.:

{¶ 1} On December 8, 2020, the relator, Mike Burkons, on behalf of himself and the taxpayers of the city of Beachwood, commenced this taxpayer's mandamus

CA20110139

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action to compel the respondent, the city of Beachwood, to terminate Stephanie Scalise's representation of Beachwood in the underlying case, *State v. Burkons*, Chardon M.C. No. 2020 CRB 00858. On January 11, 2021, Beachwood filed a motion to dismiss, and Burkons filed his brief in opposition on February 1, 2021. Beachwood filed a reply brief on February 5, 2021. For the following reasons, this court grants the respondent's motion to dismiss.

### **Factual and Procedural Background**

{¶ 2} As gleaned from the filings, their attachments, and the dockets of the underlying cases, Alex Noureddine, a resident of Beachwood and an assistant law director for the city of Cleveland Heights, saw a white Beachwood police officer harassing a black child. In the summer of 2020, Noureddine emailed Beachwood, including members of the city council, and identified the officer. Only one member of council responded to the email.

{¶ 3} On July 12, 2020, relator Mike Burkons, another Beachwood councilmember, issued an email, to at least Noureddine, and proposed an ordinance that Beachwood post police video and audio of incidents resulting in death or injury within seven days of the event. Noureddine responded to Burkons that this was lip service and wondered why Burkons had not responded earlier. Burkons replied that councilmembers were instructed not to respond because they had no authority to do anything. Noureddine then asked why were you instructed not to reply. If the officer had acted appropriately, there would be no reason not to reply. He also criticized Beachwood's leadership and complained that they should be doing more.

{¶ 4} The next morning, July 13, 2020, Burkons emailed the Cleveland Heights City manager and council. He identified himself as a Beachwood councilmember and expressed his disappointment over Noureddine's emails. Burkons opined that as an assistant law director he must know that once a councilmember has been made aware that a complaint had been filed regarding a police officer's conduct and that once the complaint had been addressed by the chief, the mayor and the law director to their satisfaction, councilmembers should not insert themselves into the issue, especially if the matter happened two years ago. Burkons further stated that Noureddine's criticism was troubling, even if it was written as a Beachwood resident and not as an assistant law director.

{¶ 5} According to a September 14, 2020 "Motion of prosecuting attorney to withdraw as counsel and appointment of special prosecutor,"<sup>1</sup> a complaint was made about this email to the city of Beachwood, which "immediately engaged University Heights Prosecutor Stephanie Scalise to gather and review all of the relevant evidence" to determine whether criminal charges were appropriate and to ensure a fair and unbiased review.<sup>2</sup> Scalise agreed to take this appointment at no cost to the city. Beachwood represents that the engagement without compensation is pursuant to a mutual aid agreement and that this part was "solely in an investigatory capacity to gather and review relevant evidence and make an

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<sup>1</sup> This motion was filed in *Beachwood v. Burkons*, Shaker Heights M.C. No. 20ARW00001, which is apparently a special administrative docket.

<sup>2</sup> Paragraph two of the September 14, 2020 motion to withdraw.

independent probable cause determination of possible criminal conduct.”<sup>3</sup> Beachwood does not have an engagement agreement with Scalise relating to this matter.<sup>4</sup> Beachwood City Council did not pass an ordinance for this arrangement.

**{¶ 6}** On September 25, 2020, Beachwood filed a criminal complaint against Michael Burkons charging him with one count of interfering with civil rights under R.C. 2921.45, a first-degree misdemeanor. *Beachwood v. Burkons*, Shaker Heights M.C. No. 20CRB00722. R.C. 2921.45(A) provides as follows: “No public servant, under color of his office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right.” In an October 16, 2020 email to Burkons’ lawyer, Scalise articulated her theory of the case: after Noureddine complained to Beachwood, Burkons emailed Noureddine’s employer to “shut him up.”

**{¶ 7}** On September 28, 2020, the Shaker Height Municipal Court issued the following journal entry: “Beachwood city prosecutors motion to withdraw from case is granted.” This court notes that the Beachwood city prosecutor’s motion sought permission to withdraw because of conflicts of interest and to appoint Stephanie Scalise as special prosecutor for all matters concerning the prosecution of this matter. On October 6, 2020, the Shaker Heights Municipal Court transferred

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<sup>3</sup> February 5, 2021 Beachwood’s reply to relator’s opposition to motion to dismiss, pgs. 2-3.

<sup>4</sup> October 19, 2020 email from Beachwood Law Director Diane Calta to Peter Pattakos, Michael Burkons’s attorney, in Exhibit B to the complaint.

the case to the Chardon Municipal Court. Burkons moved to dismiss the matter for lack of subject-matter jurisdiction because the jurisdiction of a municipal court is limited to crimes committed within its territory. The municipal court denied the motion. Burkons then filed for a writ of prohibition in the Eleventh District Court of Appeals, and the Chardon Municipal Court has stayed further proceedings.

**{¶ 8}** On October 22, 2020, Burkons, through his attorney, laid the necessary groundwork for a taxpayer's action by mailing a demand to the Beachwood Law Director to seek an injunction against or otherwise terminate Scalise's representation of Beachwood. He argued that Beachwood's Charter and ordinances require the city council to authorize and fund any assistant prosecutor. Without such authorization, Scalise's representation is void.

### **Discussion of Law**

**{¶ 9}** Article V, Section 2 of the Beachwood Charter governs the Department of Law. Section 2.1 provides that the Law Director shall be appointed and supervised by Council and the "Council may also provide for Assistant Law Directors and special legal counsel." Section 2.3 further provides that

[t]he Law Director, or an Assistant Law Director, as designated by the Law Director shall act as the City's prosecuting attorney before the Mayor's Court, Municipal Court and upon appeals. The Law Director shall perform all duties required by this Charter, the Mayor and Council and all other duties now or hereafter imposed by law upon legal counsel for cities unless otherwise provided by Ordinance by Council.

**{¶ 10}** Beachwood Codified Ordinances (hereinafter "B.C.O.") 133.02 codifies that the Law Director shall perform all other duties now or hereafter

imposed upon municipal solicitors under the laws of Ohio, unless otherwise provided by ordinance of Council. B.C.O. 133.03 provides in pertinent part as follows:

When it becomes necessary or advisable, in the opinion of Council, to employ assistants and/or special counsel to assist the Law Director in the performance of his duties, Council may employ such assistants and/or special counsel, including any law firm with which the Law Director may be connected or a member, and agree to pay such assistants and/or special counsel such reasonable compensation as shall be approved by Council.

{¶ 11} From these provisions, Burkons concludes that only the Beachwood City Council may hire or engage assistant prosecutors or assistant law directors and only such assistants may represent the city of Beachwood. Because Council did not engage Scalise, her actions in representing Beachwood in the underlying case are ultra vires. Thus, the city of Beachwood, the Council, and the Mayor have the duty to remove her from representing Beachwood. The relator has the right to have her removed because her actions are not authorized by Council.

{¶ 12} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Harris v. Rhodes*, 54 Ohio S.2d 41, 374 N.E.2d 641 (1978). Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); and *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953).

{¶ 13} In the present case, mandamus is unavailable because there is an adequate remedy at law by filing a motion to dismiss or to remove counsel in the trial court with a right to appeal that decision, if necessary, at the conclusion of the proceedings. In *State ex rel. Johnson v. Talikka*, 71 Ohio St.3d 109, 1994-Ohio-260, 642 N.E.2d 353, the Supreme Court of Ohio dealt with a nearly identical case. When the Ashtabula County Sheriff William Johnson was accused of illegally using county and jail resources for his golf outing, the Ashtabula County Prosecutor sought and obtained to have Leo Talikka appointed special prosecutor because of conflict-of-interest problems. After Talikka had obtained an indictment against the Sheriff, Johnson was granted leave to file a quo warranto action to remove Talikka as special prosecutor because the county commissioners did not participate in Talikka's appointment. The Supreme Court affirmed the court of appeals' decision denying the writ because Johnson had an adequate remedy at law by filing a motion to dismiss the indictment with an appeal if the motion was overruled and the defendant convicted.

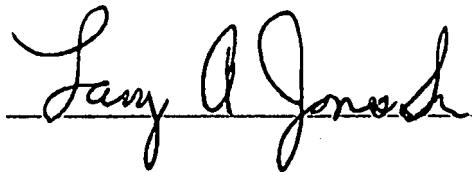
{¶ 14} Similarly, in *State ex rel. Jackson v. Allen*, 65 Ohio St.3d 37, 1992-Ohio-27, 599 N.E.2d 696, the Supreme Court of Ohio denied the extraordinary writ of quo warranto because the defendant in the criminal action had the adequate remedy at law by appealing the denial of his motion to dismiss the indictments. In this case, the former Hancock County prosecutor appointed John Allen to investigate and, if appropriate, to prosecute an attorney, *inter alia*, for perjury. The prosecutor thought he might be called as a witness. When the prosecutor left the

office, the new prosecutor did not apply to have Allen reappointed as special prosecutor. The attorney then moved to dismiss the indictment alleging that Allen's authority as special prosecutor had lapsed. The trial court denied the motion. Reginald Jackson, acting in place of the prosecutor, then sought the writ of quo warranto to remove Allen as a usurper in the office of special prosecutor. The Supreme Court denied the writ: "We conclude that [the defendant] is trying to quash the indictments through this proceeding rather than appeal the trial court's denial of his motion to dismiss. Since [the defendant] has an available appeal remedy, we grant Allen's motion for summary judgment and deny the writ for quo warranto." 65 Ohio St.3d at 39.

{¶ 15} When citizens of the city of Euclid made complaints that a Euclid police office used excessive force in effecting an arrest, the Euclid prosecutor appointed Dominic Vitantonio special prosecutor to investigate and prosecute. Vitantonio filed multiple charges against the officer, including interference with civil rights. Pursuant to R.C. 2733.07, the officer's defense attorney sought leave to file a quo warranto action to remove Vitantonio, *inter alia*, because Euclid City Council did not appoint him as required by the Euclid Municipal Ordinances. This court denied the motion for leave because, *inter alia*, there were adequate remedies at law in the trial court to contest the appointment. *In rel. of Ohio v. Vitantonio*, 8th Dist. Cuyahoga No. 108880, 2020-Ohio-36. The court rules that the procedural posture of a taxpayer's mandamus action is not a distinguishable factor; relator Burkons has an adequate remedy at law to contest the appointment.

{¶ 16} Accordingly, this court grants the motion to dismiss and dismisses this mandamus action. Relator to pay costs. The court instructs the clerk to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

{¶ 17} Writ dismissed.



LARRY A. JONES, SR., JUDGE

ANITA LASTER MAYS, P.J., and  
MICHELLE J. SHEEHAN, J., CONCUR

FILED AND JOURNALIZED  
PER APP.R. 22(C)

MAR 24 2021

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By Greg Marcik Deputy



AUTHENTICATED,  
OHIO LEGISLATIVE SERVICE  
COMMISSION  
DOCUMENT #245090

**Ohio Revised Code**  
**Section 733.56 Application for injunction.**

**Effective: November 1, 1977**

**Legislation: House Bill 219 - 112th General Assembly**

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The village solicitor or city director of law shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption.

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AUTHENTICATED,  
OHIO LEGISLATIVE SERVICE  
COMMISSION  
DOCUMENT #228792

**Ohio Revised Code**  
**Section 733.58 Writ of mandamus.**

**Effective: November 1, 1977**

**Legislation: House Bill 219 - 112th General Assembly**

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In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the village solicitor or city director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty.

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## Ohio Revised Code Section 733.59 Taxpayer's suit.

Effective: November 1, 1977

Legislation: House Bill 219 - 112th General Assembly

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If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

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**133.02 DUTIES; QUALIFICATIONS.**

The Law Director shall serve the Mayor, Council, the administrative departments and the officers, boards and commissions of the Municipality as legal counsel in connection with Municipal affairs, and subject to the direction of the Mayor and Council. S/he shall represent the Municipality in all proceedings in court or before any administrative board or commission. S/he shall perform all other duties now or hereafter imposed upon municipal solicitors under the laws of Ohio, unless otherwise provided by ordinance of Council, and s/he shall perform such other duties consistent with his/her office as the Mayor or Council may request. No person shall act as Law Director unless duly admitted to the practice of law in the State of Ohio, and such person shall have had at least five years of experience in the active practice of law.

(Ord. 2014-51. Passed 4-21-14.)

**133.03 HIRING OF ASSISTANTS OR SPECIAL COUNSEL.**

When it becomes necessary or advisable, in the opinion of Council, to employ assistants and/or special counsel to assist the Law Director in the performance of his duties, Council may employ such assistants and/or special counsel, including any law firm with which the Law Director may be connected or a member, and agree to pay such assistants and/or special counsel such reasonable compensation as shall be approved by Council. The Assistant Law Director shall perform such duties in the Department of Law as are designated by the Director of Law, and shall be responsible to and report directly to the Director of Law. In the absence or unavailability of the Law Director, the Assistant Law Director shall have the same authority and responsibility as the Law Director and shall act under the direction and control of the Law Director, the Mayor and Council, as provided herein and in the Charter.

(Ord. 2014-51. Passed 4-21-14.)

# CHARTER

## OF THE CITY OF BEACHWOOD, OHIO

EDITOR'S NOTE: The Beachwood Charter was originally adopted by the electors at the general election of November 3, 1959. It was extensively revised and re-adopted in its entirety at the general election of November 6, 2018.

### ARTICLE I. POWERS

### ARTICLE II. NOMINATIONS, ELECTIONS, QUALIFICATIONS AND REMOVAL OF OFFICERS

- Sec. 1. Municipal Elections.
- Sec. 2. Nominations and Elections.
- Sec. 3. Qualifications of Officers.
- Sec. 4. Oath or Affirmation.
- Sec. 5. Removal of Officers.

### ARTICLE III. COUNCIL

- Sec. 1. Powers, Number and Term.
- Sec. 2. Organization.
- Sec. 3. Vacancy.
- Sec. 4. Clerk.
- Sec. 5. Procedure.
- Sec. 6. Ordinances and Resolutions.
- Sec. 7. Voting; Effect of Vacancy in Office.
- Sec. 8. Mayor's Veto.
- Sec. 9. Veto Override.

### ARTICLE IV. THE MAYOR

- Sec. 1. Executive and Administrative Powers.
- Sec. 2. Term.
- Sec. 3. Vacancy.
- Sec. 4. General Powers and Duties.
- Sec. 5. Mayor's Estimate of Revenues and Expenditures.

### ARTICLE V. ADMINISTRATIVE OFFICERS AND DEPARTMENTS

- Sec. 1. General Provisions.
- Sec. 2. Department of Law.
- Sec. 3. Department of Finance.
- Sec. 4. Department of Audit.
- Sec. 5. Department of Public Safety.
- Sec. 6. Department of Public Works.
- Sec. 7. Department of Building.
- Sec. 8. Department of Community Services.

### ARTICLE VI. COMMISSIONS AND BOARDS

- Sec. 1. General Provisions.
- Sec. 2. Planning and Zoning Commission.
- Sec. 3. Civil Service Commission.
- Sec. 4. Removals.

### ARTICLE VII. INITIATIVE, REFERENDUM AND RECALL

- Sec. 1. Initiative.
- Sec. 2. Referendum.
- Sec. 3. Recall.
- Sec. 4. Petitions.

### ARTICLE VIII. MISCELLANEOUS PROVISIONS

- Sec. 1. Contracts and Fiscal Matters.
- Sec. 2. Public Utilities and Franchises.
- Sec. 3. Salaries and Bonds.
- Sec. 4. Pension and Relief Funds.
- Sec. 5. Limitation on the Rate of Taxation.
- Sec. 6. Effect of Limitation.
- Sec. 7. Amendments.
- Sec. 8. Saving Clause.
- Sec. 9. Effect of Charter Upon Existing Laws.

# CHARTER

## OF THE

### CITY OF BEACHWOOD, OHIO ARTICLE I

#### POWERS

The City of Beachwood, hereinafter sometimes referred to as the City, is a municipal corporation of the State of Ohio.

The City of Beachwood shall have all powers, general or special, governmental or proprietary, including, without limitation, all powers of local self-government and municipal home rule which may now or hereafter lawfully be possessed or exercised by any city under the Constitution and laws of the State of Ohio or the Constitution and laws of the United States. No enumeration herein of specific powers shall be held to be exclusive. No law of the State of Ohio or of the United States shall be imposed upon the City except where mandated by law, unless the City adopts or approves such State or Federal law by this Charter or by legislative act.

This Charter and City Ordinances, rules and regulations shall be construed broadly in favor of the home rule power of the City where possible.

The powers of the City shall be exercised in the manner prescribed in this Charter or, where not prescribed herein, in such manner as Council may prescribe.

None of the powers herein shall be withdrawn from the exclusive control of the City, nor shall the corporate existence of the City terminate or merge, nor shall any territory be detached from or annexed to the City, without the approval of Council and a majority of the electors of the City voting upon such proposition, as permitted by the general law of Ohio.

### ARTICLE II

#### NOMINATIONS, ELECTIONS, QUALIFICATIONS

##### AND REMOVAL OF OFFICERS

###### Sec. 1. Municipal Elections.

Regular Municipal Elections shall be held on the first Tuesday after the first Monday in November of odd-numbered years. Such other elections shall be held as may be required by law or provided for by this Charter.

###### Sec. 2. Nominations and Elections.

Nominations for elected officers shall be made only by petition, signed by electors of not less than three percent (3%) of the number of persons voting at the last Regular Municipal Election in the City and accompanied by the written acceptance of the nominee. The Clerk of Council shall obtain a certified document from the Board of Elections stating the number of persons so voting and make it available to the public. The nomination of each candidate shall be made by separate petition and filed with the Board of Elections not later than 4:00 p.m. on the ninetieth (90th) day prior to the date of election. No primary election shall be held for the selection of candidates for any elected office of the City. The ballot used for the election of officers of the City shall be without party designation. The names of all candidates for office shall be placed upon the same ballot and shall be rotated in the manner provided by the general law of Ohio. Except as provided in this Charter, the general law of Ohio shall govern the nomination and election of the elected officers of the City.

###### Sec. 3. Qualifications of Officers.

###### 1. Residency Requirement.

Each elected officer, and each person appointed to fill a vacancy in an elected office, shall have been an elector of the City and resided continuously therein not less than one (1) year immediately preceding the officer's election or appointment and shall continue to reside therein during the term of office.

###### 2. Other Public Office.

Elected officers and persons appointed to fill an elected office shall hold no other elected public office during their terms nor any public employment incompatible to the office held, except for election to an office of a

political party or as a member, officer or trustee of a governmental board or commission, council of governments, or publicly supported non-profit institution and that of Notary Public or member of the state militia or Reserve Corps of the United States. Council shall, by a two-thirds vote, determine whether any other public employment is incompatible with an elected office in the City, and its decision shall be final.

### 3. Financial Interest.

No officer of the City, elected or otherwise, shall knowingly and willfully, either directly or indirectly solicit or have a financial interest in any City contract or the expenditure of money by the City, except for such compensation, interest and benefits as are approved by Council, nor shall any officer of the City take possession of property owned by the City except for the prompt delivery of such property to the City. Any violation shall disqualify such person from holding office or employment with the City for such time as Council shall determine, in addition to other disciplinary actions or penalties provided by law. Council may adopt additional laws to provide for the ethical conduct of elected and appointed officers and employees of the City and to protect the financial integrity of the City.

### Sec. 4. Oath or Affirmation.

Every officer of the City shall, before assuming the duties of office, take and subscribe to an oath or affirmation to support the Constitution and laws of the United States, the Constitution and laws of the State of Ohio and the Charter and laws of the City of Beachwood, and to faithfully, honestly and impartially discharge the duties of the office.

### Sec. 5. Removal of Officers.

Council may remove any elected officer of the City for failure to possess or continue to possess any qualification of office established by this Charter, for a violation of the officer's oath of office, or for the conviction, while in office, of a felony. Council shall give an elected officer a written copy of the charges and an opportunity to be heard, with at least fifteen (15) days prior notice of the time and place of hearing. The removal of an elected officer shall require a two-thirds vote of Council.

Absence of a Councilmember from four (4) consecutive Regular Council meetings of Council, or a total of eight (8) Regular Council meetings in a calendar year, without such absence being authorized or approved by an affirmative vote of Council, shall operate to vacate such office forthwith and without further proceedings. (Amended 11-2-99)

## ARTICLE III

### COUNCIL

#### Sec. 1. Powers, Number and Term.

##### 1. Powers and Number.

The legislative power of the City shall be vested in a Council of seven (7) members, elected at-large, who shall have all powers and duties as enumerated or limited in this Charter.

##### 2. Term.

Councilmembers shall be elected at the Regular Municipal Election for a term of four (4) years to serve staggered terms commencing on the first day of January after such election, and shall serve until their successors are elected and qualified. Four (4) members of Council shall be elected at the Regular Municipal Election in 1995 and three (3) members shall be elected at the Regular Municipal Election in 1997.

#### Sec. 2. Organization.

At the first Council meeting in January following the election of Councilmembers, or as soon thereafter as is practicable, Council shall meet in the Council Chamber and organize. At such organizational meeting, or as soon thereafter as is practicable, Council shall elect one (1) of its members to be the Council President, for a term not beyond the next organizational meeting, and Councilmembers of all Boards and Commissions required by this Charter or by Ordinance, each to serve not beyond the next organizational meeting, unless the Councilmember shall cease in the meantime to be a member of Council. The Council President shall appoint chairpersons and members of standing and temporary committees of Council to serve terms not beyond the next organizational meeting. In case of a vacancy, the Council President shall be elected by Council from among its members, and shall serve for the unexpired term of such President.

At the organizational meeting, Council shall also elect a Council Vice President who, in the event the Council President is for any reason unable to perform the duties of Council President, shall act in the place of the Council President.

In the event of the Mayor's temporary absence or inability to perform the duties of the office of Mayor at a time during which the Council President is for any reason unable to perform the duties of Council President, the Council Vice President shall become acting Mayor in the same manner as the Council President under Article IV, Section 3 of the Charter for such period.

Council, by a two-thirds vote, may remove any Councilmember from a Board or Commission. No Councilmember shall be so removed without at least fifteen (15) days prior notice of the meeting at which such removal is proposed.

### **Sec. 3. Vacancy.**

Any vacancy in Council shall be filled by appointment by majority vote of the remaining members of Council within forty-five (45) days of such vacancy. The Council President shall report the notice of vacancy at the next Regular Council meeting after the Council President has learned that such vacancy will occur. If such vacancy is not filled within forty-five (45) days, the Mayor shall fill it by appointment. Such appointee shall hold office for the unexpired term of the member whose office is filled and shall have all the rights, powers and duties of elected Councilmembers. If the office of Council President, Vice President, or a Councilmember appointed to of a Board or Commission becomes vacant, it shall be promptly filled.

### **Sec. 4. Clerk.**

Council shall appoint a Clerk who shall be the Clerk of Council and Secretary of the Planning and Zoning Commission, Civil Service Commission and of all Boards and Commissions established by Council. The Clerk shall keep the records of Council and of the Boards and Commissions of which the Clerk is Secretary. The Clerk shall authenticate all records, documents and instruments of the City required by law and perform other duties required by Council. Council may also appoint Assistant Clerks of Council to assist the Clerk and to act in the Clerk's absence.

### **Sec. 5. Procedure.**

#### 1. Council President to Preside at Council Meetings.

The Council President shall preside over all Regular and Special Council meetings and meetings of the Committee of the Whole.

#### 2. Quorum.

A majority of the members of Council shall constitute a quorum for the transaction of business, but a lesser number may adjourn from time to time and compel the attendance of absent members.

#### 3. Council Duties.

Council shall, by Ordinance, Resolution or, when appropriate, by Motion, make provision for:

(A) The time and place of Regular and Special Council meetings, providing for at least two (2) regular Council meetings in each calendar month, except that Council may provide for only one (1) Regular Council meeting per month during the months of June, July and August, when a quorum will not be present or when Council has no agenda.

(B) The form and method of enacting Ordinances and Resolutions. Ordinances shall not contain more than one (1) subject or related subjects, which shall be clearly stated in the title, except for general appropriation Ordinances.

(C) The manner of giving any public notice of the enactment of legislation and other City proceedings which it deems proper to publish, and the printing, publishing and distribution of information of general interest at the expense of the City, as Council shall determine, provided that such information shall not express an opinion or promote any person, position or group of persons or any idea, theory or viewpoint of a political nature.

(D) The procedure for making public improvements, for levying assessments, provided that two (2) or more public improvements, including the levying of assessments therefor, may be combined in one (1) proceeding if Council finds that it will be economical and practical to undertake said improvements jointly; and the procedure for the reduction of unpaid installments and the return of paid installments of assessments levied in larger amounts than necessary to pay for public improvements.

(E) The advertising and awarding of contracts.

(F) The appointment or employment of:

(1) An Auditor, a Law Director, Assistant Law Directors and other Attorneys at Law under contract with the City.

- (2) Consultants to advise and assist the Mayor, Council or any Board, Commission, Committee or Department of the City regarding City issues.
- (G) The enforcement of attendance by Councilmembers, Directors, and City employees at its meetings; the removal of members of Boards and Commissions who either fail to attend Regular or Special meetings of the Board or Commission on which the member is serving or for other just cause; and the removal of Directors and Chiefs for just cause.
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- The removal of members of Boards and Commissions or of Directors and Chiefs shall require not less than fifteen (15) days written notice of the Regular or Special Council meeting where such removal is proposed and an opportunity for the member or Director to be heard at such meeting. An order of removal shall require a three-fourths vote of Council for passage and is not subject to veto by the Mayor.
- (H) The requirement that the Directors and City employees attend all Council meetings, when requested to attend by Council, and participate in all discussions relating to their respective Departments.
- (I) Such legislation, rules and/or regulations, or other acts as Council shall require to implement the Charter or any requirement of Council.
- (J) The manner of keeping a record of Council's proceedings and the establishment of rules, regulations and voting requirements of Council and each of the Boards and Commissions created by Charter or by Council, other than the Civil Service Commission, unless otherwise provided in this Charter.

## **Sec. 6. Ordinances and Resolutions.**

### 1. Readings.

All Ordinances and Resolutions, sometimes referred to as legislation, shall be read in full or by title only on three (3) separate days, unless Council, by a vote of not less than two-thirds of its members, suspends this rule and provides for a lesser or greater number of days.

### 2. Final Passage.

The final passage date of all Ordinances and Resolutions shall be on (1) the date the legislation is approved by the Mayor; (2) the date of the override of a Mayor's veto by Council, if disapproved; or (3) the last date the Mayor was eligible to sign the Ordinance or Resolution if the Mayor neither approves nor disapproves it.

### 3. Effective Date.

Ordinances (1) for the appropriation of money, (2) for providing for tax levies or (3) for improvements petitioned for by a majority of the owners of the property to be assessed, and (4) emergency or urgent measures declared by Council to be necessary for the immediate preservation of the public peace, health or safety or the efficient operation of the City, shall go into immediate effect, provided, however, that in the case of emergency or urgent measures, the reasons for the emergency or urgency shall be set forth in one section of the Ordinance or Resolution, and such emergency or urgent measures shall require a vote of at least two-thirds of the members of Council for passage. No other Ordinance or Resolution shall go into effect until thirty (30) days after its final passage.

### 4. Emergency or Urgent Legislation Not Permitted.

No legislation authorizing or providing for any (1) change in the zoning of any land or zoning regulations, (2) change in the boundaries of the City, (3) the surrender or joint exercise of any of its powers, (4) the granting of any franchise or (5) the compensation for elected officials, shall be passed as an emergency or urgent measure.

## **Sec. 7. Voting; Effect of Vacancy in Office.**

### 1. Voting.

- (A) All voting of Council whether after a reading or final vote shall be taken by roll call, the Clerk calling the names of each of the members in alphabetical order and recording the vote in the minutes of the meeting. A majority of the members of Council shall vote "yes" to pass any Ordinance, Resolution or Motion, at a first or second reading or to adopt the issue on the third or final reading unless a greater number is required or a lesser number is permitted by this Charter.

(B) All votes shall be recorded as "yes" or "no". A vote to "abstain" shall be counted as voting with the majority of those who do vote. A member who does not vote due to a conflict of interest shall not participate in discussion or vote on the issue and shall not sit with Council during the proceedings relating to that issue.

## 2. Effect of Vacancy in Office.

In the event of one (1) or more vacancies on Council, the quorum shall be reduced to a majority of the remaining Councilmembers. The number of Councilmembers required to pass any Motion or legislation shall be the percentage of the voting requirement applied to the remaining Councilmembers.

## 3. Effect of Conflict of Interest.

In the event a member of Council declares an inability to vote due to a conflict of interest, the member shall make a full explanation of such conflict, which shall be recorded in the minutes of the meeting. The requirements for a quorum and other voting on that issue shall be the same as if the office were vacant.

## **Sec. 8. Mayor's Veto.**

1. Every Ordinance or Resolution of Council shall be signed by the Clerk, an Assistant Clerk in the absence of the Clerk or two (2) members of Council, and presented to the Mayor forthwith for consideration noting the date of delivery to the Mayor.

2. If the Mayor approves the legislation, the Mayor shall sign it and file it with the Clerk within seven (7) days of its passage by Council. The Mayor may approve or disapprove the whole or any item of Ordinance appropriating money, but otherwise such approval or disapproval shall be addressed to the entire Ordinance or Resolution.

3. If the Mayor disapproves the legislation, or any item of it where permitted, the Mayor shall file a written notice of the disapproval with the Clerk noting the date of delivery to the Clerk. Unless written notice of disapproval is filed with the Clerk within seven (7) days after passage by Council, it shall take effect as though the Mayor had signed it.

## **Sec. 9. Veto Override.**

When the Mayor has disapproved an Ordinance or Resolution or item of it as herein provided, Council may reconsider and override the Mayor's disapproval within thirty (30) days after the Mayor files the notice of disapproval with the Clerk. If upon such reconsideration the Ordinance, Resolution or item is passed by two-thirds of the members of Council, it shall then take effect notwithstanding the disapproval of the Mayor. If the Ordinance, Resolution or item is amended on such reconsideration, it shall again be presented to the Mayor as provided in Article III, Section 8.

# **ARTICLE IV**

## **THE MAYOR**

### **Sec. 1. Executive and Administrative Powers.**

The executive and administrative powers of the City shall be vested in the Mayor, and, under the Mayor's direction, in the Directors and other administrative officers provided for in this Charter at Article V or by Ordinance.

### **Sec. 2. Term.**

The Mayor shall be elected at the Regular Municipal Election in November of 1997 and every fourth year thereafter for a term of four (4) years, commencing on the first day of January next after such election, and shall serve until a successor is elected and qualified.

### **Sec. 3. Vacancy.**