COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

	:	**CASE NO. A1301595**
LISA MCQUEEN, ET AL.,	:	
PLAINTIFFS	:	**JUDGE ROBERT WINKLER**
v.	:	
MILTON DOHONEY, JR., ET AL.,	:	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION**
DEFENDANTS.	:	

I. Introduction

This is not a voting rights case. Plaintiffs voluntarily abandoned their voting rights claim less than 48 hours after making it.

Plaintiffs now claim something extraordinary; namely, that "all ordinances passed by Cincinnati City Council are subject to referendum without exception regardless of whether council declares them to be emergency measures or not." Plaintiffs' Motion at 8. Ohio law and Cincinnati's Charter do not support Plaintiffs' view.

Encouragingly, Plaintiffs now agree that this is a Charter interpretation case. Plaintiffs have dropped their argument that this case is about a conflict with state law and the "validity of the ... Charter provision that authorized" the emergency clause in Ordinance No. 56-2013 (the "Ordinance"). *See* First Amend. Compl., ¶45. They now concede that Article II, Section 3 of the Charter is valid: "the starting point ... of the right of the people to referendum ordinances is Article II, Section 3" of the Charter. Pl. Mot. at 6.

Defendants disagree with Plaintiffs' reading of the Charter. Contrary to the basic rules of statutory interpretation, Plaintiffs ask the Court to give effect to only the first sentence of Article

II, Section 3, and find that the rest of the section is meaningless. Defendants urge the Court to give effect to all the words in Article II, Section 3 and all provisions of the Charter. "Emergency laws" by definition are laws that go into "immediate effect." And laws that go into immediate effect are, by definition, not subject to referendum. When all of the words of Article II, Section 3 are given meaning, it is clear that six votes for an emergency clause causes City ordinances to go into effect immediately without being subject to referendum.

Plaintiffs next suggest that if they are wrong about the Charter, Council's determination that the Ordinance should be effective immediately does not satisfy R.C. 731.30 because it is illusory, conclusory, or tautological. This argument also fails. Among other things, Council determined that the Ordinance was necessary to avoid laying off 344 employees and substantially reducing services. These are sufficient reasons for the Ordinance to go into effect immediately.

Plaintiffs' third argument is that seven votes were required under Article II, Section 7 of the Charter, because, in their view, the Ordinance reduced the City's parking operation. *See* Pl. Mot. at 12-13. Again, Plaintiffs ask the Court to read only one phrase of the Charter, one portion of one sentence of one section. Section 7 addresses amendments to the Administrative Code. The Administrative Code did not need to be amended in order to implement the parking modernization system, so the Ordinance did not require seven votes. To the contrary, the Administrative Code already gives the City Manager the authority to "determine the number of officers or employees of each department, division or administrative unit." Cincinnati Admin. Code art. I, § 4. And the Municipal Code gives the City Manager the authority to manage the parking system and set parking rates. Cincinnati Mun. Code 509-1, 108-13.

For these reasons, the Temporary Restraining Order should be dissolved, Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction should be denied, and the Court should enter final judgment as a matter of law in favor of Defendants.

II. Background

A. The City Budget Process

The City Administration proposed leasing a portion of the City's parking garages and lots and franchising the operation of the parking meters (the "Parking Modernization Plan" or "Plan") as part of the City's budget process in the fourth quarter of 2012. Council approved the FY2013 budget (January to June 2013) and the FY2014 and FY2015 budget plan (July 2013 to June 2015) based on implementation of an acceptable Parking Modernization Plan. Council thus avoided making deep cuts in City staff and public services.

The City Administration developed the Plan consistent with R.C. 737.022. In September 2011, the General Assembly and Governor Kasich enacted R.C. 737.022 to make clear that local governments may lease their parking systems. Parking franchises are a common sense way for local governments to raise revenue without raising taxes or adding fees for basic services. Unlike taxes or trash fees, paying for parking in City lots or at City meters is entirely voluntary. There are many parking options, including public options, that are unaffected by the Plan. Only 11% of the parking spaces downtown are affected by the Plan. *See Recommendation for Lease & Modernization of a Portion of the City of Cincinnati Parking System* (Feb. 25, 2013) at Slide 9 (Stipulation Exh. K). Public garages under Fountain Square and Washington Park, for example, are not subject to the Plan. It also spreads the revenue base—visitors pay it, too.

B. The Ordinance

City Council passed the Ordinance on March 6, 2013. (Stip. Exh. W.) It authorizes the City Manager to execute a lease with the Port Authority of Greater Cincinnati ("Port"). The City would lease certain parking garages and lots and grant the Port a franchise to operate the City's parking meters. *Id.* In exchange, the Port would pay the City approximately $92 million upfront and would provide the City with an ongoing estimated revenue stream of $3 million or more for 30 years. (Stip. Exh. W.) The Ordinance passed on a 5 to 4 vote. It contained an emergency clause that passed on a separate 6 to 3 vote. The emergency clause states:

> That this ordinance shall be an emergency measure necessary for the preservation of the public peace, health, safety and general welfare and shall, subject to the terms of Article II, Section 6 of the Charter, be effective immediately. The reason for the emergency is the immediate need to implement the budgetary measures contemplated during the December 2012 City of Cincinnati budget determinations in order to avoid significant personnel layoffs and budget cuts and resulting reductions in City services to Cincinnati residents related to the City's General Fund, which administrative actions would be needed to balance the City's FY 2013 and 2014 budgets in the absence of revenue generated by implementation of the modernization of the City of Cincinnati parking system as described herein.

Ordinance § 5.

III. Plaintiffs lack standing

The Court should begin by addressing whether Plaintiffs even have a right to bring the claims in their Amended Complaint. The Court should find that Plaintiffs lack standing to bring their declaratory judgment claim because there currently is no justiciable controversy. They also lack statutory taxpayer standing because they have not met the statutory prerequisites.

A. Declaratory Judgment Standing

In *Mallory v. City of Cincinnati*, 1st Dist. No. C-110563, 2012-Ohio-2861, the First District summarized the law of standing in a declaratory judgment action. Plaintiffs must allege a "genuine dispute between parties having adverse legal interests of sufficient immediacy and

reality to warrant the issuance of a declaratory judgment." *Id.* at ¶10. Plaintiffs do not allege that the City has taken any action to interfere with their ability to circulate petitions or collect signatures. The Amended Complaint suggests that the City "will likely act to execute and begin performance on the Parking System Lease as soon as practicable. Such actions might impair Plaintiffs' ability to seek referendum of the Ordinance." First Am. Compl., at ¶35. But this too is speculative—signing the lease only "might impair" Plaintiffs. The City's signing and proceeding with the lease cannot prevent a referendum if one is required by Ohio law. Rather, both the City and the Port, and any other party to the lease or parking franchise, will be proceeding at their own risk.

Plaintiffs admit that they have done nothing yet either. They prospectively "desire to exercise their constitutional right to circulate referendum petitions." First Am. Compl., at ¶12. In order to have standing, the Plaintiffs must first collect and submit the valid number of signatures. Plaintiffs have not yet collected enough valid signatures to place the referendum on the ballot. As such, there can be no controversy because Plaintiffs have not been denied the right to petition for a referendum or put a referendum on the ballot.

B. Taxpayer Standing

Statutory taxpayer standing exists so a municipal taxpayer can vindicate a public right when a City or its officials refuse to apply for an injunction to restrain an abuse of corporate power. That is, the General Assembly confers standing on taxpayers by statute when they otherwise would not have it, in order to challenge a municipal official's failure to act.

A taxpayer demand letter is jurisdictional prerequisite for a statutory taxpayer action, and the failure to send the required demand is fatal to statutory taxpayer standing. In *State ex rel. Fisher v. City of Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, 845 N.E.2d 500, the Ohio

Supreme Court instructs that a "jurisdictional analysis of a statutory taxpayer action begins with R.C. 733.56, which requires a city law director to apply in the city's name 'to a court of competent jurisdiction for an order of injunction to restrain the abuse of its corporate powers.'" *See also* R.C. 733.59; *Thelander v. Cleveland*, 3 Ohio App.3d 86, 444 N.E.2d 414 (8th Dist. 1981). In determining whether or not a taxpayer demand letter would have been a vain act, the Ohio Supreme Court instructs that "[t]he substantial question then comes down to this: Did the circumstances here show that it would have been unavailing to have made a request upon the solicitor." *State ex rel. White v. Cleveland,* 34 Ohio St.2d 37, 42, 295 N.E.2d 665 (1973). Futility must be established from events that occur before the action is commenced. *Jenkins v. Eberhart*, 71 Ohio App.3d 351, 357, 594 N.E.2d 29 (4th Dist. 1991).

In this case, the Plaintiffs' original complaint was not a taxpayer action. *See* Compl. (filed Mar. 6, 2013). Whether to avoid a response from the City Solicitor, or for some other reason, Plaintiffs chose not to invoke statutory taxpayer standing. They did not plead this as a taxpayer case or deliver the demand letter required by statute. *Mulder v. Amherst*, 115 Ohio App. 117, 119, 184 N.E.2d 602 (9th Dist. 1962) ("If a taxpayer fails to comply with the provisions of the statute, it is obvious that he has no right to sue for and on behalf of the city . . . ."). They abandoned a potential taxpayer action. When Plaintiffs dismissed their federal voting rights claim, they lost their mechanism for obtaining attorneys' fees. Only then did they amend their complaint to include a statutory taxpayer claim, with its attendant possibility of attorneys' fees. *See* First Am. Compl. at ¶75. But it is too late.

The taxpayer demand process is jurisdictional because it is important to the interests of justice, as seen here. *Mulder* at 119-20. Rather than apprise the City of the basis of their action,

and perhaps avoid this entire spectacle, the taxpayers skipped the statutory demand letter and obtained an *ex parte* TRO.

If the Plaintiffs had provided a taxpayer demand before filing this case, then any number of non-litigation outcomes may have been possible. The Council vote may have been different. The Solicitor could have examined the Plaintiffs' theory and apprised the City Council of the risk of a potential action based on the vote. Plaintiffs chose to avoid the taxpayer demand knowing that the City Solicitor would respond appropriately, and that the letter itself might change the vote on Council.

The Plaintiffs made a tactical choice to avoid those outcomes in favor of litigation by ambush. By that choice, Plaintiffs have waived their standing for a statutory action. The Court should conclude that the Plaintiffs do not have statutory taxpayer standing based on their failure to file their original complaint as a taxpayer action and to send the required demand letter.

IV. Plaintiffs are not entitled to declaratory judgment or an injunction

A. Legal Standard

Plaintiffs must demonstrate that they are entitled to judgment as a matter of law in order to prevail on their declaratory judgment claims. *See, e.g., Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶14. Similarly, "[t]he test for the granting or denial of a permanent injunction is substantially the same as that for a preliminary injunction, except instead of the plaintiff proving a 'substantial likelihood' of prevailing on the merits, the plaintiff must prove that he *has* prevailed on the merits." *AultCare Corp. v. Roach*, 5th Dist. No. 2008CA00287, 2009-Ohio-6186, ¶56 (emphasis original) (citations omitted); *Procter & Gamble, Inc. v. Stoneham*, 140 Ohio App.3d 260, 267-68, 747 N.E.2d 268 (1st Dist. 2000) (Plaintiffs must demonstrate a right to relief under the substantive law). Plaintiffs "must show that the

injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law." *Procter & Gamble, Inc.*, 140 Ohio App.3d at 267-68. And they must prove the required elements for an injunction by clear and convincing evidence. *Id.*

B. When all words of the Charter are given their proper meaning, it is clear that the Ordinance is immediately effective

The Court is familiar with the rules of statutory construction that apply in this case. "A court construing a provision in a city charter ... may not ignore the existence of any word or phrase." *Cleveland Electric Illuminating Co. v. Cleveland*, 37 Ohio St.3d 50, 53, 524 N.E.2d 441 (1988). Charter provisions, like all laws, "must be construed to give effect to all separate provisions and to harmonize them with statutory provisions whenever possible." *State ex rel. Commt. to Repeal Ordinance No. 146-02 v. City of Lakewood*, 100 Ohio St.3d 252, 2003-Ohio-5771, 798 N.E.2d 362, ¶20. "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision." R.C. 1.51.

1. All portions of Article II, Section 3 must be read together and given effect

Plaintiffs now concede that the citizens of Cincinnati have the home-rule authority to provide their own form of referendum and initiative power different from state law. Pl. Mot. at 6. Plaintiffs, relying only on just the first sentence of Article II, Section 3 of the Charter, argue that it makes all ordinances subject to referendum—even those with validly enacted emergency clauses. *Id.* at 6-8. Article II, Section 3 states in part that "referendum powers are reserved to the city on all questions." Based on that language, Plaintiffs claim that "there are no restrictions, limitations or exceptions ... to referendum any ordinance passed by city council." Pl. Mot. at 6.

Plaintiffs ask the Court to ignore the remaining sentences of Article II, Section 3, which is directly contrary to the rules of construction. To do so would render meaningless the emergency clause portions of the Charter and overturn the will of Cincinnati voters.

Instead, the Court must analyze the whole section. Article II, Section 3 of the Charter goes on to state that emergency ordinances "must receive the vote of a majority of the members." Cincinnati Charter art. II, § 3. Only the emergency clause must receive six votes, and that vote is taken separately: "the declaration of an emergency and the reasons for the necessity of declaring said ordinances to be emergency measures shall be set forth in one section of the ordinance, which section shall be passed only upon a yea and nay vote of two-thirds of the members ... upon a separate roll call thereon." *Id.* The Charter further emphasizes the separate and distinct nature of the emergency clause: "If the emergency section fails of passage, the clerk shall strike it from the ordinance and the ordinance shall take effect at the earliest time allowed by law." *Id.*

This is not a mistake. In 1994, Cincinnati voters approved the current language of Article II, Section 3, making clear that five votes for an ordinance and six votes for an emergency clause are sufficient to give the law immediate effect. *See* Letter from Sandy Sherman, Clerk of Council, to Robert Taft II, Ohio Secretary of State (Dec. 15, 1994) (certifying voter approval of the amendment) and related documents (Stip. Exh. C). That is, fewer than 20 years ago, Cincinnati voters decided that they did not want to give themselves the ability to seek a referendum on a law as long as six Councilmembers approved the emergency clause. Each word of what the voters approved must be given meaning by the Court.

Ohio law is clear that citizens of Ohio cities can choose when and how they exercise the referendum power. "In providing for referendum and initiative powers, [charter cities] are not restricted to the statutory mechanisms for initiative and referendum proceedings that govern non-

charter municipalities." *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 543, 697 N.E.2d 181 (1998). "Charter provisions may be more restrictive, or less restrictive than those statutory procedures pursuant to the power of local self-government granted by the people under Sections 3 and 7 of Article XVIII." *Id.* They also can change the criteria by which a law goes into immediate effect. In *State ex rel. Moore v. Abrams*, 62 Ohio St.3d 130, 580 N.E.2d 11 (1991), a plaintiff challenged the City of Portsmouth's ability to avoid a referendum through an emergency clause. Under Portsmouth's charter, the emergency language must be in the law's preamble. *Id.* at 131. The Ohio Supreme Court approved Portsmouth's actions, even though state law would require the emergency statement to be in "one section of the ordinance." R.C. 731.30. *See also Jurcisin v. Cuyahoga County Bd. of Elections*, 35 Ohio St.3d 137, 519 N.E.2d 347 (1988) (emergency measure passed in accordance with charter is not subject to referendum).

Plaintiffs suggest that for the Charter to effectively remove the referendum power from ordinances with emergency clauses, it would have to expressly state the exception in the first sentence of Article II, Section 3. Pl. Mot. at 6. They even propose the language that they believe the Charter should contain: "with the exception of those questions adopted as emergency ordinances." *Id.*

Plaintiffs' interpretation runs counter to the structure of state law. The Ohio Constitution provides the right of referendum in Article II, Section 1c. That section does not mention emergency laws, nor does it say the words "with the exception of those questions adopted by emergency." The exception for emergency laws is an entirely different section of the Constitution. Article II, Section 1d states that "emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect." Under

Plaintiffs' view, all Ohio laws would be subject to referendum, even if they were passed as emergencies, because there is no express exception. This is untrue. *See, e.g., State ex rel. Durbin v. Smith*, 102 Ohio St. 591, 596, 133 N.E. 457 (1921) ("[A]ll acts of the general assembly should not be subject to the referendum, and that those excepted therefrom should '*go into immediate effect.*'") (emphasis original).

Similarly, R.C. 731.29 provides the right of referendum for non-home-rule municipalities. It is not until the next section, R.C. 731.30, that the law makes clear that emergency ordinances go into immediate effect and thus are not subject to referendum. Again, by Plaintiffs' logic, all municipal laws are subject to referendum, even those passed with an emergency clause. This is, of course, not true. *See, e.g., State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145.

What Plaintiffs refuse to acknowledge is that "emergency laws" by definition are laws that go into "immediate effect." And laws that go into immediate effect are, by definition, not subject to referendum. When all of the words of Article II, Section 3 of the Charter are read together, the Charter plainly states that an ordinance containing an emergency clause goes into immediate effect, and is not subject to referendum, if six councilmembers vote for the clause. Ohio Const. art. II, § 1d; R.C. 731.30. *See also State ex rel. Moore v. Abrams*, 62 Ohio St.3d 130, 133, 580 N.E.2d 11 (1991).

2. The Court lacks jurisdiction to review the legislature's determination that the Ordinance must go into effect immediately

In the event that the Court disagrees with their first argument, Plaintiffs alternatively claim that the emergency clause of the Ordinance is insufficient because it simultaneously says too much (First Am. Compl., ¶¶50-51) and does not say enough (*id.* ¶¶52-53). *See* Pl. Mot. at 6-

10. (They also seem to suggest that the City cannot have its own referendum rules contrary to their position on the first issue. As explained above, that contention is incorrect.)

With regard to the contents of an emergency clause, the Ohio Supreme Court explains that "although the determination by council and the soundness of its reasons may be subject to debate, they are not subject to review by the courts." *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145, ¶42. Only where "mere parroting of comparable conclusory language" occurs does a court even have jurisdiction to review the emergency. *Id.* ¶33. Indeed, although not the case here, a legislature may enact a law by emergency for the specific purpose of removing it from the possibility of referendum. *Id.* ¶37 ("the village council was not precluded from declaring Ordinance No. 2007-07 to be an emergency based on an intent to defeat any referendum"); *see also City of Mentor ex rel. Deitrick v. City of Mentor*, 11th. Dist. No. 2007-L-084, 2008-Ohio-2138, ¶60.

The Charter requires that "the declaration of an emergency and the reasons for the necessity of declaring said ordinances to be emergency measures shall be set forth in one section of the ordinance." Cincinnati Charter art. II, § 3. Even if R.C. 731.30 were applicable here, the emergency clause in the Ordinance satisfies that law, which requires that emergency ordinances must be "necessary for the immediate preservation of the public peace, health, or safety" and must state "the reasons for such necessity." R.C. 731.30.

The emergency clause of the Ordinance, Section 5, states the nature of the emergency and explains the need for the Ordinance to take effect immediately. Among other things, Council declared the "immediate need to implement the budgetary measures contemplated during the December 2012 City of Cincinnati budget determinations in order to avoid significant personnel

layoffs and budget cuts and resulting reductions in City services to Cincinnati residents related to the City's General Fund." Ordinance § 5.

Under Council's budget plan, passed in December 2012, the Ordinance is necessary to balance the FY2014 budget, which begins in July 2013. The upfront payment of $92 million cannot be made until the Port can sell the bonds necessary to generate the money. This process takes at least 60 days. If it is not completed by July 2013, the City must balance its budget without the upfront payment.

During that December 2012 budget process, Council chose to use $4.8 million from anticipated parking franchise revenues instead of eliminating income tax reciprocity for City residents. Motion, Item No. 201201648 (Dec. 13, 2012) (Stip. Exh. J). If the parking franchise revenues are not available, the City's deficit grows by $4.8 million. Additionally, the FY 2013 budget has an $11.2 million deficit that is currently being covered by use of the existing General Fund carryover balance. Absent the Ordinance, the Administration will have to immediately begin cutting the budget for FY 2013 in order to use the General Fund carryover balance to cover one-time layoff costs such as pay out of accrued leaves and unemployment compensation for terminated employees.

The City Administration has explained that it would have to immediately begin cutting the budget in order to balance it. Those cuts include 344 employees, 269 of whom are police and fire department employees (plus a current fire recruit class), along with reductions in services and elimination of programs. See *Alternatives to the Parking Lease and Modernization Plan (Plan B)* (Feb. 26, 2013) (Stip. Exh. L).

Citizens will see reduced services. To balance the budget, Plan B calls for closing three recreation centers and six swimming pools. It would eliminate $1.7 million in funding for

human services organizations, $494,000 in funding for the Neighborhood Support Fund and the Neighborhood Business District Fund, and $50,000 for arts funding, among other cuts. *Id.*

The City also would be deprived of the economic development and community improvement projects that the City intends to fund with lease revenue. The City plans to use the revenue to increase its contribution to the Cincinnati Retirement System, construct the Wasson Way bike trail, open the MLK interchange on I-71, and spur development of a 30-story mixed use building in downtown featuring a grocery store, among other items. *See* Stip. Exh. K at Slides 46-73.

Council's reasoning is not a boilerplate recitation of emergency clause language. It describes specific and concrete consequences that will flow from failure to immediately implement the Ordinance. This Court thus does not have jurisdiction to review the sufficiency of this emergency clause. *Laughlin*, 2007-Ohio-4811, ¶42.

Plaintiffs also make the unprecedented claim that Council said too much when it included the words "general welfare" in the emergency clause. First Am. Compl., ¶¶50-51. This is unsupported in Ohio law. The only time that an emergency clause is insufficient is when it is illusory, conclusory, or tautological—i.e., when it does not offer any reason for immediate effectiveness. *See Laughlin*, 2007-Ohio-4811, ¶33. No case suggests that giving additional good reasons invalidates the emergency clause. In fact, the Ohio Supreme Court has explained the public's recourse if they disapprove of a legislature's use of emergency clauses:

> If there was in fact no emergency or if the reasons given for such necessity are not valid reasons, the voters have an opportunity to take appropriate action in the subsequent election of their representatives. However, the existence of an emergency or the soundness of such reasons is subject to review only by the voters at such a subsequent election of their representatives. They are not subject to review by the courts.

State ex rel. Moore, 62 Ohio St.3d at 132.

Plaintiffs then suggest that failing to include the word "immediate" in the right place in the emergency clause also renders it invalid. Pl. Mot. at 11. This argument has been rejected by Ohio courts. They do not require precise recitation of magic words, even the words defining the reasons for an emergency ordinance. *See State ex rel. Moore*, 62 Ohio St.3d at 133. ("[W]e do not deem it fatal that the preamble omits reference to the public peace, property, health or safety because Section 12 of the charter states that an emergency measure '*is*' an ordinance for such purposes. Therefore, repeating the language in the ordinance would be redundant; stating that an emergency exists and why it was declared, which the preamble does, is sufficient.").

The Court does not have jurisdiction to review the legislature's determination that it is necessary for the Ordinance to go into immediate effect.

3. The Administrative Code does not need to be amended in order to implement the Parking Modernization Plan

Article II, Section 7 of the Charter details how the City's Administrative Code was established and how it is amended. It starts by explaining that the departments, divisions and boards of the government existing at the time the Charter was adopted would continue for six months after the Charter became effective. Then, council was required to adopt an Administrative Code by a majority vote. "Thereafter, ... council may change, abolish, combine or re-arrange the departments, divisions and boards of the city **provided for in the administrative code**." Cincinnati Charter art. II, § 7 (emphasis added). Such an ordinance "creating, combining, abolishing or decreasing the powers of any department, division or board, shall require" seven votes, "except for the ordinance adopting the administrative code" in the first place. *Id.*

Again ignoring the basic rules of statutory construction, Plaintiffs take one phrase of one sentence of the section out of context and claim that the Ordinance must receive seven votes because it is "creating, combining, abolishing or decreasing the powers" of the City's parking operations. Pl. Mot. at 11-12. Plaintiffs are wrong. Reading all of Article II, Section 7 together, it is plain that seven votes are needed only when the Administrative Code is being amended. The City's parking operations are not mentioned in the Administrative Code, so no amendment was required. *See* Cincinnati Admin. Code art. II, § 7 (Stip. Exh. B).

The Administrative Code describes the organization of the city government. It does not establish general law. The City's Administrative Code identifies the following departments, divisions, and boards: law, police, fire, transportation and engineering, public works, water works, finance, personnel, recreation, retirement, sewers, health, community development, planning and building, parks, and the Citizens' Complaint Authority. It does not list a "Parking Facilities Division of the Department of Enterprise Services." *See* Cincinnati Admin. Code.

The Ordinance does not abolish or decrease any of the powers of any of the departments in the administrative code. Rather, the Ordinance implements specific provisions of the Cincinnati Municipal Code ("CMC"). Section 509-1, "Parking Meters, Locations," currently provides:

> The city manager ***or person designated*** by the city manager shall be authorized to provide for the installation, regulation, maintenance, control, operation, and use of parking meters on any street or part of a street, and on all other municipally owned property, where parking is permitted for limited periods only, and parking spaces are ordinarily occupied to capacity, and where the use of such parking meters would tend to reduce over-parking in violation of the ordinances and shall further be authorized to maintain such parking meters in good workable condition.

CMC 509-1 (emphasis added). And Section 108-13, "Parking Rates in Municipal Off-Street and On-Street Parking Facilities," provides that "[t]he city manager is hereby authorized to fix,

amend, revise, and collect charges and fees for parking in all city-owned off-street and on-street parking facilities including parking meters."

The Municipal Code authorizes the City Manager to enter into a contract for the management of the City's parking meters, lots, and garages. Far from a great change in City law, this has been the City's parking meter law since at least 1978. Similarly, many of the City's garages and lots are managed by third parties. The City Manager also is unilaterally authorized to set the rates for parking meters and garages.

The City Manager, even in the absence of the Ordinance, was already authorized by a past City Council to enter into a contract for the metered parking franchise. Further, Ohio law specifically allows such an action in order to achieve the economies of scale and efficiency typically provided by private companies engaged in managed competition. R.C. 733.022.

The Administrative Code codifies the City Manager's authority created by the City Charter. The City Charter provides that the City Manager is the chief executive and supervisor of the City's administration, and that "neither the mayor, the council, nor any of its committees or members shall interfere in any way with the appointment or removal of any of the officers and employees in the administrative service." Cincinnati Charter art. IV, § 2. The Administrative Code, implementing the City's organization of government, specifies that the City Manger is not a department of the City, but rather, is treated as "analogous" to a City department. Cincinnati Admin. Code art. II, § 7.

And the Administrative Code itself forecloses the Plaintiffs' arguments about the "Parking Facilities Division of the Department of Enterprise Services." The Administrative Code provides that the City Manager:

1. may assign powers and duties to departments in addition to those assigned by ordinance. Cincinnati Admin. Code art. I, § 3.

2. shall determine the number of officers or employees for each department, division or other administrative unit for which the city manager is responsible, except as otherwise provided by the charter. Cincinnati Admin. Code art. 1, § 4.

3. may direct any department to perform work for any other department. Cincinnati Admin. Code art. I, § 5.

It is only when a City division or unit is "established by ordinance" that "powers and duties conferred by ordinance upon any department, division or administrative unit may not be assigned or transferred." Cincinnati Admin. Code art. I, § 3.

Plaintiffs have not identified the "Department of Enterprise Services" as one of the departments in the Administrative Code. Nor can they identify any ordinance, other than perhaps CMC 509-1, that controls assignment of parking meter duties in the City. Plaintiffs have not identified any ordinance or law that confers any power or duty to the "Parking Facilities Division of the Department of Enterprise Services." In fact, the City's review of the applicable law and ordinances places the authority and control for parking with the City Manager, who, under the Charter, directs all work not specifically assigned by ordinance. In this case, CMC 509-1 and 108-13, and Administrative Code art. II, § 5, which delegates all contracts to the City Manager, specifically authorize the parking contract.

Plaintiffs, without legal support, ask the Court to require yet one more council vote for something already assigned to the City Manager, as contemplated by the City Charter and implemented by the Administrative Code and Municipal Code. The Court should reject the Plaintiffs' invitation to insert itself into the City Manager's executive role in the City government. The Charter is designed to implement a separation of powers, not to result in judicial intervention allowing legislative micromanagement of the City's administration.

As this Court observed in the last layoff case involving the City, "it is only in the rarest of circumstances that the judiciary may intervene to substitute its judgment for one made by the executive in the discharge of its powers." *Queen City Lodge No. 69 v. City of Cincinnati*, Case No. A0907695, Entry Denying Plaintiff's Application for Preliminary Injunction (Sept. 9, 2009) (citing *Cleveland Police Patrolmen's Assn. v. Voinovich*, 15 Ohio App.3d 72, 472 N.E.2d 759 (8th Dist. 1984)).

V. Conclusion

For the foregoing reasons, the Temporary Restraining Order should be dissolved, Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction should be denied, and the Court should enter final judgment as a matter of law in favor of Defendants. Ordinance No. 56-2013 was validly enacted by City Council as an emergency ordinance that is immediately effective as of March 6, 2013; and an affirmative vote of three-fourths of City Council was not required for passage and implementation of Ordinance No. 56-2013 because no amendment to the City's Administrative Code was required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction was served by electronic mail on March 14, 2013 on the parties listed below:

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