IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY

LISA MCQUEEN, et al.	:	**CASE NO.**	**C 1300196**
Plaintiffs-Appellees	:	**TRIAL NO.**	**A 1301595**
v.	:		
MILTON R. DOHONEY, JR., et al.	:		
Defendants-Appellants	:		

BRIEF OF DEFENDANT-APPELLANT CITY OF CINCINNATI

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II. Statement of the Case

This case is about whether Article II, Section 3 of the Cincinnati Charter permits City Council to pass ordinances that are effective immediately and not subject to referendum. For 87 years and countless emergency ordinances, the answer has been yes. Yet now, the answer suddenly is no, contrary to the Ohio Constitution, state law, the Cincinnati Charter, and this Court's cases. The trial court decision should be reversed, and the Court should enter judgment in favor of Defendants (collectively, the "City") by declaring that Ordinance 56-2013 and all emergency ordinances are immediately effective and not subject to referendum.

A. Statement of Jurisdiction and Procedural Posture

On March 6, 2013, Cincinnati City Council ("Council") passed Ordinance 56-2013 ("the Ordinance"), which authorizes the City Manager to enter into a Parking Long-Term Lease and Modernization Agreement ("Parking Agreement") with the Port of Greater Cincinnati Development Authority ("Port Authority"). T.d. 26, ¶¶ 41-44. Within minutes, Plaintiffs filed, argued, and obtained an *ex parte* Temporary Restraining Order. T.d. 36 at 1. The Complaint claimed that six yea votes were required for the entire Ordinance to be a valid emergency and that the City had violated Plaintiffs' federal civil rights. They sought attorneys' fees under 42 U.S.C. § 1988. T.d. 2. Plaintiffs did not claim taxpayer standing under R.C. 733.56. *Id.* They did not send a written demand to the City Solicitor as required by R.C. 733.59, nor did they plead that such a demand was futile. T.d. 38.

On March 7, the City removed the case to federal court and answered. T.d. 7. The next day, Plaintiffs filed an amended complaint, dropping their federal civil rights claim and related attorneys' fees request, in order to avoid federal jurisdiction. T.d. 38. They maintained their claim that the Ordinance was subject to referendum unless it received six votes on the entire ordinance and added a claim that the Ordinance required seven yea votes under Article II,

Section 7 of the Charter. T.d. 38. The Amended Complaint was the first time Plaintiffs claimed statutory taxpayer standing to challenge passage of the Ordinance. Plaintiffs still did not send a written demand to the City Solicitor, nor have they ever. T.d. 38, ¶ 75.

The case was remanded on March 8. T.d. 35. On March 12, Plaintiffs filed a Motion for Declaratory Judgment and Permanent Injunction, arguing for the first time that every ordinance is subject to referendum. T.d. 19 at 5. On March 14, the City answered and filed an opposing memorandum. T.d. 24; T.d. 25. The trial court heard the case the next day. On March 28, it issued an Order and Entry Granting Motion for Declaratory Judgment and Permanent Injunction, holding that Plaintiffs have statutory taxpayer standing and that all City ordinances are subject to referendum under Article II, Section 3 of the Charter. T.d. 36 at 11, 15. Notably, neither complaint contains any allegation that all City ordinances are subject to referendum. This timely appeal of the final appealable order follows. T.d. 36; T.d. 37; App.R. 3, 4.

B. Statement of the Facts

Governor Kasich's biennial budget bill, enacted in September 2011, amended R.C. 737.022 to clarify that Ohio municipalities can lease their parking systems. T.d. 26, ¶ 5. In October 2012, the City issued a request for proposals for such a lease. *Id.* at ¶ 6. The City Manager explained that leasing the parking system could benefit the City and its citizens by permitting a third party to increase efficiency and invest in new technologies; placing upon a third party the costs of maintenance and upgrading facilities; and allowing the City to focus its limited staff and resources on the core functions of municipal government. *Id.* at Ex. F. The lease would allow the City to maximize an asset and reduce its budget deficit without raising taxes or cutting services to unacceptable levels. *Id.*

Council passed its 2013 budget and its 2014-15 budget plan on the assumption that the Parking Agreement would be negotiated and implemented by July 2013 (the beginning of FY2014). *Id.* at Ex. L. It is an integral part of solving the City budget deficit and will accelerate growth through job creation and economic development. *Id.* at Ex. J, H, I. If the Parking Agreement fell through, the Administration would have to balance the budget through layoffs and service cuts known as "Plan B." *Id.* at Ex. L. In February 2013, the City Administration recommended the Parking Agreement, a public-to-public partnership with the Port Authority. *Id.* at ¶¶ 12, 20. Council approved the Ordinance authorizing the City Manager to execute the Parking Agreement on March 6. *Id.* at Ex. W. Five members of Council voted for the ordinance, and six members voted for the emergency declaration. *Id.*

Plaintiffs are residents, voters, or taxpayers within the City. T.d. 26, ¶ 59. After March 8, some Plaintiffs were involved in circulating petitions seeking a referendum on the Ordinance. *Id.* at ¶ 60. Plaintiffs personally use city parking and would be personally affected by changes in rates, hours, and enforcement. *Id.* at ¶ 63. One plaintiff argues that his business would be impacted by the parking system changes. *Id.* at ¶ 64.

III. Assignments of Error and Argument

FIRST ASSIGNMENT OF ERROR: The trial court erred by finding that Plaintiffs have standing to bring their claims. T.d. 36, attached as Appendix Exhibit A.

First Issue Presented for Review and Argument: When Plaintiffs failed to follow statutory procedure and seek to vindicate a private right, they do not have taxpayer standing.

Standing is determined as of the filing of the complaint. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 24 (Citations omitted). When Plaintiffs filed their Complaint, they did not allege taxpayer standing. T.d. 2.

Plaintiffs made the strategic choice to obtain a TRO *ex parte*, in violation of Civ.R. 65 and Local Rule 7(A). To succeed in that strategy, Plaintiffs had to file their case without first making a written demand on the City Solicitor. Knowing that they did not have taxpayer standing, but nonetheless wishing to have the taxpayers pay their attorneys' fees, Plaintiffs' Complaint included a federal civil rights claim. *Id.* In order to evade federal jurisdiction after removal, Plaintiffs dropped their federal claim. T.d. 38. But they still insisted on trying to make the taxpayers pay their attorneys' fees, so they added a claim of statutory taxpayer standing. *Id.* As part of their litigation strategy, Plaintiffs never made the written demand required by R.C. 733.59. T.d. 38, ¶75. The Court should not permit Plaintiffs to proceed as taxpayers.

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. Neither the trial court decision nor the Amended Complaint specifies the alleged "abuse of corporate power." Rather, the court declared the ordinance subject to referendum. T.d. 36 at 2. The trial court did not determine that any act by the City constituted an abuse of corporate power. Instead, it stayed otherwise valid legislation so Plaintiffs could obtain signatures for a referendum in which voters could decide whether to keep or repeal the ordinance. *Id.*

A. <u>Plaintiffs lack standing because they did not make a written demand.</u>

R.C. 733.59 describes the procedure for gaining taxpayer standing: "If the … 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." 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.'" *State ex rel. Fisher v. City of Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, 845 N.E.2d 500, ¶ 11.

The trial court erred when it excused Plaintiffs' failure to send a written demand. When deciding whether the act is futile courts ask, "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). The City Solicitor's involvement in the process of passing the Ordinance cannot be the sole basis of determining that a written demand is a futile act. The Charter mandates that the City Solicitor "serve the council, officers and boards of the city as legal counsel and attorney." Charter art. IV, § 5. If a taxpayer can argue that a demand is futile when the City Solicitor is performing his duties under the Charter, the exception would swallow the rule. Futility requires more than involvement in the process. And in fact, Ohio courts have required more proof.

When courts find that a demand is futile, it is because the solicitor had already opposed the taxpayer's specific legal position. *See White* at 41-42 (demand for public records futile when law director had already refused to provide the records after a public record request); *State ex rel. Nimon v. Springdale*, 6 Ohio St.2d 1, 6, 215 N.E.2d 592 (1966) (demand for writ of mandamus futile when the law director advised the council in a formal, written opinion that it should not certify a petition). In this case, Plaintiffs failed to give the City Solicitor any opportunity to respond to their legal position, which was so novel it changed from the filing of their Amended Complaint on March 8 to the motion for permanent injunction on March 12. T.d. 38; T.d. 19.

Plaintiffs chose to avoid the written demand, fearing that the letter might cause the City to take steps to avoid the alleged problem. The demand requirement is intended to allow the City to fix the problem. *Nimon* at 6 ("the statute is intended to prevent the municipal corporation

from becoming a plaintiff in court without its consent"). If the City Solicitor had been advised that the Charter allowed referendum on all ordinances, then the City could have sought its own declaration of the law under R.C. 2721.02, thereby precluding this entire case. Or it could have found other paths to reach its goal.

For example, if the City Solicitor had been advised of the novel theory that *all* legislative actions are subject to referendum, the City may have proceeded administratively. The City Manager already is authorized to administratively designate a third party to manage the City's parking. *See* CMC 509-1 (discussed *infra*). The Ordinance could have been modified to make it an administrative act, which is not subject to referendum. *See Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998).[1]

Plaintiffs first argued that the Charter subjects all ordinances to referendum a week after filing their complaint. By then, the time for sending a demand had passed. Plaintiffs cannot be permitted to create their own futility. And they cannot be permitted to assert statutory standing in an amended pleading without a demand. To rule otherwise allows any prospective plaintiff to avoid the demand requirement by amending their complaint after creating a controversy that could have been avoided if the statute was followed.

B. Plaintiffs lack standing because they did not post a bond.

This case was allowed to proceed without a deposit or any meaningful bond. *See* Appendix Exhibit B, Common Pleas Cost Statement. R.C. 733.59 requires – before the suit can be entertained by a court – posting of a bond that gives security for the costs of the proceeding. *State ex rel. Phillips Supply Co. v. City of Cincinnati*, 1st Dist. No. C120168, 2012-Ohio-6096, ¶ 17 ("a party must … satisfy the statutory requirements *prior to initiating his action*") (Emphasis

[1] In fact, this Court could conclude that the Ordinance is an administrative act not subject to referendum. *See, e.g.*, *Seaton v. Lackey*, 182 S.W.2d 336 (Ky. 1944).

added). As such, "R.C. 733.59 unequivocally withholds jurisdiction to bring a statutory taxpayer action unless such security is given." *State ex rel. Citizens for Better Portsmouth v. Snydor*, 61 Ohio St.3d 49, 54, 572 N.E.2d 649 (1991). Plaintiffs did not post security for the claim. They did not even pay a deposit. And they certainly did not do it before filing their complaint. The Cost Statement shows that no deposit was made. Appx. Ex. B. Even assuming that the deposit could serve as adequate bond in this case, the deposit was not paid. Therefore, the trial court never had jurisdiction to hear the statutory taxpayer claim.

C. The Plaintiffs in this case are mere interlopers.

Plaintiffs must establish standing to bring a taxpayer claim before the Court may consider the merits. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999). Plaintiffs did not offer proof of their motivation for pursing this action without first notifying the City. Plaintiffs cannot meet their burden because they seek to achieve personal or political goals through the judicial process. Plaintiffs disagree with Council's decision to close its budget deficit by monetizing an underachieving City asset. They don't seriously assert that increasing parking fees affects a public right. Instead, their disagreement is a private preference for how the City should fund its operations.

The Ohio Supreme Court has ended the misuse of courts by politically motivated parties who contest official acts "merely upon the ground that they are unauthorized and invalid." *State ex rel. Teamsters Local Union No. 436 v. Bd. of Cty. Commrs. of Cuyahoga Cty.*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224, ¶¶ 16-17. *Teamsters* rejected the use of Ohio's taxpayer statute when the taxpayer could not demonstrate that the remedy sought (an injunction) would benefit the public. Plaintiffs assert solely personal, business, or otherwise political interests. *See*, T.d. 26, ¶¶ 60-64. They cannot show the injunction benefits the public other than by

asserting their opinion about what the public policy of the City should be. This is a legislative task, not an argument for a court. As the Ohio Supreme Court observed, "allowing constant judicial intervention into government affairs for matters that do not involve a clear public right would also not benefit the public." *Teamsters* at ¶ 17. The remedy is not a referendum, but the election of Council under the republican form of government.

Second Issue Presented for Review and Argument: Plaintiffs' claims lack sufficient "immediacy and reality" to have declaratory judgment standing.

Plaintiffs' declaratory judgment claim did not present an actual controversy. In *Mallory v. City of Cincinnati*, 1st Dist. No. C110563, 2012-Ohio-2861, ¶ 10, the Court explained that it does not have jurisdiction unless Plaintiffs allege a "genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." "[I]f the complaint fails to show the existence of a real, present dispute, then any opinion by a court would be merely advisory." *Id.* at ¶ 11. There is no such controversy here. At the time of the Amended Complaint, Plaintiffs admitted that they had not taken any action or collected any signatures. Nor had they collected signatures sufficient to put a referendum on the ballot. They prospectively "desire[d] to exercise their constitutional right to circulate referendum petitions." T.d. 38, ¶ 12. Until the board of elections actually certifies the signatures, there could be no actual controversy. Then, as in most referendum cases, Plaintiffs' claim would ripen if the City failed to put the proposed referendum on the ballot. *See* R.C. 731.29; *see, e.g.*, *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145 (2007). None of this happened because Plaintiffs' prematurely invoked the court's jurisdiction to obtain an advisory opinion. *Sheward*, 86 Ohio St.3d at 469.

SECOND ASSIGNMENT OF ERROR: The trial court erred by declaring that all Cincinnati ordinances are subject to referendum. T.d. 36.

First Issue Presented for Review and Argument: Under the plain language of Article II, Section 3 of the Charter, emergency ordinances are immediately effective and not subject to referendum.

A. The Charter has provided for emergency ordinances since it was adopted.

The question of whether emergency ordinances in Cincinnati are subject to referendum is answered by reading the plain language of Article II, Section 3 of the Charter. "Where the language of a statute is plain and unambiguous and conveys a clear and definitive meaning there is no occasion for resorting to rules of statutory interpretation." *Dikong v. Ohio Supports, Inc.*, 1st Dist. No. C120057, 2013-Ohio-33, ¶ 18. "The interpretation of a statute is a matter of law that is reviewed by an appellate court under a de novo standard." *Id.* at ¶ 16.

The first sentence of Article II, Section 3 states: "The initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner provided by the laws of the state of Ohio." That sentence has been unchanged since the Charter's adoption in 1926.

Article II, Section 3 then explains how Council may pass emergency ordinances:

> Emergency ordinances upon a yea and nay vote must receive the vote of a majority of the members elected to the council, and 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 elected to the council upon a separate roll call thereon. 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.

The power to enact emergency ordinances also has existed since 1926. Appx. Exhibit C. The only changes to that section were made in 1994, when Cincinnati voters amended the Charter to

allow emergency ordinances to pass with five votes, so long as the emergency declaration received six votes. T.d. 26, Ex. C.

Hamilton County courts have had several occasions to rule on issues related to Article II, Section 3. No court in 87 years has suggested that the City could not pass emergency ordinances, or that those ordinances were always subject to referendum. Indeed, courts reached the opposite conclusion. "It will be observed that by the adoption of [section] 2 of the ordinance [the emergency clause,] the people of the City of Cincinnati are denied the right to express their views concerning this ordinance by the referendum, for by operation of [section] 2 of the ordinance[,] it becomes immediately effective." *Schultz v. Cincinnati*, 28 Ohio Law Abs. 29, 1938 Ohio Misc. LEXIS 906, *7 (C.P. 1938); *Sentinel Police Assn. v. City of Cincinnati*, 1st Dist. No. C940610, 1996 Ohio App. LEXIS 1512, *12 (Apr. 17, 1996) ("valid emergency ordinances become effective immediately"); *see also City of Cincinnati ex rel. Newberry v. Brush*, 1st Dist. No. C830674, 1984 Ohio App. LEXIS 8835 (Jan. 11, 1984); *Walsh v. City of Cincinnati City Council*, 1st Dist. No. C77292, 1977 Ohio App. LEXIS 9287 (Oct. 14, 1977). The plain language of Article II, Section 3 and its treatment by Hamilton County courts demonstrate that emergency ordinances are not subject to referendum in Cincinnati.

B. <u>The trial court reached its erroneous conclusion because it did not read all parts of Article II, Section 3 together.</u>

The trial court's conclusion is unsupported by state law. Rather than read all of Article II, Section 3, it read only the first sentence. And rather than read the first sentence as one statement, it broke that single sentence into two parts, separated by the semi-colon, and treated those parts as unrelated to each other. T.d. 36 at 13-15.

Courts must construe laws "as a whole." *City of Cincinnati v. State*, 1st Dist. No. C110680, 2012-Ohio-3162, ¶ 9. "They have a duty to give effect to all of the words used in the

statute and may not delete words or insert words that are not used." *Id.* They "may not ignore the existence of any word or phrase." *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 53, 524 N.E.2d 441 (1988). Charter provisions, too, "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. The trial court did not follow these rules.[2]

The trial court recognized that "[i]t is generally presumed in Ohio that emergency legislation is not subject to referendum." T.d. 36 at 13. But the trial court did not apply this general presumption to Cincinnati, even though Article II, Section 3 states that referendum powers "shall be exercised in the manner provided by the laws of the state of Ohio." Instead, the trial court took one part of the section's first sentence – the words "all questions" – to mean that the general presumption does not apply. T.d. 36 at 13-14. The court read the second part to mean that Cincinnati was referring only to those portions of state law stating the procedural steps for referendum. *Id.* at 15. "Manner," in the court's view, means procedure. *Id.* The court then supported its view by declaring that Article II, Section 3 was ambiguous, which favored the right of referendum. Id. at 15-16. The trial court erred.

Article II, Section 3 is not ambiguous. It is plain that Cincinnati voters gave their Council the power to enact emergency ordinances, which are not subject to referendum. "The main goal of statutory construction is to determine and give effect to the ... intent" of the legislation. *City of Cincinnati*, at ¶ 8.

[2] The United States Supreme Court explains that "the first rule of case law as well as statutory interpretation is: Read on." *Ark. Game & Fish Comm'n v. United States*, 133 S.Ct. 511, 520 (2012).

The words of Article II, Section 3 were not invented by the Charter drafters in 1926. They come from the Ohio Constitution, which was adopted in 1912. The operative language is the same:

Ohio Constitution, Article II Section 1f – Powers of Municipalities	Cincinnati Charter, Article II Section 3, first sentence
The initiative and referendum powers are hereby reserved to the people of each municipality on **all questions** which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be **exercised in the manner now or hereafter provided by law**.	The initiative and referendum powers are reserved to the people of the city on **all questions** which the council is authorized to control by legislative action; such powers shall be **exercised in the manner provided by the laws of the state of Ohio**.

The meaning of those words was explained near the time they were added to the Constitution. In 1915, the Ohio Supreme Court described the meaning and operation of Article II, Section 1f and what is now R.C. 731.30 in *Shryock v. Zanesville*, 92 Ohio St. 375, 110 N.E. 937 (1915). Zanesville had passed an emergency ordinance to construct a water filtration system. Like Plaintiffs here, Shryock argued that the ordinance must be subject to referendum because "these [referendum] powers so reserved to the people are to apply to **all questions** which municipalities may now or hereafter be authorized by law to control by legislative action," the limits in R.C. 731.30 were unconstitutional. *Id.* at 380-81 (Emphasis added).

Shryock, like our Plaintiffs, also argued that the clause "'[s]uch powers shall be exercised in the manner now or hereafter provided by law' must be limited to" procedural items such as "fixing the per centum of signers and their qualifications, the form of the petition and the method of its circulation, filing, protests, etc., and that it cannot be enlarged into the embracing of the subject of emergency laws." *Id.* at 384.

The Ohio Supreme Court rejected those views. "[T]he court finds a clear and unmistakable meaning to be given to Section 1f which will grant to municipal legislative bodies

the same power [as the General Assembly] (but subject to the same limitations) of exempting certain classes of laws from the operation of the referendum." *Id.* at 384. "Such powers shall be exercised in the manner now or hereafter provided by law," means all of the laws relating to referendum not just the procedural items. "[T]the manner of exercising the right or power shall be provided by law, and since [R.C. 731.30-31] merely provide the manner, it is obviously not only not repugnant to the constitution but wholly consistent with it." *Id.* at 385.

Shryock remains good law. Examining the same language in 1970, the Ohio Supreme Court stated, "[a] superficial examination of that section might lead to the conclusion that referendum may not be denied as to any municipal legislative action, the section reserving to the people such power on '*all questions* which such municipalities may control by legislative action.' Such a conclusion, however, uniformly has been rejected by this court." *State ex rel. Bramblette v. Yordy*, 24 Ohio St.2d 147, 148-49, 265 N.E.2d 273 (1970), citing *Shryock.*

Emergency ordinances are immediately effective and not subject to referendum precisely because R.C. 731.30 is one of the laws providing the **manner** in which the right of referendum may be exercised under state law. The trial court's view would reverse nearly 100 years of Ohio law.[3]

The question, then, is whether the words "such powers shall be exercised in the manner provided by the laws of the state of Ohio" in the Charter refer to something different than the words "such powers shall be exercised in the manner now or hereafter provided by law" in the Ohio Constitution. The answer is no.

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[3] The trial court relies on *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 477, 2002-Ohio-997, 764 N.E.2d 971 for its suggestion of a procedural/substantive dichotomy in Ohio law. T.d. 36 at 15. But *Ditmars*, and the line of cases relied on for the language cited by the trial court, relate to procedural matters, not to the meaning of R.C. 731.30. *E.g., Christy v. Summit Cty. Bd. of Elections*, 77 Ohio St.3d 35, 38, 671 N.E.2d 1 (1996); *State ex rel. Bogart v. Cuyahoga Cty. Bd. of Elections*, 67 Ohio St.3d 554, 555, 621 N.E.2d 389 (1993).

When Cincinnatians drafted the initiative and referendum provisions of the Charter in 1926, they had the benefit of the Ohio Constitution and statutes, and *Shryock* interpreting those laws. They used the words of the Ohio Constitution and referred to the laws of Ohio in the same context and near in time, enlightened by the explanation in *Shryock.* The drafters said as much in their Report of Charter Amendment Commission, in which they explained that Article II, Section 3 "is practically an adaptation of the constitutional provision preserving the initiative and referendum. We provide, however, for separate roll calls upon emergency ordinances," which is the "practice provided by the Constitution for the General Assembly."[4,5] Those words and those laws cannot be interpreted to mean different things now. *See, e.g.*, R.C. 1.49; *Bailey v. Republic Engineered Steels*, 91 Ohio St.3d 38, 40, 741 N.E.2d 121 (2001) (interpreting statute in context of original intent of drafters, because a "court may consider ... circumstances under which the statute was enacted, [and] the legislative history").[6] And, until now, they were not.

C. "Emergency ordinance" does not have a different meaning in Cincinnati than it does in the rest of Ohio.

The trial court concludes that emergency ordinances are subject to referendum because the Charter "does not specifically exempt emergency legislation from the power" of referendum. T.d. 36 at 13. As described above, *Shryock* rejected the same argument with regard to the same language in Article II, Section 1f of the Ohio Constitution. The "manner provided by the laws" of Ohio necessarily includes R.C. 731.30, which defines emergency ordinances and exempts them from referendum. This principle was reaffirmed by the Ohio Supreme Court in *Taylor v.*

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[4] Report of Charter Amendment Commission to City Council (Aug. 2, 1926), attached as Appendix Exhibit D (on file at the Cincinnati Historical Society). Council placed the proposed Charter on the ballot two weeks later. Ordinance 336-1926 (Aug. 18, 1926).

[5] The emergency ordinance provision for the General Assembly is Article II, Section 1d of the Ohio Constitution. Like R.C. 731.29-30, it says that emergency ordinances are immediately effective and not subject to referendum.

[6] *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (interpreting the meaning of the Second Amendment of the U.S. Constitution through an understanding of the meaning of the words as used in contemporaneous documents at the time of its passage).

City of London, 88 Ohio St.3d 137, 143, 723 N.E.2d 1089 (2000), where the court unambiguously explained that laws which "go into immediate effect" under R.C. 731.30 are not subject to referendum. The "immediate effect" language of R.C. 731.30 "preclude[s] referendum of properly adopted emergency legislation." *Id.*

Likewise, in *Laughlin*, 115 Ohio St. 3d 231 at ¶ 32, the Ohio Supreme Court explained that emergency ordinances are those that are immediately effective, so adding the word "immediate" in an ordinance is superfluous. Under these cases, an emergency ordinance by definition goes into immediate effect and is not subject to referendum.

The trial court impermissibly reads out of the Charter the emergency ordinance portion, which is 107 of the 150 words in Article II, Section 3. Those words cannot be meaningless. *Cleveland Elec. Illum. Co.*, 37 Ohio St.3d at 53.

The trial court relies exclusively on *State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, 2011-Ohio-4485, for the idea that the words "emergency ordinance" can mean something other than laws that are immediately effective and not subject to referendum. T.d. 36 at 13. Contrary to the trial court's view, *Julnes* only makes sense if the term "emergency ordinance" means a law that is not subject to referendum. *Julnes* found the South Euclid charter's language ambiguous because it makes two contradictory statements. It says that "except as otherwise provided by the Constitution or the general laws of the State of Ohio," ordinances "including, but not limited to, emergency ordinances ... shall be subject to referendum." The problem is that emergency ordinances are not subject to referendum under Ohio law, but at the same time the charter provision says specifically that South Euclid emergency ordinances are subject to referendum. Emergency ordinances cannot be simultaneously subject to and not subject to referendum.

The Ohio Supreme Court understood that the default definition of the term "emergency ordinance" is a law that is not subject to referendum. Were it otherwise, there would have been no ambiguity in *Julnes*. That is why the court concluded its analysis explaining that "R.C. 731.29 and 731.30 do not exempt Ordinance No. 05-11 from referendum, **in light of the specific charter provision subjecting it to referendum.**" *Id.* ¶ 44 (Emphasis added); *see also Taylor*, 88 Ohio St.3d at 143; *Laughlin* at ¶ 32.

This makes sense under Ohio law. In cities where emergency ordinances are subject to referendum, the charters specifically say so, because they must exempt laws from the default rule of R.C. 731.30. *State ex rel. Snyder v. Board of Elections,* 78 Ohio App. 194, 200, 69 N.E.2d 634 (1946). In *Snyder*, Toledo's charter did exactly that, stating "An emergency measure shall be subject to referendum as other ordinances or resolutions." *Id.* at 196. *See also, Julnes; Bramblette*, 24 Ohio St.2d at 151, 265 N.E.2d 273.

In cases without specific language, the default definition of R.C. 731.30 applies. *See State ex rel. Taxpayers League of North Ridgeville v. Noll*, 11 Ohio St.3d 190, 191, 464 N.E.2d 1007 (1984). And, this is precisely how Cincinnati's Charter has been interpreted throughout its history. *Schultz*, 1938 Ohio Misc. LEXIS at *7; *Sentinel Police Assn.*, 1996 Ohio App. LEXIS at *12 ("valid emergency ordinances become effective immediately"); *see also Newberry*, 1984 Ohio App. LEXIS 8835. The trial court erred. Judgment should be entered for Defendants.

Second Issue Presented for Review and Argument: City Council validly enacted the Ordinance when five members voted in favor of the Ordinance and six members voted in favor of the emergency clause.[7]

Plaintiffs argue that Cincinnati must receive favorable votes from two-thirds of the members in order to be an emergency under R.C. 731.30. However, citizens of Ohio cities can

[7] Plaintiffs intend to argue three alternative theories. *See* Appellee's Response to Appellants' Emergency Motion for Expedited Briefing Schedule (Mar. 29, 2013). The Second, Third, and Fourth Issues Presented for Review are the City's responses to those arguments.

choose when and how they exercise the referendum power. *Buckeye Community Hope Found.*, 82 Ohio St.3d at 543. They also can change the criteria by which a law goes into immediate effect. *See, e.g., State ex rel. Moore v. Abrams*, 62 Ohio St.3d 130, 580 N.E.2d 11 (1991); *see also Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 519 N.E.2d 347 (1988). Article II, Section 1 of the Charter provides that City law prevails when state law conflicts.

Article II, Section 3 of the Charter states that emergency ordinances "must receive the vote of a majority of the members." Charter art. II, § 3. It then states that 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.*

This is not a mistake. In 1994, Cincinnati voters amended Article II, Section 3 to its current language. T.d. 26, Ex. C. 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. To require six votes on the entire Ordinance is contrary to the plain reading of the Charter and violates the principles of home rule.

Third Issue Presented for Review and Argument: The Court lacks jurisdiction to review the Council's determination that the ordinance is an emergency.

Plaintiffs claim that the emergency clause simultaneously says too much (T.d. 38, ¶¶ 50-51) and does not say enough (*id.* ¶¶ 52-53). *See* T.d. 19 at 6-10. 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." *Laughlin*, 115 Ohio St.3d 231 at ¶ 42. Only where "mere parroting of comparable conclusory language" occurs does a court even have jurisdiction to review the emergency. *Id.* at ¶ 33.

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." Charter art. II, § 3. Section 5 of the Ordinance meets that requirement. Council declared, among other reasons, 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." T.d. 26, Ex. W § 5.

Section 5 is not a boilerplate recitation of emergency language. It describes specific and concrete consequences that flow from inability to immediately implement the Ordinance. This Court thus does not have jurisdiction to review the emergency clause. *Laughlin* at ¶ 42.

Plaintiffs also make the unprecedented claim that Council said too much when it included the words "general welfare" in the emergency clause. T.d. 38, ¶¶ 50-51. 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* at ¶ 33. No case suggests that giving additional good reasons invalidates the emergency clause. Plaintiffs then suggest that failing to put the word "immediate" in the right place in the emergency clause renders it invalid. T.d. 19 at 11. This argument also has been rejected by Ohio courts. *Laughlin* at ¶ 32 (failure to include word "immediate" not fatal to emergency ordinance).

Fourth Issue Presented for Review and Argument: The Administrative Code does not need to be amended in order to implement the Parking Modernization Plan.

Plaintiffs argue that seven votes were required to enact the Ordinance under Article II, Section 7 of the Charter. T.d. 38, ¶¶ 56-67. They reach that incorrect conclusion by taking out of context one phrase of one sentence of the section.

Article II, Section 7 details how the Administrative Code is amended. "[C]ouncil may change, abolish, combine or re-arrange the departments, divisions and boards of the city **provided for in the administrative code**." 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. *Id.* Reading all of Article II, Section 7, it is plain that seven votes are needed only when the Administrative Code is being amended. The parking operations are not in the Administrative Code, so no amendment was required. *See* T.d. 26, Ex. B.

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 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 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 Administrative Code itself forecloses the Plaintiffs' arguments. The Administrative Code provides that the City Manager "may assign powers and duties to departments in addition to those assigned by ordinance"; "determine the number of officers or employees for each department, division or other administrative unit for which the city manager is responsible"; and "direct any department to perform work for any other department." Admin. Code art. II, §§ 3-5.

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." Admin. Code art. II, § 3. The "Department of Enterprise Services" is not one of the departments in the Administrative Code. Nor is there any ordinance, other than perhaps CMC 509-1, that controls assignment of parking meter duties. Plaintiffs cannot identify any ordinance or law that confers any power or duty to the "Parking Facilities Division of the Department of Enterprise Services." The administration of parking rests with the City Manager.

Plaintiffs, without legal support, ask the Court to require yet one more council vote for a duty already assigned to the City Manager. The Court should reject the Plaintiffs' invitation to insert itself into the City Manager's executive role in City government.

IV. Conclusion

For the foregoing reasons, the Order of the trial court should be reversed and the Court should enter judgment in favor of the City by declaring that Ordinance 56-2013 is a validly enacted emergency ordinance that is immediately effective and not subject to referendum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email on April 19, 2013 on the following:

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MAR 28 2013
ROBERT C. WINKLER

ENTERED
MAR 28 2013

LISA McQUEEN, *et al.*	:	Case No. A1301595
Plaintiffs,	:	
and	:	Judge Robert C. Winkler
CITY OF CINCINNATI *ex rel.* LISA McQUEEN, et al.	:	**ORDER AND ENTRY GRANTING MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION**
Relators,	:	
v.	:	
MILTON R. DOHONEY, JR., *et al.*		
Defendants-Respondents.		

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INTRODUCTION

On March 6, 2013, Cincinnati City Council passed and Mayor Mark Mallory signed Ordinance No. 56-2013, authorizing City Manager Milton Dohoney, Jr. to enter into an agreement under which the City would lease its on-street parking meters and City-owned parking lots and garages to the Port of Greater Cincinnati Development Authority. The Port Authority, in turn, would contract with private entities to operate and maintain those parking assets throughout the City and to enforce compliance with the City's parking ordinances and regulations. The Ordinance passed by a vote of 5 to 4; however, a provision declaring it to be an emergency measure passed by a 6 – 3 vote.

Immediately after Ordinance No. 56-2013 was adopted, Plaintiffs/Relators sought a Temporary Restraining Order prohibiting the City from taking any action to implement it. This Court granted the Temporary Restraining Order and set the matter for hearing on Plaintiffs/Relators' Motion for Declaratory Judgment and Permanent

EXHIBIT
A

Injunction on March 15, 2013. At the conclusion of the hearing, the matter was taken under submission for decision by this Court.

Plaintiffs/Relators contend – and Defendants/Respondents do not seriously dispute – that the emergency declaration was included to give the Ordinance immediate effect and thereby preclude any citizen-initiated referendum on it.

The essential issue in this case is whether the City's declaration of emergency in Ordinance No. 56-2013 precludes a referendum on the Ordinance. For the reasons that follow, the Court concludes that it does not, and so grants the request for declaratory judgment and permanent injunction prohibiting the City from taking any action to implement the Ordinance pending the outcome of any such referendum.

FACTS AND PROCEDURAL HISTORY

On October 26, 2012, the City of Cincinnati issued a Request for Proposals ("RFP") with respect to a Concession Lease Agreement for Selected City-Owned Parking Assets. On November 26, 2012, the City received nine proposals in response to the RFP. After reviewing the proposals, the City invited three teams to Cincinnati for interviews and the City started negotiations with two teams.

As a result of these negotiations, the City selection team recommended a public/private partnership structure with the Port of Greater Cincinnati Development Authority ("Port Authority") as lessee and a private entity to be known as "ParkCincy" serving as operator, asset manager, and underwriter. ParkCincy is a team made up of Guggenheim Securities LLC, (the underwriter for the issuance of bonds), AEW Capital Management, L.P. (the asset manager), Xerox State & Local Solutions (the on-street operator), Denison Parking, Inc. (the off-street operator), and its various subcontractors and vendors.

On February 27, 2013, City Manager Dohoney transmitted to the Mayor and members of the City Council a draft ordinance relating to a Parking Lease & Modernization Agreement. On March 4, 2013, the Budget and Finance Committee of the Cincinnati City Council considered the draft ordinance and directed that it be separated into two ordinances.

On March 6, 2013, City Manager Dohoney transmitted to the Mayor and members of the City Council a draft ordinance relating to a Long Term Lease & Modernization Agreement for City Parking System — B Version. The ordinance transmitted with the City Manager's memorandum was ultimately adopted by the City Council and was designated as Ordinance No. 56-2013. The City Council voted to adopt Ordinance No. 56-2013 by a vote of 5-to-4.

The Ordinance authorizes the City Manager to execute a lease with the Port Authority of Greater Cincinnati. The City would lease certain parking lots and garages and grant the Port Authority a franchise to operate the City's parking meters. In exchange, the Port Authority would pay the City approximately $92 million up front and would make annual payments of approximately $3 million for thirty years.

The City asserts that the Ordinance is necessary to balance the fiscal year 2014 budget, which begins in July, 2013. It explains that during the budget planning process, Council chose to use $4.8 million from anticipated parking franchise revenues instead of eliminating income tax reciprocity for City residents. The City claims that if the parking franchise revenues are not available, its deficit will grow by that $4.8 million. Additionally, the fiscal year 2013 budget has an $11.2 million deficit, and the City posits that it will have to immediately begin cutting the budget by, *inter alia,* cutting 344 employees (269 of whom are police and fire department employees), reducing services,

and eliminating programs. Without the revenue generated by the parking arrangement, the City claims that it would need to close three recreation centers and six swimming pools, 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. The City claims that "it 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 1-71, and spur development of a 30-story mixed use building in downtown featuring a grocery store, among other items."[1]

Subsequent to adopting Ordinance No. 56-2013, the City Council voted to include an emergency declaration by a vote of 6-to-3. 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.

On March 8, 2013, a certified copy of a referendum petition regarding Ordinance No. 56-2013 was filed with Reginald Zeno, the Finance Director for the City of Cincinnati. Plaintiffs are all either residents, voters or taxpayers within the City of Cincinnati. Some of the Plaintiffs are actively involved in circulating the referendum

[1] Defendants' Memorandum in Opposition, pp. 13-14.

petition. Plaintiff Pete Witte is one of the four members of the committee designated on the petition.

In addition to their efforts to subject Ordinance No. 56-2013 to referendum, Plaintiffs also utilize the on-street and off-street parking facilities of the City and, in light of the changes to the City's parking system to be brought about through implementation of Ordinance No. 56-2013, Plaintiffs would be directly impacted by any change in the rates, hours and enforcement of the parking system.

Additionally, Plaintiff Pete Witte is a business owner some of whose patrons utilize the on-street or off-street parking facilities of the City. As a result of the changes to the City's parking system to be brought about by implementation of Ordinance No. 56-2013, those patrons and Mr. Witte's business would be directly impacted by any change in the rates, hours and enforcement of the parking system.

Through the petition effort, Plaintiffs are claiming the right to enforce and vindicate their alleged public right to referendum, notwithstanding the City's contention that Ordinance No. 56-2013 is not subject to referendum.

Immediately after Ordinance No. 56-2013 was adopted by the City Council, Plaintiffs sought and this Court issued a Temporary Restraining Order prohibiting the City from taking any action to implement it. The Court subsequently ordered that the hearing on the motion for preliminary injunction be consolidated with the trial on the merits of the case pursuant to ORCP 65(B)(2). At the conclusion of the March 15, 2013 hearing, the matter was taken under submission; on March 20, 2013, the Temporary Restraining Order was extended pending the Court's decision on the merits.

ISSUES

Plaintiffs/Relators have raised several issues in their First Amended Complaint and their Motion for Declaratory Judgment and Permanent Injunction. Their foremost claim is the request for a declaration from the Court that Ordinance 56-2013 is subject to referendum as provided by the Cincinnati City Charter. In its Answer and Memorandum in Opposition to Plaintiffs/Relators' Motion for Declaratory Judgment, the City of Cincinnati addresses those issues and raises the matter of Plaintiffs/Relators' standing to pursue their claims as alleged in the First Amended Complaint. In view of the dispositive nature of the Court's decision concerning Plaintiffs/Relators' right to a referendum in relation to Ordinance 56-2013, the remaining issues need not be addressed.

DISCUSSION

The standard for injunctive relief is well settled in Ohio law:

> A party seeking a TRO or preliminary injunctive relief must show, by clear and convincing evidence, (1) a substantial likelihood that the party will prevail on the merits, (2) the party will suffer irreparable injury or harm if the requested injunctive relief is denied, (3) no unjustifiable harm to third parties will occur if the injunctive relief is granted, and (4) the injunctive relief requested will serve the public interest. *Cincinnati v. Harrison*, 1st Dist. No. C-090702, 2010-Ohio-3430, ¶8, citing *The Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist. 2000). A court must balance all four factors in determining whether to grant or deny injunctive relief, and no one factor is determinative. *Toledo Police Patrolman's Assn., Local 10, IUPA, AFL-CIO-CLC, v. Toledo*, 127 Ohio App.3d 450, 469, 713 N.E.2d 78 (6th Dist.1998).

Brookville Equipment Corp. v. Cincinnati, 2012-Ohio-3648 (1st App. Dist.), at ¶11.

"The 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." *Miller v. Miller*, 2005-Ohio-5120 (11th App. Dist.), ¶10-11, citing *Ellinos, Inc. v. Austintown Twp.,* 203 F.Supp.2d 875, 886 (N.D.Ohio 2002); *Edinburg Restaurant, Inc. v. Edinburg Twp.*, 203 F.Supp.2d 865, 873 (N.D.Ohio 2002).

"Irreparable injury means a harm for which no plain, adequate, or complete remedy at law exists. *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14, 684 N.E.2d 343 (8th Dist. 1996). A party does not have to demonstrate actual harm — threatened harm is sufficient. *Convergys Corp. v. Tackman*, 169 Ohio App.3d 665, 2006-Ohio-6616, 864 N.E.2d 145, ¶ 9 (1st Dist.)." *Brookville Equipment Corp. v. Cincinnati, supra,* at ¶23.

STANDING

The City of Cincinnati challenges Plaintiffs/Relators' standing to pursue the claims in their Amended Complaint both individually and in their capacity as statutory taxpayers. The City argues that Plaintiffs/Relators lack standing to bring an action for declaratory judgment because there is no justiciable controversy. The City further asserts that Plaintiffs/Relators have failed to adhere to the specific statutory requirements required to maintain a taxpayer suit. For the reasons that follow, the Court finds that Plaintiffs/Relators have sufficiently demonstrated standing to pursue their claims individually and in a taxpayer suit.

The City of Cincinnati correctly states the law of standing in relation to declaratory judgment actions as summarized in *Mallory v. Cincinnati,* 2012-Ohio-2861 (1st Dist. App.). In *Mallory*, the First District Court of Appeals analyzed the issue of standing as it relates to actions for declaratory judgment. The Court stated:

> The Ohio Constitution, Article IV, Section 4(B), limits the subject matter jurisdiction of common pleas courts to "justiciable matters," which the Ohio Supreme Court has interpreted to mean an actual controversy between the parties. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St. 3d 536, 542, 660 N.E.2d 458 (1996). This is true even in an action for a declaratory judgment. *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St. 3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9. "A 'controversy' exists for purposes of a declaratory judgment when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Wagner v. Cleveland*, 62 Ohio App. 3d 8, 13, 574 N.E.2d 533 (8th Dist.1988), citing *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973); *see also Kincaid v. Erie Ins. Co.*, 128 Ohio St. 3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶10 (internal citations omitted) (an actual controversy is "more than a disagreement; the parties must have adverse legal interests."). In other words, the plaintiff must seek the "protection of the law" from the "adverse conduct or adverse property interest" of a party. *State ex rel. Barclays Bank PLC* at 542.

Ohio's Declaratory Judgment Act is a statutory scheme created in derogation of the common law; the existence of jurisdiction in a declaratory judgment action must be evident from the allegations in the complaint. See *Van Stone v. Van Stone*, 95 Ohio App. 406, 411, 120 N.E.2d 154 (6th Dist. 1952). If the complaint fails to show the existence of a real, present dispute, then any opinion by a court would be merely advisory — and it is a well-established principle of law that courts should not issue advisory opinions. See *Scott v. Houk*, 127 Ohio St. 3d 317, 2010-Ohio-5805, ¶22, 939 N.E.2d 835.

Thus, the Court must determine whether Plaintiffs/Relators have demonstrated an actual controversy between themselves and the City of Cincinnati. The City premises its argument, among other things, on the speculative nature of Plaintiffs/Relators' claim that the City's signing the Parking System Lease might impair Plaintiffs/Relators' ability to seek a referendum on Ordinance 56-2013. The City suggests that if it were to sign the

Parking System Lease, it could not prevent a referendum on the ordinance if one were required by Ohio law, but rather would be proceeding at its own risk.

Relying on *Middletown v. Ferguson*, 25 Ohio St. 3d 71, 76, 495 N.E.2d 280 (1986), Plaintiffs/Relators assert that the signing of the Parking System Lease would destroy any meaningful relief by means of a referendum on the Ordinance. In *Middletown*, the City Council passed an emergency ordinance directing the city manager to enter into contracts with the Ohio Department of Transportation for certain road improvements. ODOT accepted bids for the improvements and awarded a contract for the construction project, and construction began shortly thereafter. Just three days prior to the contract being awarded, the Board of Elections validated sufficient signatures to have an initiative placed on the November ballot. The voters approved the initiative ordinance repealing the enabling legislation and all commitments for the road project. At the time the initiative passed, construction was nearly sixty percent complete. The effect of the initiative would have halted the completion of the project.

The City of Middletown believed the initiative to be an unconstitutional impairment of a contract and allowed the project to continue to the point of completion. The Ohio Supreme Court agreed that the initiative as passed impaired the obligations of the contract between the City and ODOT in violation of Article I, Section 10 of the United States Constitution and therefore, the initiative ordinance was void *ab initio*. *Id.*, 25 Ohio St. 3d at 383. The Court went on to state that "once having granted certain powers to a municipal corporation, which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature (or here, the electorate) is not free to alter the corporation's ability to perform." *Id.* at 385 [quoting *Continental Illinois Nat'l Bank v. Washington*, 696 F.2d 692, 700 (9th Cir.

1983)]. The Court explained that "had the initiative had been brought at an earlier time, *before there was an executed contract*, and before construction had begun, this controversy likely would not be before us today." *Id.* at 383 (emphasis added).

The City's argument that it would be proceeding at its own risk if it were to sign the Parking System Lease misses the mark. Had Plaintiffs/Relators not obtained a temporary restraining order in this matter, this case would likely be at an end. The City has it backwards. If the City had signed the Parking System Lease, it would have been at Plaintiffs/Relators' "risk." Plaintiffs/Relators would be deprived of any meaningful relief even if they were to succeed with the referendum on Ordinance 56-2013.

Based on the foregoing, Plaintiffs/Relators have sufficiently demonstrated an actual controversy between themselves and the City of Cincinnati. Accordingly, Plaintiffs/Relators have standing to proceed with their action for declaratory judgment.

The City also challenges Plaintiffs/Relators' standing to pursue their taxpayer claims under R.C. 733.59 for declaratory judgment. The Ohio Legislature has conferred standing upon municipal taxpayers to vindicate a public right when a city or its officials refuse to apply for an injunction or to restrain an abuse of corporate power. A taxpayer demand letter is a jurisdictional prerequisite to a statutory taxpayer action and the failure to send the required demand is fatal to statutory taxpayer standing. As of the date of the hearing on Plaintiffs/Relators' Motion for Declaratory Judgment and Permanent Injunction, a demand letter as described in R.C. 733.59 had not been served upon Cincinnati City Solicitor John P. Curp.

The City has directed the Court's attention to *Fisher v. Cleveland,* 109 Ohio St. 3d 33, 2006-Ohio-1827, wherein the Ohio Supreme Court stated 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 corporate powers.'"

Plaintiffs/Relators argue that the demand letter required by R.C. 733.59 would have been a futile or vain act, given that Mr. Curp, in fulfilling his obligations as City Solicitor and chief legal counsel for the City of Cincinnati, advised the City Council that the emergency language contained in Ordinance 56-2013 would prohibit a referendum on the Ordinance. Under R.C. 733.59, Mr. Curp would be placed in the untenable position of having advised the City Council on how to make the Ordinance referendum-proof, and then, at the request of a taxpayer, applying to a court for an injunction or declaration as to the taxpayers' right to a referendum on that same Ordinance. In determining whether or not a taxpayer demand letter would be a vain act, "the substantial question 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 (1973). In this instance, given Mr. Curp's advice to City Council and his close involvement with the process which ultimately led to the passage of Ordinance 56-2013 as emergency legislation, the statutory demand letter would have been in vain and to no avail. Thus, despite the lack of a statutory demand letter, Plaintiffs/Relators have demonstrated sufficient standing to proceed in a statutory taxpayer action.

EMERGENCY LEGISLATION

The Cincinnati City Council adopted Ordinance 56-2013 as emergency legislation in accordance with the City Charter. The City argues that Article II, Section 3 of its Charter provides that such emergency legislation goes in to effect immediately and therefore is not subject to referendum. The significance of designating an ordinance as

emergency legislation and whether such emergency legislation is subject to referendum is not specifically addressed in the Charter.

The City urges the Court to give all the words contained in the Charter their plain and ordinary meaning, and in so doing, conclude that emergency Ordinance 56-2013 is not subject to referendum.

Plaintiffs/Relators interpret Article II, Section 3 of the Charter to allow for referendum on all ordinances passed by the City Council, and the reference in that Section to the laws of the State of Ohio relates solely to the mechanics or procedures of the referendum process itself (*i.e.,* gathering signatures, circulating petitions, filing requirements, deadlines, etc).

As a matter of statutory construction, the Court is not permitted to add language exempting emergency legislation from referendum where no such language exists in the Charter provision. The First District Court of Appeals recently so held in *Brookville Equipment Corp. v. Cincinnati,* 2012-Ohio-3648, at ¶ 20:

> Because council chose not to include language in the ordinance, a court will not add that language when undertaking an interpretation of such ordinance. *See,* e.g., *State ex rel. Lorain v. Stewart,* 119 Ohio St. 3d 222, 2008-Ohio-4062, 893 N.E.2d 184 (refusing to add language to a statute when engaging in statutory interpretation).

The Ohio Supreme Court has for many years instructed the lower courts that when interpreting provisions for municipal initiative or referendum, those provisions are to be liberally construed so as to permit rather than preclude the exercise of the powers of referendum and initiative:

> This conclusion is consistent with our duty to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained.

State ex rel. Julnes v. S. Euclid City Council, 130 Ohio St. 3d 6, 2011-Ohio-4485, ¶ 28 (citing *State ex rel. Oster v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St.3d 480, 486, 756 N.E.2d 649).

It is generally presumed in Ohio that emergency legislation is not subject to referendum. To be sure, in cases where the Ohio Revised Code's referendum provisions apply – with respect to non-charter municipalities, for example -- R.C. 731.29 -30 make clear that emergency legislation is not subject to referendum. R.C. 731.29 states, in pertinent part, "Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code." R.C. 731.30 refers to emergency ordinances, appropriations for current expenses and street improvements. See *State ex rel. Laughlin v. James,* 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145 (non-charter village council ordinance not subject to referendum due to emergency declaration). However, the Ohio Supreme Court recently found an emergency ordinance subject to referendum where the city charter provided for referendum on emergency ordinances. *State ex rel. Julnes v. S. Euclid City Council,* 130 Ohio St. 3d 6, 2011-Ohio-4485.

The City of Cincinnati derives its powers as a home rule city from the Ohio Constitution. The First District Court of Appeals recently reaffirmed that view. In *State ex rel. Phillips Supply Co. v. Cincinnati,* 2012-Ohio-6096, ¶53, the Court stated, "The city of Cincinnati is a charter municipality which derives its powers of local self-government from Ohio Constitution, Article XVIII, Section 3. Thus, the City's power to enact legislation is conferred by the City Charter, not the Ohio Revised Code."

The City of Cincinnati as a charter municipality may enact legislation as provided by its Charter. Article II, Section 3 of the City Charter, which governs citizens'

referendum powers, was adopted as a charter amendment in 1994 by the voters of Cincinnati.

The City of Cincinnati's Charter provides:

> Article II, Section 1: All legislative powers of the city shall be vested, subject to the terms of this charter and of the constitution of the state of Ohio, in the council. The laws of the state of Ohio not inconsistent with this charter, except those declared inoperative by ordinance of the council, shall have the same force and effect of ordinances of the city of Cincinnati; but in the event of conflict between any such law and any municipal ordinance or resolution the provisions of the ordinance or resolution shall prevail and control.
>
> Article II, Section 2: All ordinances and resolutions in force at the time this charter takes effect, not inconsistent with its provisions, shall continue in force until amended or repealed by the council.
>
> Article II, Section 3: The initiative and referendum powers are reserved to the *people* of the city on *all* questions which the council is authorized to control by legislative action; such powers shall be *exercised* in the *manner* provided by the laws of the state of Ohio. Emergency ordinances upon a yea and nay vote must receive the vote of a majority of the members elected to the council, and 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 elected to the council upon a separate roll call thereon. 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.

(Emphasis added.)

The citizens of Cincinnati have reserved the initiative and referendum power to themselves on all questions which the Council is authorized to control by legislative action. Those powers shall be ***exercised*** in the ***manner*** provided by the laws of the state of Ohio. The question is whether the initiative and referendum powers reserved to the people in the first clause of Article II, Section 3 are somehow diminished by the second clause which provides that those powers are to be exercised in the manner provided by Ohio law. The Court must decide if the citizens of Cincinnati chose to limit

their referendum rights in those instances where the City Council passes emergency legislation.

The City Charter does not specifically exempt emergency legislation from the powers reserved to the people. The Charter language is clear that it refers to all legislation passed by City Council with no exceptions. If the people of Cincinnati had intended to exempt emergency legislation from their referendum powers, they could have done so when adopting Article II, Section 3 of the City Charter.

Turning to the second clause of Article II, Section 3, the question of how those powers are to be exercised must be answered. The referendum powers are to be exercised in the manner provided by the laws of Ohio. This refers to the procedures to be employed when seeking a referendum, not to any limit on the right of referendum itself. Cincinnati's Charter does not provide any procedural mechanism for the conduct of initiative or referendum proceedings, but rather defaults to state law. Without the reference to Ohio law, the citizens of Cincinnati would have the right to referendum but no procedural method to implement the right. See *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 477, 2002-Ohio-997, 764 N.E.2d 971:

> The statutory procedure governing municipal initiative and referendum in R.C. 731.28 through 731.41 applies to municipalities where the charter incorporates general law by reference, except where the statutory procedure conflicts with other charter provisions.

The City Charter's reference to Ohio law applies the procedures to be followed in ***exercising*** the people's right to initiative and referendum; it places no restraint or limitation on that right.

To be sure, the City Charter provisions at issue here are by no means free from ambiguity. However, the Supreme Court of Ohio has set forth the course to be followed

when a city charter provides its citizens with an unrestricted right to referendum followed by a reference to state law for the manner of its exercise:

> Given the ambiguity of the charter language as well as our oft-cited mandate to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained, we will not do so.

State ex rel. Julnes v. S. Euclid City Council, 130 Ohio St. 3d 6, 2011-Ohio-4485, ¶ 43 (citing *State ex rel. Oster v. Lorain County Bd. of Education* (2001), 93 Ohio St. 3d 480, 486, 756 N.E.2d 649. Neither will this Court do so.

CONCLUSION

The Court has considered the arguments of counsel, the law of Ohio, exhibits, precedent, and the rules of statutory construction, and has weighed the relevant factors required of Plaintiff/Relators in order for them to prevail on their claim for injunctive relief. For the reasons stated herein, the Court hereby grants Plaintiffs/Relators' Motion for Declaratory Judgment and Permanent Injunction.

Therefore, it is hereby ORDERED that, pending the outcome of the referendum process on Ordinance 56-2013, Defendants Milton Dohoney and the City of Cincinnati shall take no further action to implement Ordinance 56-2013, nor shall they execute or perform under the Long-Term Lease and Modernization Agreement for the City of Cincinnati Parking System. This is a final appealable order. There is no just cause for delay.

SO ORDERED.

3/28/13
Date

Judge Robert C. Winkler

COURT OF COMMON PLEAS
ENTER
HON. ROBERT C. WINKLER
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

Copies to be sent via ordinary U.S. mail to:

Curt C. Hartman (0064242)
3749 Fox Point Ct.
Amelia, OH 45102

Christopher P. Finney (0038998)
Finney, Stagnaro, Saba & Patterson
2623 Erie Avenue
Cincinnati, OH 45208

Mark A. Vanderlaan (0013297)
George H. Vincent (0010340)
Bryan E. Pacheco (0068189)
Dinsmore & Shohl, LLP
1900 Chemed Center
255 E. Fifth Street
Cincinnati, OH 45202

Terrance A. Nestor (0065840)
Assistant City Solicitor
Aaron M. Herzig (0079371
Deputy City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, OH 45202

Common Pleas Cost Statement

Case Number: A 1301595

Last Activity Date: 04/09/2013

Caption: LISA MCQUEEN vs. MILTON R DOHONEY JR

Filing Date: 03/06/2013

Filing: H842 INJUNCTION- OC- TAXED IN COSTS

Current Judge: 230 ROBERT C WINKLER 03/13/2013

Previous Judge:

Note: TEMPORARY RESTRAINING ORDER 3/6/13

Cost Appl Date:

# of Notifications: 12

Last Billing Date: 04/02/2013

Arbitration:

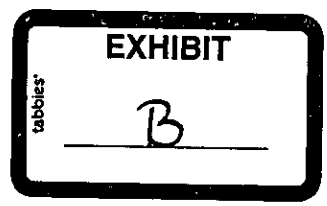
Consolidated:

Deposit Motion Flag: N

Miscellaneous Ind:

Party/Attorney Info

Name	Party	Attorney	Court ID
Address		**Address**	
LISA MCQUEEN	P1	FINNEY/CHRISTOPHER/P	38998
5610 ARNSBY PL		2623 ERIE AVENUE	
CINCINNATI OH 45227		CINCINNATI OH 45208	
SHIRLENE BRITTON	P2		
5400 HAMILTON AVE APT 409			
CINCINNATI OH 45224			
PETE WITTE	P3		
4319 RIDGEVIEW AVE			
CINCINNATI OH 45238			
EDWARD D HYDE	P4		
2480 FAIRVIEW AVE STE 102			
CINCINNATI OH 45219			
JOHN BRANNOCK	P5		
3227 LOOKOUT DR			



CINCINNATI OH 45208			
DOUGLAS B ROBINSON JR	P6		
3621 VICTORIA LN			
CINCINNATI OH 45208			
MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI	D1	NESTOR/TERRANCE/A	65840
801 PLUM ST		ROOM 214 CITY HALL 801 PLUM STREET	
CINCINNATI OH 45202		CINCINNATI OH 45202	
MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI	D1	VINCENT/GEORGE/H	10340
801 PLUM ST		1900 CHEMED CENTER 255 EAST FIFTH STREET	
CINCINNATI OH 45202		CINCINNATI OH 452023172	
MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI	D1	HERZIG/AARON/M	79371
801 PLUM ST		801 PLUM STREET RM 214	
CINCINNATI OH 45202		CINCINNATI OH 45202	
MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI	D1	CURP/JOHN/P	64782
801 PLUM ST		801 PLUM ST ROOM 124	
CINCINNATI OH 45202		CINCINNATI OH 45202	
MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI	D1	VANDERLAAN/MARK/ALAN	13297
801 PLUM ST		1900 CHEMED CENTER 255 EAST FIFTH STREET	
CINCINNATI OH 45202		CINCINNATI OH 452024720	
MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI	D1	PACHECO/BRYAN E	68189
801 PLUM ST		1900 CHEMED CENTER 255 EAST FIFTH STREET	
CINCINNATI OH 45202		CINCINNATI OH 45202	
CITY OF CINCINNATI	D2	HERZIG/AARON/M	79371
801 PLUM ST		801 PLUM STREET RM 214	
CINCINNATI OH 45202		CINCINNATI OH 45202	
CITY OF CINCINNATI	D2	CURP/JOHN/P	64782
801 PLUM ST		801 PLUM ST ROOM 124	

CINCINNATI OH 45202		CINCINNATI OH 45202	
CITY OF CINCINNATI	D2	VANDERLAAN/MARK/ALAN	13297
801 PLUM ST		1900 CHEMED CENTER 255 EAST FIFTH STREET	
CINCINNATI OH 45202		CINCINNATI OH 452024720	
CITY OF CINCINNATI	D2	PACHECO/BRYAN E	68189
801 PLUM ST		1900 CHEMED CENTER 255 EAST FIFTH STREET	
CINCINNATI OH 45202		CINCINNATI OH 45202	
CITY OF CINCINNATI	D2	NESTOR/TERRANCE/A	65840
801 PLUM ST		ROOM 214 CITY HALL 801 PLUM STREET	
CINCINNATI OH 45202		CINCINNATI OH 45202	
CITY OF CINCINNATI	D2	VINCENT/GEORGE/H	10340
801 PLUM ST		1900 CHEMED CENTER 255 EAST FIFTH STREET	
CINCINNATI OH 45202		CINCINNATI OH 452023172	

Cost Statement

Docket ID #	Entry Type	Dock Code	Entry Date	Docket Description / Comment	Amount	
101743575	D	FF	04/18/2013	MEMORANDUM OF PLAINTIFFS-RELATORS IN OPPOSITION TO DEFENDANTS MOTION FOR AUTOMATIC STAY	$5.00	N
101637104	D	COA	04/10/2013	COURT OF APPEALS OF HAMILTON COUNTY CASE NO. C 1300196, TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES FILED		
101613891	D	NS	04/09/2013	NOTICE OF APPEALABLE JUDGMENT SENT BY ORDINARY MAIL TO ALL PARTIES REQUIRED BY LAW.		
101612316	D	FXM	04/09/2013	DEFENDANTS' MOTION FOR AUTOMATIC STAY OF JUDGMENT PURSUANT TO RULE 62(C)		
101589237	D	AF	04/05/2013	COMPLETE TRANSCRIPT OF PROCEEDINGS FOR APPEAL (C 1300196)		
101547891	D	FF	04/03/2013	STIPULATION REGARDING RE-FILING OF AMENDED COMPLAINT	$2.00	N
101533201	F	BILL	04/02/2013	BILLED: 645.00 CHRISTOPHER P FINNEY		
101491306		JNAF	03/29/2013	NOTICE OF APPEAL FILED. NO. C1300196 COPY SENT TO CURT C HARTMAN, CHRISTOPHER P FINNEY		
101478272	D	NC	03/28/2013	NOTIFICATION COST.	$24.00	N

101478271	D	K6	03/28/2013	ORDER AND ENTRY GRANTING MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION IMAGE	$51.00	N
101412723	D	EOG	03/22/2013	ORDER GRANTING MOTION TO REMAND IMAGE	$3.00	N
101412468	D	EEG	03/22/2013	ENTRY GRANTING MOTION TO ESTABLISH AMOUNT OF SECURITY FOR COSTS OF PROCEEDINGS PURSUANT TO R.C. 733.59 IMAGE	$6.00	N
101412202	D	EEG	03/15/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101412171	D	EEG	03/15/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101412161	D	EEG	03/15/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101412152	D	EEG	03/15/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101412095	D	EEG	03/15/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101412086	D	EEG	03/15/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101412076	D	EEG	03/15/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101387341	D	EORD	03/20/2013	ORDER EXTENDIGN TEMPORARY RESTRAINING ORDER IMAGE	$6.00	N
101328250	D	FF	03/15/2013	STIPULATIONS OF FACT	$7.00	N
101327263	D	EEG	03/11/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101324606	D	EEG	03/08/2013	ENTRY GRANTING APPROVAL IMAGE	$3.00	N
101324601	D	EEG	03/08/2013	ENTRY GRANTING APPROVAL**CH. 5** IMAGE	$3.00	N
101323472	D	FF	03/14/2013	DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFFS MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION	$20.00	N
101323216	D	FXA	03/14/2013	DEFENDANTS ANSWER TO FIRST AMENDED COMPLAINT	$8.00	N
101309308	D	FNFF	03/14/2013	NOTIFICATION FORM FILED.	$1.00	N
101309281	D	FNFF	03/14/2013	NOTIFICATION FORM FILED.	$1.00	N
101309235	D	FNFF	03/14/2013	NOTIFICATION FORM FILED.	$1.00	N
101308576	D	FXN	03/14/2013	NOTICE OF APPEARANCE OF COUNSEL FOR MARK A VANDER LAAN GEORGE H VINCENT AND BRYAN E PACHECO	$2.00	N
101308179	D	EF	03/06/2013	TEMPORARY RESTRAINING ORDER IMAGE	$9.00	N
101294811		245	03/13/2013	JUDGE ASSIGNED CASE ASSIGNED TO WINKLER/ROBERT/C PRIMARY		
101291190	D	FXM	03/12/2013	MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION & TRIAL BRIEF	$16.00	N
101275396	D	FNFF	03/12/2013	NOTIFICATION FORM FILED.	$1.00	N

101275363	D	FNFF	03/12/2013	NOTIFICATION FORM FILED.	$1.00	N
101275246	D	FNFF	03/12/2013	NOTIFICATION FORM FILED.	$1.00	N
101256651	D	FXM	03/08/2013	MOTION TO ESTABLISH AMOUNT OF SECURITY FOR COSTS OF PROCEEDING PURSUANT TO R.C. 733.59	$3.00	N
101256165	D	FN	03/08/2013	NOTICE OF ADDITIONAL EXHIBITS		
101254933		JPRE	03/11/2013	ELECTRONIC POSTAL RECEIPT RETURNED, COPY OF SUMMONS & COMPLAINT DELIVERED TO CITY OF CINCINNATI ON 03/08/13, FILED. [CERTIFIED MAIL NBR.: 7194 5168 6310 0661 9436]		
101254932		JPRE	03/11/2013	ELECTRONIC POSTAL RECEIPT RETURNED, COPY OF SUMMONS & COMPLAINT DELIVERED TO MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI ON 03/08/13, FILED. [CERTIFIED MAIL NBR.: 7194 5168 6310 0661 9429]		
101249097	D	FXM	03/08/2013	DEFENDANTS' EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER		
101245904	D	FN	03/07/2013	NOTICE OF REMOVAL	$2.00	N
101226370	D	FF	03/06/2013	CERTFIFICATION OF NOTICE PROVIDED TO COUNSEL FOR DEFENDANTS	$2.00	N
101225385	D	SUMA	03/07/2013	SUMMONS ISSUED BY CERTIFIED MAIL TO CITY OF CINCINNATI	$4.00	N
101225384	D	MAIA	03/07/2013	CERTIFIED MAIL SERVICE ISSUED TO CITY OF CINCINNATI [CERTIFIED MAIL NBR.: 7194 5168 6310 0661 9436]	$7.00	N
101225380	D	SUMA	03/07/2013	SUMMONS ISSUED BY CERTIFIED MAIL TO MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI	$4.00	N
101225379	D	MAIA	03/07/2013	CERTIFIED MAIL SERVICE ISSUED TO MILTON R DOHONEY JR CITY MANAGER CITY OF CINCINNATI [CERTIFIED MAIL NBR.: 7194 5168 6310 0661 9429]	$7.00	N
101220011	D	COMP	03/06/2013	COMPLAINT FILED	$201.00	N
101220010	D	SPFT	03/06/2013	SPECIAL PROJECTS FEE PER ENTRY 2/1/02 IMAGE 147; M-0200002	$125.00	N
101220009	D	POST	03/06/2013	POSTAGE: COST DESK	$2.00	N
101220008	D	LAAT	03/06/2013	O.R.C. SECTION 2303.201	$26.00	N
101220007	D	FCF	03/06/2013	CLASSIFICATION FORM FILED.	$1.00	N
101220006	D	CMPT	03/06/2013	COURT MEDIATION PROGRAM FEE PER ENTRY 8/3/99 IMAGE 164; M-9900002.	$25.00	N

101220005	D	CLRT	03/06/2013	COMPUTER LEGAL RESEARCH	$3.00	N
101220004	D	CLKA	03/06/2013	CLERK FEE FOR EACH CAUSE	$25.00	N
101220003	D	CCAT	03/06/2013	COURT AUTOMATION	$6.00	N
101220002	D	C	03/06/2013	COURT INDEX: TAXED IN COST	$14.00	N
101220001	P	TICF	03/06/2013	TAXED IN COSTS - FILING CHRISTOPHER P FINNEY	$0.00	Y

Totals

Total Deposits:	$0.00
Total Costs:	$652.00
Total Credits:	$0.00
Total Money Out:	$0.00
Unapplied Deposits:	$.00
Unapplied Costs:	$652.00

Account Statement

Account	Account Name	Amount: Deposits	Applied: Deposits
1000-0131	CASE DEPOSIT (ISSUE) #1	0.00	0.00
2000-0132	COURT INDEX	14.00	0.00
2000-0211	CLERK FEES	437.00	0.00
2000-0273	SPECIAL PROJECTS FUND	125.00	0.00
2000-0275	COURT MEDIATION PROGRAM	25.00	0.00
2000-0278	COMPUTERIZED LEGAL RESEARCH	3.00	0.00
2000-0279	COURT AUTOMATION	6.00	0.00
2000-0752	POSTAGE	16.00	0.00
2000-0804	O.R.C. SECTION 2303.201	26.00	0.00
		---	---
		-652.00	0.00

Article II, Section 3 of the Charter of the City of Cincinnati
From Adoption in 1926 to Present

Art. II, § 3 – 1926 to Nov. 1994	**Art. II, § 3 – Nov. 1994 to present**	**Comparison**
The initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner provided by the laws of the state of Ohio. Emergency ordinances upon a yea and nay vote must receive the vote two-thirds of all the members elected to the council, 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 upon a separate roll call thereon.	The initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner provided by the laws of the state of Ohio. Emergency ordinances upon a yea and nay vote must receive the vote of a majority of the members elected to the council, and 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 elected to the council upon a separate roll call thereon. 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.	The initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner provided by the laws of the state of Ohio. Emergency ordinances upon a yea and nay vote must receive the vote ~~two-thirds~~ of ~~all~~ a majority of the members elected to the council, and 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 ~~upon a separate roll call thereon.~~of two-thirds of the members elected to the council upon a separate roll call thereon. 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.

EXHIBIT
C

REPORT OF CHARTER AMENDMENT COMMISSION.

To the Honorable Council,

City of Cincinnati.

We herewith submit our draft of amendments to the Charter of Cincinnati. While we submit a complete, "integral and inclusive home rule City Charter" in accordance with Section 22, Article 3, of the present Charter, the draft is in reality an amendment, since a majority of the provisions are copied from the present Charter. In submitting the amended Charter to the people we advise that the resolution be so worded as clearly to specify that it is an amendment as defined in Reutener V. Cleveland, 107 Ohio State, page 117.

In preparation of the draft of these amendments we asked all of the department heads, boards, administrative officers and members of Council for suggestions. We investigated the provisions of charters in other cities, and in a few instances copied certain provisions applicable to conditions in Cincinnati.

While the Commission worked unofficially for some time prior to its actual appointment and had the work well under way prior to July 7, since that time the Commission has been in session practically every day. The Commission organized by electing Henry Bentley, Chairman, Robert A. Taft, Vice-Chairman, and Howard L. Bevis, Secretary.

The Commission's report is unanimous, except in reference to Section 14 of Article 7 dealing with the Rapid Transit Commission and Article 9 relating to proportional representation. Mr. Gorman submits a section which he believes should be substituted for Section 14, Article 7. Mr. Taft did not agree to Article 9 providing for proportional representation,

EXHIBIT

D

but at this time has not submitted any substituted provision.

The principal change in the amended Charter from the existing Charter relates to the greater powers of home rule given to the City and to the Council. The existing Charter adopts as part thereof the general and all local or special laws enacted by the General Assembly of Ohio in force on January 1, 1918. This has created a very awkward situation and has deprived the City of most of its home rule powers, and has even deprived it of the benefit of amendments made by the Legislature since January 1, 1918. The amended Charter proposes that all legislative power of the City be vested in the Council, subject only to such restrictions as are contained in the Charter itself or the Constitution of Ohio.

While the amended Charter appears to be somewhat longer than the Charter adopted in 1917, this Charter was subsequently supplemented by amendments in 1924, and the present proposed draft is not much longer than the Charter now in force. In addition thereto the present Charter has adopted all the sections of the General Code of Ohio in force in 1918 applicable to Cincinnati. These provisions, several thousand in number, would require a large volume if set forth in full.

In view of the larger powers given the Council it has been necessary to specifically prescribe in the Charter the extent in which they can legislate so as to insure proper publicity. It has also been deemed advisable to restrict its powers in the Civil Service, the Sinking Fund Trustees, and the University, nor can the Council abolish the offices of City Auditor, City Treasurer, City Solicitor and the other Boards and Commissions named in the Charter.

We feel confident that many of the problems of the municipal government during the past ten years will be not by the

much greater flexibility and home rule conferred on the City by the proposed draft.

We have felt that theoretically some of the existing Boards, such as the Park Board and the Health Board should be abolished and their powers vested in the heads of departments appointed by the City Manager, but the record of these Boards has been of such exceptionally fine character that we have found public sentiment strongly in favor of their continuance.

In addition to the home rule provisions, the principal changes relate to the City Auditor, the Civil Service Commission and the taxation powers. Under the existing Charter the City Auditor would hereafter be appointed by the City Manager. We have made him appointive by the Mayor and Council, and responsible to the Council, on the theory that the responsibility for the government is upon the Council and that it is entitled to have an independent officer check the financial operations of its appointee, the City Manager. In order to insure his independence the City Auditor is given a fixed term of two years.

The Civil Service Commission is continued in office but will hereafter be appointed, one member by the Mayor and the Council, one member by the University Trustees and one member by the Board of Education, in view of the fact that the employees of those Boards are subject to the Civil Service Commission. The Secretary and Chief Examiner will be appointed by the City Manager and be subject to Civil Service rules.

The functions of the Civil Service Commission are two-fold: to prevent the dismissal of competent employees and to conduct the examinations under Civil Service rules. The greater independence given the Commission will render it more of a judicial body in passing upon the question of dismissal and will make the tenure of the City employees more secure. On the other

hand in the securing of additional employees for the City, it is necessary that the Commission and its Secretary act in closest co-operation with the City Manager, as an employment bureau to secure the best available men. We have, therefore, made the Secretary appointive by the City Manager but he must conduct his examinations subject to the rules of the Commission, and they also have power to revise his findings. The Council is not given power to change the Civil Service rules prescribed by the laws of the state.

We have by Article 6 taken advantage of the provisions of the Tallentire Home Rule Act passed by the last session of Legislature. The effect of the provision is to take the City taxes out of the jurisdiction of the County Budget Commission and grant to the City for its current expenses approximately six mills, or about one mill more than can be obtained under the existing laws. In most cases, this will obviate the necessity for a special levy and will give to the City sufficient revenue for its necessities without extravagance. The City of Cleveland has approximately six and one-half mills for current expenses, or about one-half mill more than we have provided. Hereafter the City will know definitely what revenues it can expect to receive and can formulate a definite financial program.

We have also given power to the City Planning Commission to formulate a ten year, bond program which, upon its adoption by Council, becomes an official program which may only be varied by two-thirds vote of the Council.

We think that a comprehensive plan for the issue of bonds is essential to the orderly progress and the credit of the City.

A detailed summary of the provisions is as follows:-

ARTICLE I. POWERS OF THE CITY.

The present provisions of Article 1 are adopted, and supplemented by provisions establishing complete home rule. Unforder to take advantage of the Tallentire Act and other laws we provide that the City "shall have all powers that now are or hereafter may be granted by the laws of the State of Ohio." In order to prevent confusion in interpretation, in Article 2 we provided that in event of conflict between an ordinance and a statute the ordinance shall prevail.

ARTICLE II. LEGISLATIVE POWER.

Section 1 vests all legislative power in Council. So that it will not be necessary to adopt an entirely new municipal code, state laws are continued in force until changed by ordinance of Council.

Section 2 is Section 3, Article XIII of the present Charter.

Section 3 is practically an adaptation of the constitutional provision preserving the initiative and referendum. We provide, however, for separate roll calls upon emergency ordinances. This is the practice provided by the Constitution for the General Assembly. It is inserted so that, if a Councilman desires to vote for an ordinance and yet not have it declared an emergency, he can do so.

Section 4 is Section 1, Article III of the present Charter. We provide specifically, however, that Council shall fill vacancies in its own body.

Section 5 and 6 provides rules for the procedure of Council based upon approved legislative action. They provide for one publication of ordinances, either in a newspaper of general circulation or a newspaper published under the authority of

Council." The last part of Section 6 is taken from Section 3 and 4, Article XII of the present Charter. We suggest that the Clerk take advantage of the provisions of these sections providing for the publication of summaries of ordinances.

Section 7, with a few editorial changes is the same as Section 10, Article III of the present Charter. Instead of requiring a four-fifths vote to override the disapproval of the City Manager upon departmental changes, we provide for a three-fourths vote.

ARTICLE III. MAYOR.

Sections 1 and 2 are the same as Sections 2 and 3, Article III with a few editorial changes. We have removed the ambiguity in the present Charter as to whether the Vice-Mayor could ever become Mayor.

Section 3 provides that all appointments made by the Mayor shall be made with the advice and consent of the Council.

ARTICLE IV. EXECUTIVE AND ADMINISTRATIVE SERVICE.

Section 1 is the same as Section 6, Article III of the present Charter.

Section 2 is the same as Section 7, Article III.

Section 3 incorporates all the ideas of Section 8, Article III, defining the powers of the City Manager. In view of the change in reference to the home rule provision we have tried specifically to define the City Manager's duties.

Section 4 is the same as Section 9, Article III.

In view of the fact that the state laws no longer control, we provide specifically for certain officials.

Section 5 establishes by Charter the position of City Solicitor and defines his duties.

Section 6 establishes by Charter the position of City Treasurer.

Section 7 provides for a Director of Public Utilities who shall exercise the powers of the City in relation to public utilities except the Cincinnati Water Works, the Cincinnati Southern Railway and any other municipally owned or operated utilities. He succeeds to the powers of the Director of Street Railroads and the Director of Motor Buses.

Section 8 establishes the position of the City Auditor. Under Section 6, Article III of the present Charter the City Manager would appoint the Auditor to serve at his pleasure. He provides for his selection by the Mayor for a definite term of two years.

Section 9. This section continues the Mayor and City Manager as members of the Board of Control until January 1, 1929, when Council shall select the one representing the Auditor, to act instead of the Mayor.

Section 10 provides for a Superintendent of Water-Works. A sufficient charge shall be made for water to maintain the plant, but no surplus use to be diverted from the water fund.

Section 11 provides for the removal of officials.

ARTICLE V. CIVIL SERVICE.

We have already referred to the changes made by Sections 1 and 2 relative to the Civil Service Commission.

Section 3 prohibits Council from modifying the provisions of this Article as referred to Civil Service and incorporated in Section 1, Article XIII of the present Charter.

Section 4 is the same as Section 11, Article III.

ARTICLE VI. INSTITUTIONS.

This may combine Article IV and V of the present

Charter dealing with the University and Hospitals into one article.

Section 1 is the same as Article IV.

Section 2 combines Sections 1 and 2, Article V, of the present Charter without change.

Section 3 provides for the appointment of the Superintendent of Hospitals, with the approval of the Directors of the University instead of the Directing Medical Staff, as provided in Section 3, Article V, of the present Charter.

Section 4 is practically the same as Sections 5 and 6, Article V of the present Charter.

Section 5 is the last part of Section 7, Article V, of the present Charter. The first part is taken care of by our Section 2.

We have eliminated Sections 8 and 9 of Article V of the present Charter as being detail unnecessary in a Charter giving full home rule powers.

ARTICLE VII. - BOARDS AND COMMISSIONS.

Articles VI, VII, VIII, IX and X dealing with Boards and Commissions have been combined into one article.

Section 1 establishes the Board of Park Commissioners as provided in Article VI of the present Charter. The street repair work in the Parks is transferred to the City Manager.

Section 2 continues the City Planning Commission, but there are to be three appointed members instead of two. Instead of all three members of the Park Board serving, we provide for only one representative from that Board and we add to this Commission the Chairman of the City Planning Committee of the Council.

Sections 3, 4 and 5 are the present Sections 2, 3 and 4 of Article VII.

Section 6 provides that amendments to the zoning ordinance must first be submitted to the Commission, but the Council by a two-thirds vote may overrule their decision.

Section 7 provides that if the Commission adopts a bond program which is approved by two-thirds of Council, no bonds can be issued for purposes not included in the program unless Council overrules the decision of the Commission by a two-thirds vote.

Section 8 is the same as Section 7, Article VII.

Section 9 is the same as Section 8, Article VII.

Section 10 is the same as Section 9, Article VII.

Section 11 is the same as Section 10, Article VII.

Section 12 combines Sections 1, 2 and 3, Article VIII dealing with the Board of Health.

Section 13 is based on Article IV of the present Charter establishing the Sinking Fund Trustees. The powers given sinking fund trustees by state law are adopted in accordance with the constitutional provisions.

Section 14 continues the Rapid Transit Commission in existence until operation is begun, but in no event later than January 1, 1931.

ARTICLE VIII. TAXATION AND FINANCE.

Section 1 provides that the City shall have the powers granted by the Tallentire Law.

Section 2 establishes a budget system in accordance with the Vorys budget law. The Tallentire law passed prior to the Vorys Act provides that, in order to take advantage of home rule in taxation, a budget system must be established. Subsequently the Vorys Act was passed which now governs the budget system in cities.

Section 3 provides that the maximum levy for current expenses of the City shall be 6.65 mills. Of this .55 of a mill goes to the University and .10 of a mill to the Recreation Commission leaving the City 6 mills for operating expenses. Out of this levy .25 of a mill must be used for street reconstruction or other permanent improvements.

Section 4 places the Sinking Fund levies outside of the limitations, and provides that Council may not reduce the amounts certified for levy by the Sinking Fund Trustees.

Section 5 provides that extra levies may be submitted to the voters for current expenses, improvements having a life of five years or more, and for recreational purposes.

Section 6 gives Council the power to levy such other taxes as may be lawful.

Section 7 provides that within the limitations of the Griswold law bonds may be issued for any improvements having a life of five years or more which the City may lawfully construct.

Section 8 provides no department of the City shall issue bonds without first securing the approval of Council.

ARTICLE IX. NOMINATIONS AND ELECTIONS.

A majority of the committee feels the P. R. system should be given further trial, and therefore adopts Sections 2 to 21, Article III of the present Charter inclusive. Provision is made that six or more candidates may have their representatives at the polls and the central counting place as witnesses, inspectors and challengers.

ARTICLE X. MISCELLANEOUS.

These three sections are formal, continuing the

present officers in power; providing in case of invalidity of one section, it shall not affect other sections; and providing that the Charter take effect January 1, 1927, except as otherwise provided.

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The Commissioners met at various times with the City Manager, Mayor, Solicitor and representatives of the University, the Hospital, Sinking Fund Trustees, Civil Service Commission, City Planning Commission, Recreation Commission, Park Board, members of Council, and the Federated Civic Association.

We wish to express our appreciation and thanks to all of the foregoing for the many helpful suggestions which made the work of the Commission possible.

The present Charter (Article III, Sections 22-25) provides that after the draft is submitted to Council there shall be three public hearings for discussion and revision. If this amendment is to be submitted at the November election Council must provide immediately for hearings and take final action on or before September 8. If changes are to be made in the draft it must be returned to the Commission in such time that it may make the changes and re-submit the revised draft to Council.

In such event, also, Council must take final action on or before

September 1. The Commission will be very glad to be present at these hearings to answer any questions.

Respectfully submitted,

August 2, 1926.

(Signed) Henry Bentley,
Chairman

Robert A. Taft
Vice-Chairman,

Robert N. Gorman

Howard L. Bevis,
Secretary

MINORITY RECOMMENDATION.

I believe that the Rapid Transit Commission should be abolished as soon as practicable. It can be done legally without any prolonged litigation.

I have drawn a section which seems to satisfy any objections which might be raised by reason of the decision, in State vs. Otis, 98 Ohio State 83.

Under the provisions of Section 9142 G. C. the construction of any elevated railroad must be approved by the Service Director. This power I have vested in the Suburban Transit Board.

I suggest the following as Section 14 of Article VII of the draft:-

"There is hereby created a Suburban Transit Board, which shall consist of the City Manager, the Director of Public Utilities and the City Auditor. The City Manager shall be the president and the Director of Public Utilities shall be the Secretary of the Board.

"In event any elevated railroad is constructed, such construction shall be in accordance with general plans approved by the Suburban Transit Board.

"The Board shall have all powers that are now or may hereafter be granted to the Board of Rapid Transit Commissioners by general law except as modified by ordinance. The present members of the Board of Rapid Transit Commissioners shall serve until January 1, 1927 and thereafter the Board of Rapid Transit Commissioners shall be abolished, and the duties of the members thereof cease and determine. All powers and duties now conferred upon said Board shall thereafter be performed by the Suburban Transit Board."

(Signed) Robert N. Gorman