

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LISA McQUEEN, et al.

and

CITY OF CINCINNATI, ex rel.
LISA McQUEEN, et al.,

Appellees,

vs.

MILTON R. DOHONEY, et al.,

Appellants.

APPEAL NO. C-130196

TRIAL NO. A1301595

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COURT OF APPEALS

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BRIEF OF *AMICI CURIAE* CINCINNATI USA REGIONAL CHAMBER,
CINCINNATI CENTER CITY DEVELOPMENT CORP., PORT OF GREATER
CINCINNATI DEVELOPMENT AUTHORITY, UPTOWN CONSORTIUM, INC., AL.
NEYER, ASSOCIATED BUILDERS & CONTRACTORS, FLAHERTY & COLLINS
PROPERTIES, JDL WARM CONSTRUCTION LLC, MESSER CONSTRUCTION CO.,
MILLER-VALENTINE GROUP, NORTHPOINTE
GROUP, OSWALD COMPANY, AND TOWNE PROPERTIES IN SUPPORT OF
APPELLANT CITY OF CINCINNATI



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I. INTRODUCTION

This case is not about the proposed parking transaction. The stakes are far greater than any single ordinance or project. The trial court's decision limits all emergency ordinances of the City of Cincinnati ("City"). Under the trial court's interpretation of the charter of the City of Cincinnati ("Charter"), all ordinances, even those adopted as emergency measures intended to take effect immediately, are subject to referendum. The result is to deprive such ordinances of needed certainty because they would be subject to the ever-present possibility of referendum and injunction – just like the injunction the trial court entered in this case. This result would cripple economic development potential in the City.

For the past 50 years, the City of Cincinnati has worked to address the health and public safety issues that come with an aging urban core. In 1962, the City adopted the Central Business District Core Urban Renewal Plan, which, as updated, has guided the City's work. A key strategy in those efforts has been to build partnerships with private developers, including many of the *amici*, to implement economic development projects. Not only is much of the current face of Downtown Cincinnati the result of those efforts, they have extended into Over-the-Rhine, Clifton and the Uptown area, Columbia-Tusculum, and other neighborhoods across the City.

Many of these economic development projects proceed through Council on a normal track. But frequently, the projects have a need to act on an expedited basis because of construction schedules, market conditions, contracting requirements, financing availability and deadlines, and myriad other reasons. Additionally, other parties to these transactions require certainty in order to continue to commit their own resources and financial investment. By way of limited example, successful development projects at Fountain Square, Great American Tower at Queen City Square, Oakley Station, Mercer Commons, the Delta Airlines Reservation Call

Center, Washington Park, Shillito Lofts, Michigan Terrace in Hyde Park, and annual CitiRamas in neighborhoods across the City all have included the use of emergency ordinances. Stripping the City and other municipalities of the power to act on an expedited basis when needed would impede projects like these and jeopardize development and job creation throughout the area. Allowing the trial court decision to stand would also burden the City and Hamilton County with a competitive disadvantage vis-à-vis neighboring jurisdictions and more distant communities competing to attract new development and jobs.

This is particularly true because the trial court's ruling is contrary to well-settled law applied in other Ohio courts holding that emergency ordinances by municipalities are not subject to referendum. Indeed, the language of the Charter interpreted by the trial court in this case is substantively identical to corresponding language in the Ohio Constitution. The Ohio Supreme Court has consistently held that such language does not make emergency ordinances subject to referendum. Allowing a contrary ruling to stand in this case would single out the City and Hamilton County as poor environments for economic development – ones where potentially time-sensitive development activity is subject to the vagaries of politically-motivated litigation and requests for injunctive relief contrary to Ohio law.

Amici all deal regularly with the City and other municipalities regarding economic development activities. The Cincinnati USA Regional Chamber is the nation's fifth largest chamber of commerce and represents the interests of nearly 5,000 area businesses. It strives to enhance the economic vitality and quality of life of Cincinnati and the region, and seeks to attract new business and new industries to the area while retaining and growing existing business. Economic development, particularly in the urban core, is a key to these objectives. Cincinnati Center City Development Corp. ("3CDC") is a private, not-for-profit corporation whose mission

is to strengthen the core assets of downtown by revitalizing and connecting the Fountain Square District, the Central Business District and Over-the-Rhine. Its redevelopment projects have included Fountain Square, Washington Square Park, the 21c Museum Hotel, numerous projects in the Gateway Corridor in Over-the-Rhine, and many others.

The Port of Greater Cincinnati Development Authority (“Port Authority”) partners with local communities to facilitate economic development in the City and throughout Hamilton County. It works to enhance the use of the land resources throughout the area in order to facilitate the retention and generation of jobs and the generation of additional tax revenues. Examples of its development activity include Great American Tower at Queen City Square, Oakley Station, and numerous ongoing or completed “brownfield” projects where abandoned or underutilized industrial and commercial sites are environmentally remediated and redeveloped. Uptown Consortium, Inc. is a non-profit community development corporation dedicated to the improvement of Uptown Cincinnati, which includes the neighborhoods of Avondale, Clifton, Corryville, Clifton Heights, Fairview, University Heights, and Mt. Auburn. It encompasses the University of Cincinnati and many of the region’s leading health care institutions. The Uptown Consortium’s areas of focus include community and economic development. Its members employ nearly 50,000 people, have a payroll of \$1.4 billion, and produce an annual economic impact of over \$3 billion.

Al. Neyer is a real estate developer that has been operating in and around Cincinnati for more than 100 years. It is currently working closely with the City on a number of projects including U Square in Clifton, the Offices of Vernon Manor, the Residences at RiverWalk, and St. Xavier Park. A number of those have involved financing issues with the City of Cincinnati that have necessitated – on a rapid timeline – enactment of measures by City Council that were

identified as emergency measures. Over the years, Al. Neyer has done many similar projects for which emergency ordinances were passed, including developments Columbia Square in Columbia-Tusculum and the Delta Airlines Reservation Center in Downtown Cincinnati.

Towne Properties began 50 years ago with the transformation of the historic row houses in Mt. Adams into a revitalized neighborhood and has grown to developing apartments, condominiums, landominiums, commercial, recreational and mixed use property not only within Cincinnati but also across the region. Many of those projects have involved close work with the City of Cincinnati for land acquisition, property acquisition, or other assistance in development and redevelopment projects, including Fountain Place, the Shillito Lofts, Garfield Place developments, Adams Landing, and U Square.

Messer Construction Co. has been a major Cincinnati-based construction contractor and manager since it was founded by Frank Messer in 1932. Today it plans and performs complex commercial construction across Indiana, Kentucky, North Carolina, Ohio, and Tennessee, totaling some \$800 million a year. Many of the new construction and reconstruction projects in the City of Cincinnati have been projects that Messer was intimately involved with – certainly through construction and construction management, but in many cases, also in a development role. Associated Builders & Contractors is a national association representing 22,000 merit shop construction and construction related firms. A number of its member companies work in the construction and building trade businesses in the City of Cincinnati and regularly work on projects that involve the City.

Flaherty & Collins Properties is an Indianapolis-based, full-service real estate firm specializing in multi-family and mixed-use development, construction and property management. It has developed 46 projects and more than 8,000 units in the past 15 years with a

value in excess of \$1 billion and has been involved with the construction of over 15,000 units. Flaherty & Collins has maintained a management office in Cincinnati and is currently developing the Boulevard at Oakley Station, a 302-unit luxury apartment community in Cincinnati that will open in the Summer of 2013. Earlier this year, the City selected Flaherty & Collins to develop the Pogue's garage site at Fourth & Race. It plans to build a tower with 300 luxury apartments, a 1000-space garage, and a 15,000 square foot grocery.

JDL Warm Construction Co. is a general contractor/construction manager headquartered in Cincinnati with business across the country. The company is the fourth generation of a line of family owned companies located in Cincinnati and stretching across 110 years. Those businesses have been involved in major developments in Downtown Cincinnati including renovation of the Carew Tower, construction of buildings on Court Street and Seventh & Walnut, and the Fountain Place development. Miller-Valentine Group has been a leading commercial real estate developer and contractor throughout the Greater Cincinnati region for the past 50 years. It has constructed more than 80 million square feet of commercial space, it owns and manages a portfolio of more than 11 million square feet of commercial space and more than 11,000 multi-family, senior living, and student housing residential units. For most of its history, Miller-Valentine has been active in the Cincinnati market including in projects that depend upon action by or resources from the City of Cincinnati.

NorthPointe Group is a team of real estate specialists who work to create unique development and redevelopment opportunities throughout Greater Cincinnati, frequently working hand-and-hand with the City. In particular, NorthPointe has been involved in a number of residential and commercial developments involving City funds that have created opportunities for new jobs and housing with the City. Frequently those projects require that the City act in an

emergency fashion to make sure the organizers can meet the targeted deadlines for completion of construction prior to the opening of the exhibition. Oswald Company is a Cincinnati-based commercial building contractor that is involved in real estate development projects in Greater Cincinnati. It has been recognized by the Cincinnati Business Courier as one of the fastest growing companies in the area. It regularly is involved in projects that the City of Cincinnati participates in and Oswald relies upon the City's ability to move quickly when necessary to meet development objectives.

Amici urge the Court to overturn the decision of the trial court holding that emergency ordinances of the City do not take effect immediately and are instead subject to the referendum process. Allowing that decision to stand would contravene well-settled legal precedent and would chill economic development through the region.

II. STATEMENT OF THE CASE

Procedural Posture

This is an appeal of the trial court's entry of a permanent injunction and declaratory judgment prohibiting the City from proceeding to implement an emergency ordinance concerning the disposition of certain parking-related assets. The trial court entered the injunction based on its interpretation of the Charter, which it determined required that all ordinances be subject to referendum, even ones validly enacted as emergency ordinances. (T.d. 36). The City appealed from the ruling and *amici* urge reversal.

Statement of the Facts

The salient facts are set forth in a stipulation between Plaintiffs and the City. (T.d. 26). The stipulation includes an authentic copy of the Charter. (*Id.* – Exhibit A). *Amici's* arguments do not depend on consideration of facts beyond the stipulation. Rather, *amici* contend that the

trial court's ruling is erroneous based on the language of the Charter and well-settled legal authority set forth in decisions by the Ohio Supreme Court concerning emergency ordinances.

III. ARGUMENT

FIRST ASSIGNMENT OF ERROR: The Trial Court Erred By Issuing A Permanent Injunction And Declaratory Judgment In Favor Of Plaintiffs.

First Issue Presented for Review and Argument: The City Charter is Substantively Identical to Article II, §1f of the Ohio Constitution and Should be Construed Consistently to Exempt Emergency Ordinances from Referendum.

The trial court's decision recognizes that emergency ordinances generally are not subject to referendum under Ohio law. (T.d. 36 at 14 - "It is generally presumed in Ohio that emergency legislation is not subject to referendum."). The decision also noted that sections 731.29 and 731.30 of the Ohio Revised Code exempt emergency ordinances from referendum. (*Id.* at 13); *see also State ex rel. Webb v. Bliss*, 99 Ohio St.3d 166, 2003 Ohio 3049, 789 N.E.2d 1102 (2003) ¶11 (the language of §731.30 regarding the immediate effect of emergency ordinances "thereby exempt[s] them from referendum.").

The trial court concluded that none of this legal authority exempting emergency ordinances from referendum applied because of the particular language of Cincinnati's Charter. The relevant language of the Charter, as identified and interpreted by the trial court, is as follows:

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.

(T.d. 26 – Charter at Art. II, §3; T.d 36 at 14). The trial court concluded that because the Charter referred to "all" legislation and there was no express exemption for emergency ordinances, the Charter created a right of referendum over emergency ordinances notwithstanding the

presumptive rule to the contrary under Ohio law. (T.d. 36 at 15). The decision also read the language of the clause after the semicolon regarding the “exercise[]” of the referendum power as merely procedural and not incorporating Ohio Revised Code § 731.30 or other law exempting emergency ordinances from referendum. (*Id.*). Both of these conclusions were in error.

The language of the Charter is substantively identical to the corresponding language of the Ohio Constitution regarding municipal ordinances and referendum power, providing that:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

(Ohio Constitution Article II, §1f). This provision of the Ohio Constitution is identical in both substance and structure (including the clause regarding the exercise of referendum powers) to the language of the Charter. The logical conclusion is that the Charter language, first enacted in 1926, was taken directly from the Constitution’s language, adopted on September 3, 1912. (*Id.*).

While the trial court concluded that this language means that emergency ordinances are subject to referendum, the Ohio Supreme Court has repeatedly held to the contrary. *E.g., Taylor v. City of London*, 88 Ohio St.3d 137, 143; 723 N.E.2d 1089, 1094 (2000) (holding that an emergency ordinance was not subject to referendum and explicitly stating that the language “such powers shall be exercised in the manner now or hereafter provided by law” incorporated Ohio Revised Code §§731.29 and 731.30); *State, ex rel. Lemaitre v. City of Clyde*, 6 Ohio St.3d 344, 344 453 N.E.2d 644, 645 (1983) (construing city charter provision that expressly incorporated the Ohio Constitution and observing that “city council passed the ordinance under declaration of an emergency. The import of this distinction is that **any ordinance which is passed under color of an emergency is not subject to referendum.**”) (emphasis added). So have other appellate courts. *Materkowski v. Belmont County Bd. of Elections*, 2002 Ohio 4370

P11-13 (7th Dist. 2002) (notwithstanding the general referendum rights created by Article II, §1f, municipalities still may pass emergency ordinances that “cannot be challenged by referendum”); *State, ex rel. Emrick v. Wasson*, 60 Ohio App.3d 498, 503, 576 N.E.2d 814 (2nd Dist. 1990) (“Section 1f, Article II does not, however, apply to emergency measures”).

The principle that emergency ordinances passed by Cincinnati City Council are not subject to referendum has been recognized by Hamilton County courts in decisions predating the trial court’s ruling. *Schultz v. Cincinnati*, 28 Ohio L. Abs. 29, 13 Ohio Op. 186 (C.P. Hamilton Cty. 1938), was an effort to enjoin operation of a Cincinnati ordinance passed with an emergency clause. Plaintiff challenged the sufficiency of the reasons included in that clause. Reviewing the provisions of the Charter and the General Code’s precursors to 731.29 and 731.30, the court concluded that the emergency clause precluded of the ordinance’s being taken to referendum:

It will be observed that by the adoption of §2 of the Ordinance [the emergency provision] the people of the City of Cincinnati are denied the right to express their views concerning this ordinance by way of referendum for by the operation of §2 of the ordinance it becomes immediately effective.

28 Ohio L. Abs. at 31. The Court held that there was not an appropriate challenge to the emergency clause and denied the injunction.

Likewise, in *Walsh v. Cincinnati City Council*, 54 Ohio App.2d 107, 375 N.E.2d 811 (1st Dist. 1977), this Court recognized that a valid emergency ordinance precluded the right to referendum. Although *Walsh* struck down the emergency ordinance on other grounds not applicable here (and which have been defined and limited by subsequent decisions of the Ohio Supreme Court), it recognized the general principle that emergency ordinances are not subject to referendum. *Id.*, 54 Ohio App.2d at 113, 375 N.E.2d at 815 (rejecting alternative grounds for upholding the ordinance based on passage of time and concluding that this “would bar resort to referendum *just as effectively as if it would be barred if the action of the Council was to be*

permitted to stand.") (emphasis added). Accordingly, *Walsh* held that the ordinance in question violated Article II, Section 1f of the Ohio Constitution. *Id.* Thus, *Walsh* makes clear that the Charter must be construed consistently with the corresponding language of the Ohio Constitution and that a properly enacted emergency ordinance would "bar resort to referendum." *Id.*

Both *Walsh* and the decisions of the Ohio Supreme Court construing the substantively identical language of Article II, §1f establish that: 1) the "all questions" language does not make emergency ordinances subject to referendum; and 2) the "exercised in the manner" language does incorporate section 731.30 of the Ohio Revised Code.¹ *E.g., City of London*, 88 Ohio St.3d 137, 143, 723 N.E.2d 1089, 1094 (2000). The City raised this argument in the injunctive proceedings below. (T.d. 25 – Mem. in Opp. at 10-11). The trial court's decision did not address this issue and is based solely on the trial court's own interpretation of the "all questions" language. (See T.d. 36 at 14-15). The trial court's interpretation of the Charter – which is unsupported by any legal precedent and which does not discuss the substantively identical language of the Ohio Constitution -- must be reversed. The Charter should be construed consistently with the Ohio Constitution, Ohio Revised Code section 731.30, and the presumption in Ohio law noted by the trial court, all of which dictate that emergency ordinances are not subject to referendum. Failure to do so would make Cincinnati an outlier in application of Ohio law and would chill economic development throughout the area.

¹ Note that these decisions do not depend in any way on Article II, section 1d of the Ohio Constitution, which provides that emergency laws of the State of Ohio are not subject to referendum. That section is limited to state laws passed by the requisite number of members of "each branch of the general assembly." Ohio Const. Art. II, §1d. It has nothing to do with municipal ordinances. *State ex rel. Julnes v. South Euclid City Council*, 2011 Ohio 4485 P39; 955 N.E.2d 363, 370-71 (2011) (noting that Article II, section 1d had no relevancy to the analysis of a municipal charter provision because "that section is restricted to state laws"); see also *Buckeye Community Hope Foundation et al. v. City of Cuyahoga Falls et al.*, 82 Ohio St.3d 539, 543; 697 N.E.2d 181, 184 (1998) (Art. II, §1f, "is the sole constitutional source" for municipal referendum and initiative powers").

**Second Issue Presented For Review And Argument: The Charter
Incorporates Sections 731.29 and 731.30 of the Ohio Revised Code
Excepting Emergency Ordinances from Referendum**

Unless this Court can identify language in the Charter negating them, sections 731.29 and 731.30 apply to City ordinances. *State ex rel. Fattlar v. Boyle* 83 Ohio St.3d 123, 127, 1998 Ohio 428, 698 N.E.2d 987 (1998) (“[m]unicipal charters must be construed to give effect to all separate provisions and to harmonize them with statutory provisions whenever possible”); *State ex rel. Ryant Comm. v. Lorain Cty. Bd. of Elections* 86 Ohio St.3d 107, 112, 712 N.E.2d 696 (1999) (“[i]n the absence of express language in a charter demonstrating a conflict with a statute, it is the duty of courts to harmonize the provisions of the charter and statutes relating to the same matter”). There is no language in the Charter negating the application of sections 731.29 and 731.30. To the contrary, the Charter expressly incorporates consistent Ohio law: “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.” (T.d. 26 – Charter at Art. II, §1; T.d 36 at 14).

This Court need not decide whether sections 731.29 and 731.30 conflict with the Charter. The Ohio Supreme Court, considering the identical language of Article II, §1f of the Ohio Constitution, has already held that they do not. It stated this holding in the most explicit and instructive terms: “Clearly, R.C. 731.29 and 731.30, which preclude referendum of properly adopted emergency legislation, do not contravene the rights afforded to citizens under Section 1f, Article II of the Ohio Constitution.” *Taylor v. City of London*, 88 Ohio St.3d 137, 143, 2000 Ohio 278; 723 N.E. 2d 1089, 1094 (2000); *see also Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 543; 697 N.E.2d 181, 184 (1998) (statutory procedures “must be consistent with the specific powers granted by Section 1f, Article II, since it is the sole constitutional source for referendum and initiative powers”). If the sections do not

conflict with Article II, §1f, they cannot conflict with the substantively identical language of the Charter.

Beyond the absence of conflict, the Ohio Supreme Court held in *City of London*, that the language of Article II, section 1f that “*such powers shall be exercised in the manner now or hereafter provided by law*” operated to affirmatively incorporate the limitations of sections 731.29 and 731.30. *Id.* (emphasis in original); *see also State, ex rel. Lemaitre et al. v. City of Clyde, et al.*, 6 Ohio St.3d 344, 344, 453 N.E.2d 644, 645 (1983) (holding that charter language referring to the Ohio Constitution and the laws of Ohio incorporated sections 731.29 and 731.30). The Charter contains substantively identical incorporating language: “such powers shall be exercised in the manner provided by the laws of the state of Ohio.” (T.d. 26 – Charter at Art. II, §3; T.d 36 at 14). Thus, the Charter also affirmatively incorporates sections 731.29 and 731.30 of the Ohio Revised Code. This conclusion is buttressed by the additional language of the Charter regarding incorporation of Ohio law. (T.d. 26 – Charter at Art. II, §1).

It is also supported by the inclusion of the emergency ordinance provision of the Charter in the same section as the initiative and referendum provision. This has been the case since 1926 when that provision – with those two parts – was first added to the Charter.² There would be no

² Cincinnati was first incorporated pursuant to legislation adopted by the General Assembly and effective January 1, 1802. The current Charter traces its origin back to a 1924 effort, led by Murray Seasongood, to bring the City Manager form of government to Cincinnati. The Charter was amended in 1924 to change the way in which City Council and the mayor were chosen and adding a professional city manager to run the government. In 1926, following election of the first new Council, a Charter Commission was appointed and drew up the Charter as it exists today. That Committee consisted of Robert Gorman, a municipal law expert who had been solicitor of a number of communities in Hamilton County, Robert Taft, a lawyer and legislator, and Henry Bentley, President of the City Charter Committee, which had been responsible for the change in the Charter in 1924. The Charter Commission produced a new Charter that, following public hearings, was presented to the voters in November, 1926 and adopted.

As originally enacted, Article II, Section 3 of the Charter provided that:

legal or logical reason to include the emergency ordinance language in the same section as the initiative and referendum language if it made no difference, for referendum purposes, whether an ordinance were enacted as an emergency. The trial court's decision improperly divorces those concepts. This is contrary to a proper construction of the Charter, which should give effect to all related provisions.

It is also contrary to well-established Ohio law. Under sections 731.29 and 731.30 of the Ohio Revised Code, which are not inconsistent with the Charter and which are affirmatively incorporated into the Charter, emergency ordinances are not subject to referendum. So that economic development will not be impeded in greater Cincinnati and so that courts in Hamilton County will construe the application of sections 731.29 and 731.30 consistent with their application in other Ohio municipalities and counties, the trial court's decision should be reversed.

Third Issue Presented For Review And Argument: Under The Separation of Powers Doctrine, The Enactment of an Emergency Ordinance is Beyond Review by the Courts.

In this case, there is no dispute that the ordinance in question is denominated an emergency ordinance and sets forth the basis for the emergency in a single section, Section 5, of the ordinance. (T.d. 26 – Exhibit W at §5). It describes, among other things “the immediate need to implement the budgetary measures contemplated during the December 2012 City of

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 ye and nay vote must receive the vote of 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 ye and nay vote upon a separate roll call thereon.

Cincinnati budget determinations in order to avoid significant personnel layoffs and budget cuts and resulting reductions in City services to Cincinnati residents.” (*Id.*). In their motion papers below, Plaintiffs quibble with this language and demand that the ordinance be invalidated as a result. Specifically, they argue that because the ordinance refers to the “preservation of the public peace, health, [and] safety” rather than the “immediate preservation” of those objectives, it is fatally flawed. (T.d. 19 – Motion at 11). Conversely, Plaintiffs argue that because the ordinance also refers to “public welfare” (although it actually uses the term “general welfare”), that also invalidates it. (*Id.*).

These arguments ignore the entirety of the language of the ordinance. It refers specifically to an “immediate need” and goes on to describe the nature and substance of that need. (T.d. 26 – Exhibit W at §5). The ordinance also states that it is an “emergency” measure that is “necessary” to meet these needs. (*Id.*). Plaintiffs offer no reason that a reference to the goal of preserving the “public welfare” requires a judicial determination that an ordinance is fatally flawed. These arguments find no support in the law. In fact, the Ohio Supreme Court has considered and rejected *exactly* the argument Plaintiffs advance in this case.

In *State ex rel. Laughlin v. James*, 2007 Ohio 4811, P30, 874 N.E.2d 1145, 1152 (2007) the Ohio Supreme Court considered a challenge to an emergency ordinance that was identified as “necessary for the preservation of the public health, safety, and welfare.” This encompasses both challenges Plaintiff makes in this case: the language says “necessary” rather than “immediately necessary” and it includes an additional reference to “welfare.” *Id.* The Ohio Supreme Court upheld the challenged legislation as a valid emergency ordinance, holding among other things that “there is no requirement that an emergency declaration contain specific language that its enactment is an *immediate* necessity.” *Id.*, 2007 Ohio 4811, P32 (emphasis in original).

There is no magic language required for an emergency ordinance. Both the Ohio Supreme Court and prior decisions of this Court hold that courts cannot engage in the type of hypertechnical review that Plaintiffs invite. *State ex rel. Waldick v. Williams*, 74 Ohio St.3d 192, 195; 658 N.E.2d 241, 244 (1995) (“as we have repeatedly held, where an ordinance, passed by the council of a municipality, is declared to be an emergency in accordance with the municipality’s laws and sets forth the immediate necessity thereof, the legislative determination of the existence of an emergency is not reviewable by a court”) (internal quotes and citations omitted); *Jurcisin v. Cuyahoga Cty. Bd. Of Elections*, 35 Ohio St.3d 137, 519 N.E.2d 347, (1988) syll. ¶3 (same); *Walsh v. Cincinnati City Council*, 54 Ohio App.2d 107, 112, 375 N.E.2d 811 (1st Dist. 1977) (holding that “[c]learly, then, this court cannot review the cogency of the reasons a legislative body gives for its declaration that an ordinance is an emergency measure” and limiting judicial inquiry to whether the language of the ordinance is “obviously illusory or tautological”). The ordinance in this case declares an emergency and goes on to identify and describe an “immediate need” that is related to layoffs and budget cuts that will impact public health and safety. (T.d. 26 – Exhibit W at §5). The identification of the immediate need satisfies the minimal level of judicial review. *State ex rel. Waldick*, 74 Ohio St.3d at 195, 658 N.E.2d at 244 (1995) (ordinance setting forth an “immediate necessity” is not reviewable by the courts); *see also Howard v. City of Tipp City* 1986 Ohio App. LEXIS 8064, *4-5 (2nd Dist. Aug. 26, 1986) (noting that “loss of the opportunity for additional jobs and revenue due to a failure to take prompt action is a genuine rather than illusory or tautological reason”).

The prohibition on further review by the courts is not a matter of grammar or convenience. It arises from the fundamental doctrine of separation of powers. The courts resolve legal disputes, not political ones concerning legislative determinations. *Id.*; *State ex rel.*

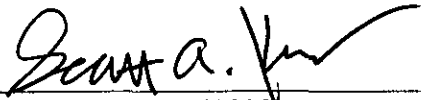
Moore v. Abrams, 62 Ohio St.3d 130, 132; 580 N.E.2d 11, 12 (1991) (stating that “the existence of an emergency or the soundness of such reasons is subject to review only by the voters at such a subsequent election of their representatives. They are not subject to review by the courts.”) (citing and quoting *State ex. Rel. Fostoria v. King*, 154 Ohio St. 213, 220-21, 94 N.E.2d 697, 701 (1950)); *City of Warren ex rel. Bluedorn v. Hicks*, 124 Ohio App.3d 621, 627; 707 N.E.2d 15, 18 (11th Dist. 1997) (affirming decision that an emergency ordinance was not subject to referendum and noting that “the trial court here was compelled to defer to the council’s legislative determination of the existence of an emergency”).

That principle resonates in this case. The issue before this Court is not the proposed parking transaction, it is the more fundamental issue of whether the courts can sit in judgment of Council’s decisions whether and when to pass an emergency ordinance. The answer is clearly no. Council legislates, not the courts. Beyond the separation of powers, economic development decisions should not be resolved in litigation. Subjecting emergency ordinances to potential review in injunctive proceedings is bad business, bad policy, and bad governance. This Court should reverse the decision of the trial court and, consistent with the clear and repeated guidance from the Ohio Supreme Court, should decline to sit in further review of the validly enacted emergency ordinance at issue in the case.

IV. CONCLUSION

For all of the foregoing reasons, *amici* urge this Court to reverse the trial court’s order granting a permanent injunction and declaratory judgment and to enter judgment in favor of the City.

Respectfully submitted,



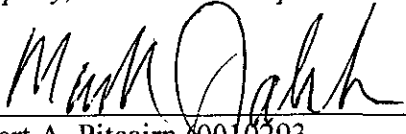
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The undersigned hereby certifies that true and accurate copy of the foregoing was served
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