

FILED
COLUMBIANA COUNTY
COURT OF COMMON PLEAS

ORIGINAL
DEC 0 2019
(JRS)
C/O

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO

ANTHONY J. DATTILIO
CLERK

CITY OF EAST LIVERPOOL, OHIO)
)
)
PLAINTIFF)
)
-VS-)
)
EAST LIVERPOOL CITIZENS AGAINST)
TRAFFIC CAMERAS, et. al.,)
)
DEFENDANTS)

CASE NO. 2019 CV 462
DECISION AND
JUDGMENT ENTRY
(FINAL AND APPEALABLE)

The parties in the case have each filed Motions for summary judgment and those Motions have been fully briefed. The issues are now before me for further consideration and decision.

Facts Not Genuinely Disputed

For the purpose of the Motions for summary judgment, the following facts are not genuinely disputed:

1. On February 6, 2017, the City Council of East Liverpool passed Ordinance No. 17, 2017, an "Ordinance Adopting Traffic Law Photo Monitoring Program and Establishing Civil Penalties for Automated Speed Violation."
2. On February 7, 2017, the Mayor of East Liverpool signed Ordinance No. 17, 2017.¹
3. Ordinance No. 17, 2017 was not passed as an emergency measure and did not go into effect until thirty days after February 7, 2017.
4. Ordinance No. 17, 2017 was Codified in Chapter 309 of the

¹ Complaint, Exhibit 1.

Codified Ordinances of East Liverpool.

5. After the effective date of Ordinance No. 17, 2017, the East Liverpool Citizens Against Traffic Cameras (East Liverpool Citizens) circulated an Initiative Petition, which sets forth a Proposed Ordinance: AN ORDINANCE RESTRICTING THE USE OF MOBILE SPEED ENFORCEMENT VEHICLES AND TRAFFIC LAW PHOTO-MONITORING DEVICES AND REPEALING ORDINANCE NUMBER 17, 2017 AND CHAPTER 309 OF THE CODIFIED ORDINANCE OF EAST LIVERPOOL, OHIO.²

6. The Initiative Petition of the East Liverpool Citizens was filed with the City Auditor of East Liverpool on or about August 8, 2018. Thereafter the City Auditor of East Liverpool transmitted a certified copy of the text of the Proposed Ordinance to the Columbiana County Board of Elections (Board of Elections).

7. The Board of Elections examined all signatures on the Initiative Petition of the East Liverpool Citizens to determine the number of electors of East Liverpool that had signed it. On August 27, 2018, the Board of Elections returned the Initiative Petition to the City Auditor of East Liverpool with a certification that it contained the requisite number of signatures for placement on the ballot.

8. Pursuant to and in order to comply with a Court order in Columbiana County Case No. 2017 CV 481, on August 7, 2019, the City Auditor of East Liverpool certified to the Board of Elections the validity and sufficiency of

² Complaint, Exhibit 2.

the Initiative Petition of the East Liverpool Citizens.³

9. The Board of Elections approved the Initiative Petition of the East Liverpool Citizens for placement on the ballot for the general election held November 5, 2019.

10. East Liverpool filed this action on September 26, 2019 seeking primarily injunctive and declaratory relief.⁴ The injunctive relief sought included asking me to keep the Initiative Petition of the East Liverpool Citizens from appearing on the ballot for the general election held November 5, 2019 or any election thereafter and restraining any vote thereon if it did appear on the ballot. The declaratory relief sought includes asking me to find that the City Auditor of East Liverpool had not certified the sufficiency and validity of the Initiative Petition of the East Liverpool Citizens and to determine that the Initiative Petition of the East Liverpool Citizens was actually a referendum that was untimely filed.

11. I previously determined that the City Auditor of East Liverpool had certified the sufficiency and validity of the Initiative Petition of the East Liverpool Citizens and had therefore satisfied R.C. § 731.28 and/or that laches barred East Liverpool from maintaining the argument to the contrary.⁵ Subject to my decision and a separate Nunc Pro Tunc Judgment Entry filed October 24, 2019, the Initiative Petition of the East Liverpool Citizens appeared on the ballot for the general election held November 5, 2019.

³ See, Judgment Entry filed October 8, 2019.

⁴ See, Complaint, pages 5-6, ¶ (a)-(g).

⁵ See, Judgment Entry filed October 8, 2019.

Summary Judgment Standard

Summary judgment should ordinarily be granted with caution, according to the Supreme Court of Ohio and the Seventh District Court of Appeals.⁶ The traditional standards controlling summary judgment are well established and have been previously recited.⁷ They are incorporated herein by reference.

In this case, all parties are moving parties seeking summary judgment on the basis that there is no genuine issue as to any material fact and that each claims to be entitled to a judgment as a matter of law.

Legal Analysis

The crux of the issue remaining to be decided is whether the Initiative Petition of the East Liverpool Citizens is actually a referendum that is time-barred as a matter of law. In arguing for the latter, East Liverpool attempts to distinguish this case from binding precedent because Ordinance No. 17, 2017 was not passed as an emergency measure. According to East Liverpool, the East Liverpool Citizens are limited to filing a referendum petition to repeal Ordinance No. 17, 2017.⁸

In State ex rel. Sharpe v. Hitt an initiative petition sought to repeal Ordinance No. 1570 covering the parking of vehicles and to enact a new measure removing parking meters now installed and in use from city streets.⁹ The auditor of the City of Urbana believed that the parking enactments were

⁶ See, Murphy v. Reynoldsburg (1992), 65 Ohio St. 3d 356, 359, 604 N.E. 2d 138, 140, 1992-Ohio-95; PNC Mortgage, a Division of PNC Bank v. Krynicki (2017), 85 N.E. 3d 1024, (Ohio App. Dist. 7), 2017-Ohio-808, ¶ 8.

⁷ See, Judgment Entry filed October 8, 2019.

⁸ East Liverpool Motion for summary judgment, page 6.

⁹ (1951), 155 Ohio St. 529, 99 N.E. 2d 659.

passed as emergencies and therefore not subject to referendum or to repeal by initiative petition. The auditor also claimed that the initiative petition was actually a referendum that was filed untimely. The auditor therefore did not certify the initiative petition to the Champaign County board of elections.¹⁰

Like the auditor of the City of Urbana, East Liverpool urges that the Initiative Petition of the East Liverpool Citizens is an untimely filed referendum petition since its intent is to repeal Ordinance No. 17, 2017.¹¹ But the Ohio Supreme Court rejected this argument and ultimately directed the auditor of the City of Urbana to certify the initiative petition to the Board of Elections of Champaign County.¹² In so doing, the Supreme Court did not base its decision on the fact that Ordinance No. 1570 was passed as an emergency measure. Instead of restricting its use, the Supreme Court found it "interesting to note" that neither the Constitution of Ohio nor the statutes place any definite limitations on the use of the initiative.

Moreover, the Supreme Court agreed that constitutional, statutory or charter provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed.¹³

The Supreme Court also agreed with the reasoning of Judge Allen. She wrote earlier that it was not the intention of the framers of the constitutional

¹⁰ *Id.*, 155 Ohio St. at 532, 99 N.E. 2d at 661.

¹¹ East Liverpool Motion for summary judgment, page 6.

¹² *State ex rel. Sharpe v. Hitt*, 155 Ohio St. at 540, 99 N.E. 2d at 664.

¹³ *Id.*, 155 Ohio St. at 545, 99 N.E. 2d at 662.

amendments of 1912, when they provided for the initiative in municipalities, to limit the subjects upon which the initiative could be exercised to those not subject to the referendum.¹⁴ The analysis of the Hitt Court resulted in its syllabus holdings, including:

Where an ordinance relating to parking spaces and the installation and use of parking meters in connection therewith is passed by a municipal council, even though enacted as an emergency measure effective immediately and thereby not subject to the referendum, *the electors of the municipality may initiate an ordinance for the repeal of such legislation, and where the initiative petition prepared and formulated for such purpose is in conformity with the provisions of Section 4227-1, General Code, and is duly filed with the city auditor, that official is under the mandatory duty to certify such petition to the board of election.*¹⁵

Even though Hitt was decided in 1951, it remains good and binding law. Article II, Section 1f of the Ohio Constitution remains the sole constitutional source of initiative and referendum powers, reserved by the people of the state to the people of each municipality.¹⁶ The Ohio Supreme Court continues to liberally construe the power of initiative and referendum to effectuate the rights reserved.¹⁷ A liberal construction is appropriate because the right of the people to use the initiative and referendum is "one of the most essential safeguards to representative government."¹⁸

¹⁴ Id., 155 Ohio St. at 538-539, 99 N.E. 2d at 663-664.

¹⁵ Id., 155 Ohio St. at 529, 99 N.E. 2d at 659, syllabus ¶ 4.

¹⁶ State ex rel. Todd v. Felger (2007), 2007 WL 549577 (Ohio App. Dist. 7), 2007-Ohio-731, ¶ 12 citing Buckeye Community Hope Found. v. Cuyahoga Falls (1998), 82 Ohio St. 3d 539, 542.

¹⁷ See, State ex rel. LetOhioVote.ORG v. Brunner (2009), 123 Ohio St. 3d 322, 916 N.E. 2d 462, 2009-Ohio-4900, ¶ 24 citing State ex rel. Evans v. Blackwell (2006), 111 Ohio St. 3d 1, 854 N.E. 2d 1025, ¶ 32; State ex rel. DeBrosse v. Cool (1999), 87 Ohio St. 3d 1, 6, 716 N.E. 2d 1114, 1119, 1999-Ohio-239.

¹⁸ State ex rel. LetOhioVote.ORG v. Brunner, 2009-Ohio-4900, ¶ 20 citing State ex rel. Nolan v. ClenDening (1915), 93 Ohio St. 264, 277-278, 112 N.E. 1029.

An initiative is a proposal that allows the people to directly enact a law if they accept the proposal in an election.¹⁹ The power of initiative is indeed broad as embodied in R.C. § 731.28. As written, the statute provides that ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation by the general assembly may be proposed by initiative petition.²⁰ The Proposed Ordinance of the East Liverpool Citizens provides for the exercise of a power delegated to East Liverpool by the General Assembly and allows the people to directly enact a law. Specifically, the use of mobile speed enforcement vehicles and traffic law photo-monitoring devices.

The Proposed Ordinance of the East Liverpool Citizens now under consideration is grounded in the broad power conferred by R.C. § 731.28. The initiative and referendum powers must be liberally construed so as to permit rather than preclude the exercise of these powers by the people.²¹ To accept the position of East Liverpool, Hitt must be read too narrowly, abandoning a liberal construction in favor of imposing a definite limitation on the power of an initiative that is not found in the Ohio Constitution or R.C. § 731.28. This the Ohio Supreme Court does not sanction.

As East Liverpool points out, a referendum functions merely as a "veto" that allows the people to directly repeal a law already in existence.²² State of

¹⁹ State ex rel. Todd v. Felger, 2007-Ohio-731, ¶ 13.

²⁰ R.C. § 731.28 (emphasis added).

²¹ State ex rel. Commt. For Proposed Ordinance to Repeal Ordinance No. 146-02, West End Blight Designation v. Lakewood (2003), 100 Ohio St. 3d 252, 798 N.E. 2d 362, 2003-Ohio-5771, ¶ 30.

²² East Liverpool Motion for summary judgment, page 4; See, also, State ex rel. Todd v. Felger, 2007-Ohio-731, ¶ 13.

Ohio ex rel. Osborne v. Zumbar aptly illustrates the difference between a referendum and an initiative.²³ In that case the Fifth District Court of Appeals was confronted with an "initiative petition" that sought solely to undo actions of the City of North Canton.²⁴ Notably, no new legislation was proposed by the "initiative petition." The Fifth District Court of Appeals found "on its face" the "initiative petition" was a referendum related to Ordinance Nos. 66–05 and 67–06 and was untimely as a matter of law.²⁵ State ex rel. Osborne v. Zumbar can thus be distinguished based on the law and the facts of this case.

Although it is not controlling, East Liverpool likens this case to State ex rel. Osborne v. Zumbar. To do so, East Liverpool skips over and does not mention that the Proposed Ordinance of the East Liverpool Citizens seeks to do much more than merely veto or repeal Ordinance Number 17, 2017 and Chapter 309 of the Codified Ordinances of East Liverpool. It includes a Proposed Ordinance that regulates the exercise of a power delegated to East Liverpool by the General Assembly. Through the Proposed Ordinance the East Liverpool Citizens seek to directly enact a law if the proposal is accepted by the electorate. Clearly and as a matter of law, this is properly the function of an initiative.²⁶

The Ohio Supreme Court has consistently approved the use of an initiative as a means of proposing new legislation.²⁷ In State ex rel. North Main Street Coalition v. Webb, an initiative petition proposed an ordinance to approve a

²³ (2008), Not reported in N.E. 2d, 2008 WL 4061197 (Ohio App. Dist. 5), 2008-Ohio-4437.

²⁴ Id., 2008-Ohio-4437, ¶ 12-14.

²⁵ Id., 2008-Ohio-4437, ¶ 16.

²⁶ State ex rel. Todd v. Felger, 2007-Ohio-731, ¶ 13

²⁷ See, e.g., State ex rel. Oberlin Citizens for Responsible Development v. Talarico (2005), 106 Ohio St. 3d 481, 836 N.E. 2d 529, 2005-Ohio-5061.

different location for a grade-separation project.²⁸ The Ohio Supreme Court determined a village clerk abused her discretion when she refused to certify the sufficiency and validity of the initiative petition to the Lorain County board of elections.²⁹ The reasoning of the Supreme Court included that the proposed ordinance is legislative and therefore subject to initiative because it would enact a law rather than simply execute or administer preexisting laws.³⁰

Without question, East Liverpool Ordinance No. 17, 2017 is a legislative decision that is subject to an initiative.³¹ The Initiative Petition of the East Liverpool Citizens is not transformed into an untimely referendum merely because it also seeks to repeal Ordinance Number 17, 2017 and Chapter 309 of the Codified Ordinances of East Liverpool. According to the Ohio Supreme Court, an initiative that has the effect of a referendum on the ordinance it seeks to repeal is entirely permissible.³² As pointed out by the Board of Elections, it is necessary for the Initiative Petition of the East Liverpool Citizens to include a repeal provision in order to avoid having conflicting laws.³³

Based upon the foregoing, as a matter of law, I find that the Initiative Petition of the East Liverpool Citizens is a valid initiative petition under Ohio law. It is not an untimely filed referendum. I find that there is no genuine issue of material fact that precludes summary judgment on this issue.

²⁸ (2005), 106 Ohio St. 3d 437, 835 N.E. 2d 1222, 2005-Ohio-5009, ¶ 10, 29, 39.

²⁹ *Id.*, 2005-Ohio-5009, ¶ 7.

³⁰ *Id.*, 2005-Ohio-5009, ¶ 53.

³¹ See, State ex rel. Todd v. Felger, 2007-Ohio-731, ¶ 14.

³² See, State ex rel. Comm. For Proposed Ordinance to Repeal Ordinance No. 146-02, West End Blight Designation v. Lakewood, 2003-Ohio-5771, ¶ 12 citing State ex rel. Sharpe v. Hitt, 155 Ohio St. 529, syllabus, ¶ 3; See, also, Storegard v. Bd. of Elections of Cuyahoga County (1969), 22 O. Misc. 5, 255 N.E. 2d 880.

³³ Motion for summary judgment of Board of elections, page 5.

Moreover, for the reasons stated herein and previously, I find as a matter of law that East Liverpool is not entitled to any of and/or the balance of the relief requested in its Complaint, including any continued injunctive relief. The Board of Elections and the East Liverpool Citizens are each entitled to and hereby are granted summary judgment on the Complaint of East Liverpool as a matter of law.

The Temporary Restraining Orders previously issued in this case are hereby dissolved.³⁴ The Board of Elections is directed to release the results of the vote on the Initiative Petition of the East Liverpool Citizens, to certify the results of the election as to the Initiative Petition to the Ohio Secretary of State, and/or to take and perform all other actions required by law.

Pursuant to Civ. R. 58(B), the Clerk of this Court is requested to serve upon all parties not in default a notice of this judgment and the date of entry upon the journal.

The costs of this action are taxed against the Plaintiff, City of East Liverpool, Ohio.

IT IS SO ORDERED.



Scott A. Washam, Judge

December 2, 2019

CC: Charles L. Payne, Esq. (clp@paynelaw.net)
Krista Peddicord, Esq.
Mark Hanni, Esq. (attymarkhanni@gmail.com)
Kevin Daley, Esq. (attykevindaley@gmail.com)
Donald Bean, 1214 Riverview Street, East Liverpool, Ohio 43920

³⁴ See, Judgment Entry filed October 8, 2019 and Nunc Pro Tunc Judgment Entry filed October 24, 2019.