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September 12, 2017

Judgement Ruling,  
Entry May 1, 2017,  
Case Number  
A1702034 Judge Robert  
C. Winkler.

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declaration of the parties' rights pursuant to Relator's request for such a declaration in his Verified Complaint).

The Court heard testimony from Sherry Poland, the Director of Elections for the Board, Christine Doyle, Clerk of Council for the City, Kristie Lowndes, Tax Commissioner and Assistant Treasurer of the City, and Moeller, the aforementioned City Manager.

**I. Findings of Fact**

According to the testimony and evidence adduced at the hearing, on March 2, 2017, the Madeira City Council passed Ordinances No. 17-03 and 17-04, submitting proposed Charter amendments to the electors as two ballot issues, Issues 2 and 3 for the Special Election to take place on May 2, 2017.

As the meeting minutes and testimony demonstrated, City Council passed each ordinance by the two-thirds vote required by Sections 9 of Article XVIII of the Ohio Constitution. Even though such action is arguably not required, City Council also voted to dispense with the three-reading rule pertaining to ordinances found in Article III, Section 4 of the Charter. Because the measures were not subject to referendum, the subject ordinances became effective immediately upon passage, pursuant to Article XI, Section 1 (A) of the Madeira City Charter.

Relator presented no evidence to corroborate his claims that Ordinances 17-03 and 17-04 were enacted as "emergency measures" or that the City of Madeira abused its corporate powers as alleged in his Verified Complaint. Likewise, Relator's claim that this process violated R.C. 731.19 is equally unavailing and not supported by the evidence adduced at the hearing.

On March 10, 2017, Mr. Moeller identified a typographical error in Ordinance No. 17-03. The City referred to "Article XI. ORDINANCES AND RESOLUTIONS" instead of "Article XII. INITIATIVE, REFERENDUM, AND RECALL." The body of the proposed amendments

was correctly transcribed on all documents. This fact was established by the testimony of Madeira City Manager Tom Moeller and the various exhibits submitted to the Court for review.

After discovering this typographical error, Mr. Moeller corresponded with Ms. Poland, who in turn sought advice from the Ohio Secretary of State's office. At the hearing, Ms. Poland testified that she followed the counsel of Patricia Wolfe at the Ohio Secretary of State's office by suggesting that the City should adopt a resolution correcting the typographical error contained in Ordinance No. 17-03. During a regular meeting on March 13, 2017, City Council passed Ordinance No. 17-06, which corrected the reference to the title of "Article XI." instead of "Article XII."

No evidence of any kind was adduced or presented which would tend to support Relator's allegations that both Ms. Poland and the Board more generally were involved in any fraud, deceit or abuse of corporate powers in regard to the correction of this typographical error.

Likewise, Relator also presented no evidence to corroborate his allegations that the City engaged in a conspiracy to commit fraud against the Hamilton County Board of Elections and electors of the City of Madeira. If anything, the evidence and testimony adduced at the hearing demonstrate the opposite – that the subject ordinances were enacted in an open meeting of City Council, and that the City remedied the typographical error as soon as it was discovered by notifying the Board.

The Court likewise finds that the City mailed the proposed amendments to the electors on March 31, 2017 well in advance of the May 2<sup>nd</sup> Special Election. This mailing was completed in accordance with Article XIV, Section 5 (E) the City Charter, which requires that the mailings occur not less than 30 days prior to the election.



Relator spent a significant portion of the hearing making arguments about the timing of the certification of Ordinance No. 17-06. As an initial matter, Ms. Doyle signed a copy of Ordinance No. 17-06, “certifying” the same. That notwithstanding, Relator failed to identify any specific certification requirements pertaining to proposed Charter amendment ordinances passed by City Council under Sections 8 & 9 of Article XVIII of the Ohio Constitution as codified in Article XIV, Section 5 of the Madeira City Charter. The lone references to certification requirements and proposed Charter amendments are found in Section 9 of Article XVIII of the Ohio Constitution and its corresponding codification in Article XIV, Section 5(F) of the Madeira City Charter, and is only triggered when a Charter amendment is approved by a majority of electors (*i.e.* after the election has taken place) and occurs between the Clerk and the Secretary of State.

Relator also alleged that the fact that Mr. Lowndes “certified” (that is, “signed”) the corrective ordinance as the “acting clerk” in some way invalidated its transmittal to the Board (and, thus, invalidated the Board’s subsequent placement of the corrected Charter amendment on the ballot). Despite nearly four hours of testimony, however, Relator did not present or adduce evidence which demonstrated any impropriety in Ms. Lowndes’ appointment and actions as “acting clerk.” Moreover, he did not present or adduce evidence demonstrating that her actions (or those of Mr. Moeller) constituted fraud, abuse of corporate powers or legal sham proceedings.

On April 4, 2017 (thirty-two days after Ordinances No. 17-03 and 17-04 were passed by City Council), Relator filed a protest regarding the proposed Charter amendments with the Board of Elections. On April 7, 2017, the Board unanimously (3-0) denied his request to remove the proposed Charter amendments from the ballot. According to its hearing transcript, the Board

noted that absentee ballots had already been mailed, and Relator indicated that he'd been actively soliciting absentee ballot applications for the election on the proposed Charter amendments. According to Ms. Poland, the Board of Elections had already issued 51 absentee ballots, 19 of which have already been voted and returned.

Relator neither submitted nor adduced evidence tending to show any entitlement to injunctive relief. More specifically, he did not demonstrate any factual basis for suffering irreparable harm, nor did he establish any basis for this Court to take the extraordinary step of enjoining the democratic process – an action which would be adverse to the public interest and public policy more generally.

The Court also accepted as evidence and reviewed all applicable Madeira Council meeting minutes, as well applicable provisions of the Madeira City Charter and the Ohio Constitution.

## II. Conclusions of Law and Holding


After reviewing the filings and evidence in the record, the Court holds as follows:

- Relator's Motion for a Temporary Restraining Order, request for a Preliminary Injunction and additional request for injunctive relief in his Verified Complaint are hereby **OVERRULED and DENIED**.
- Upon review of the request for Declaratory Judgment set forth in Relator's Verified Complaint, the Court does hereby find Declaratory Judgment in favor of the City, Moeller and the Board and does hereby state and declare as follows:
  - 1) The prohibitions, restrictions, and/or limitations within Article XIV of the Charter of the City of Madeira do not prohibit and/or preclude the City and the Board from proceeding forward with the special election on May 2, 2017;

- 2) Neither the City nor Mr. Moeller nor the Board engaged in any conduct relating to the certification of Issues 2 and 3 which constituted fraud, abuse of corporate powers or a sham legal process;
- 3) The certification of the March 13, 2017 corrective ordinance by an “acting clerk” did not violate Ohio law in any regard and did not constitute fraud, abuse of corporate powers or a sham legal process;
- 4) The certification of Issues 2 and 3 complied with the City Charter and thus did not violate Ohio law;
- 5) The certification of Issues 2 and 3 likewise complied with the requirements set forth for such procedures by the Ohio Revised Code and the Ohio Constitution, particularly those set forth in Sections 8 and 9 of Article XVIII of the Ohio Constitution; and
- 6) Neither the City nor Moeller nor the Board engaged in a conspiracy to commit fraud against the “voters of Madeira,” as alleged by Relator in his Verified Complaint;

- As it pertains to Relator’s taxpayer demand, his request for relief is hereby **OVERRULED.**
- Relator’s claims against the City, Moeller, and the Board are hereby **DISMISSED** in their entirety and with prejudice with each party bearing their own costs.

IT IS SO ORDERED.

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.



1 Ohio App.3d 44  
Court of Appeals of Ohio, First  
District, Hamilton County.

OPPENHEIMER, Appellant,  
v.  
CITY OF MADEIRA et al., Appellees.

Jan. 14, 1981.

Plaintiff appealed from a judgment of the Court of Common Pleas of Hamilton County seeking to enjoin the vote on an amendment to city charter. The Court of Appeals, Black, J., held that the language of the city charter and the incorporated language of section of the Constitution which required that submission of a proposed charter amendment to the electorate should be done by mailing to the electors by name was mandatory, and addressing copies of the proposed charter amendment to "Resident" did not comply with such mandatory provisions, and thus the vote on the proposed amendment and the results thereof were a nullity.

Judgment accordingly.

**\*\*441** *Syllabus by the Court*

\*44 1. Section 8, Article XVIII of the Ohio Constitution, is incorporated into the amendment provisions of the charter of a municipal corporation by a provision that "copies of \* \* \* amendments [to the charter] shall be mailed to the electors as required in the case of this original charter."

2. Under such conditions, the charter and Section 8, Article XVIII of the Ohio Constitution, require that the copies of the proposed amendment to the charter be addressed *by name*, by the clerk of the municipality, to the electors appearing on the poll or registration books of the last regular or general election held in the municipality. Addressing copies of the proposed charter amendment to "Resident" does not comply with this mandatory requirement.

**Attorneys and Law Firms**

French, Marks, Short, Weiner & Valleau and Richard J. Valleau, Cincinnati, for appellant.

Timothy S. Hogan, City Sol. for appellees.

**Opinion**

BLACK, Judge.

Plaintiff-appellant, Philip D. Oppenheimer, sought to enjoin the vote on an amendment to the Madeira City Charter (Charter) because copies of the amendment were placed in the mail addressed to "Resident" and not to each elector whose name appeared on the registration books of the last general election held in the city, as required by law. The trial court denied him all relief finding that Madeira had "substantially complied" with the Charter and the Ohio Constitution. We disagree with that judgment.

The facts were stipulated. The Madeira City Council adopted an ordinance requiring that an amendment of Sections 1 and 7, Article III of the Madeira City Charter, be submitted to vote of the qualified electors of the city at the election on November 6, 1979. The amendment extended the terms of the mayor and the six councilmen from two to four years, provided alternating (staggered) elections for half of the councilmen, and imposed a limitation of three consecutive terms for the mayor and the councilmen.

A copy of the full text of the amended sections of the Charter and an explanatory letter were placed in envelopes, *uniformly addressed*, to "Resident"; the following is an example of the address format:

"RESIDENT

"7821 Buckeye Crescent

"Cincinnati OH 45243"

(The zip code "45243" includes all of the city of Madeira.)

The Charter provides, in Section 5 of Article XIV, that "copies of such amendments shall be mailed to the electors as required in the case of this original charter." The requirement for original charters is found in Section 8, Article XVIII of the Ohio Constitution, which provides that in the original submission of a proposed charter to the electorate " \* \* \* the clerk of the municipality shall mail a copy of the proposed charter to \*45 each elector whose name appears upon the poll or registration books of the last regular or general election held therein. \* \* \* "



We hold that the constitutional provisions for mailing to the electors by name are mandatory, and that addressing copies of the proposed charter amendment to "Resident" does not comply with those mandatory provisions.

We find no precedent in the reported cases in Ohio, and the issue appears to be of first impression. However, we support our holding by relying on cases which hold that clear and unambiguous terms in the Constitution, or in the statutes relating to election procedures, are mandatory.

*Billington v. Cotner* (1971), 25 Ohio St.2d 140 [54 O.O.2d 270], 267 N.E.2d 410, held that those provisions of Sections 8 and 9, Article XVIII of the Ohio Constitution, providing that the calling of a special election by the municipality's legislative authority to vote on a proposed charter amendment, \*\*442 are mandatory, and that the failure of Cleveland's council to establish a date for the special election was fatal. The language of the Constitution is clear and unequivocal, and the omission of the date was a gross mistake. Even though the election had been held and the proposal received a favorable vote, the Supreme Court stated that it would not be "intimidated" in its dedication to the law and that every attempt must be made to preserve the validity of elections. *Id.*, at 152, 267 N.E.2d 410. The election was declared a nullity and of no effect. See, also, *State ex rel. Vrooman v. Kauffman* (1926), 22 Ohio App. 282, 153 N.E. 897.

We note that, in the present case, plaintiff asked for alternative relief: to enjoin the placing of this issue on the ballot, or to enjoin the counting of the votes on the issue, or to enjoin the release and certification of the results. His demand for relief was sufficiently broad to bring the whole elective process on this issue into question.

[1] [2] Charter provisions for amendments are controlling and must be followed to the letter. *State ex rel. Werner v. Koontz* (1950), 153 Ohio St. 325 [41 O.O. 309], 91 N.E.2d 473. Technical errors in describing the districts from which councilmen will be elected under a charter amendment may be corrected by the clerk, and council has no power to keep the issue off the ballot for errors subject to ministerial correction. *State ex rel. Polcyn v. Burkhardt* (1973), 33 Ohio St.2d 7 [62 O.O.2d 202], 292 N.E.2d 883. But when the governing language contains

no ambiguity about procedures affecting the right to vote, that procedure must be followed. See *In re Election of Council of Oak Harbor* (Ottawa Co. C.P. 1953), [53 O.O. 426], 118 N.E.2d 692.

[3] The language of the Madeira Charter, and the incorporated language of Section 8, Article XVIII of the Ohio Constitution, is clear and unequivocal. This language requires that the copies of the proposed amendment be addressed *by name* to the electors appearing on the poll or registration books of the last regular or general election held in Madeira. If the intent had been to allow a mailing to "Resident," other language would have been used. It is not legally significant that envelopes addressed to "Resident" may conceivably reach all electors, because the vital legal point is what the Charter demands in specific language, not what alternatives there may be.

It may be that the Madeira Clerk sought to mail the notice by a less expensive method than addressing the electors by name, but cost alone cannot justify a violation of mandatory charter provisions.

We find nothing in the record that would allow departure from the clear and unequivocal requirements of the Madeira Charter and the Ohio Constitution. The \*46 concept of "substantial compliance" has no applicability in the instant cause. Plaintiff was, as a matter of law, entitled to judgment in his favor prior to the election, and the only method now available to give him the relief to which he was then entitled is to invalidate the vote on this issue. We reverse the decision of the Court of Common Pleas of Hamilton County and hereby declare that the vote on the proposed amendment to the Charter of the city of Madeira, as contained in Ordinance No. 1420, held on November 6, 1979, and the results thereof, are a nullity and without effect.

*Judgment accordingly.*

PALMER, J., concurs. \*

#### All Citations

1 Ohio App.3d 44, 439 N.E.2d 440, 1 O.B.R. 25

Footnotes

\* BETTMAN, P. J., participated in this case which was, however, decided after his resignation.

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September 12, 2017

Appellant Brief Filed in  
Hamilton County Court  
of Appeals. George  
Parker, Attorney.  
Appeal Number  
C1700206.

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

CITY OF MADEIRA EX REL. DOUGLAS OPPENHEIMER,	:	Appeal No. C1700206
	:	
Appellant,	:	Trial No.A-11702034
	:	
vs.	:	
	:	
CITY OF MADEIRA, et al.,	:	
	:	
Appellees.	:	

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Appeal from the Hamilton County Court of Common Pleas

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**BRIEF OF APPELLANT  
CITY OF MADEIRA EX REL. P. DOUGLAS OPPENHEIMER**

---

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## **II. Statement of the Case**

In an election case, the trial court erred in not granting an injunction prohibiting the Hamilton County Board of Elections from holding a special election on proposed charter amendments to the charter of Madeira, Ohio. The trial court also erred by declaring judgment for the City of Madeira, Thomas Moeller (its City Manager) and the Hamilton County Board of Elections when the City of Madeira failed to follow the law in placing charter amendments on the ballot for consideration by its electors.

### **A. Statement of Jurisdiction**

This appeal was timely filed on May 8, 2017 and was taken from the trial court's judgment entry denying the request for an injunction and declaring judgment in favor of the City of Madeira, Thomas Moeller and the Hamilton County Board of Elections. T.d. 23. The trial court's entry is a final appealable order. O.R.C. §2505.02.

### **B. Procedural Posture**

P. Douglas Oppenheimer ("Doug Oppenheimer") filed a taxpayer lawsuit complaint on April 11, 2017. T.d. 2. This lawsuit was also a follow up to the denial of the election protest Doug Oppenheimer had filed with the Hamilton County Board of Elections. Doug Oppenheimer also filed a motion for a temporary restraining order and request for a preliminary and permanent injunction the same day as the complaint. T.d. 7. The complaint was amended on April 27, 2017. T.d. 18. The Hamilton County Board of Elections ("BOE"), the City of Madeira



("Madeira") and Thomas Moeller ("Moeller") each filed memorandum in opposition to the request for an injunction on April 26, 2017 and the case proceeded to trial on all issues, by agreement, on April 27, 2017. After trial, the court denied the request for an injunction and declared judgment for the Madeira, Moeller and the BOE. T.d. 21. The notice of appeal was filed May 8, 2017. T.d.23.

### **C. Statement of Facts**

In March 2017, the city council of Madeira passed ordinances to place proposed charter amendments on the ballot at a May 2, 2017 special election. Madeira filed the ordinances with the BOE on the filing deadline date of March 3, 2017. T.p. 14-18. Subsequent to the filing with the BOE, Moeller decided that there were errors in the ordinance language regarding one of the proposed charter amendments, set out to correct the error and sought advice from the BOE. T.p. 24. According to Sherry Poland, Executive Director of the BOE, the city council of Madeira could pass corrective ordinances and file with the BOE, using O.R.C. §3505.14 as the means to authorize the correction. T.p. 23 and 32-33. On March 14, 2017, Moeller had one of his subordinates, Christy Lowndes, sign what was represented to the BOE as the corrective ordinance as if she had authority to act as the Clerk of Council. T.p. 73. The ballot language that was suggested as containing an error was not printed by an outside vendor. T.p. 20. Christy Lowndes testified that Moeller appointed her acting clerk of council on the morning of March 14, 2017 and could do so because he was the city manager. T.p. 72. Moeller testified that he did not appoint Christy Lowndes and that none of the steps to have had her appointed were followed. T.p. 82. Finally, Christine Doyle, the only legal

authorized and duly appointed Clerk of Madeira City Council testified that she did not put copies of the proposed charter amendments in the mail but that proposed amendments was sent to the **citizens** of Madeira. T.p. 57.

### **III. Appellant’s Claimed Assignments of Error and Argument**

#### **FIRST CLAIMED ASSIGNMENT OF ERROR**

The trial court erred in denying the request for an injunction.

\*\*\*

The standard of review to be applied for the three issues raised in this first claimed assignment of error is a mixture of all three commonly referenced standards for appellate review. This court discussed this mixed standard in *Vontz v. Miller*, 2016-Ohio-8477.

“{¶26} We review the trial court’s decision to grant or deny an injunction under an abuse-of-discretion standard. Id. at 268 (*Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1<sup>st</sup> Dist.2000)). But we review de novo issues of law upon which the trial court based its decision, such as the sufficiency of the evidence to support a judgment and the interpretation of contract and statutory provisions. *Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342, ¶ 8; *Lehigh Gas-Ohio, LLC v. Cincy Oil Queen City, LLC*, 1st Dist. Hamilton No. C-130127, 2014-Ohio-2799, ¶ 43. And we review factual determinations under the deferential manifest-weight-of-the-evidence standard. See *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20-2.”

#### **First Issue Presented for Review and Argument**

Where the Madeira Clerk of Council testifies that the mailing required by the

Ohio Constitution and the Madeira Charter of proposed amendments to the charter was sent to citizens of Madeira (rather than electors) and that she as Clerk did not mail them, the trial court made clear errors of judgment, its findings are an abuse of discretion and are contrary to law.

At Article XIV, §5 paragraph E, the Charter for Madeira provides “Not less than 30 days prior to such election, the Clerk shall mail a copy of the proposed charter amendment to each elector whose name appears on the poll or registration books of the last regular or general election held in Madeira.” This charter provision is a restatement of the constitutional provisions of Ohio Constitution Article XVIII, Sections 8 and 9. Christine Doyle, Clerk of Madeira City Council, testified that the mailing “was mailed to the **citizens** of Madeira regarding charter amendments” and that “I did not put them in the mail.” T.P. 57. This is not sufficient to comply with the charter and is contrary to law. This court has previously decided a case directly on point with the present case, *Oppenheimer v. City of Madeira*, 1 Ohio App.3d 44 (1981). In *Oppenheimer*, this court nullified the results of a 1979 charter amendment election. This court held that the language of the city charter and the incorporated language of the section of the Ohio Constitution which required proposed charter amendment be mailed to the electors was mandatory, and addressing copies of the proposed charter amendment to “Resident” did not comply with such mandatory provisions, and thus the vote on the proposed amendment and the results thereof were a nullity. *Id.* at 46. The evidence points only to the conclusion that the mailing was not sufficient to comply with the charter and the constitution or the holding of *Oppenheimer* that requires more than substantial compliance *Id.* at 46. Any other



method of mailing is a deviation from the required procedures and was sufficient reason to grant the injunction.

### **Second Issue Presented for Review and Argument**

Where a City Manager acts outside the scope of his authority, had a subordinate take action as if she were the clerk of council, the trial court erred by not finding that such acts are sham legal process, fraud and sufficient reasons to find the procedures for placing proposed charter amendments on the ballot were not followed.

It is axiomatic in Ohio that “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” *Am. Fedn. of State, Cty. & Mun. Emps. Local #74 v. Warren*, 2008-Ohio-3905 at ¶36. To the end, Madeira adopted a charter. The adoption and amendment of a municipal charter are governed by Article XVIII, sections 8 and 9, Ohio Constitution. The “manifest object” of Section 9 “is to provide the procedure for the submission of a charter amendment to electors” and these “requirements are clear and complete, and are not to be added to or subtracted from.” *Billington v. Cotner* (1971), 25 Ohio St.2d 140, 146, 54 O.O.2d 270, 267 N.E.2d 410.

Further, on one hand, while the charter limits the interference by the City Manager with jurisdiction of the Clerk of Council, at Article IV, §2, Madeira City Charter, the facts of this case show that Moeller, as the City Manager, fraudulently



and flagrantly interfered with the jurisdiction of the Clerk of Council. Moeller's commanding of the tax commissioner to sign her name as if she had any authority to act as the Clerk of Council was a nullity, a fraud and a legal sham. The sixth un-numbered paragraph of this Article of the charter provides "He [the City Manager] shall serve as chief executive officer over all departments except that he shall not have jurisdiction or authority over, or serve as, the Clerk, Treasurer, Clerk-Treasurer, or Solicitor." The charter further provides for the appointment of an acting City Manager when the City Manager is temporarily absent or disabled at the un-numbered paragraph 8 of the same Article.

On the other hand, The charter further provides, at Article V. §1, Madeira City Charter for the appointment of a Clerk by Council. That section states "Council shall appoint a Clerk who shall be a resident of the municipality. He shall attend all meetings of Council, keep its records, and perform all duties prescribed for him in this charter, and such additional duties as may be imposed upon him by any measure of Council or by general law. His appointment shall be for 2 years, concurrent with the term of Council appointing him." Christine Doyle is the Clerk of Council and she did not participate in the filing of the corrective ordinance with the BOE nor did she send the proposed charter amendments to the electors of Madeira. Nowhere in the charter is there any provision for the appointment of an acting clerk. "The canon *expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other." *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 121 Ohio St.3d 560, 2009-Ohio-1355, 906 N.E.2d 409, ¶ 42, quoting *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶ 24. Since there is specific charter provisions for the

appointment of an acting City Manager but not an acting Clerk of Council, no attempt to appoint an acting clerk can be successful and clearly not by the City Manager. Moeller and his subordinates actions are a legal sham, fraudulent and falsified election materials.

Additionally, the trial court's finding that no evidence was presented to corroborate the allegations that Madeira, its City Manager, its Tax Commissioner and the BOE were engaged in a conspiracy to commit fraud against the electors of the City of Madeira is contrary to law, all of the evidence and especially the testimony of Moeller and Christy Lowndes. Moeller so egregiously exceeded his authority as to commit a fraud upon the BOE with the submission of the corrective ordinance on March 14, 2017. He did so in order to beat a deadline for the internal printing of the ballots for the May 2, 2017 special election by the BOE. Plainly put, the City Manager had no authority to appoint an acting clerk; The tax commissioner had no authority to hold herself out to the BOE as acting clerk; The tax commissioner did not attend the meeting when the ordinance was to have been enacted T.p. 73 , but relied upon what the Moeller told her to do. T.p.73. The charter of Madeira requires the Clerk to attend meetings and does not permit the relaying of information from the City Manager to his subordinate and command her to sign as the Clerk. This is a clear abuse of the corporate powers and disregards the charter entirely. This is an abuse of the corporate powers of Madeira that support the granting of an injunction.

### **Third Issue Presented for Review and Argument**

Where Madeira files an ordinance with the BOE that contains errors the provisions of O.R.C. §3505.14 cannot be used to justify correction of proposed charter amendments after the petition filing deadline.

O.R. C. §3505.14 was used as the mechanism for permitting the correction of the errors contained in the original petition of one of the proposed amendments to the charter on March 14, 2017 , 11 days after the deadline T. p. 28-29. No plain reading of this statute permits the manipulation of the constitutional and charter time provisions that filing had to take place not less than sixty days prior to the election. “It is well recognized that a court cannot read words into a statute but must give effect to the words used in the statute.” See generally *State ex rel. McDulin v. Indus. Comm.* (2000), 89 Ohio St.3d 390, 392, 732 N.E.2d 367; *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus, citing *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 254 N.E.2d 8. O.R.C. §3505.14 plainly permits ballot printing errors to be corrected not petition errors. The trial court erred in ruling that the BOE could use O.R.C. §3505.14 to change the language of the proposed amendments from what was on the petitions filed on March 3, 2017. The trial court erred by finding that certification of Issues 2 and 3 complied with the Charter of Madeira and the Ohio Constitution.

\*\*\*



## SECOND ASSIGNMENT OF ERROR

The trial court erred in declaring judgment in favor of all appellees.

### **First Issue Presented for Review and Argument**

Appellant was entitled to have it declared that the procedures for placing proposed charter amendments on the ballot were not strictly followed.

This issue presents an issue of law. The standard of review on issues of law is de novo. *Arnott v. Arnott*, 132 Ohio St.3d 401 at ¶17. As stated in the first assignment of error, the procedures for placing proposed charter amendments on the ballot were disregarded, the City Manager exceeded his authority in commanding a subordinate to act as Clerk of Council to certify a corrective ordinance and the Clerk of Council did not mail the proposed charter amendments to the electors of Madeira as required. The trial court did not follow the law in making the 6 declarations in favor of Madeira, Moeller and the BOE as contained in the judgment entry and each and every such finding is contrary to the evidence and is the exact opposite of what was established by any appropriate consideration of the evidence. In *Oppenheimer*, this court held that “substantial compliance” with the mailing requirement is inapplicable. Id. at 46. The Clerk of council is the one and only person that is authorized to mail the required mailing and she must send it to the electors of Madeira not to citizens. Further, when Moeller exceeded his authority and his subordinate poses as the Clerk of Council, what Moeller submitted to the BOE is a



nullity and must be declared as a nullity. Finally, the BOE cannot use O.R.C. §3505.14 as the means to correct errors in proposed charter amendments filed after the constitutional and charter deadlines because it is against a plain reading of the statute which clearly permits correcting errors in the printing process not the filing of the proposed language.

### **Second Issue Presented for Review and Argument**

Appellant was entitled to have it declared that the BOE was an unwitting co-conspirator of Madeira and its Autocratic City Manager when it allowed the election to go forward.

In holding the special election on May 2, 2017 and not granting the election protest, the BOE was not concerned with the charter requirements for mailing the proposed amendments or the origin of the March 14, 2017 corrective ordinance. However, even though it was believed by the BOE Executive Director (that those requirements) did not fall “under the BOE duties or responsibilities” T.p. 38-39, once it was made aware of the procedural deficiencies it had an obligation to stop the process or become an unwitting co-conspirator along with Madeira, Moeller and his unwitting co-conspirator subordinate in election fraud. Various Ohio Revised Code sections, under the jurisdiction of the BOE, prohibited the unauthorized actions of Moeller and his subordinate, Christy Lowndes, in hastening the attempts to cover up the fraud in the filing with the BOE O.R.C. §3599.14 (A) (7) and (8), as well as §3599.36 prohibit the behavior of Christy Lowndes in falsifying the corrective ordinance that Moeller hand delivered and filed to the BOE on March 14, 2017 knowing it was a legal sham. Specifically, Christy Lowndes was never authorized to

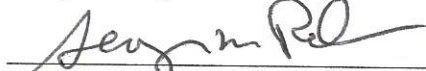
act as Clerk of Council of Madeira as represented on the March 14, 2017 filing with the BOE nor could she have been. The ordinance was required to be filed with the BOE so it had to be a material matter as required by §3599.36 constituting election falsification. Christy Lowndes signed it at the command of Moeller but he testified he did not appoint her to act as Clerk of Council. This is also election falsification.

Next, the mailing by the Clerk of Council of the proposed charter amendments to the electors was mandatory, with no exception. *Oppenheimer*. Id. Once the BOE became aware of the failure to strictly comply with this requirement the special election should have been cancelled by the BOE because this charter requirement and the corresponding constitutional requirement were also election laws under the BOE jurisdiction. The court erred in not declaring the BOE to be an unwitting co-conspirator to the election fraud of Madeira and it not declaring the appellant entitled to have the BOE enforce the requirement that the mailing requirements be strictly enforced.

#### **IV. Conclusion**

The decision of the trial court to deny the injunction must be reversed. Doug Oppenheimer was entitled to an injunction and just like in *Oppenheimer*, the only method now available to give him the relief to which he was entitled is to invalidate the vote on the issues and this court should declare judgment in favor of appellant on each and every item listed in the judgment entry. Based upon the evidence established at trial, this court must set aside the results of the special election as a sham declare the results of the special election a nullity and without effect.

Respectfully submitted,



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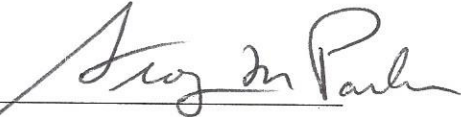
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### **Certificate of Service**

I certify that a copy of the Brief of Appellant has been served on Brian W. Fox and Steven P. Goodin, attorneys for Madeira and Moeller, at 312 Walnut Street, Suite 1800, Cincinnati, Ohio 45202, and David T. Stevenson, Assistant Prosecuting Attorney for Hamilton County Board of Elections at 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202 via ordinary U.S. mail this 8<sup>th</sup> day of August, 2017.



George M. Parker



Madeiramessenger.com

September 12, 2017

# Appellees Merit Brief Filed in Hamilton County Court of Appeals. Brian Fox, Attorney for City of Madeira. Appeal Number C1700206.

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**Please Scroll Down**

Case No. C-17-206

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

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**CITY OF MADEIRA *ex rel* DOUGLAS OPPENHEIMER**

**Relator-Appellant**

**v.**

**CITY OF MADEIRA, *et al.*,**

**Defendants-Appellees.**

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**MERIT BRIEF OF APPELLEES  
CITY OF MADEIRA AND CITY MANAGER TOM MOELLER**

---

Respectfully submitted,

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**I. STATEMENT OF THE CASE.**

**A. STATEMENT OF JURISDICTION.**

This case concerns a municipal election which has already been held and the results of which have been certified by Co-Appellee the Hamilton County Board of Elections (“BOE”). Citing a number of picayune and often-nonexistent errors in the conduct of the election, Relator City of Madeira *ex rel.* Douglas Oppenheimer (“Appellant”) sought to enjoin it at the trial court and now seeks to obviate its results on appeal.

His attempt to invoke the jurisdiction of this Court, at this stage of the proceedings, flies in the face of Ohio law. The Ohio Supreme Court has expressly held that, “[w]hen an election has passed, as it has here, the action for extraordinary relief or an appeal from a judgment in the extraordinary-writ action is moot.” *State ex rel Hills Cmty., Inc. v. Clermont County Bd. of Elections*, 91 Ohio St.3d 465, 468, 746 N.E.2d 1115 (2001); *see also State ex rel. Gyurcik v. Brown*, 176 Ohio St. 288, 199 N.E.2d 596 (1964) (holding, “[s]ince the time for the election has passed and the election has been completed by the voters’ rejection of the proposed ordinance, the case has become moot.”). Moreover, this Court has held that “Ohio courts have long recognized that a court cannot entertain jurisdiction over a moot controversy.” *Paige v. Ohio High Sch. Ath. Ass’n*, 1st Dist. Hamilton No. C-130024, 2013-Ohio-4713, ¶7.

Therefore, as an initial matter, the City of Madeira, Ohio and its City Manager Tom Moeller (collectively “Madeira Appellees”) object to this Court’s jurisdiction as the issues raised by Appellant are now moot. This objection notwithstanding, the Madeira Appellees concede that this Court could otherwise exercise both personal and subject matter jurisdiction over the appeal concerning matters pled in Appellant’s Verified Complaint.



**B. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS.**

On February 27, 2017, the Madeira City Council passed Ordinance 17-02, a piece of “omnibus legislation” containing four proposed amendments to the Madeira Charter. *See* Tp. 90:22 - 91:2; 94:6 - 16. These amendments were to be presented to the electorate at the May 2, 2017 Special Election. *See id.*

Subsequently, Council sought to bifurcate the proposed amendments into two separate ballot issues to aid the voters’ consideration of same. *See* Tp. 94:17 - 95:15. At a special meeting on March 2, 2017, Council passed Ordinances 17-03 and 17-04. Each was read one time after Council dispensed with the three reading requirement and neither was passed as an emergency measure. *See* Tp. 97:2 - 7; 105:7 - 18. At that same Special Meeting, Council also introduced and passed Ordinance 17-05 for the purpose of repealing 17-02. *See* Tp. 94:17 - 95:15. Ordinance 17-05 was passed in the same manner as Ordinances 17-03 and 17-04. Tp. 105:7 - 18. Ordinances 17-03 and 17-04 were each certified by Madeira’s Clerk and transmitted to the BOE.

On March 10, 2017, during the BOE’s public proofing period for proposed ballot initiatives, City Manager Thomas Moeller identified a typographical error in Ordinance 17-03. *See* Tp. 105:19 - 106:1; 108:14 - 23. Mr. Moeller contacted Sherry Poland at the BOE seeking direction with regard to correcting the error. *See* Tp. 31:15-25; 45:19 - 46:10. Ms. Poland consulted with the Ohio Secretary of State’s office, which advised that Council adopt a resolution correcting the error. *Id.*

Ms. Poland relayed this advice to Mr. Moeller on March 13, 2017. *Id.* That same day, at a regularly scheduled Council meeting, Council approved Ordinance 17-06, correcting the errors relating to the mistaken title and numerals that existed in original 17-03. Tp. 105:19 - 25.

The next day, Kristie Lowndes (who holds the position of Madeira's assistant treasurer and tax commissioner) served as acting clerk in place of the ordinary clerk Christine Doyle (who was out of the country at the time) in order to certify Ordinance 17-06 prior to its transmission to the BOE. *See* Tp. 74:9 - 75:15; 76:19 - 77:21. Upon her return to the United States, Ms. Doyle also certified Ordinance 17-06. *See* Tp. 109:19 - 110:9. At no time during the hearings before the BOE or the trial court, did Appellant articulate any express or implied legal requirement that the Ordinance be certified by the Clerk prior to transmission to the BOE.

In the next few days, the ballots were prepared by the BOE with the corrected proposed amendments prior to the March 18th printing deadline. Tp. 35:15 - 21.

On April 7, 2017, Appellant's counsel appeared before the BOE challenging the BOE's inclusion of the proposed charter amendments on the Madeira ballot. *See* BOE Trans. (Apr. 7, 2017), at 19:20 - 20:8, attached as Ex. A to Respondents' Memo. in Opp. to Relator's Motion for TRO (Td. 17). Specifically, he argued that the mailings failed to reference the ordinances, that Ordinance 17-06 was improperly certified, and that the correction of the typographical errors in the original submission to the BOE was done improperly. *See id.*, at 21:18 - 24:22. The BOE's Chairman summarized the futility of the proceedings by asking at the outset: "...what are we supposed to do about this now, because it is in fact already on the ballot and [absentee] voting has started?" *Id.*, at 20:1 - 19.

On April 11, 2017, Appellant filed a Verified Complaint containing only two counts and seeking the following relief: (a) "a declaratory judgment that the prohibitions, restrictions and/or limitations within Article XIV of the Charter of the City of Madeira prohibit and/or preclude the CITY OF MADEIRA and the BOE from proceeding forward with the special election on May 2, 2017[;]" and (b) "the issuance of an injunction against and restraining the CITY OF MADEIRA

and THOMAS W. MOELLER, the City Manager for the City of Madeira, and the BOE those acting at their behest or direction, from holding the special election on May 2, 2017[.]” T.d. 2, at ¶¶ 24 and 26.

A merits hearing for a permanent injunction was held on April 27, 2017. Tp. 8:21 - 9:25. At its conclusion, the trial court took the matter under advisement to fully consider the testimony and exhibits presented. On May 1, 2017, the Court entered a final and appealable judgment denying Appellant’s request for injunctive relief, declaring judgment in favor of Madeira Appellees, and dismissing Appellant’s claims against the BOE and the Madeira Appellees in their entirety. Judgment Entry, Td. 21 (May 1, 2017), at pp. 5 - 6. Notably, the Court made the following findings of fact:

- “Relator presented no evidence to corroborate his claims that Ordinances 17-03 and 17-04 were enacted as ‘emergency measures’ or that the City of Madeira abused its corporate powers as alleged in his Verified Complaint.”
- “No evidence of any kind was adduced or presented which would tend to support Relator’s allegations that both Ms. Poland and the Board more generally were involved in any fraud, deceit or abuse of corporate powers in regard to the correction of this typographical error.”
- “Relator failed to identify any specific certification requirements pertaining to the proposed Charter amendment ordinances passed by City Council[.]”
- “Likewise, Relator also presented no evidence to corroborate his allegations that the City engaged in a conspiracy to commit fraud against Hamilton County Board of Elections and electors of the City. If anything, the evidence and testimony adduced at the hearing demonstrate the opposite - that the subject ordinances were enacted in an open meeting of City Council, and that the City remedied its typographical error as soon as it was discovered by notifying the Board.”

Judgment Entry, Td. 21 (May 1, 2017), at pp. 3 - 4 (emphasis added).

On May 2, 2017, the election concluded and the results were tallied. Then, six days *after* the election he sought to enjoin, Appellant filed the instant Notice of Appeal. In his docketing statement, he identified the probable issue for review as, “[w]hether evidence at trial was



sufficient *to enjoin the vote* on an amendment to the Madeira City charter.” Docket Statement (May 8, 2017) (emphasis added).

On May 12, 2017, Appellant filed a “Motion for Injunction” asking this Court to prohibit the City from certifying the results of the special election held on May 2, 2017 and from implementing the voter-approved charter amendments. On May 23, the results approving the ballot measures were certified to the BOE and then to the Secretary of State, and the Charter amendments implemented. *See* Exs. A and B to Madeira Appellees’ Memo. in Opp. to Motion for Injunction (May 24, 2017). This Court properly overruled Appellant’s motion on June 7th.

Appellant now asks this Court to nullify the election and reverse the will of the electorate, relief which was not requested from the trial court, and which is contrary to Ohio law.

## **II. ARGUMENT.**

### **A. SUMMARY OF ARGUMENT.**

Appellant’s brief fails to cite a single error of law by the trial court. Instead, it is premised solely upon the following unsupported and easily-refuted assertions (which charitably constitute mixed questions of fact and law with questions of fact predominating):

(1) The acting clerk’s one-time usage of the term “citizens” on the witness stand provides incontrovertible proof that the Madeira Appellees failed to follow the electoral provisions of the Madeira Charter (which refer to Madeira voters as “electors”).

(2) The controverted election is a legal nullity because the Madeira Appellees employed a third-party mailing service to send notice to electors. Appellant contends the Madeira Charter requires the clerk to place each notice in the mail by hand (spoiler alert: it does not).

(3) Appellee and Madeira City Manager Tom Moeller is an “autocratic” figure who masterminded a “fraud” and “sham” election by conspiring with the other Madeira



Appellees. The record actually shows that the appropriate adjective for Appellee Moeller is “beleaguered,” not “autocratic,” and no evidence supports the existence of a conspiracy or abuse of municipal corporate powers.

In the end, the record demonstrates a fairly typical Ohio municipal election, with immaterial clerical and administrative errors properly corrected (with the assistance of the Ohio Secretary of State) before the issues were presented to voters. As the trial court found, nothing in this record even remotely supports the extraordinary remedy of invalidating the results.

**B. STANDARD OF REVIEW.**

Appellant contends without explanation that “all three commonly referenced standards for appellate review” are implicated by his assignments of error. Appellant’s Brief (Aug. 9, 2017), at p. 3. As noted above, however, Appellant raises no issues of law which would require *de novo* review. His only assignments of error concern his demand for an injunction and the trial court’s findings attendant to his request for declaratory judgment.

The Ohio Supreme Court established the standard of review applicable to injunctions by holding, “[an] injunction is an extraordinary remedy...addressed to the sound discretion of the court...and its allowance is a matter of grace...And unless there is a plain abuse of discretion on the part of trial courts, in granting or refusing injunctions, reviewing courts will not disturb such judgments.” *Perkins v. Quaker City*, 165 Ohio St. 120, 125, 133 N.E.2d 595 (1956).

As for declaratory judgment, the Ohio Supreme Court has held, “[t]he granting or denying of declaratory relief is a matter for judicial discretion,... this court will not reverse unless the lower court's determination is clearly unreasonable.” *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St. 3d 133, 2007-Ohio-1248, ¶12, 863 N.E.2d 142 (quoting *Bilyeu v. Motorists Mut. Ins. Co.*, 36 Ohio St.2d 35, 37, 303 N.E.2d 871, syllabus (1973)).

Accordingly, only the “abuse-of-discretion” standard is implicated by Appellant’s two assignments of error. Reversal under this standard requires more than an error of law or judgment, but rather a finding that the court’s rulings were unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (1983). A court of appeals may not merely substitute its judgment for those of an administrative body (such as the BOE) or a trial court. *See Pons v. Ohio State Medical Board*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993). “There is no abuse of discretion where there is ‘some evidence’ in support.” *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St. 3d 373, 376, 658 N.E.2d 1055 (1996).

To the extent this Court entertains Appellant’s contentions about the import of certain trial evidence, review of such issues could arguably be subject to a “manifest weight of the evidence” standard. The Ohio Supreme Court has held that: “Reversal on the manifest weight of the evidence and remand for a new trial are not to be taken lightly.” *Eastley v. Volkman*, 132 Ohio St. 3d 328, 2012-Ohio-2179, ¶31, 972 N.E.2d 517. “Weight of the evidence concerns ‘the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other...Weight is not a question of mathematics, but depends on its *effect in inducing belief*.’” *Id.* at ¶12 (emphasis in original). An appellate court “must always be mindful of the presumption in favor of the finder of fact.” *Id.* at ¶21.<sup>1</sup>

### **III. ASSIGNMENTS OF ERROR AND ARGUMENT.**

As noted *supra*, Appellant filed his appeal absent any apparent jurisdiction. Although the Madeira Appellees will address each assignment of error in turn, they nonetheless reassert their position that all such issues are now moot and thus outside this Court’s jurisdiction.

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<sup>1</sup> Appellant sought a permanent injunction, and thus the evidence would have had to have been “clear and convincing” to warrant any relief. *See, e.g., P&G v. Stoneham*, 140 Ohio App. 3d 260, 267-268, 747 N.E.2d 268, (1st Dist. 2000).

Additionally, the Madeira Appellees hereby incorporate by reference the arguments presented in the brief filed by Appellee BOE as if contained herein.

**A. APPELLANT’S FIRST ASSIGNMENT OF ERROR.**

*The trial court erred in denying the request for an injunction.*

**First Issue Presented for Review and Argument**

*Where the Madeira Clerk testifies that the mailing required by the Ohio Constitution and the Madeira Charter of proposed amendments to the charter was sent to citizens of Madeira (rather than electors) and that she as the Clerk did not mail them, the trial court made clear errors of judgment, its findings are an abuse of discretion and are contrary to law.*

In 1981, Appellant (who has filed numerous lawsuits against the City of Madeira across nearly four decades) challenged another Madeira election. In that case, which could not be more distinguishable from the facts involved here, a cognizable legal deficiency in the process was identified based on clear stipulated facts (the City had generically addressed its mailings to “Resident” and not to named electors, as is required by both the Madeira Charter and the Ohio Constitution). *Oppenheimer v. Madeira*, 1 Ohio App. 3d 44, 45, 439 N.E.2d 440 (1st Dist. 1981). As the analysis below shows, Appellant’s misguided attempts to shove these facts beneath the penumbra of the Reagan-era *Oppenheimer* holding fall somewhere between “unavailing” and “desperate.”

The following exchange between Appellant’s counsel and Ms. Doyle constitutes the entirety of the testimony he adduced at the merits hearing regarding the controverted mailing:

Q. M’am, I’m going to ask you to identify -- see if you recognize what’s handed to you as proposed Exhibit 1. Do you recognize that document?

A. Yes. This was mailed to the citizens of Madeira regarding the charter amendments.

Q. Okay. That was mailed to them.

A. Yes.



Q. Did you mail them?

A. I did not put them in the mail.

Tp. 57:2 - 12.

Based on this testimony, Appellant asks this Court to conclude (apparently *de novo*) that Madeira violated Article XIV § 5 of its own Charter, which requires that the Clerk “mail” the proposed amendments to each “elector.”

Ms. Doyle’s supposedly nefarious (and allegedly unconstitutional) use of the term “citizens of Madeira” (as opposed to the statutory term “electors”) hardly warrants a response. From the context of her statement, it is obvious that Ms. Doyle was not employing “citizens of Madeira” as a term of art, much less as a term intentionally designed to supplant “elector.” Indeed, the spoken terms could reasonably be understood as interchangeable. The trial court properly found this pedestrian use of the term “citizens” to be of no evidentiary import; neither should this Court.

Moreover, Ms. Doyle’s testimony that she did not physically “place” the proposed amendments in the mail does not stand as incontrovertible proof that she flouted her obligations under Art. XIV §5. Indeed, the record supports the conclusion that the Clerk ensured that the proposed amendments were mailed to Madeira electors, whether or not she physically “put them in the mail” herself.

The Clerk worked in conjunction with the BOE to obtain an updated list of all of the registered voters in Madeira (the “electors”); this list was then provided to a third-party mailing company to ensure “every elector in the community receives a full copy of the proposed amendments.” *See* Tp. 126:1 - 10, 127:10 - 23. Her actions are consistent with the definition of the verb “mail” as set forth in Black’s Law Dictionary (7th ed.): “1. To deposit (a letter,



package, etc.) with the U.S. Postal Service; *to ensure that a letter package, etc. is properly addressed, stamped, and placed into a receptacle for mail pickup.*” (emphasis added). Upon information and belief, there exists no Ohio case proscribing this routine practice.

Appellant (who, himself, is both a Madeira “citizen” and an “elector”) presented no evidence to contradict this testimony. *See id.*, at 127:19 -23. Indeed, he did not develop the “citizen” or “mail” issues during the five-hour-plus trial court proceeding, resting instead on the out-of-context “gotcha” quotes which serve as the basis for this appeal. Unlike the original *Oppenheimer* case, no material – much less constitutional – error has been identified. The election results must stand.

### **Second Issue Presented for Review and Argument**

*Where a City Manager acts outside the scope of his authority, had a subordinate take action as if she was the clerk of council, the trial court erred by not finding that such acts are sham legal process, fraud, and sufficient reasons to find the procedures for placing proposed charter amendments on the ballot were not followed.*

Appellant argues that the City Manager’s appointment of an acting clerk provides sufficient grounds “to find the procedures for placing proposed charter amendments on the ballot were not followed.” Appellant’s Brief (Aug. 9, 2017), at p. 5. Tellingly, Appellant fails to address which “procedures” were ignored, or why the appointment of an acting clerk could serve as grounds to overturn the will of the electorate. Other than conclusory references to inapplicable canons of construction, he fails to provide a single line of legal authority to support such a conclusory contention.

Indeed, whether City Manager Tom Moeller, was actually the one to “appoint” the acting clerk is not clear from the evidence presented at trial. The titled Clerk, Christine Doyle, was on vacation and unavailable at the time Ordinance 17-06. Ms. Lowndes, who ordinarily serves as the assistant treasurer and tax commissioner, testified that she served as the acting clerk and

certified the final ordinance language to the BOE. *See* Tp. 71:22 - 73:19. Ms. Lowndes testified that she believed Mr. Moeller had named her as acting clerk.

That Ms. Lowndes mistakenly thought Moeller had appointed her is immaterial. Appellant had the burden to prove by clear and convincing evidence that her appointment was proscribed by Ohio law, or that there was some legal requirement that the Clerk certify the subject Ordinance prior to transmitting it to the BOE. Showing honest confusion among city employees about the administrative details of the appointment fails to prove anything of the sort.

Regardless, it is undisputed that Ms. Doyle (the regular Clerk) did certify the corrective ordinances to the BOE. Tp. 109:19 -110:6. Mr. Moeller testified: “I reviewed the legislation with her when she returned to the city, and showed to her what city council had done, and that’s when she acknowledged that it was the – it was the appropriate legislation.” *Id.* Thereafter, Ms. Doyle affixed her signature to Ordinance 17-06. *See id. at* 110:18-22.

What’s more (and maybe most relevant), neither Ohio law nor Madeira’s Charter places an affirmative obligation on the Clerk to certify the language of a proposed amendment to anyone *before* the election. *See* Article XIV, §5(F) (“A copy of any *approved* charter amendment must be certified by the Clerk to the Secretary of State within 30 days *after* adoption.”) (emphasis); *see also* Tp. 64:5 - 65:18; 110:23 - 111:15. Thus, the Madeira Appellees’ actions complied with the relevant statutes in every regard.

### **Third Issue Presented for Review and Argument**

*Where Madeira files an ordinance with the BOE that contains errors the provisions of O.R.C. §3505.14 cannot be used to justify correction of proposed charter amendments after the petition filing deadline.*

It is uncontroverted that Madeira timely filed its proposed amendments, Ordinance Nos. 17-03 and 17-04 with the BOE on March 3, 2017. On March 10th, during the public posting period prescribed by R.C. § 3505.14 “Proofs of Ballots,” a typographical error was identified and

Madeira officials contacted the BOE. *See* Tp. 24:4 - 19. The BOE then contacted the Secretary of State, who advised that Madeira pass an ordinance correcting the error under R.C. §3505.14 prior to the expiration of the ballot printing deadline. *See* Tp. 28:12-22.

Appellant argues that the advice offered by the Secretary of State was “plainly” wrong. The actual controlling provisions of R.C. § 3505.14, however, attest to the contrary.

R.C. § 3505.14 provides that the BOE shall secure printed proofs of the ballot and “post such proofs in a public place in the office of the board for a period of at least twenty-four hours for inspection and *correction of any errors* appearing thereon. The board shall cause such proofs to be read with care and after correcting *any errors* shall return the corrected copy to the printer.” (emphasis added). The term “any” is not one of limitation; rather, it plainly allows for “any errors” to be corrected, without regard to whether they originated before or after the original petition deadline.

This interpretation is bolstered by the fact that Ohio’s Secretary of State instructed the BOE and Madeira to proceed as they did. Ms. Poland from the BOE testified:

On or about March 13th of 2017 I spoke with Patricia Wolfe, elections administrator with the Ohio Secretary of State’s office, regarding the typographical error in Madeira Ordinance No. 17-03.

Patricia Wolfe advised that the proper course was for the City of Madeira to pass an ordinance that corrected the typographical error in Madeira Ordinance No. 17-03.

I relayed this information to City Manager, Thomas Moeller, and law director, Brian W. Fox.

Tp. 45:19-46:6 (testimony elicited during examination by Appellant).

The Secretary of State has developed an entire body of regulations to operate in conjunction with Ohio’s elections statutes. *See* Ch. 111 of the Ohio Administrative Code. Courts of appeal “must give due deference to an administrative interpretation formulated by an



agency that has accumulated substantial expertise in the particular subject area and to which the General Assembly has delegated the responsibility of implementing the legislative command.” *OPUS III-VII Corp. v. Ohio State Bd. of Pharmacy*, 109 Ohio App.3d 102, 671 N.E.2d 1087 (10th Dist.1996) (citing *State ex rel. McLean v. Indus. Comm.*, 25 Ohio St. 3d 90, 25 Ohio B. 141, 495 N.E.2d 370 (1986)). “Furthermore, such deference is afforded to an administrative agency's interpretation of its own rules and regulations if such an interpretation is consistent with statutory law and the plain language of the rule itself.” *Id.* at 113 (citing *Jones Metal Prods. Co. v. Walker*, 29 Ohio St.2d 173, 181, 281 N.E.2d 1 (1972)).

Appellant cites no case law supporting his interpretation of R.C. § 3505.14. On the other hand, Madeira and the BOE followed the advice of the Secretary of State, who interprets and implements Ohio election law and its corresponding regulations on a daily basis. Accordingly, the trial court did not abuse its discretion, and its rulings were fully supported by the evidence. Appellant’s First Assignment of Error must be overruled in its entirety.

**B. APPELLANT’S SECOND ASSIGNMENT OF ERROR.**

*The trial court erred in declaring judgment in favor of all appellees.*

Both of the issues raised under Appellant’s Second Assignment of Error seek a redetermination of questions of fact already answered by the trial court. Neither issue, however, was or is appropriate for declaratory relief. When construing Ohio’s declaratory judgment statute (R.C. § 2721.03), Ohio courts have consistently found that “there is no true controversy” when the “issue presented by appellant is a question of fact” under a statute. *Maxheimer v. Weir*, 5th Dist. Ashland No. 734, 1981 Ohio App. LEXIS 11532 (July 30, 1981); *see also Kim’s Auto & Truck Serv. v. City of Toledo*, 6th Dist. Lucas No. L-06-1274, 2007-Ohio-2260, ¶¶14 - 17.

Thus, as a matter of law, Appellant’s Second Assignment of Error should be overruled on this basis alone.



### **First Issue Presented for Review and Argument**

*Appellant was entitled to have it declared that the procedures for placing proposed charter amendments on the ballot were not strictly followed.*

Appellant seeks new declaratory relief for the first time on appeal. In his Complaint, and at the trial of the matter, Appellant sought “a declaratory judgment that the prohibitions, restrictions and/or limitations within Article XIV of the Charter of the City of Madeira prohibit and/or preclude the CITY OF MADEIRA and the BOE from proceeding forward with the special election on May 2, 2017.” T.d. 2, at ¶ 24. Now, for the first time on appeal, Appellant seeks a declaration that the procedures were not strictly followed. Appellant is prohibited from changing its requested relief on appeal.

Additionally, the supposed evidentiary basis for Appellant’s requested declaration is once again the inconclusive testimony concerning the mailing of the proposed amendments to the electors. Appellant failed to present any substantive evidence, let alone clear and convincing evidence, that Madeira’s Clerk failed to satisfy her obligations under Article XIV § 5. The “citizens” versus “electors” canard presents no basis – either as a question of fact, or a matter of law – to overturn election results.

### **Second Issue Presented for Review and Argument**

*Appellant was entitled to have it declared that the BOE was an unwitting co-conspirator of Madeira and its Autocratic City Manager when it allowed the election to go forward.*

At the merits hearing, Appellant improperly sought to employ the Ohio Declaratory Judgment Act to, in effect, have various Madeira officials declared “bad people.” The trial court found absolutely no evidence (and Appellant cites to none in the record) to corroborate the serious charges of fraud and conspiracy leveled against Madeira Appellees and the BOE. The

statutory provisions he now relies upon were neither raised in his Verified Complaint, nor at trial.

The testimony of Ms. Poland Tp. 45:19-46:6, Ms. Doyle (Tp. 64:5 - 65:18), Ms. Lowndes (Tp. 75:5 - 76:10), and Mr. Moeller (115:20 -117:19) collectively show city officials, the BOE, and the Secretary of State paying careful attention to their obligations under the applicable laws, while working to ensure the appropriate information was presented to the Madeira electors. Further, no factual predicate was presented to support an allegation of fraud – much less evidence which satisfied the heightened standard under Civ.R. 9(B).

Appellant’s baseless fraud allegations are as reckless, heedless and borderline-defamatory as his repeated and disrespectful use of the term “autocratic” to describe the City Manager in his papers. Appellant’s filings demonstrate his continuing desire to function as a community gadfly; however, this Court should reject Appellant’s illogical attempts to besmirch the City Manager’s good name. Indeed, the trial court’s disposition of these claims was fully supported by the evidentiary record and does not come close to constituting an abuse of discretion.

**IV. CONCLUSION.**

The issues raised by Appellant are moot as the will of the electorate was certified and implemented. Regardless, Appellant’s assignments of error lack merit and should be overruled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served this 11th day of September 2017, by electronic mail (email) pursuant to Civ.R. 5(B)(2)(f) on the following:

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