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

CITY OF MADEIRA EX REL. DOUGLAS OPPENHEIMER,	:	**Appeal No. C1700206**
	:	
	:	**Trial Court Case No. A-1702034**
Plaintiff-Appellant	:	
	:	
v.	:	
	:	
CITY OF MADEIRA, ET AL.	:	
	:	
Defendants-Appellees		

BRIEF OF APPELLEE
BOARD OF ELECTIONS OF HAMILTON COUNTY, OHIO

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I. STATEMENT OF THE CASE

Defendant – Appellee Board of Elections of Hamilton County, Ohio, (herein: "Board") offers the following additions to the Plaintiff – Appellant's Oppenheimer's statement of the case.

A. Procedural Posture

The Board of Elections of Hamilton County, Ohio certified proposed amendments to the Charter of the City of Madeira (herein: "City" or "Madeira") on March 3, 2017 to be placed on the ballot at a special election occurring May 2, 2017. T.p. 14. On March 14th, Madeira delivered to the Board an ordinance correcting a typographical error in the original submission. T.p. 34. Revised ballot language reflecting the correction was submitted to the Secretary of State and approved on the same day. T.p. 33. The Appellant did not filed his protest until April 5, 2017, thirty-three (33) days after the initial filing with the Board, twenty-two (22) days after the revised ballot language was filed, and after voting had begun.[1] *Id.* The Board promptly heard and denied the protest on April 7. *Id.* It was not until Apri1 11, 2017, thirty-nine (39) after the intitial filing that Appellant filed suit in the Hamilton County Court of Common Pleas. T.d. 2.

B. Statement of Facts

On March 3, 2017, the City of Madeira submitted paperwork to the Board requesting an election on several proposed amendments to the Charter of the City of Madeira. T.p. 14. The proposed charter amendments were certified the same day by the Board for inclusion on the ballot at a special election to be held May 2, 2017. *Id.*

[1] Ballots for all elections being held on May 2, 2017, were required to be ready for distribution to uniformed services and overseas absentee voters (UOCAVA voters) – and early absentee voting for such voters began – on March 18, 2017. T.d. 16; R.C. § 3511.04. Early in-person absentee voting for non-UOCAVA voters began April 4, 2017. T.d. 16; R.C. § 3509.01

Pursuant to O.R.C. § 3505.14, the Board publicly posted the ballot language for review by the public and the authority who submitted the ballot question. T.p. 18-19. This is known as the proofing period. *Id.* During this proofing period the City of Madeira, through their city manager, Thomas Mueller, brought to the Board's attention a typographical error in the ordinance. T.p. 24. On March 14th, the City of Madeira submitted an ordinance correcting a non-substantive, numerical typographical error in its original ordinance. T.p. 14. The Board accepted the March 14th filing on the advice of the Secretary of State's office. T.p. 28.

The Appellant did not file a protest until April 5, 2017, after voting had begun. T.d. 16 *Exhibit 3, Transcript of April 7, 2017 Board of Elections Meeting at pp. 43-45*. The Board denied the protest as the election had already begun and the Board was not the appropriate forum to rule on the internal procedural issues of Madeira raised by Appellant. *Id.* Appellant subsequently filed a taxpayer lawsuit on April 11, 2017. T.d. 2. After a hearing on the lawsuit, the Court denied Appellants request for Declaratory Judgment, Injunctive Relief, Motion for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction on the basis that the Board complied with the procedures set forth in the Ohio Revised Code and Ohio Constitution, particularly those set forth in Section 8 and 9 of Article XVIII of the Ohio Constitution and that Board did not engage in any conduct that constituted fraud, abuse of power or a sham legal process. T.d. 20. The election was held on May 2, 2017, with the charter amendments passing the vote with 62.58% and 62.24% of the vote, respectively[2].

[2] See *Cumulative Report of May 2, 2017 Primary Elections, Hamilton County, OH* available at http://boe.hamilton-co.org/files/files/elections/May%202017/P17OffCumulative.pdf

II. ARGUMENT

A. Standard of Review

The standard of review regarding the granting of an injunction by a trial court is whether the trial court abused its discretion. *Perkins v. Quaker City*, 165 Ohio St. 120, 125, 59 O.O. 151, 133 N.E.2d 595 (1965). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140 (1983).

It is well settled that the power of the courts to intervene in election matters is limited. *Maschari v. Tone* 2004 -Ohio- 2876 ¶ 13, 157 Ohio App.3d 366, 370, 811 N.E.2d 555, 558 (6th Dist. 2004). Boards of elections are the local authorities best equipped to gauge compliance with election laws. *State ex rel. Sinay v. Sodders* 80 Ohio St.3d 224, 231, 685 N.E.2d 754, 760 (1997). The acts of a board of elections within the jurisdiction conferred upon it by law are presumed to be valid, performed in good faith, and in the exercise of sound judgment. See: *Zalud Oldsmobile Pontiac, Inc. v. Tracy* 77 Ohio St.3d 74, 80, 671 N.E.2d 32, 37 (1996).

In the absence of allegations of fraud, corruption, abuse of discretion, or a clear disregard of statutes or applicable legal provisions, a discretionary decision of a board of elections is not subject to judicial review. *State ex rel. Senn v. Board of Elections of Cuyahoga County* 51 Ohio St.2d 173, 175, 367 N.E.2d 879, 880 (1977), citing: *State ex rel. Flynn v. Bd. of Elections*, 164 Ohio St. 193, 129 N.E.2d 623 (1955).

B. Plaintiff–Appellant's Assignments of Error

The Trial Court erred in denying the request for an injunction.

The Trial Court erred in declaring judgment in favor of all appellees.

First Issue Presented for Review and Argument

The Board incorporates the arguments of the City of Madeira.

As a preliminary matter, to the extent that they are applicable to the Board, the Board hereby incorporates the arguments contained in the Brief of the City of Madeira by reference as if contained herein.

Second Issue for Review and Argument

Protest matters and claims for injunctive relief are rendered moot after an election has been held to protect the value of the vote and the integrity of elections.

Protest matters must be brought and *resolved* before an election is held, or else they are rendered moot and no further remedy is available. *State ex rel. Hills Communities, Inc. v. Clermont Cty. Bd. of Elections*, 91 Ohio St.3d 465, 467, 746 N.E.2d 1115 (2001). ("As we have repeatedly held, 'prohibition may issue to prevent the placement of names or issues on a ballot even though a protest hearing has been completed, *as long as the election has not yet been held.*" (Emphasis added.) citing *State ex rel. Crossman Communities of Ohio, Inc. v. Greene Cty. Bd. of Elections*, 87 Ohio St.3d 132, 136, 717 N.E.2d 1091 (1999); *State ex rel. Bona v. Village of Orange,* 85 Ohio St.3d 18, 21, 706 N.E.2d 771 (1999).

The mootness doctrine applies equally to claims for injunctive relief as they do for claims brought under writs of prohibition and mandamus. *Reveria Tavern, Inc. v. Summit Cty. Bd. of Elections*, 2004-Ohio-6733, ¶¶ 40-43 (9th Dist. Summit 2004). The rationale for prohibiting protests to be continued after the election is to protect the value of the vote and the integrity of elections. "[T]o allow a protest to a petition for a local option election to be considered after the general election when an adequate opportunity was available for the plaintiff to challenge the petition beforehand, would unjustly disenfranchise those in the majority who chose to vote in

favor of the local option." *Riviera* at ¶¶ 40-43, citing *Brink v. Franklin Cty. Bd. of Elections*, 21 Ohio App.3d 283, 488 N.E.2d 240 (1985).

Further, prohibiting pre-election contests from interfering with post-election results furthers the public policy favoring free competitive elections. *Stern v. Bd. of Elections of Cuyahoga Cty*, 14 Ohio St.2d 175, 184, 237 N.E.2d 313 (1968); *State ex rel. Ashbrook v. Brown* (1988), 39 Ohio St.3d 115, 529 N.E.2d 896 (1988).

In the instant case, the election has been held and both Amendments passed. *See Cumulative Report of May 2, 2017 Election.* Appellant filed his protest after voting had begun, and continues to attempt to interfere with the integrity of a free competitive election. *Stern* at 184. The alleged defects in the initiating ordinance were ripe when it was passed on March 2nd, and yet Appellant failed to pursue his protest with the requisite diligence which resulted in this matter being unresolved before the election was held. *Hill Communities* at 467. "It is well established that in election-related matters, extreme diligence and promptness are required." *State ex rel. Commt. for the Referendum of Ordinance No. 3543–00 v. White*, 90 Ohio St.3d 212, 214, 736 N.E.2d 873, 875 (2000). Appellant failed to act with diligence and promptness and the election has been held, rendering this issue moot.

Third Issue Presented for Review and Argument

Courts liberally construe municipal referendum powers so as to permit rather than to preclude their exercise by the people and the Ohio Constitution grants authority to Municipalities to amend their form of Government.

In Ohio, all political power is inherent in the people and they have the right to alter, reform, or abolish same whenever they deem necessary. *Ohio Constitution*, Art. I, § 2. To that end, "[t]he constitutional right of citizens to referendum is of paramount importance," and courts

liberally construe municipal referendum powers so as to permit rather than to preclude their exercise by the people. *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145, ¶ 25 (2007), citing *State ex rel. Ohio Gen. Assembly v. Brunner,* 115 Ohio St.3d 103, 2007-Ohio-4460, 872 N.E.2d 912, ¶ 8 (2007); *State ex rel. Commt. for the Proposed Ordinance to Repeal Ordinance No. 146–02, W. End Blight Designation v. Lakewood,* 100 Ohio St.3d 252, 2003-Ohio-5771, 798 N.E.2d 362, ¶ 30 (2003); Section 1f, Article II, Ohio Constitution (municipal referendum powers are reserved to the people of each municipality on all questions that municipalities "may now or hereafter be authorized by law to control by legislative action").

The Ohio Constitution grants municipal corporations in the State the authority to exercise all powers of local self-government. *Ohio Constitution,* Art. XVIII, § 3. In furtherance of this authority, municipalities may adopt charters and periodically amend them. *Ohio Constitution,* Art. XVIII, § 7. The process by which such charters may be adopted and amended is through a municipal referendum as found in Sections 8 and 9 of Article XVIII. Pertinent to this matter, Section 9 provides that amendments "may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof," and that the submission of such amendment to the electors "shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission." *Ohio Constitution,* Art. XVIII, § 9. The requirement of Section 8 provides that "[t]he ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid." *Ohio Constitution,* Art. XVIII, § 8. By the terms of these

sections, when the legislative authority of a municipality chooses to submit charter amendments to its electors for approval, there are only two requirements: 1) that the vote to submit the question be two-thirds of the legislative authority; and 2) that the submission set the date of the special election on the question if will not be held at a regularly scheduled municipal election. The Constitution thus sets forth an unencumbered process to submit basic governmental changes to the people which "wisely provides a procedure different from that used by elected representative lawmakers in enacting laws." *Billington v. Cotner*, 25 Ohio St.2d 140, 146–47, 267 N.E.2d 410, 415 (1971). The manifest object of these sections is to provide the procedure for the submission of charter amendments to the electors and these "requirements are clear and complete, and are not to be added to or subtracted from." *Id.* at 146, *State ex rel Committee for the Charter Amendment, City Trash Collection v. City of West Lake,* 97 Ohio St.3d 100, 106 ¶ 31 (2002).

Appellant does not allege that the ordinance submitted by the City to the Board violates either Section 8 or 9 of Article XVIII of the Constitution. The Madeira Charter provisions that Appellant claims were violated simply do not apply to legislation directing the Board to conduct an election. Madeira Charter Art. III, Sec. 4, Quorum and Voting, clearly requires three readings only when an ordinance or resolution has "the force or effect of law." The legislative actions of which Appellant complains have no such effect. They do not enact any change or amendment of the codified ordinances or Charter of the City, but rather only call for an election to be conducted, upon which the force and effect of the proposed amendments will be determined. For the same reasons, the submission of the question is not governed by R.C. § 731.19. [3]

[3] To the extent that Appellant's challenge is based upon the single subject rule also found in R.C. § 731.19, such challenge was premature as challenges based upon the single subject rule may only be made following enactment of the amendment. See: *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-

Fourth Issue Presented for Review and Argument

When a Relator in an election case fails to exercise the utmost diligence and promptness the action is barred by the equitable doctrine of laches.

"Relators in election cases must exercise the utmost diligence." *State ex rel. Fuller v. Medina Cty. Bd. of Elections*, 97 Ohio St.3d 221, 2002 Ohio 5922, ¶¶ 7 (2002); *State ex rel. Duclos v. Hamilton Cty. Bd. of Elections*, 145 Ohio St.3d 254, 2016-Ohio-367, 48 N.E.3d 543, ¶¶ 7-13 (2016); *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections,* 137 Ohio St.3d 62, 2013-Ohio-4490, 997 N.E.2d 524, ¶ 30 (2013). "Therefore, relators requesting extraordinary relief in an election-related matter are required to act with the required promptness, and if they fail to do so, laches may bar the action." *Id. citing State ex rel. Newell v. Tuscarawas Cty. Bd. of Elections*, 93 Ohio St.3d 592, 595, 2001 Ohio 1806 (2001). The Ohio Supreme Court has always required election cases to be filed promptly. *See, e.g., State ex rel Cooker Restaurant Corporation v. Montgomery County Board of Elections*, 80 Ohio St.3d 302, 1997 Ohio 315, 686 N.E.2d 238 (1997) (Delay in filing expedited elections matter of six days following denial of protest bars claim as briefing schedule extended past deadline to have absentee ballots printed and ready for use); *State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88 Ohio St.3d 187, 189, 2000 Ohio 295 (2000) ("We have held that a delay as brief as nine days can preclude our consideration of the merits of an expedited election case."); *Carver v. Stankiewicz*, 101 Ohio St.3d 256, 2004 Ohio 812 (2004) (denying an extraordinary writ because the Relators waited 19 days before filing their claim); *State ex rel. Valore v. Summit Cty. Bd. of Elections*, 87 Ohio St.3d

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Ohio-4310, 977 N.E.2d 590, ¶¶ 11-12 (2012); *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶ 52 (2007)

144, 146, 718 N.E.2d 415, 416–17 (1999) (candidate waited 16 days following denial of certification to file his action).

While it involved the certification of a candidate rather than a question or issue, the timeline in *Duclos, supra,* is instructive. There the court found that the matter became ripe when the protested candidate filed his allegedly defective petitions. *Duclos*, 2016-Ohio-367, ¶ 9. The opposing candidate waited over a month (35 days) to file his protest. *Id.* at ¶ 10. Six weeks elapsed between the filing of the application and the commencement of the suit. *Id.* at ¶ 11. In determining that laches barred the complaint, the Court noted that Uniformed and Overseas Citizens Absentee Voting Act absentee ballots became available and voting in the contested primary had begun with the matter still unresolved. *Id.* at ¶ 12.

Appellant is no different position here. The alleged defects in the initiating ordinance were ripe when it was passed on March 2nd. Yet Appellant waited thirty-three (33) days to bring his protest, and an additional week to file his action in the Court of Common Pleas. At the time Appellant initiated the protest, early in-person absentee voting for all voters was already underway. The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party, *Id.* at ¶ 13, all of which are present in this case. The lower Court was correct in denying Appellant's eleventh hour request to derail the election.

III. CONCLUSION

In this matter, the discretionary decision which Appellant attacks is the decision by the Board to certify certain proposed amendments to the Madeira City Charter to the ballot for a special election held on May 2, 2017. While he claims that the City's submission was deficient on several procedural grounds, Appellant presented no evidence that the Board committed fraud

or corruption, abused its discretion, or otherwise clearly disregarded applicable statutes or legal provisions. For these and the foregoing reasons, Appellants request to overturn the results of a freely held election that has already passed should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by electronic mail and regular United States mail upon all counsel of record on this 11th day of September, 2017.

/s/ David T. Stevenson
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Served on: Brian W. Fox, Steven P. Goodin, and George M. Parker