



Via Electronic Mail

September 12, 2018

Director Ed Leonard
Deputy Director David Payne
Franklin County Board of Elections
1700 Morse Road
Columbus, Ohio 43229-9513

Re: Tie Vote on Municipal Initiative Petition

Dear Director Leonard and Deputy Director Payne:

During its August 24, 2018 meeting, the Franklin County Board of Elections considered a proposed municipal initiative to amend a Grandview Heights zoning ordinance for placement on the November 6, 2018 General Election ballot. The board's focus was its statutory duty to examine each petition seeking to place an initiative before the electors of a municipal political subdivision to determine:¹

Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot.²

Board Member Sinnott made a motion to determine that the initiative petition is invalid under that analysis, and Chairman Preisse joined him in support of the motion. Board members Sexton and Marinello voted against the motion. Pursuant to R.C. 3501.11(X), the board submitted the tie vote to the Secretary of State for a decision.

In this matter, the law is clear: zoning and rezoning are legislative acts and as such are subject to initiative under the Ohio Constitution, and, in the absence of language in the municipal charter to the contrary, petitioners are not bound by the same statutory process that council must follow to engage in these legislative acts.

Article II, §1f of the Ohio Constitution reserves the power of initiative to the people of each municipality and sets two general restrictions to the execution of the power. First, the Constitution restricts the content of a municipal initiative to those subject matters which a

¹ R.C. 3501.11(K); R.C. 3501.38(M).

² R.C. 3501.38(M)(1)(a).

municipality is authorized by law to control by legislative action. Second, the Constitution restricts the process of exercising the power of municipal initiative to those guidelines provided by law.³

Section 8.2 of the Charter of the City of Grandview Heights contains substantially similar language. It reserves the power of initiative to the people of the city with the same general restrictions. The subject matter of the initiated proposal must be one the city is authorized to control by legislative action and the power of initiative must be exercised as provided in the processes laid out by state law.⁴

No party to this matter in controversy disagrees that the people of the City of Grandview Heights may execute the power of initiative. Instead, the reasons cited to invalidate the petition center on whether the proposed initiative complies with the restrictions to content and process that the Ohio Constitution and Grandview Heights Charter place on it. I will address each restriction separately.

Regarding the requirement that municipal initiative is only appropriate on “questions which such municipalities may now or hereafter be authorized by law to control by legislative action,”⁵ Board Members Sinnott and Preisse argue that the Grandview Heights proposal falls outside the power of initiative because it seeks to address an administrative action, not a legislative one. They do not provide great detail as to why they believe it is administrative in nature. Board Members Sexton and Marinello believe that the subject of the proposed initiative is legislative in nature, because the initial passage of the zoning ordinance was a legislative act.

The Ohio Supreme Court has defined a legislative action as one “making a law” rather than one “executing or administering a law already in existence.”⁶ Specific to zoning-related proposals, the Ohio Supreme Court has held that an amendment to a zoning code is a legislative act.⁷ Here, the proposed initiative would amend the language of a current ordinance that sets the boundaries of the “Green Space Overlay District.” The new language would change boundaries, establish setback distances, and restrict construction in certain areas.

³ Ohio Constitution, Article II, §1f. “The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.”

⁴ Section 8.2, Initiative and Referendum, of the Charter of the city of Grandview Heights. “Initiative and referendum powers are hereby reserved to the people of the City on all questions which the City may be authorized by this Charter, by City ordinance or by State law to control by legislative action, and such powers shall be exercised in the manner prescribed by State law. No measure initiated by the people and adopted by popular vote shall be repealed by Council, or so amended by it as to destroy the effectiveness thereof, within two years after it takes effect.”

⁵ Ohio Constitution, Article II, §1f.

⁶ *Donnelly v. Fairview Park*, 13 Ohio St.2d 1 (1968).

⁷ See, *State ex rel. Hazel v. Cuyahoga Cty. Bd. Of Elections*, 80 Ohio St.3d 165 (1997), citing *State ex rel. Zonders v. Delaware Cty. Bd. Of Elections*, 69 Ohio St.3d 5 (1994): “Generally, the adoption of a zoning amendment, like the enactment of the original zoning ordinance, is a legislative act which is subject to referendum.”

The Grandview Heights initiative proposal would be a change to the current use of city territory—a rezoning. Zoning and rezoning is a subject matter that the Grandview Heights City Council is authorized by Ohio law to control by legislative action.⁸ Therefore, the proposed initiative appears to comply with the Ohio Constitution’s content restriction on power of initiative.

Regarding the restriction that any group of petitioners exercise its power of municipal initiative “in the manner now or hereafter provided by law,”⁹ Board Members Sinnott and Preisse argue that the proposed initiative is invalid because petitioners failed to follow the process that the Grandview Heights City Council must follow to adopt or amend an ordinance regarding zoning of its territory—i.e., submission to the Planning Commission, a recommendation by the Planning Commission to the City Council, and consideration and a vote by City Council. This argument is confused.

The applicable language in Article II, §1f of the Ohio Constitution does not refer to the manner in which a municipal legislative authority may pass zoning ordinances. Instead, the Constitutional language refers to the manner that Ohio law provides for petitioners *to place a municipal initiative on the ballot* in Revised Code Sections 731.28 through 731.41—the number of required petition signatures, the proper office in which to file the petition, etc.¹⁰ None of the materials presented for my consideration raise concerns that the initiative petition did not meet those requirements, and so the proposed initiative appears to comply with the Ohio Constitution’s process restriction on the power of initiative.

In light of this analysis of the arguments raised in the materials submitted by the parties to this tie vote, I break the tie against the motion to consider the petition invalid. For purposes of the board’s duty under R.C. 3501.11(K) and 3501.38(M), the petition falls within the scope of a municipal political subdivision’s authority to enact via initiative.

Sincerely,



Jon Husted

cc: Members of the Franklin County Board of Elections

⁸ Ohio Constitution, Article II, §1f; R.C. 713.10. While Ohio law and the Grandview Heights Charter require City Council to seek a report and recommendation from the Planning Commission prior to adoption of an ordinance containing a zoning plan or amendment, the power to adopt the zoning ordinance ultimately lies with the City Council and not with the Planning Commission.

⁹ Ohio Constitution, Article II, §1f.

¹⁰ See *Cincinnati v. Hillenbrand*, 103 Ohio St. 286 at 298, discussing Ohio General Code Sections 4227-1 through 4227-12, which are current Ohio Revised Code sections 731.28 through 731.41. “Section 1f, Article II, is a comprehensive grant of power to the people of municipalities, and the legislation with reference to its exercise is obviously such legislation as is found in the provisions of Section 4227-1 *et seq.*...”