

**IN THE COURT OF COMMON PLEAS OF ATHENS COUNTY, OHIO  
CIVIL DIVISION**

**GREGORY SMITH et al,**

**Case Number: 24CI0180**

**Relators,**

**v.**

**Judge: MCCARTHY**

**GREG CLEMENT et al,**

**Respondents.**

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**PRELIMINARY INJUNCTION TWO AND  
PREEMPTIVE WRIT OF MANDAMUS  
ENTRY & ORDER**

Now comes the Court this 12<sup>th</sup> day of September 2024 upon Relators' Motion for Preliminary Injunction filed August 28, 2024. The Court has reviewed the record, including all recent filings by the parties, the Court of Appeal's decisions in Case Nos. 24CA17, 24CA22 and proceeds to rule upon the motion.

This Court has previously ordered a preliminary and permanent injunction and an alternative writ and show cause order. This Court also issued a stay of proceedings at Respondents' request to allow them an opportunity to appeal. The Court notes that Respondents' appeal regarding this case was dismissed on or about August 26, 2024 in Case Nos. 24CA17 and 24CA22.

As the Court of appeals has dismissed the appeal, this Court's previous order of a stay of proceedings is hereby vacated and the matter returned to the active trial docket.

Once again, Relator asserts time is short. This is in part due to Realtors' petition being submitted to the Nelsonville Clerk in June and the subsequent refusal of Nelsonville City Council to pass an ordinance to send the Relators' petition initiative to the Board of Elections at their next public meeting held July 8, 2024. By failing to pass an ordinance, the petition initiative was not sent to the Board of Elections to be placed upon the November 5, 2024 ballot. Relators then secured legal counsel who filed Relators' petition for mandamus on July 18, 2024. This filing was 20 days away from the August 7, 2024 Athens Board of Elections deadline for accepting initiatives for placement on the November 5, 2024 ballot.

The Nelsonville citizens dearly have a right to submit a petition to the electorate for the citizens to decide by vote if the current charter form of government should stay in place or if it should return to a statutory form of government. The citizens previously voted to replace the statutory form of government with a charter form of government. It is axiomatic that the citizens can also chose to go back to a statutory form of government. One question that remains is what provision(s) should control the proposed dissolution of the charter form of government: the Charter's or the Ohio Constitution's?

By way of review, Relators filed their petition for writ of mandamus on July 18, 2024 and on July 24, 2024 filed a motion for TRO, preliminary and permanent injunctions. Because "time was short" then as well, the Court held an all-encompassing hearing consolidating the preliminary hearing and permanent injunction hearing together to be heard along with the issues brought forth in the petition for mandamus. Relators

filed an amended Complaint on July 29, 2024 adding the Board of Elections as a party. A hearing on all matters was held on July 30, 2024.

The Board of Elections were represented at the hearing with one days' notice although they had opportunity to join as an intervening necessary party at any time prior to the hearing. Although there is a question of actual notice being provided to the BOE, the Court finds that by being present at the hearing the BOE demonstrates it had actual notice of the amended complaint as well as the hearing. As time was exceedingly short (7 days before the BOE deadline), at the July 30, 2024 hearing the Court stated it could have summarily issued a preemptory writ and injunction just based upon the affidavits but chose to hold a hearing to hear from the parties, in part, because the issue is important to the city /citizens and the issue is novel. Therefore, since there were only seven days before the BOE deadline and the Court would have to write a lengthy order, BOE's motion to continue was not well taken and was denied.

The Court again finds that Relators have standing to bring the instant action. Further that upon receipt of the Relators' petition the Nelsonville Clerk appropriately contacted the Athens County Board of Elections which determined there were 180 valid signatures – enough to add the initiative to the election ballot for November 5, 2024 (*See Board of Elections letter to Nelsonville Clerk dated June 27, 2024*). See also the second letter dated August 2, 2024 and a third letter dated August 7, 2024 from the Board of Elections confirming 180 valid signatures were obtained and validated. In the last August 7, 2024 letter the BOE asserts that they do not provide legal advice or an opinion as to the sufficiency of the signatures as the BOE informed the Nelsonville

Clerk that only 136 valid signatures were needed indicating the petition initiative could proceed.<sup>1</sup> Regardless, the Nelsonville Clerk found the 180 valid signatures established the sufficiency of the petition. Therefore, the Court concludes the initiative contains a sufficient number of valid signatures to proceed to city council for the passing of an ordinance to send it to the BOE to be placed on the general election ballot.

Procedurally, once the clerk decided the sufficiency of the petition, she informed the city council and the petition committee of the results. The Court finds this was accomplished as evidenced by a petitioners' committee member testifying she received a call from the Nelsonville Clerk advising the petition was sufficient. Additionally, City Council sought a legal opinion from the City Law Director on the issue as a result immediately thereafter. Further, the petition was never found to have any deficiencies. If it did have any deficiencies it was required by law to be returned to the petitioners' committee with any deficiencies noted. The Court finds the petition was never returned to the petitioners' committee nor were any deficiencies noted.

As a result, this Court finds it then became incumbent upon the City Council to pass an ordinance sending the petition initiative to the board of elections for balloting in accordance with Ohio law. Nelsonville City Charter Section 10.02(B) states the City Council shall pass an ordinance if the Nelsonville Clerk of Council found the petition sufficient. The word "shall" used in NCC 10.02 make the provision mandatory

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1. The 8/7/24 BOE Letter states "\*\*\*This verification supersedes and rescinds the notices dated June 27, 2024 and August 2, 2024.\*\*". Additionally, 8/7/24 was the last day to submit initiatives to the BOE.

and not discretionary. The City Council's duty at that point is ministerial. This Court finds the City Council must formalize the sufficiency of the petition found by the Nelsonville Clerk of Council. The City Council can suspend the three-reading rule of the proposed ordinance to expedite matters to pass the ordinance if time is short. However, City Council refused to pass, or even address, such an ordinance at their next meeting on July 8, 2024 as required by the Nelsonville Charter.

In the *Sandusky* case, the Ohio Supreme Court found that that city council erred when it failed to pass an ordinance sending petitioners' charter amendment to the board of elections for them to place on the ballot. *State ex rel. Sanduskians for Sandusky v. Sandusky*, 2022-Ohio-3362, 169 Ohio St. 3d 702, 712, 207 N.E.3d 730, 739, *reconsideration denied*, 2022-Ohio-3752, 168 Ohio St. 3d 1421. The Court noted in their *Sandusky* decision that in *State ex rel. Ebersole v. Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283 "we recognized that the process for submitting a charter amendment to the ballot must not be conflated with the process for an initiative. *Id.* at ¶ 11. R.C. 731.31, which by its terms applies only to initiative and referendum petitions, is inapplicable to a municipal charter-amendment petition unless something in the municipal charter incorporates the statute into the charter-amendment process. Because the *Sandusky* Charter contains no provision that incorporates the full-text requirement of R.C. 731.31 into the charter-amendment process, city respondents erred in finding the petition invalid." Here the Court finds that the petitioners' initiative, once found to be satisfactory to the clerk, required the city council to pass an ordinance. *Sandusky, supra*.

Nelsonville City Charter Article 10 provides for "Initiatives, Referendums,

and Recalls.” An “initiative” is a proposal which allows the people to directly enact a law if they accept the proposal in an election and a “referendum” is a proposal which allows the people to directly repeal or ratify a law which has already been enacted by the legislature. *Ohio Const. art. 2, § 1f. State ex rel. Flak v. Betras*, 2017-Ohio-8109, 152 Ohio St. 3d 244, abrogated by (on other issues) *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, 155 Ohio St. 3d 496. A “recall” of a public official is not the issue herein nor is a referendum. The significance, in part, is that a citizens’ initiative requires 15% of the electorate vote based upon the votes cast in the last gubernatorial election in order to proceed to council for an ordinance to be passed. *See NCC Section 10.03*. The Relators’ petition initiative herein seeks to disband Nelsonville’s current city charter form government and return to a statutory form of government. However, the Nelsonville City Charter does not set forth a specific procedure to dissolve their charter form of government. This was last attempted by the electorate in 2015.

The Ohio Supreme Court has weighed in on this issue stating, “Though a charter amendment can be initiated by a petition signed by 10 percent of a municipality’s electors, *see* Article XVIII, Section 9, Ohio Constitution, a charter amendment is *not* an “initiative.” Indeed, R.C. 731.28 describes initiatives as “[o]rdinances and other measures providing for the exercise of any powers of government.” We have observed that this definition does not describe a charter amendment.” *See State ex rel. Ebersole v. Powell City Council*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶ 11. *State ex rel. Sanduskians for Sandusky v. Sandusky*, 2022-Ohio-3362, 169 Ohio St. 3d 702, 711, 207 N.E.3d 730, 738, *reconsideration denied*, 2022-Ohio-3752, 168 Ohio St. 3d 1421, 196

However, the Ohio Constitution provides a process for how charter forms of governments are to amend their provisions in Article XVIII, Sec. 9. It states, "Amendments to any charter framed and adopted as herein provided may be submitted \* \* \* upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority." It does not state a specific process to dissolve a charter form of government. However, it provides a procedure for specifically amending the charter which could include dissolution of the charter form of government. Amendment of a city charter is controlled by provisions of state constitution addressing procedure to amend a municipal charter State ex rel. Maxcy v. Saferin, 2018-Ohio-4035, 155 Ohio St. 3d 496, 122 N.E.3d 1165.

It does not appear that the City Charter includes any of the State provisions regarding the charter amendment process nor sets forth a clear procedure to follow to dissolve their charter form of government. At most, the Nelsonville Charter provides a citizens' initiative proposal for the ballot needs to be signed by 15% of the electorate from the last gubernatorial race. *See NCC Section 10.03*. In applying Ohio Constitutional Article XVIII, Sec. 9, only 10% of the electors need to sign a petition, to amend the Charter to disband the Charter form of government. Other courts have previously found petitions containing signatures from ten percent of the electors of a municipality setting forth a proposed amendment to the municipality's charter trigger the duty of the legislative authority to submit the proposed charter amendment to the electorate. Ohio Const. Art.

18, § 9. *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, 155 Ohio St. 3d 496, 122 N.E.3d 1165. As a result, the Nelsonville City Charter herein and the Ohio Constitution appear in conflict. When the city charter and state constitutional provisions conflict, the constitutional provisions prevail. See *State ex rel Sanduskians for Sandusky v. Sandusky* (2022), 169 Ohio St.3d 162. Therefore, the Court finds 10% of the electors of Nelsonville need to have signed the Relator's petition initiative for it to be valid to amend the charter. *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, 155 Ohio St. 3d 496, 122 N.E.3d 1165. The Nelsonville Clerk found Relators' petition sufficient as evidenced when she contacted Relators committee to advise them of its sufficiency. The percentage of electors required to sign petitions is ten percent of the electors of the municipality based upon the total number of votes cast at the last preceding general municipal election. *State ex rel. Huebner v. W. Jefferson Vill. Council*, 75 Ohio St. 3d 381, 384, 662 N.E.2d 339, 342 (1995). The petition was never returned by the clerk to the petitioners' committee and they were never advised as to any deficiencies. The Court concludes the Clerk determined the petition initiative signatures to be sufficient. Presumably, the clerk applied a 15% electorate requirement pursuant to NCC 10.03, and found the petition initiative to be sufficient. Therefore, the Court finds since the Clerk found the "initiative" met the 15% threshold of valid signatures, it is axiomatic that it also met a lower threshold of 10% threshold of valid signatures under for a charter amendment pursuant to Ohio Constitutional Article XVIII, Sec. 9. The number of valid signatures required to warrant placement of a proposed city charter amendment before the voters is 10% of the number of votes cast at the last preceding general municipal election. *State ex rel.*



*Commt. for the Charter Amend., City Trash Collection v. Westlake*, 2002-Ohio-5302, 97 Ohio St. 3d 100, 776 N.E.2d 1041. Although the petition initiative is better described as a charter amendment, it is in compliance with Ohio Constitutional Article XVIII, Sec. 9. *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035.

Further, the Court finds that NCC Ordinance 32:15 does not provide a legal excuse for City Council to avoid introducing a new ordinance and voting on whether to send it to the board of elections. Regarding that ordinance, the 2015 city council rejected the petition initiative to disband the charter government for not providing for a transitional government. It did not pass an ordinance not for failing to comply with Ohio Constitutional Article XVIII, Sec. 9. Additionally, that action was not appealed to the Court so it has little to no precedential value as it was not legally challenged and upheld. Further, *State ex rel. Sanduskians for Sandusky v. Sandusky* (2022), 169 Ohio St.3d 162, specifically held that a city council's failure to submit the petition to the board of elections was improper even though that council did not submit the petition because they believed the petition to be in error. In *Sandusky*, the Ohio Supreme Court issued a limited writ compelling the city council to pass an ordinance to place the measure on the ballot. The Ohio Supreme Court has previously found that it is not the role of the city council to substitute its judgment for that of the voters as to what matters should appear on the ballot; nor can the city council assess the constitutionality of a proposal to amend the charter, because that role is reserved for the courts. *State ex rel. Ebersole v. Powell City Council*, 141 Ohio St.3d 17, 2014-Ohio-4283. City council's authority in reviewing sufficiency of petitions to place charter commission question on ballot is limited to

approving their form and not their substantive merits; signatures which for any reason have not been examined must be presumed to be valid. Const. Art. 18, §§ 7-9. *State ex rel. Concerned Citizens for more Pro. Govt. v. Zanesville City Council*, 70 Ohio St. 3d 455, 639 N.E.2d 421 (1994).

The proximity of the election one month after filing of mandamus petition establishes the lack of an adequate remedy in the ordinary course of law for proponents of a city ordinance by initiative. *State ex rel. Commt. for Proposed Ordinance to Repeal Ordinance No. 146-02, W. End Blight Designation, v. Lakewood*, 2003-Ohio-5771, 100 Ohio St. 3d 252, 798 N.E.2d 362. The impact to a proposed city charter amendment is at least equally as important. As far as Relators suffering irreparable harm caused by the initiative not being placed upon the ballot, the Court takes judicial notice that the presidential election is 53 days away, and that voter turnout is greater during such years. Further, the current council can encumber money and control spending of municipal funds through legislative action that may (or may not) survive the charter amendment dissolving the municipality. The transitional government, if passed, will take a year as well to implement. Therefore, to delay a vote on the initiative would cause harm to the Relators and citizens in Nelsonville, Ohio due to those factors so time is of the essence.

The Court is mindful that the placing of the initiative on the ballot may result in extra expense to the City. However, any extra expense could have been avoided if Council passed an ordinance in accordance with the charter's mandate provided in NCC Section 10.02 when called upon.

In addressing the motion for preliminary injunction, the Court finds: 1) there is a substantial likelihood that the Realtors will prevail on the merits, 2) Relators will suffer irreparable injury by missing the opportunity to place the measure on the ballot for the November 5, 2024 election, 3) No third parties will be harmed by the placement of the initiative on the ballot, and 4) the public interest is best served by placing the initiative on the Nelsonville ballot for the citizens' consideration. Further, it appears Respondents will continue to permit the obstruction of council's passing an ordinance to send the initiative to the Athens County Board of Elections in violation of Relators' rights.

Therefore, upon motion of Relators, and pursuant to R.C. § 2727.02, the Ohio Constitution Arts. I Sec 2, XVII Sec 1, XVIII, §§ 5, 8, 9, and 14, Ohio Revised Code §731.28 to 731.41, and the Nelsonville City Charter, and for good cause shown, the Court orders a Preliminary Injunction to all Respondents restraining them from preventing Nelsonville City Council from considering and passing an ordinance requiring the submission of petitioners' initiative to the Athens County Ohio Board of Elections by for placement on the November 5, 2024 ballot.

As City Council cannot ignore their duty under the charter to pass an ordinance, similarly the BOE cannot refuse to place the initiative on the ballot because they believe it to be unconstitutionally sound. As the Ohio Supreme Court previously stated in *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, 144 Ohio St. 3d 239, 41 N.E.3d 1229, "we held that a county board of elections cannot refuse to certify a ballot measure based on its assessment that the measure, in substance, would be unconstitutional if enacted. *Id.* at ¶ 4–5, 12 (requiring a county board of

elections to place a proposed city-charter amendment on the ballot despite its concern that the measure would be unenforceable because it conflicted with the Ohio Constitution). This court “ ‘will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature.’ ” “ **\*\*333** *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, ¶ 16, quoting *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5, 6, 454 N.E.2d 1321 (1983). County boards of elections have no authority to review the substance of a proposed municipal-charter amendment; *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, 155 Ohio St. 3d 496, 122 N.E.3d 1165.

The Court finds that a preliminary injunction preventing any hinderance to the council passing the ordinance should issue. Relators also request the Court to order the council to pass the ordinance to send the initiative to the ballot. That is an action requiring an act determined by mandamus, the substance of Relators’ amended complaint, as opposed to an injunctive act which is usually requested to prevent an action from occurring. Generally, to be entitled to a writ of mandamus, a relator must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13.

In light of the above, the Court finds the Relators’ right to require the performance of the City Council to propose, introduce and pass an ordinance in accordance with NCC 10.02(B) is clear and it is apparent that no valid excuse can be given

for not doing it and therefore Relators are entitled to a limited preemptive writ.

Accordingly, the Court orders a preemptive limited writ of mandamus ordering Nelsonville City Council members, Respondents herein, to enact forthwith an ordinance providing for the submission of the proposed petition initiative to the Nelsonville electors in the November 5, 2024 election and that the Athens County Board of Elections certify that Relators' petition initiative has enough valid signatures to qualify for placement on the general election ballot. Nelsonville City Council shall cause a copy of the passed ordinance to be received by the Athens County Board of Elections no later than 3:00 p.m. on September 16, 2024. See *R.C. 2731.06* and *State ex rel. Sanduskians for Sandusky v. Sandusky* (2022), 169 Ohio St.3d 702.

Although the record is clear that the Clerk found Relators' petition to be sufficient, the record is not clear the number of votes cast in the last general election and that number forms the basis of the 10% threshold of valid signatures required for the initiative to be placed upon the ballot. That issue is left to the BOE to verify that the petition has enough valid signatures to meet the 10% threshold under Ohio Constitution Article XVIII, Sec. 9.

This issuance of the preemptive limited writ of mandamus constitutes a final appealable order.

IT IS SO ORDERED.

A handwritten signature in blue ink, appearing to read "G. McCarthy", with a vertical line extending downwards from the end.

Judge George P. McCarthy

**TO THE CLERK:**

Please provide a copy of the foregoing to all parties of record, via their attorney if represented, through the clerk's electronic filing case management system and if unable to do so then by regular U.S. Mail., proper postage prepaid.