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August 16, 2018

Mr. Edward Leonard, Director
Mr. David Payne, Deputy Director
Franklin County Board of Elections
1700 Morse Road
Columbus, OH 43229

Via E-Mail

Re: Response to the City of Grandview Heights' August 7, 2018 Protest Letter

To the Franklin County Board of Elections:

This firm serves as legal counsel to the three individuals (the "Petitioners") listed on the face of the initiative petition proposing an ordinance to amend Section 1151.04 of the Codified Ordinances of the City of Grandview Heights, Ohio (the "Petition" and the "Proposed Ordinance"). On behalf of the Petitioners, we hereby file the following response to the Protest filed against the Petition by the City of Grandview Heights, Ohio (the "City" or "Grandview Heights") on August 7, 2018.

I. The Grandview Heights Charter and Ohio law required the Petition to be filed with the City Finance Director, not with the City Planning Commission.

In its first argument, the City confuses the process for its City Council to propose and enact zoning ordinances with the process for residents to propose and adopt zoning ordinances by initiative petition. These are fundamentally different mechanisms with fundamentally different procedures.

A. The City Council's procedures for enacting zoning ordinances apply only to the City Council.

As explained by the City in its Protest, the City Council passed an ordinance requiring the City Planning Commission to provide a report to the Council before the Council can change its Zoning Code. By its own terms, this process is limited to the "Council" (*see,* Section 1143.01 of the Codified Ordinances of Grandview Heights), and is, therefore, entirely irrelevant to zoning ordinances proposed by initiative petition. And other than this, the City provided no support for its bald assertion that the initiated zoning ordinances are bound to the procedures that Council creates for itself.

B. The Grandview Heights Charter follows state law with respect to initiative petitions, and state law requires initiative petitions to be filed with the City Finance Director.

The process to propose and adopt ordinances by initiative petition, including zoning ordinances, is set forth in Section 8.2 of the Grandview Heights Charter, which provides:

> 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.
>
> (Emphasis added).

As is apparent, the Charter sets forth *no* special requirements for zoning changes proposed by initiative petition. Instead, the Charter follows the procedure set forth in Ohio law. And although home rule municipalities, such as Grandview Heights, are permitted to set forth procedures unique to initiated zoning ordinances, Section 8.2 of the Charter has actually foreclosed this ability by providing that the initiative process "shall" follow Ohio law with no exceptions nor any ability to change the process. Thus, even if Section 1143.01 of the Codified Ordinances was written to include initiated zoning ordinances, it would be in direct violation of Section 8.2 of the City Charter, which prohibits the City from diverging from the process set forth in state law, and unenforceable.

Turning to Ohio law, nowhere does it provide that initiated zoning ordinances are required to follow a separate procedure for approval from other initiated ordinances. *See*, R.C. 731.28, 731.30-731.41 (providing for the submission of initiative petitions to the city auditor or equivalent officer, and not to municipal planning commissions). Instead, R.C. 731.28 provides that initiative petitions proposing municipal ordinances, regardless of the subject matter, shall be filed with the city auditor or equivalent officer. In Grandview Heights, the equivalent officer is the City Finance Director, and, pursuant to R.C. 731.28, the Petition was filed with the City Finance Director, who, in turn, accepted the Petition for filing, transmitted it to the Board for verification, and upon receipt of the Board's verification of the Petition, certified the Proposed Ordinance for placement on the November 6, 2018 general election ballot.

C. The City has already acknowledged and admitted that the Petition was properly filed with the City Finance Director.

The City even publicly agreed with this understanding of Ohio law on the *same day* it filed its Protest against the Petition. In the City Finance Director's August 7, 2018 letter certifying the Proposed Ordinance to the Board for placement on the ballot, he wrote:

> **Pursuant to R.C. §731.28 and the Charter of the City of Grandview Heights**, I have reviewed the petition for its facial

> sufficiency and validity and have not identified errors as to the form. Accordingly, **I am fulfilling the statutory duty** to certify the facial sufficiency and validity of the initiative petition to the Board.

See, City Finance Director's August 7, 2018 Letter to the Board of Elections, attached as Exhibit A (emphasis added). This is an admission by the City that the Petitioners followed the correct procedure when they filed the Petition with the City Finance Director.

D. Courts and the Ohio Secretary of State have already explained that the state law provision cited by the City does not apply to zoning initiatives.

Despite the clear law and the City's own public pronouncement of the law, the City contends in its Protest that all initiated zoning ordinances are required to be approved by a municipal planning commission after an advertised public hearing. But the City is completely wrong. This very argument has been flatly rejected by the courts and by the Ohio Secretary of State. In *Drockton v. Bd. of Elections of Cuyahoga Cty*, the Cuyahoga County Court of Common Pleas held that R.C. 713.12, which establishes the "advertised public hearing" requirement for the municipal planning commission procedure set forth in R.C. 713.10, is "not relevant" to initiative petitions as the "public hearing" set forth in R.C. 713.12 is "achieved during the campaign period" for the initiative petition. *Drockton,* 16 Ohio Misc. 211, 216, 240 N.E.2d 896, 45 O.O.2d 171 (C.P. 1968). Citing this opinion approvingly, the Ohio Secretary of State has advised to boards of elections that zoning initiatives are "not subject to" the very public hearing process that the City, here, contends is required for the Proposed Ordinance. *See,* Ohio Secretary of State's Ohio Ballot Questions and Issues Handbook, at 7-11, available at https://www.sos.state.oh.us/globalassets/elections/eoresources/general/questionsandissues.pdf. Thus, the municipal planning commission and public hearing process are not relevant to the Petition here as the Proposed Ordinance will be subject to significant discussion and debate between now and the general election.

E. The City waived its argument that the Petition should have been filed with the City Planning Commission by directing the City Finance Director to accept the Petition for filing, transmitting it to the Board for review, and subsequently certifying the Proposed Ordinance for placement on the ballot.

Even if the law can somehow be read to have required the Petition to be filed with the City Planning Commission, the City waived its ability to raise this argument. This is because the City Finance Director (1) accepted the Petition for filing, (2) transmitted the Petition to the Board of Elections for verification, (3) received the Board's report as to the validity and sufficiency of the Petition, and (4) certified the Proposed Ordinance to the Board for placement on the November 6, 2018 ballot. *See,* Exhibit A. If the City believed the Finance Director did not have the authority or duty to take any of these functions, then the Finance Director should have refused or declined to do any or all of them. Instead, the Finance Director informed the Petitioners and the Board that he was acting at all times "pursuant" to his authority under Ohio law and the Grandview Charter. For these reasons, the City has waived its ability to subsequently contend that the Petition was improperly filed.

In short, the Petitioners correctly followed the Grandview Heights Charter and Ohio law by submitting the Petition to the City Finance Director rather than the City Planning Commission.

II. The Proposed Ordinance would enact an amendment to the City's Zoning Code, and is, therefore, a legislative act.

In its second argument, the City contends that the Proposed Ordinance is not an exercise of legislative action. However, the Proposed Ordinance is unquestionably an exercise of legislative action as it would enact an amendment to the City's Zoning Code redefining the boundaries of the City's Green Space Overlay District and setting the land-use restrictions therein.

A. The Ohio Supreme Court has repeatedly held that amendments to municipal zoning codes are legislative acts.

The Ohio Supreme Court's well-established test for determining whether an action is legislative or administrative is "whether the action taken is one enacting a law, ordinance, or regulation, or executing a law, ordinance, or regulation already in existence." *State ex rel. Langhenry v. Britt*, 151 Ohio St.3d 227, 2017-Ohio-7172, 87 N.E.3d 1216, ¶ 18 (internal quotation and citations omitted) (emphasis added). Explaining this more, the Court has stated that "actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative." *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, ¶ 44. Additionally, "an act or resolution constituting a declaration of public purpose and making provision for the ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body." *Id.* (internal quotation and citations omitted).

In the context of zoning, the Court has held that approval of a development plan that comports with existing zoning regulations is administrative in nature, but that "**an amendment to the zoning code itself is a legislative act**." *Langhenry*, at ¶ 18, citing *State ex rel. Hazel v. Cuyahoga Cty. Bd. of Elections*, 80 Ohio St.3d 165, 168-169, 685 N.E.2d 224 (1997) (emphasis added). This principle is also repeated in *State ex rel. Oberlin Citizens for Responsible Development. v. Talarico*, one of the main cases relied upon by the City in its Protest. *See, Oberlin Citizens,* 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 27 ("Generally, **the adoption of a zoning amendment, like the enactment of the original zoning ordinance, is a legislative act**") quoting *State ex rel. Zonders v. Delaware Cty. Bd. of Elections*, 69 Ohio St.3d 5, 11, 630 N.E.2d 313 (1994).

Under the Ohio Supreme Court's test and precedent, the Proposed Ordinance, here, is unquestionably a legislative act. It would enact a permanent amendment to the City's Zoning Code, establishing new boundaries for the City's Green Space Overlay District and setting forth new land-use policies therein. It does not merely execute a zoning plan already in existence. Additionally, the Proposed Ordinance declares a purpose to "preserve, protect, and strengthen the City's Green Space Overlay District and adjacent parkland," and provides the means to

accomplish that objective, again, by redefining the boundaries of the Green Space Overlay District and setting forth new-land use policies therein. Thus, the Proposed Ordinance fits squarely into the Ohio Supreme Court's precedent of finding amendments to municipal zoning codes to be legislative acts, not administrative acts.

B. The Proposed Ordinance is not a "challenge to an administrative action" by the City.

In an attempt to get around the Ohio Supreme Court's clear precedent, the City tenuously contends that the Proposed Ordinance is only a "challenge to an administrative action," and, therefore, cannot be proposed by initiative petition. As an initial matter, the Proposed Ordinance is not merely a "challenge to an administrative action." Here, some of the Petitioners may have disagreed with a particular administrative action taken by the City—a controversial lot split—but the Proposed Ordinance is about redefining the boundaries City's Green Space Overlay District, and this constitutes a legislative act. Some of the Petitioners or the Petition signers may have disagreed with the lot split, but there are a multitude of additional reasons why they all would want to update the City's Green Space Overlay District ordinance.

To support its argument that the Proposed Ordinance is an impermissible challenge to an administrative action, the City cites *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077. In *Ebersole*, the Ohio Supreme Court ruled, in part, that petitioners could not sidestep the Court's precedent prohibiting administrative actions from being subject of a referendum by proposing an ordinance directing the city council to repeal an administrative action. *See, Ebersole*, at ¶ 14, 29-36. Unlike the proposed ordinance in *Ebersole*, the Proposed Ordinance here would not serve to repeal or otherwise undo the lot split action. It does not require or call upon the City Council to in anyway repeal or undo the lot split, and it does not even address lot splits in a general sense. If the Proposed Ordinance is approved by the voters, the particular lot split will remain in effect.

The mere fact that some of the Petitioners or signers may have disagreed with an administrative action taken by the City does not transform a legislative act into an administrative act. Regardless of the Petitioners' or signers' alleged motivations, the Proposed Ordinance would amend the City's Zoning Code to establish new boundaries for the City's Green Space Overlay District and establish new land-use policies for the properties therein. Under the Ohio Supreme Court's precedent, this is a clearly a legislative act.

III. Nothing in the Petition or the Proposed Ordinance warrants preventing the Proposed Ordinance from being submitted to the voters of Grandview Heights.

Continuing to grasp at straws, the City, in its final argument, contends that the Petition contains "misleading or inaccurate information." The City's argument boils down to its opinions of and disagreements with the substance of the Proposed Ordinance. But this is not an appropriate forum for the City to weigh in on the merits of the Proposed Ordinance, and the City has not identified anything in the Petition that would warrant blocking the Proposed Ordinance from being submitted to the electors of Grandview Heights.

A. The Ohio Supreme Court held that the sole legal case cited by the City does not apply to municipal initiative petitions and that the only wording requirement for such petitions is to contain the title and text of the proposed ordinance.

As an initial matter, the City has not identified any legal support for preventing the Proposed Ordinance from being submitted to the voters. The sole legal principle cited by the City for its argument is that "[b]allot language 'ought to be free from any misleading tendency.'" Protest at *6 citing *Markus v. Trumbull Cty. Bd. of Elections*, 22 Ohio St.2d 197, 259 N.E.2d 501 (1970) (emphasis added). However, the *ballot language* is not at issue in the Protest, as it has not even been prepared by the Board, yet.

Moreover, the Ohio Supreme Court has expressly stated that the standard announced in *Markus v. Trumbull Cty. Bd. of Elections*—the sole case cited by the City—does not apply to the wording of municipal initiative petitions. *Christy v. Summit Cty. Bd. of Election*, 77 Ohio St.3d 35, 38, 671 N.E.2d 1 (1996). Indeed, the Court explained that *Markus* is "inapposite because [it] addressed the requirements for *summaries* of ordinances in zoning referendum petitions pursuant to [R.C. 519.12(H)]" and that "there is no summary requirement for municipal initiative petitions." *Id.* (emphasis original). Instead, the only language requirement for municipal initiative petitions is that they contain the "full and correct copy of the title and text of the proposed ordinance." *Id.* citing R.C. 731.31. Here, the Proposed Ordinance contains the full and correct copy of the title and text, and the City has not alleged otherwise. Therefore, there is no basis in law for blocking the submission of the Proposed Ordinance to the electors of Grandview Heights.

On this basis alone, the Board must deny the City's third ground raised in the Protest.

B. None of the language in the Petition or the Proposed Ordinance is misleading or inaccurate.

Even if the Board engages in a review of the Petition's wording, contrary to the Ohio Supreme Court's holding in *Christy*, nothing in the Petition or the Proposed Ordinance is "misleading or inaccurate." The City contests the use of the word "strengthen" as used in the Proposed Ordinance's "whereas" clauses that "the People of the City of Grandview Heights desire to preserve, protect, and strengthen the City's Green Space Overlay District and adjacent parkland." The City asserts that the Proposed Ordinance's new boundaries for the District would not "strengthen" it, but such an assertion is merely the City's opinion on the substance of the Proposed Ordinance. In contrast, the Petitioners believe that the proposed new boundaries, which would include previously uncovered—and currently undeveloped—property, would better preserve, protect, and strengthen the District. And ultimately, it should be up to the electors of Grandview Heights to decide how best to preserve, protect, and strengthen the Green Space Overlay District.

The City also falsely states that the Proposed Ordinance describes the Green Space Overlay District as "parkland or a nature preserve" when it is not. The Proposed Ordinance does not do this, however. Rather, the Proposed Ordinance describes the Green Space Overlay District

as a "park-like area of privately owned lots along Goodale Boulevard and adjacent to some of the City's parkland." *See,* Proposed Ordinance, First Whereas Clause (emphasis added). Indeed, all references to "parkland" in the Proposed Ordinances refer to parkland "adjacent" to the Green Space Overlay District, not *in* the District. Further, the only reference to a "nature preserve" is a description of the location of the property with the lot split as being "north of the Elmwood Hill natural resource area/preserve," identifying a specific nature preserve in the area and eliminating any possible ambiguity. *See*, Proposed Ordinance, Third Whereas Clause (emphasis added). Contrary to the City's assertion otherwise, nowhere does the Proposed Ordinance describe the Green Space Overlay District as "parkland or a nature preserve." Thus, the only thing misleading or confusing about this is the City's false claim that the Proposed Ordinance describes the Green Space Overlay District as "parkland or a nature preserve."

The City also faults the Petition for not providing an explanation of the full history of the Green Space Overlay District and not explaining the effects of the Proposed Ordinance. Again, the City has not identified any legal authority requiring this information to be in the Petition. Moreover, the Proposed Ordinance does provide the history of the District, stating that it was created in 1989 and re-adopted in 1998. *See,* Proposed Ordinance, First and Second Whereas Clauses. As to whether the Petition explains "how" it will achieve its goals, this is simply not required of an initiative petition. Indeed, this is the very information that will be discussed and debated by the electors of Grandview Heights prior to the November 6, 2018 general election.

In sum, the Ohio Supreme Court has explicitly stated that type of review of the Petition's language engaged in by the City is not appropriate for municipal initiative petitions, and even if the Board engages in the review, the City has not identified any "misleading or inaccurate" statements in the Petition. Therefore, there is no basis for blocking submission of the Proposed Ordinance to the electors of Grandview Heights at the November 6, 2018 general election.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request the Board to deny the City's Protest and allow the Proposed Ordinance to be submitted to the electors of Grandview Heights at the November 6, 2018 general election.

Respectfully submitted,

Derek S. Clinger

cc: Timothy A. Lecklider, tlecklider@franklincountyohio.gov
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PETITIONERS' EXHIBIT A

August 7, 2018

The CITY of
GRANDVIEW HEIGHTS

VIA HAND DELIVERY

Mr. Edward Leonard, Director
Franklin County Board of Elections
1700 Morse Rd.
Columbus, OH 43229

Dear Director Leonard:

I am the Finance Director for the City of Grandview Heights. On July 18, 2018, I received the Board's statement attesting to the number of electors of the City of Grandview Heights who have signed an initiative petition to amend Section 1151.04 of the Codified Ordinances of Grandview Heights.

Pursuant to R.C. §731.28 and the Charter of the City of Grandview Heights, I have reviewed the petition for its facial sufficiency and validity and have not identified errors as to the form of the petition. Accordingly, I am fulfilling the statutory duty to certify the facial sufficiency and validity of the initiative petition to the Board.

This action should not be construed, and is not intended as, a waiver of the City's right to protest the petition pursuant to R.C. §3501.39.

Respectfully,
Bob Dvoraczky
Finance Director
City of Grandview Heights

Copies to:

Ron O'Brien, Franklin County Prosecutor
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