

August 7, 2018



VIA HAND DELIVERY

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

Re: Grandview Heights initiative petition

Dear Director Leonard:

Frost Brown Todd LLC has been retained as special counsel to Grandview Heights Finance Director Bob Dvoraczky and the City of Grandview Heights with regard to an initiative petition matter recently submitted to the City by certain electors of the City.

Pursuant to Ohio Revised Code Section 731.28, the City of Grandview Heights has reviewed the initiative petition, which proposes to enact an Ordinance to amend Section 1151.04 of the Codified Ordinances of the City of Grandview Heights, Ohio. To the best of our knowledge and that of the Finance Director, who is charged with accepting filings of such petitions on behalf of the City and remitting them if compliant with law, the petition does not appear to present any facial deficiencies as to form.

The Ohio Supreme Court has ruled that municipalities may not undertake quasi-judicial determinations in this context. *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶16. Therefore, the Finance Director of the City of Grandview Heights is fulfilling his statutory obligation under R.C. Section 731.28 to submit the petition to the County Board of Elections [see Finance Director's Letter of August 7, 2018].

But "[w]hile municipal officials [like the Grandview Heights Finance Director] 'have limited discretionary authority concerning matters of form, but not matters of substance . . . a board of elections has greater discretion to inquire into the sufficiency of a proposed ballot measure than municipal officials do.'" *State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elections*, 148 Ohio St.3d 176, 2016-Ohio-5919, 69 N.E.3d 696, ¶7, quoting *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, ¶¶10–11." Specifically, "[a] board may reject a petition if it 'violates the requirements of [R.C. Chapter 3501], Chapter 3513. of the Revised Code, or any other requirements established by law.'" *Id.*, quoting R.C. 3501.39(A)(3). Reasons for a board of elections to reject a municipal initiative petition include "the petition fall[ing] outside the scope of authority to enact via initiative . . . [t]he petition shall be invalid if any portion of the petition is not within the initiative power." R.C. §3501.39(A)(3).

Thus, for the reasons summarized below, pursuant to Ohio Revised Code §3501.39 and on behalf of the City of Grandview Heights, I hereby provide notice of protest and request a hearing for the Board to determine whether the initiative petition is invalid.

I. **The Initiative Petition Exceeds the Powers Reserved for Citizens by the Ohio Constitution, in that it Proposes a Zoning Change that Was not First Submitted to Grandview Heights Planning Commission, as Required by Ohio Revised Code Section 713.10.**

The initiative petition cannot be forwarded to the ballot because it exceeds the scope of municipal power, and, therefore, the scope of a permissible initiative effort. As explained in more detail below, zoning legislation is subject to a mandatory legislative process - including a public hearing and recommendation from the Grandview Heights Planning Commission ("Planning Commission") - and any attempt by City Council itself or citizens through an initiative petition to circumvent Planning Commission and adopt zoning legislation through Council alone is legally invalid.

The Charter of the City of Grandview Heights provides in Section 8.2 that "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."

Similarly, the Ohio Constitution reserves the powers of initiative and referendum to the people of each municipality "on all questions which such municipality may now or hereafter be *authorized by law to control by legislative action*." Ohio Constitution, Article II, Section 1f (emphasis added). As a necessary corollary, the referendum and initiative power is *limited* to questions the municipality is authorized by law to control by legislative action. *Myers v Schiering*, 27 Ohio St.2d 11 (1971), paragraph one of the syllabus. Therefore, citizens can only propose ordinances by initiative that municipal governments are authorized by the Constitution or by law to enact. In other words, an ordinance cannot be enacted by an initiative petition process if City Council itself could not adopt the ordinance. The proposed ordinance being submitted as an initiative petition could not be enacted by City Council itself.

Importantly, the enclosed petition purports to enact/amend a **zoning** ordinance. Ohio Revised Code Section 713.10 imposes a requirement on municipalities that no amendment or change to districting or zoning ordinances "shall become effective unless the ordinance proposing it is first submitted to the planning commission for approval, disapproval or suggestions..." In Ohio, regardless of whether a rezoning or amendment to the zoning code is initiated by a landowner, Planning Commission itself, or City Council, the proposed zoning change must be considered by the Planning Commission after an advertised public hearing where both proponents and opponents may be heard. The Planning Commission then forwards the proposed zoning change to City Council with a recommendation of approval, approval with modifications, or disapproval. After another advertised public hearing before Council, the matter is ripe for consideration and action by City Council. During this process, Planning Commission and Council may seek the advice of professional zoning and development staff, as well as legal advice as to any potential private property rights and/or other constitutional concerns.

Grandview Heights' zoning code and zoning map amendment process is consistent with the typical Ohio zoning amendment process described above. The City of Grandview Heights Charter, in Section 6.4.2., establishes a City Planning Commission and states that "the duties,

powers and limitations of the City Planning Commission shall be prescribed by City ordinance, and in the absence of such ordinance it shall perform the duties and exercise the powers conferred upon city planning commissions by State law not in conflict with this Charter.” Pursuant to Section 6.4.2, City Council has enacted Section 1143.01 of the Codified Ordinances:

1143.01 PROCEDURE.

- (a) Council may, from time to time, on its own motion or on petition, after public notice and hearing as provided by law *and after report by the Planning Commission*, amend, supplement or change the boundaries or regulations in the Zoning Ordinance established now or subsequently. In case the Planning Commission disapproves the proposed change, such amendment shall not be passed except by the favorable vote of three-fourths of all members of Council. If no report is received from the Planning Commission in sixty days, it may be assumed that such Commission has approved the amendment.

Section 1143.01(a) is clearly consistent with O.R.C. 713.10 in that it requires any proposed change to the Codified Ordinances or the city’s zoning map be submitted first to Planning Commission for a report and a recommendation of approval or disapproval. Therefore, R.C. Section 713.10 applies to any change or amendment to Grandview Heights zoning or districting.

Ohio courts have held that R.C. Section 713.10 provides a mandatory procedure for enacting a zoning ordinance; if that procedure is not followed, then the enactment is null and void and of no effect. *Vito v. Garfield Heights*, 1962 Ohio Misc. Lexis 210 p. 10, 94 Ohio L.Abs. 21, 200 N.E.2d 501, 31 Ohio Op.2d 530, and see also *Pidgeon v Ramar Land Corp.*, 62 Ohio Misc. 2d 223, 230, 597 N.E.2d 562, 1991 Ohio Misc. LEXIS 64, which both rely upon *State ex rel. Fairmount Center Co. v. Arnold*, (1941) 138 Ohio St. 259.¹

The proposed initiative petition seeks to enact a zoning change. If City Council wished to enact the exact language proposed by the initiative petition, the language would first need to be submitted to the City’s Planning Commission for its recommendation. Only after receiving that

¹ *Fairmount Center* interpreted Ohio General Code Section 4366-11, later re-codified as O.R.C. 713.10, which read in part as follows: "The council or other legislative body may, from time to time, amend or change the number, shape, area or regulations of or within any district or districts; but no such amendment or change shall become effective unless the ordinance proposing such amendment or change shall first be submitted to the planning commission, board or officer for approval, disapproval, or suggestions and the planning commission, board or officer shall have been allowed a reasonable time, not less than thirty days, for consideration and report. Before any ordinance, measure, or regulation authorized by this and the three foregoing sections may be passed, the council or other legislative body shall hold a public hearing thereon, and shall give thirty days' notice of the time and place thereof in a newspaper of general circulation in the municipality; and during said thirty days the text or copy of the text of such ordinance, measure or regulation, together with the maps or plans or copies thereof forming part of or referred to in said ordinance, measure or regulation and the maps, plans and reports submitted by the planning commission, board or officer shall be on file, for public examination, in the office of the clerk of the council or other legislative body or in such other office as may be designated by the council or other legislative body. No such ordinance, measure or regulation which violates, differs from or departs from the plan or report submitted by the planning commission, board or officer shall take effect unless passed or approved by not less than three-fourths of the full membership of the council or other legislative body."

recommendation and convening a public hearing would Council be able to take action to enact the legislation. Zoning legislation enacted by City Council without first being submitted to the Planning Commission would be rendered null and void.

Petitioners have short-circuited the statutory requirement of Planning Commission input and recommendation. Allowing petitioners to circumvent this statutory requirement exceeds the petitioners' legislative powers authorized by the Ohio Revised Code and the Constitution.

Therefore, the Franklin County Board of Elections cannot submit to the electors of Grandview Heights a question which is not authorized by state law. Courts have previously held that questions that exceed municipal powers are not appropriate to place before the voters. See *Sensible Norwood* (holding that board did not have to place initiative petition to impose felony penalties on drug offenses on the ballot because municipalities do not have authority to define felony offenses). As recently as October 2017, the Ohio Supreme Court relied on *Sensible Norwood* in upholding a board of elections decision to withhold an initiative from the ballot based on the initiative exceeding municipal powers. *Betras*, 152 Ohio St.3d 244, 2017-Ohio-8109, 95 N.E.3d 329, at ¶¶13–16.

II. The Initiative Petition Exceeds the Powers Granted to Citizens by the Ohio Constitution, in that it is a Challenge to an Administrative Action, not an Exercise of Legislative Action.

As stated above, the powers of referendum and initiative are limited to questions the municipality is authorized by law to undertake *by legislative action*. *Myers*, 27 Ohio St.2d 11 at paragraph one of the syllabus (Emphasis added). See also *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 697 N.E.2d 181, paragraph two of the syllabus (“Pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to [initiative or] referendum proceedings.”).

The Ohio Supreme Court has made clear that a county board of elections must withhold an initiative or referendum from the ballot where the petition is filed to challenge an administrative action. *Oberlin*, *supra*, at 31; see also *Sensible Norwood* at ¶¶13-20; see also *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 2017-Ohio-8109, 95 N.E.3d 329, ¶¶13–16 (denying petitioners' writ for placement of initiative on ballot where initiative would have created private cause of action, which was beyond scope of municipal legislative authority).

The test for determining whether the proposed action is legislative or administrative is whether the action taken is “one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence.” *Oberlin* at ¶23, quoting *Donnelly v. Fairview Park*, 13 Ohio St.2d 1, 42 O.O.2d 1, 233 N.E.2d 500 (1968), paragraph two of the syllabus.

While the underlying initiative petition on its face appears to be an effort to repeal in part and amend in part a legislative enactment (*i.e.*, Grandview Heights Codified Ordinance 1151.04, attached as Appendix A), a review of the proposed ordinance shows that it is, in fact, an attempt

to revoke the April 19, 2017 *administrative* decision of the City of Grandview Heights Planning Commission to grant a lot split at 1000 Elmwood, a property which is north of an overlay district (“the Overlay District”) that the proposed petition seeks to alter. Specifically, the proposed ordinance language plainly references this administrative act by the city’s Planning Commission, an administrative body of the City.² Additionally, the practical impact of the proposal clearly targets the residential parcel created by the lot split now being opposed by the initiative committee and constitutes a retroactive, de facto reversal of the lot split by placing the new lot in a no-build zone. This administrative approval by the Planning Commission could have been subject to an appeal to the Franklin County Court of Common Pleas pursuant to R.C. Chapter 2506 within 30 days of issuance, but no party availed himself or herself of such appeal rights. That decision is now final and unappealable.

State ex rel. Ebersole v. Del. County Bd. of Elections, 140 Ohio St.3d 487 (2014) is especially instructive in this matter. In *Ebersole*, the Ohio Supreme Court rejected a petition for an initiated ordinance to repeal an ordinance that approved a final development plan, an administrative action taken by the City of Powell’s City Council. The Ohio Supreme Court upheld the Delaware County Board of Elections’ determination that an initiative petition process cannot be used to repeal or otherwise challenge an administrative action. *Id.* at ¶30 (citing *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 17 (because it arises from the same constitutional source, the power of initiative is subject to the same limitation as the power of referendum)). In effect, a collateral attack on a municipal approval cannot be made through an initiated ordinance if the underlying approval was administrative in nature (and the petitioner did not pursue appropriate administrative appeal rights).

Here, the proposed initiated ordinance purports to be a legislative enactment; however, a plain reading of the proposed ordinance and a review of its actual impact indicates that its intent is to force one parcel into a newly created no-build zone and, retroactively, to effectively countermand an administrative action. The proposed ordinance expressly references the administrative action of the city’s Planning Commission as the reason for the petition.

The proposed initiated ordinance would amend the city’s existing Overlay District along Goodale Blvd., so that the newly created (split) lot is included in an amended overlay district, which petitioners have stated in writing they seek to expand to thwart future “unwanted” development. The proposal also changes the development standards in the Overlay District from a heightened development standard that increases front and side yard setbacks to a complete “no-build” zone.

The attached map marked as Appendix B shows the City’s existing Overlay District in green and the effect of the proposed initiative measure in red. One can clearly see that the proposal expressly prohibits the newly created lot (Parcel ID 030-003216) from exercising its right to build, in clear derogation of the Planning Commission’s administrative action granting the lot split in April 2017.

² The Proposed Ordinance states: “WHEREAS, in 2017, the City of Grandview Heights approved a controversial lot split directly north of the Elmwood Hill natural resource area/preserve, establishing a precedent that could result in unwanted development in and around the Green Space Overlay District and adjacent parkland.”

The initiative petition is a retroactive challenge to the Planning Commission's administrative action, as evidenced by the initiative language expressly referencing that decision and the practical effect of the ordinance. Its effect is to nullify the Planning Commission's decision.

Further, Appendix C, a document circulated by the petitioners in connection with their signature collection efforts and which was posted on social media in an effort to garner additional signatures, also clearly states that the intent of the petition is not to positively affect legislation but rather to block development of one particular parcel. Specifically, the document states:

What will the Proposed Legislation Do?

- 1 – In early 2017, the City approved a controversial lot split directly north of the Elmwood Hill natural resource area/preserve (no. 14 on the Map). **The proposed legislation redefines the existing Green Space to include the space in Red on the Map, thus eliminating this unwanted precedent, which could generate development** and further compromise the Green Space and adjacent park areas.
- 2 - **Redefining the existing Green Space** eliminates already developed areas to the East of Urlin Avenue and **includes undeveloped areas abutting the existing Green Space** to help restore the Green Space size and preserve the park-like setting.

See Appendix C [emphasis added]. The goal of this proposed legislation is to alter the 2017 administrative decision of the Planning Commission and to prevent development on the newly split parcel. It is a referendum on an administrative act, disguised as an initiative petition.

III. The Petition Signatures may have been Obtained Based on Misleading or Inaccurate Information.

Ballot language “ought to be free from any misleading tendency.” *Markus v. Trumbull Cty. Bd. of Elections*, 22 Ohio St.2d 197, 259 N.E.2d 501 (1970). The Initiative Petition language utilized by petitioner in collecting signatures contains, or, at a minimum, suggests information that is inaccurate. For example, as demonstrated by Appendix B, despite representations in the petition language that the proposal strengthens the City's existing greenspace overlay district, *the proposal actually decreases* the overall amount of land included in the Overlay District. Specifically, it removes existing public parkland from the current Overlay District the petition claims to protect (*i.e.*, the entire south side of Goodale Blvd., which is currently protected by City ordinance). Further, it proposes to remove from the Overlay District several parcels located on Broadview and Urlin Avenues that currently abut the greenspace. In sum, the existing Overlay District is being reduced by at least 25%, if not more.

Moreover, the petition language makes repeated references to “parkland” and “natural resource/preserve” areas. Other than the protected city land south of Goodale Blvd., the Overlay

District, as currently enacted, is not a park or nature preserve. It establishes building lines (setbacks) on private property, and does not give the public any right to use the setback areas on the private property as passive green space or in any other way. It does not establish a conservation easement or other “preserve” sort of arrangement, or protect any natural resource. It simply establishes building lines. In fact, other than the undeveloped land south of Goodale Blvd., which petitioners seek to remove from the Overlay District, the only public land in the proposed district is one parcel south of the newly split parcel (Parcel No. 030-000167). The Overlay District is merely a zoning overlay that imposes increased development standards in the form of increased setback requirements for properties located within the Overlay District. By suggesting that this constitutes parkland or a nature preserve, the petition confuses and misleads electors. And by not informing signers that the total area of the proposed district removes public parkland while providing increased protection of private residences to prevent neighbors’ future development without the possibility of variance, this further adds to confusion.

Thirdly, the proposed initiative petition fails to accurately explain to electors that it replaces a decades-old set of setback lines—which are subject to variance—with a complete prohibition on a number of residents’ ability to develop or alter their real estate. The words and diagram on petitioners’ Appendix B and C clearly address a desire to prohibit “unwanted development” and expressly reference the “controversial lot split” that is not currently within the Overlay District. The petition simply fails to address how this effort prohibits other adjoining property owners from using their property within the parameters established in the City’s Codified Ordinances.

IV. Conclusion

The Board of Elections cannot place unlawful ballot efforts before voters. The City protests this unlawful initiative and respectfully requests that the Board withhold it from the ballot. The proposed ordinance would be an administrative, rather than legislative, action and falls outside the scope of authority to enact via initiative.

Respectfully submitted,



Eugene L. Hollins
Frost Brown Todd LLC
Special Counsel for the City of Grandview Heights, Ohio

Copies to:

Ron O’Brien, Franklin County Prosecutor
Counsel for the Board of Elections

Jeff Mackey, CERA,
Manager of Petitions and Filings for Franklin County Board of Elections

Ray DeGraw, Mayor of the City of Grandview Heights

APPENDIX A

1151.04 GREEN SPACE OVERLAY DISTRICT.

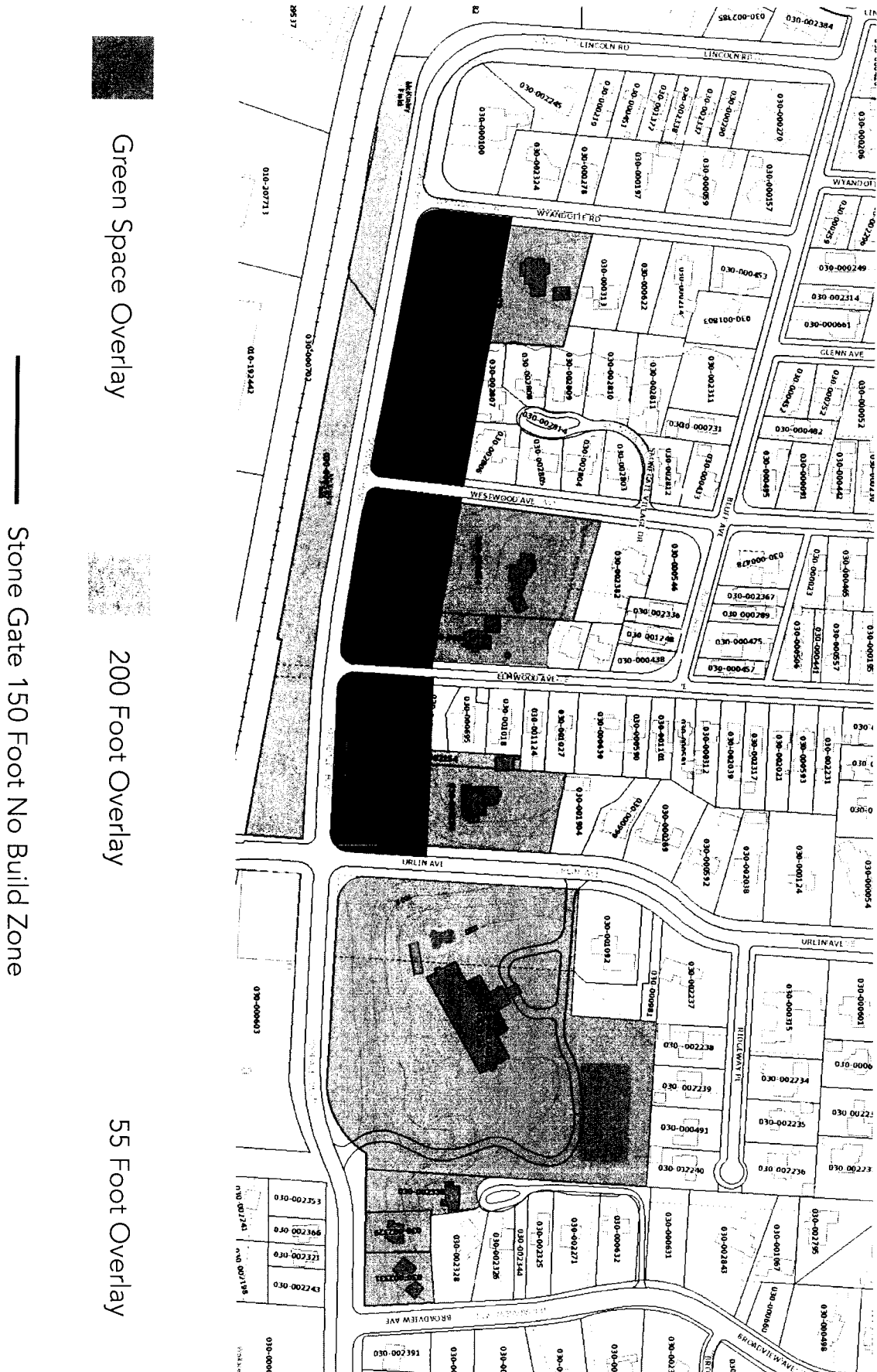
(a) All lots bordering on the north side of Goodale Boulevard between the center line of Broadview Avenue on the east and the center line of Wyandotte Road on the west and all lots bordering on the south side of Goodale Boulevard from the center line of Grandview Avenue on the east and the center line of Lincoln Road extended on the west shall be included in this Overlay District.

(b) All properties within this Overlay District shall have a minimum front yard of 100 feet.

(c) All properties within this Overlay District shall have a minimum side yard of twenty-five feet.

(Ord. 98-13. Passed 9-8-98.)

APPENDIX B



June 21

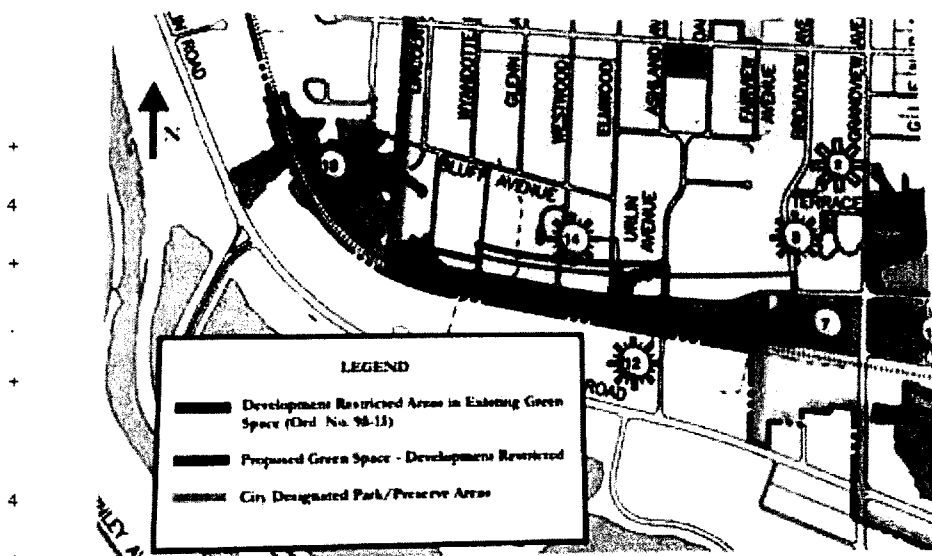
***** Save Grandview Green Space *****

25 buffer signatures needed TODAY or Tomorrow to ensure meet Board of Elections stipulations. Contact (text/call) Jody Oster at [REDACTED] to add your support (signature).

**PRESERVE GRANDVIEW'S GREEN SPACE
SIGN THE INITIATIVE PETITION TO PUT
PROPOSED LEGISLATION ON THE NOVEMBER 6, 2018 BALLOT
THAT WILL PRESERVE AND STRENGTHEN THE GREEN SPACE
CALL JODY OSTER AT [REDACTED] TO SIGN**

What is the Green Space?

Park-like area of privately owned lots along Goodale Blvd., est. 1989 (Ord. No. 89-20), further legislation in 1998 defining the Green Space & restricting development in the area marked in Blue on the Map below (Ord. No. 98-13, City Code § 1151.04). Borders 2nd largest City park area (Nos. 7 & 12 on the Map), including Wallace Gardens, baseball diamond, shelter house, picnic areas, tennis courts, play area, dog friendly park, & Elmwood Hill natural resource area/preserve (No. 14) Near Tarpy Woods (No. 18)



What will the Proposed Legislation Do?

1 - In early 2017, the City approved a controversial lot split directly north of the Elmwood Hill natural resource area/preserve (No. 14 on the Map). The proposed legislation redefines the existing Green Space to include the space in Red on the Map, thus eliminating this unwanted precedent, which could generate development and further compromise the Green Space and adjacent park areas.

2 - Redefining the existing Green Space eliminates already developed areas to the East of Urlin Avenue and includes undeveloped areas abutting the existing Green Space to help restore the Green Space size and preserve the park-like setting.



6

15 Comments



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