

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO, ex rel. SALEM CITIZENS FOR ACTION, et al.,

Petitioners-Relators,

v.

COLUMBIANA COUNTY BOARD OF ELECTIONS, et al.

Respondents.

OPINION AND JUDGMENT ENTRY
Case No. 20 CO 0026

Writ of Mandamus

BEFORE:

Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:

Dismissed.

Atty. Nicholas M. Barborak, 120 South Market Street, Lisbon, Ohio 44432, for Salem Citizens for Action and John Jeffrey Conrad.

Atty. Vito Abruzzino, Columbiana County Prosecutor and *Atty. Krista R. Peddicord*, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Columbiana County Board of Elections.

Atty. Dave Yost, Ohio Attorney General, *Atty. Julie M. Pfeiffer*, Lead Counsel, *Atty. Ann Yackshaw*, Assistant Attorneys General, Constitutional Offices Section, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215, for Ohio Secretary of State, Frank LaRose.

Dated: December 27, 2021

PER CURIAM.

{¶1} Relators, Salem Citizens for Action and John Jeffrey Conrad, have petitioned this Court for a writ of mandamus requiring the certification of a referendum petition and placement on the next available general election ballot. The Ohio Secretary of State, Frank LaRose, and the Columbiana County Board of Elections filed motions to dismiss this original action. Relators did not file any responsive briefs to either motion. For the reasons stated herein, we hereby find the motions to dismiss are well taken.

{¶2} On January 7, 2020, Salem City Council passed Salem Ordinance No. 191015-49 (“Ordinance” hereafter). This Ordinance authorized the mayor to contract with the Regional Income Tax Agency (“RITA”) for the collection of municipal income taxes. Relators filed a petition with the Board of Elections seeking a referendum to “* * * allow the citizens of Salem, Ohio to vote on whether or not to switch to RITA for income tax collection.” (10/16/20 Writ of Mandamus, Exh. C.) On February 7, 2020, a protest against the referendum petition was filed with the Board of Elections.

{¶3} The Board of Elections held a hearing on this protest on August 7, 2020. The protest hearing resulted in a tied vote. Therefore, on September 8, 2020, the Ohio Secretary of State broke the tie and disallowed the referendum.

The citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

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 referendum proceedings.

Buckeye Community Hope Found. v. Cuyahoga Falls, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998), paragraphs one and two of syllabus.

{¶4} “The test for determining whether the action of a legislative body 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.” *Donnelly v. City of Fairview Park*, 13 Ohio St.2d 1, 233 N.E.2d 500 (1968), paragraph two of the syllabus.

{¶5} Accordingly, the Ohio Secretary of State determined, “Salem City Ordinance #191015-49 did not enact or amend the existing law or ordinance. Rather, it addressed the means of carrying out the policy or purpose of the already existing income tax. It is administrative in nature, not legislative.” (10/16/20 Writ of Mandamus, Exh. F.)

{¶6} Relators filed a petition for a writ of mandamus seeking certification of the referendum petition and placement on the “next available” general election ballot. “To be entitled to a writ of mandamus, relators must establish that (1) they have a clear legal right to have their ballot measure(s) presented to the voters, (2) respondents have a corresponding legal duty to submit the ballot measure(s) * * * and (3) relators possess no adequate remedy in the ordinary course of the law.” *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶ 23.

{¶7} Election cases require the “utmost diligence” of relators. *State ex rel. Fuller v. Medina Cty. Bd. of Elections*, 97 Ohio St.3d 221, 2002-Ohio-5922, 778 N.E.2d 37, ¶ 7. “[R]elators 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.*

{¶8} Relators filed the petition for mandamus on October 16, 2020. The Secretary of State’s decision breaking the tie from the Board of Elections was issued on September 8, 2020. More precisely, Relators waited 38 days to file the subject writ after the issuance of the decision breaking the tie from the Board of Elections. Much shorter delays, 17 or 18 days, have been held to constitute unjust delay resulting in actions barred by laches. *Id.*

{¶9} 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.” *State ex rel. Carrier v. Hilliard City Council*, 144 Ohio St.3d 592, 2016-Ohio-155, 45 N.E.3d 1006, ¶ 8. Relators did not seek to place the referendum on the next general election – November 2020. Rather, Relators sought to place the referendum on a later general election. Relators did not seek any expedited election action in the Supreme Court of Ohio.

{¶10} The Ordinance has now been in effect for over a year. Relators have failed to file any responsive pleading to the pending motions to dismiss. The petition is silent as to a possible reason for the 38-day delay. Accordingly, there is nothing in the record before this Court to justify such a delay.

{¶11} Therefore, the Court finds the writ of mandamus action is barred by the doctrine of laches. The motions to dismiss are well taken.

{¶12} Relators' writ of mandamus is hereby dismissed. Final order. Costs taxed to Relators.

{¶13} The Clerk of Courts is hereby directed to serve upon all parties notice of this judgment and the date of entry upon the journal. Civ.R. 58.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO