[Cite as *State ex rel. Szymanowski v. Grahl*, 2015-Ohio-3074.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State ex rel. Clemens J. Szymanowski, Dennis Dumminger and Kathie M. Collins

Relators

v.

Paul Grahl, Auditor, City of Fremont

Respondent

Court of Appeals No. S-15-004

DECISION AND JUDGMENT

Decided: July 29, 2015

* * * * *

Andrew R. Mayle and Ronald J. Mayle, for relators.

James F. Melle, for respondent.

* * * * *

JENSEN, J.

I. Introduction

{¶ 1} In this original action, relators, Clemens J. Szymanowski, Dennis Dumminger, and Kathie M. Collins, seek a writ of mandamus against respondent, Paul Grahl, auditor for the city of Fremont, in Sandusky County, Ohio. Relators request that

this court order respondent to transmit a certified copy of Ordinance No. 2014-3742 and a referendum petition, obtained by relators, to the Sandusky County Board of Elections.

{¶ 2} The ordinance, passed by the Fremont City Council on November 20, 2014, "authorizes the Mayor to proceed with the process of removing the Ballville Dam." Relators claim they have satisfied the statutory elements set forth in R.C. 731.29 to have the issue of the dam's removal put to the voters of Fremont at the November 3, 2015 general election.

{¶ 3} Relators and respondent each filed for summary judgment, and each opposed the other's motion. For the reasons that follow, respondent's motion is granted, and relators' motion is denied.

II. Statement of Facts and Procedural History

{¶ 4} The material facts are not in dispute. The Ballville Dam was built along the Sandusky River in 1913. In 1960, the city of Fremont purchased the dam and the surrounding land from the Ohio Power Company. Initially, the dam was used as a source of hydroelectric power, but at some point, it was repurposed to serve the city's public water needs. Until 2013, the city operated the dam as the primary source of public water.

{¶ 5} In 2008, the Ohio Environmental Protection Agency (OEPA) issued a "Findings and Orders" notification wherein it cited multiple Ohio Administrative Code violations related to the operation of a public water system. The OEPA ordered the city to prepare plans for the construction of an off-stream reservoir "due to continuing concerns with water quality in the Sandusky River." The OEPA gave the city until

March 15, 2011 to prepare such plans and threatened monetary penalties if it did not comply.

{¶ 6} In response to the OEPA's directive, the city worked with the Ohio Department of Natural Resources (ODNR). On June 9, 2008, city council passed Ordinance No. 2008-3462. The ordinance authorized the mayor to enter into a "subsidy agreement" whereby ODNR would provide $5,000,000 to the city in exchange for the city constructing a reservoir. To be eligible for the funds, the city agreed, in part, to "commit to the removal of the Ballville Dam by December 31, 2012." Section 1 of the ordinance authorized the mayor "to enter into agreement * * * with the [ODNR], Wildlife Division, in connection with the construction of an off-stream reservoir and the removal of the Ballville Dam." The ordinance passed by a vote of 6-0 on June 9, 2008.

{¶ 7} The agreement negotiated by the mayor and the ODNR in 2008 was entitled "The Subsidy Agreement for Boater-Angler Access Program," and was attached to Ordinance No. 2008-3462. It defined "the project" as two-fold: construction of the reservoir and removal of the Ballville Dam. The purpose of the project was (1) to increase motorboat access for Ohio boating anglers; and (2) to restore stream connectivity throughout the state of Ohio for the purpose of improving ecosystem function. Restoring stream connectivity was intended to "restore access for native fish to additional spawning habitat upstream of the Dam."

{¶ 8} The reservoir was constructed and became operational in February of 2013. It is now the primary source of water for the city of Fremont.

{¶ 9} As for the dam, the 2008 subsidy agreement originally called for its removal by December 2012. Since then, however, the agreement has been extended twice. Most recently, in March of 2015, the mayor and the ODNR executed a third subsidy agreement, extending the deadline for the dam's removal to December 31, 2017.

{¶ 10} In the years since passage of Ordinance No. 2008-3462, city council has passed several additional ordinances and resolutions with regard to "the project."

{¶ 11} This case concerns Ordinance No. 2014-3742, dated November 20, 2014. It states, in part,

> ORDINANCE NO. 2014-3742
>
> AN ORDINANCE AUTHORIZING THE MAYOR TO PROCEED WITH THE PROCESS OF REMOVING THE BALLVILLE DAM AND DECLARING AN EMERGENCY
>
> WHEREAS, the Ohio Department of Dam Safety has issued the City a notice of violation to bring the Ballville Dam into compliance with State Safety rules and has established time frames for said compliance,
>
> * * *
>
> SECTION 1. The City Council hereby authorizes the Mayor to proceed with the process of removing the Ballville Dam.

SECTION 2. That the Fremont City Council hereby determines that it is in the best interest of the City to remove the Ballville Dam.[1]

* * *

{¶ 12} According to the complaint, following passage of the ordinance, relator Kathie Collins circulated a referendum petition among voters in Fremont, Ohio. The petition sought to have the issue of the dam's removal put to the electors of Fremont for their approval or rejection at the general election on November 3, 2015. Relators claim that they collected signatures "well exceeding" the statutory minimum.

{¶ 13} After collecting signatures, relators allege that they "timely" presented the petition and a certified copy of the ordinance to respondent on December 19, 2014. Pursuant to R.C. 731.29, relators requested that respondent transmit those items to the county board of elections, within ten days, for the purpose of placing the issue on the ballot. Respondent failed to do so.

{¶ 14} After ten days had passed, relators pursued the matter with the city law director, urging the director to seek a writ of mandamus pursuant to the director's authority under R.C. 733.58. When the law director did not do so, relators filed the instant complaint on March 3, 2015.

{¶ 15} Relators filed the complaint in their personal capacities and on behalf of the municipal corporation pursuant to R.C. 733.59. They request that this court issue a writ of mandamus compelling respondent to "immediately [and] fully comply with R.C.

[1] As noted by relators, the ordinance failed to pass as an emergency measure.

731.29 – including performing his ministerial duty to transmit the relevant materials to the board of elections." Relators allege that they lack a plain and adequate remedy in the ordinary course of law. Relators also claim costs and fees pursuant to R.C. 733.61.

{¶ 16} On March 31, 2015, we issued an alternative writ of mandamus, ordering respondent to answer the complaint or file a motion to dismiss. On April 28, 2015, respondent answered the complaint, denying that relators were entitled to a writ. He then filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C) on May 21, 2015.

{¶ 17} By order dated June 2, 2015, we indicated that we would treat respondent's motion as a motion for summary judgment, pursuant to Civ.R. 56(C). Relators filed their own motion for summary judgment on June 30, 2015. Both parties opposed the other's motion, and the issues presented in those motions are now before this court.

III. Law and Analysis

{¶ 18} The rules of civil procedure govern original actions filed in the courts of appeal. 6th Dist.Loc.App.R. 6. Summary judgment will be granted when there is no genuine issue of material fact and, construing the evidence most strongly in the nonmovant's favor, reasonable minds can only conclude that the movant is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 19} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). Once the movant supports the motion with appropriate

evidentiary materials, the nonmovant "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 20} In this case, relators argue that there are no genuine issues of material fact in dispute and that, pursuant to R.C. 731.29, they are entitled to a writ of mandamus, as a matter of law. Conversely, respondent alleges that he is entitled to judgment because relators cannot show a clear legal right to the relief they have requested.

{¶ 21} A writ of mandamus is an extraordinary remedy. "Although a city auditor or a village clerk has discretion as to whether to certify a referendum petition, the exercise of that discretion is not final." *Truman v. Village of Clay Center*, 160 Ohio App.3d 78, 2005-Ohio-1385, 825 N.E.2d 1182, ¶ 16 (6th Dist.), citing *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 122 N.E. 39 (1918). A writ of mandamus will lie to compel the auditor or clerk to act when the petitioner has demonstrated (1) a clear legal right to have the petition transmitted to the board of elections, (2) a corresponding clear legal duty of the auditor or clerk to do so, and (3) the lack of an adequate remedy in the ordinary course of law. *Id.* at ¶ 16, citing *State ex rel. Webb v. Bliss*, 99 Ohio St.3d 166, 2003-Ohio-3049, 789 N.E.2d 1102, ¶ 8. "The constitutional right of citizens to referendum is of paramount importance, and courts liberally construe municipal referendum powers so

as to permit rather than to preclude their exercise by the people." (Citation omitted.) *State ex rel. Laughlin v. James*, 115 Ohio St.3d 239, 2007-Ohio-4811, 874 N.E.2d 1145, ¶ 25.

A. Applicable Constitutional and Statutory Provisions

{¶ 22} Section 1f of Article II of the Ohio Constitution provides,

> 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.

{¶ 23} The statutory right to a referendum is set forth in R.C. 731.29, which provides, in part,

> Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code. * * *
>
> When a petition, signed by ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation, is filed with the city auditor or village clerk within thirty days after any ordinance * * * is * * * passed by the legislative authority of a village, * * * ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such auditor or clerk shall, after ten days, and not

> later than four p.m. of the ninetieth day before the day of election, transmit a certified copy of the text of the ordinance or measure to the board of elections. The auditor or clerk shall transmit the petition to the board together with the certified copy of the ordinance or measure. * * *

{¶ 24} Once a petition and ordinance are delivered to the board of elections, the board is then charged with examining the petition, and if appropriate, submitting the ordinance to the voters. R.C. 731.29.

{¶ 25} Not all legislative acts by a municipality, however, are subject to referendum. The Ohio General Assembly, with the enactment of R.C. 731.30, specifically limited certain laws from the operation of the referendum. *State ex rel. Bramblette v. Yordy*, 24 Ohio St.2d 147, 149-150, 265 N.E.2d 273 (1970). R.C. 731.30 provides, in part,

> Whenever the legislative authority of a municipal corporation is required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, sections 731.28 to 731.41, inclusive, of the Revised Code shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto.[2]

[2] R.C. 731.30 also exempts three classes of ordinances from the operation of the referendum: (1) those providing for appropriation for current expense; (2) those providing for certain street improvements; and (3) emergency ordinances necessary for

B. Relators' Motion for Summary Judgment

{¶ 26} Relators argue that they have complied with the procedural requirements set forth in R.C. 731.29, that the role of the respondent, as auditor, is "merely ministerial," and that he has "usurped the authority of the Sandusky county board of elections" by failing to transmit the petition and ordinance.

{¶ 27} The rest of relators' arguments are responsive to the case put forth by respondent, namely that R.C. 731.30, not R.C. 731.29, applies to this case.

C. Respondent's Motion for Summary Judgment

{¶ 28} Respondent's primary argument is that the right to a referendum does not apply to Ordinance No. 2014-3742 because that ordinance was the eighth ordinance pertaining to this public improvement project. Because the right to referendum only applies to "the first ordinance" under R.C. 731.30, respondent argues that relators' request for a writ should be denied.

{¶ 29} Second, respondent argues that relators had an adequate remedy at law but failed to pursue it. Respondent's position is that Ordinance No. 2008-3462, passed in June of 2008, was "the first ordinance" with regard to the project, and relators' right to pursue a referendum, if at all, was at that time.

{¶ 30} Third, respondent claims that relators are barred from recovering attorneys fees because they failed to satisfy the requirements set forth in R.C. 733.59 before filing

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the immediate preservation of the public peace, health or safety. *State ex rel. Bramblette* at 149-150. Those exemptions are not at issue here.

suit. Fourth, respondent argues that relator Collins does not have standing to sue because she is neither a resident, nor a taxpayer, in the city of Fremont. Finally, respondent argues that relators cannot show a special interest in city funds that are different than the interest held by other taxpayers in the city of Fremont, and therefore their claim must fail.

{¶ 31} The crux of this case is whether R.C. 731.30 applies. Application of that statute would thwart relators' pursuit of a referendum under R.C. 731.29.

{¶ 32} As explained by the Ohio Supreme Court, "whenever the legislative authority is required to pass more than one ordinance or measure to complete the legislation necessary to make and pay for any public improvement, only the first ordinance or other measure required to be passed is subject to referendum." *State ex rel. Bramblette*, 24 Ohio St.2d at 150, 265 N.E.2d 273 (finding a municipal charter that exempts from referenda those ordinances that raise revenue is constitutional). Thus, where a series of ordinances are necessary to make and pay for a public improvement, the referendum procedure is available only to challenge the first ordinance relating to the improvement but not subsequent ones. *See State ex rel. Kleem v. Kafer*, 13 Ohio App.3d 405, 469 N.E.2d 533 (9th Dist.1983), paragraph two of the syllabus (denying writ where "the ordinance under attack represents the third legislative action on the public improvement in question.").

{¶ 33} In the years since passage of Ordinance No. 2008-3462, Fremont City Council has passed the following measures that are specific to the removal of the Ballville Dam:

Resolution No. 2008-1752, October 16, 2008, authorized the city to apply for $3,800,000 in funding from the Water Pollution Control Loan Fund ("WPCLF") for the purpose of "restoring and protecting valuable water resources through the Ballville Dam removal."

Resolution No. 2011-1811, passed on January 6, 2011, authorized the city to apply for additional WPCLF funding for "the removal of the Ballville Dam and restoration of the Sandusky River and declaring an emergency." The resolution called for a sponsorship amount "not to exceed $2,500,000."

Ordinance No. 2013-3655, passed on September 19, 2013, authorized an expenditure of $74,000 to an engineering firm under contract with the city "for the Ballville Dam Project * * *."

Ordinance No. 2013-3656, passed on September 19, 2013, authorized payment to a consultant up to $127,000 for "the Ballville Dam Removal - Phase III."

Ordinance No. 2014-3695, passed on April 3, 2014, authorized the city's safety service director to enter into a contract with MWH Constructors, Inc. for "options for either removing or repairing the dam * * *." The ordinance includes a preliminary construction budget of $10,700.00.

> Ordinance No. 2014-3722, passed on July 17, 2014, authorized an expenditure of $11,500 for consulting services "for the Ballville Dam Project."

{¶ 34} Ordinance No. 2014-3742, at issue herein, is the most recent; it was passed on November 20, 2014. As discussed, it directs the mayor to "proceed with the process of removing the dam."

{¶ 35} Relators argue that R.C. 731.30 does not apply to Ordinance No. 2014-3742 for two reasons. First, they claim that the ordinance was the "first time city council actually ordained removal of the Ballville Dam." Relators urge "this court [to] reject the auditor's attempt to act as this court's lexicographer by artificially defining 'Project' to include the making of the reservoir with the removal of the dam."

{¶ 36} It is not respondent who defined "the project" to include removal of the dam; rather, it was the ODNR and the mayor who did so in 2008 with the negotiated subsidy agreement. That agreement was attached and referenced in Ordinance No. 2008-3462. Elsewhere, relators state incorrectly that "the agreement with ODNR doesn't require removal of the dam." The 2008 ordinance and subsidy agreement specifically call for "the removal of the Ballville Dam." We reject relators' first argument.

{¶ 37} Second, relators argue that R.C. 731.30 "is not implicated" because "there is no 'public improvement' at issue in the November [2014] ordinance." This argument only makes sense if respondent was arguing that the November 2014 ordinance was the "first ordinance" involving a "public improvement." Respondent argues that the

November 2014 ordinance is not, in fact, the first ordinance and therefore, relators are not entitled to a referendum.

{¶ 38} As to the merits of their claim, we disagree that demolition of a dam should not be considered a "public improvement" under R.C. 731.30. Relators argue that "tearing down something old is not the same thing as 'making' a 'public improvement,' which contemplates making something not previously existing or improving upon an existing structure that will not be demolished."

{¶ 39} Relators cite no authority to support their position. Moreover, they present the removal of the dam in isolation, without regard to the whole project. By definition, the project also includes the creation of a reservoir.

{¶ 40} We are also guided by R.C. 1311.25, which applies to mechanic liens on public improvement projects. The statute defines "public improvement" to specifically include "demolition * * * of a water system, * * * water works, and any other structure or work of any nature by a public authority."

{¶ 41} Finally, as respondent points out, by way of affidavit, the demolition phase of the project will include several construction projects, including the placement of 15 concrete piers across the Sandusky River and construction of a "notch," a chemical feed building, an intake channel, and wetlands.

{¶ 42} It is clear that the improvement of the public water system and the ecosystem by constructing a reservoir and removing a dam qualifies as a public improvement. We reject relators' second argument.

{¶ 43} Finally, relators accuse the city and the respondent of attempting to "defeat a referendum" and that "[s]uch gamesmanship is not contemplated by the Ohio constitution [sic] or R.C. 731.30." We note, however, that the Ohio Supreme Court has acknowledged that municipalities may pass legislation in such a way as to intentionally defeat a referendum even "if the sole purpose of council * * * is to prevent a vote by the electorate on the legislation." (Citations omitted.) *State ex rel. Laughlin*, 115 Ohio St.3d 239, 2007-Ohio-4811, 874 N.E.2d 1145, ¶ 37.

{¶ 44} For the reasons stated above, we find that Ordinance No. 2014-3742 is a subsequent ordinance that is incidental to, and in furtherance of, a public improvement project that was approved by city council in 2008 with the passage of Ordinance No. 2008-3462. We further find that respondent acted within his discretion when he refused to transmit the petition.

{¶ 45} To obtain a writ of mandamus, relators must prove that they have a clear legal right to the relief prayed for, that respondent is under a clear legal duty to perform the requested act, and that relator has no adequate remedy at law. *State ex rel. Taxpayers League of N. Ridgeville v. Noll*, 11 Ohio St.3d 190, 192, 464 N.E.2d 1007 (1984). Here, relators cannot show a clear legal right to have the petition transmitted to the board of elections or a clear legal duty by respondent to do so. Therefore, relators' request for a writ of mandamus must be denied.

{¶ 46} The remaining arguments raised by respondent are rendered moot by this decision.

IV. Conclusion

{¶ 47} For the foregoing reasons, respondent's motion for summary judgment is granted, relators' motion for summary judgment is denied, and relators' request for a writ of mandamus is denied. The costs of these proceedings are assessed to relators.

Writ denied.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE