

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.  
CITY OF CHILLICOTHE  
Joseph P. Sulzer, Mayor  
35 South Paint Street  
Chillicothe, Ohio 45601

CASE NO. 09-1746

Original Action in Mandamus  
and Prohibition

Relators,

Expedited Election Matter  
Under S.Ct. Prac. R. X, Sec. 9

-v-

ROSS COUNTY BOARD  
OF ELECTIONS  
Address  
Chillicothe, Ohio 45601

Respondent.

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MEMORANDUM IN SUPPORT OF THE WRIT OF MANDAMUS,  
OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

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James L. Mann (0007611)  
City of Chillicothe, Asst. Law Director  
20 East Second Street  
Chillicothe, Ohio 45601

Michael M. Ater  
Ross County Prosecutor  
72 North Paint Street  
Chillicothe, Ohio 45601

Counsel for Relator

Counsel for Respondent

FILED  
SEP 28 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

## I. Writ of Mandamus

The City of Chillicothe (“Chillicothe”) is entitled to a writ of mandamus in this matter compelling the Ross County Board of Elections (“the Board”) to conduct a quasi-judicial hearing with respect to the protest filed and at issue in this matter. In order that a writ of mandamus may be issued, Chillicothe must establish that it has a clear legal right to the requested relief, a clear legal duty exists with the board of elections to grant that relief, and that there is a lack of an adequate remedy in the ordinary course of law. State ex rel. Duncan v. Portage Cty. Board of Elections, 115 Ohio St. 3d 405, 2007 Ohio 5346, ¶8.

As previously recognized by this Court, the lack of an adequate legal remedy in the ordinary course of law is evidenced by the close proximity of the election date in this matter. State ex rel. Canales-Flores v. Lucas Cty. Bd. Of Elections, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, ¶10 cited by Duncan, 115 Ohio St. 3d 405, 2007 Ohio 5346, ¶8. In the instant case, the hearing was conducted on September 2, 2009. The Board has not, and will not, take action to approve its minutes until its October 2009 meeting, and the general election will occur on November 3, 2009.

In order to establish the remaining requirements, Chillicothe must establish “‘that the board of elections engaged in fraud, corruption, abuse of discretion, or clear disregard of statutes or other pertinent law.’ ” Duncan, 115 Ohio St. 3d 405, 2007 Ohio 5346, ¶9 citing Rust v. Lucas Cty. Bd. Of Elections, 108 Ohio St.3d 139, 2005-Ohio-5795, 841 N.E.2d 766, ¶8.

As set forth in the Complaint and accompanying affidavit, the initiative petition came about through the actions of persons and the procedures set forth in R.C. 731.28. Chillicothe then filed a protest in accordance with R.C. 3501.39. In such instances, this Court has clearly held that a protestor is entitled to a quasi-judicial hearing; simply stated, R.C. 3501.39 requires it. State ex rel. Thurn v. Cuyahoga Cty. Bd. Of Elections (1995), 72 Ohio St.3d 289, 291, 649

N.E.2d 1205 (“Since R.C. 3501.39 required a hearing which in some respects resemble a judicial trial, the board exercised quasi-judicial authority in denying Thurn’s protest...); State ex rel. Harbarger v. Cuyahoga Cty. Bd. Of Elections (1996), 75 Ohio St.3d 44, 661 N.E.2d 699; State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. Of Elections (1997), 80 Ohio St.3d 302, 686 N.E.2d 238.

More specifically, R.C. 3501.39(A)(2) reads in pertinent part: “The ... board of elections shall accept any petition described in section 3501.38 of the Revised Code unless ... [a] written protest against the petition ..., naming specific objections, is filed, a *hearing is held*, and a determination is made by the election officials with whom the protest is filed that the petition violates any requirement established by law.” (Emphasis added)

In the present case, Chillicothe filed a protest with the Board specifically stating its protests were made pursuant to R.C. 3501.39. Protests filed pursuant to R.C. 3501.39 are subject to a hearing by the board of elections as clearly stated by the statute. Furthermore, a hearing in such instances includes the introduction of evidence in the forms of sworn testimony and exhibits. Christy v. Summit Cty. Bd. Of Elections (1996), 77 Ohio St.3d 35, 37, 671 N.E.2d 1 (“The board exercised quasi-judicial authority by denying relators’ protests following an R.C. 3501.39 hearing which included sworn testimony.”); Thurn, 72 Ohio St.3d at 291, 649 N.E.2d 1205 (“Thurn filed a protest, and a hearing which included sworn testimony was held by the board.”).

The Board not only abused its discretion by its failure to accept evidence, it has also clearly disregarded applicable statutes and case law. The Board failed to conduct a hearing as contemplated by R.C. 3501.39 and this Court’s previous rulings. Rather, it permitted oral arguments similar to those that might be presented to a court of appeals.

Chillicothe is entitled to an opportunity to present evidence at a quasi-judicial hearing with respect to its protest in this matter. It has a clear legal right to a quasi-judicial hearing, the Board has a clear legal duty to conduct a quasi-judicial hearing, and a writ of mandamus should issue.

I. Writ of Prohibition

A. No law proposed – administrative vs. legislative acts.

In the alternative, Chillicothe is entitled to a writ of prohibition in this matter as the proposed initiative petition is not a proper subject for initiative. To be entitled to the writ, it must be established that (1) the Board has exercised or is about to exercise quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no adequate remedy exists in the ordinary course of law. State ex rel. Stoll v. Logan Cty. Bd. Of Elections, 117 Ohio St.3d 76, 2008 Ohio 333, 881 N.E.2d 1214, ¶28.

In the instant case, a protest was filed in accordance with R.C. 3501.39(A). The purpose of the protest was to challenge the sufficiency of an initiative petition filed pursuant to R.C. 731.28. As noted above, a quasi-judicial hearing is clearly contemplated in such instances and should be conducted by the Board.

In light of the proximity of the general election date, Chillicothe has no adequate remedy at law.

Moreover, it is apparent that the Board intends to place this issue on the ballot regardless of the lack of authority to do so. The proposed initiative petition seeks to overcome administrative acts as opposed to legislative acts. Administrative actions are not subject to initiative proceedings. State ex rel. Upper Arlington v. Franklin County Board of Elections, 119

Ohio St.3d 478, 2008-Ohio-5093, ¶20, citing State ex rel. Oberlin v. Citizens for Responsible Dev. V. Talarico, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶22.

An administrative act is recognized by the Court as one that executes or administers a law, ordinance or regulation already in existence. Upper Arlington, 119 Ohio St.3d 478, 2008-Ohio-5093, ¶21, citing Donnelly v. Fairview Park (1968), 13 Ohio St.2d 1, 42 O.O.2d 1, 233 N.E.2d 500, paragraph two of the syllabus.

In the instant action, Chapter 315 of Chillicothe's Codified Ordinances was clearly enacted in order to administer the previously passed ordinance authorizing the mayor to enter into a contract with Redflex Systems. Without the passage of Chapter 315, there was no way to administer the underlying contract. Any attempt to repeal Chapter 315 is not subject to initiative proceedings.

Moreover, the passage of both Ordinance No. 151-07 and Chapter 315 were administrative acts. Ohio Revised Code 715.05 grants a municipal corporation the authority to "organize and maintain police and fire departments, ... and purchase and hold all implements and apparatus required therefor." R.C. 715.05. Ordinance No. 151-07 incorporates the contract by reference, and specifically provides that the purpose for the use of cameras is to monitor, identify and enforce speed and red light violations and to attempt the reduction of vehicle collisions at specific intersections. Ordinance No. 151-07 and its resulting contract, therefore, were authorized by R.C. 715.05 in order to maintain the police department and hold implements and apparatus for maintenance of that department.

Ordinance 62-08 authorizing the creation of Chapter 315 similarly provides that the purpose of the photo traffic enforcement system is to increase compliance with traffic control signals and speed limits without increased expenses associated with increased police manpower.

Thus, the creation of Chapter 315 was an administrative act that is not subject to initiative petition.

The Board is unauthorized to place the initiative petition on the general election ballot of November 3, 2009 because it is not a proper subject for such a petition.

B. Confusing and misleading to voters.

Chillicothe is also entitled to a writ of prohibition because the initiative petition is confusing and misleading to voters because it is incapable of enforcement or implementation.

The initiative petition represents to voters that the contract entered into by Chillicothe with Redflex Traffic Systems would be terminated when in fact such termination is incapable by initiative petition and could not be enforced. This is true not only for the reasons set forth above (i.e., the ordinance authorizing the contract was an administrative act), but because passage of the initiative petition would impair an existing contract. As such it is an illegal and unconstitutional act and could not be enforced. City of Middletown v. Ferguson (1986), 25 Ohio St.3d 71, 495 N.E.2d 380.

The initiative petition further represents to voters that the traffic law enforcement powers of a law enforcement officer employed by Ross County can be regulated by Chillicothe when in fact passage of the initiative petition could not be enforced. It is axiomatic that a sheriff has a duty to enforce laws, including traffic laws. The initiative petition cannot be enacted to prevent or limit such enforcement authority.

The definition section of the proposed ordinance provides in part:

“b. ‘Qualified traffic law violation’ means a violation of any of the following: (1) any state or local law relating to compliance with a traffic control signal or a railroad

crossing sign or signal; or (2) any state or local law limiting the speed of a motor vehicle.

- d. 'Traffic law photo-monitoring device' means any electronic, photographic, video, radar, laser or digital system used to produce evidence of an alleged traffic violation and/or the identity of the operator of any motor vehicle.
- e. 'Mobile speed enforcement vehicle' means any vehicle that uses any electronic, photographic, video, radar, laser or digital system to produce evidence of the speed of motor vehicles or the identity of the operator of any motor vehicle."

These definitions describe not only the equipment provided by RedFlex under its contract, but also every law enforcement vehicle utilized in the City. The problem caused by these overly broad definitions is apparent when section 1 of the proposed ordinance is reviewed.

"Section 1: The City of Chillicothe, including its various boards, agencies and departments, shall not use any traffic law photo-monitoring device or mobile speed enforcement vehicle for the enforcement of a qualified traffic law violation, unless a law enforcement officer is present at the location of the device or vehicle and personally issues the ticket to the alleged violator at the time and location of the violation."

This means that a city police officer that clocked a vehicle by radar or laser equipment contained in the law enforcement vehicle may not radio another law enforcement officer to stop a vehicle for a speed violation unless the officer who operated the radar or laser equipment requires the officer making the traffic stop to return to the location of the violation with the offender. The officer who operated the radar or laser equipment would then have to personally issue the ticket. This places the proposed ordinance in direct conflict with the provisions of Section 4511.091 of the Ohio Revised Code which provides that the law enforcement officer

receiving the radio message may arrest the driver of the motor vehicle and issue a citation for the violation.

The initiative petition cannot restrict the traffic law enforcement powers of a law enforcement officer employed by the Chillicothe Police Department or the Ross County Sheriff Department from enforcing speed and red light violations in the event that the patrol car or officer utilizes a mounted camera, a radar, or a laser system for enforcement purposes when in fact passage of the initiative petition could not be enforced. Authority to utilize such devices is set forth in R.C. 4511.091. Nor can the initiative petition restrict the traffic law enforcement powers of a law enforcement officer employed by the Chillicothe Police Department or the Ross County Sheriff Department from enforcing speed and red light violations in the event that law enforcement utilizes more than one officer for enforcement purposes. R.C. 4511.091(B).

The initiative petition is confusing and misleading to voters in other ways as well and, as such, is incapable of enforcement. It represents to voters that future councils for the City of Chillicothe would be precluded from entering future contracts when such action is precluded. Ferguson, 25 Ohio St.3d 71, 495 N.E.2d 380.

It implies that the Ohio Rules of Civil Procedure and Title 23 of the Ohio Revised Code would apply to any civil proceeding for the enforcement of *any* traffic law violation and is not limited in scope. As a result, it fails to comply with the Traffic Rules adopted by this Court, and it exceeds the scope of the Ohio Rules of Civil Procedure. See Traf. R. 1; Civ. R. 1.

Finally, the initiative petition represents to voters that the procedures set forth in Chapter 119 of the Ohio Revised Code would apply to any administrative proceeding for the enforcement of any traffic law violation when in fact those procedures apply to state agencies and not

administrative proceedings as contemplated in appeals of administrative rulings in municipal government quasi-judicial hearings. See R.C. 119.01.

The resulting cumulative effect is one that is incapable of implementation and enforcement of the initiative petition on any level. It is therefore misleading and confusing to the voting public and a writ of prohibition should issue.

## II. Conclusion.

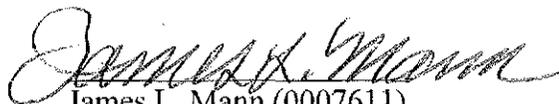
### A. Chillicothe is entitled to a Writ of Mandamus

This Court has previously held that a writ of mandamus will be granted when a relator has a clear legal right to the requested relief, a clear legal duty exists with the board of elections, and there is a lack of an adequate remedy in the ordinary course of law. Duncan, 115 Ohio St. 3d 405, 2007 Ohio 5346, ¶8. Therefore, Chillicothe respectfully requests that this Court issue a writ of mandamus ordering the Board to conduct a quasi-judicial hearing to determine whether the initiative petition should be placed on the November 3, 2009 general election ballot.

### B. Chillicothe is entitled to a Writ of Prohibition

In the alternative, a writ of prohibition will issue where a board of elections has exercised or is about to exercise quasi-judicial power, the exercise of that power is unauthorized by law, and denying the writ will result in injury for which no adequate remedy exists in the ordinary course of law. Stoll, 117 Ohio St.3d 76, 2008 Ohio 333, 881 N.E.2d 1214, ¶28. Chillicothe is entitled to a Writ of Prohibition and requests that the Court issue such Order accordingly.

Respectfully submitted,

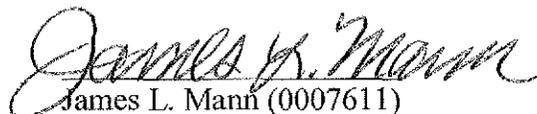


James L. Mann (0007611)  
Assistant Law Director  
20 East Second Street  
Chillicothe, Ohio 45601  
Phone: 740-774-4175  
Fax: 740-773-6081  
lawdirector@horizonview.net  
Counsel for Relator City of Chillicothe

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following via facsimile,  
and regular U.S. mail postage prepaid this 28<sup>th</sup> day of September 2009:

Michael M. Ater  
Ross County Prosecuting Attorney  
72 North Paint Street  
Chillicothe, Ohio 45601



James L. Mann (0007611)  
Assistant Law Director  
Counsel for Relator City of Chillicothe