

IN THE COURT OF COMMON PLEAS  
COLUMBIANA COUNTY, OHIO

**ORIGINAL**

CITY OF EAST LIVERPOOL, OHIO

**FILED**  
COLUMBIANA COUNTY  
COURT OF COMMON PLEAS  
PLAINTIFF

CASE NO. 2019 CV 462

-VS-

**ANTHONY J. DATTILO**  
CLERK

DECISION AND  
JUDGMENT ENTRY  
(NOT FINAL OR APPEALABLE)

EAST LIVERPOOL CITIZENS AGAINST  
TRAFFIC CAMERAS, et. al., )  
)  
DEFENDANTS )

At the conclusion of the hearing held October 1, 2019, the Court took under advisement the request of the Plaintiff for a Temporary Restraining Order (TRO). The Court is now in receipt of a memorandum filed on behalf of the City of East Liverpool, Ohio (City of East Liverpool), a memorandum on behalf of East Liverpool Citizens Against Traffic Cameras (East Liverpool Citizens), and a post-hearing brief filed on behalf of the Columbiana County Board of Elections (Board of Elections). The issues are now before the Court for further consideration and decision.

Legal Analysis

A TRO may be granted without notice only if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition."<sup>1</sup> An injunction is an extraordinary remedy. The allowance of an injunction rests in the sound

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<sup>1</sup> See, Civ. R. 65(A).

discretion of the court and depends on the facts and circumstances surrounding the particular case.<sup>2</sup>

The City of East Liverpool initially requests a TRO "to prevent the initiative measure from being on the ballot for the November 5, 2019 General Election."<sup>3</sup> At the hearing on October 1, 2019, Attorney Payne also requested alternative relief: that this Court temporarily restrain the Board of Elections from counting or tabulating the vote on the initiative measure if it appears on the ballot for the November 5, 2019 General Election. These requests will be considered separately.

1. Preventing the Initiative Petition of the Citizens of East Liverpool From Appearing on the Ballot for the November 5, 2019 General Election.

The City of East Liverpool has no charter and is therefore a statutory city subject to the general laws of the State of Ohio.<sup>4</sup> Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation by the general assembly may be proposed by initiative petition.<sup>5</sup> At issue is the Initiative Petition circulated by the Citizens of East Liverpool (Initiative Petition).<sup>6</sup> The Initiative Petition sets forth a Proposed Ordinance: AN ORDINANCE RESTRICTING THE USE OF MOBILE SPEED ENFORCEMENT VEHICLES AND TRAFFIC LAW PHOTO-MONITORING DEVICES AND REPEALING ORDINANCE NUMBER

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<sup>2</sup> See, Perkins v. Village of Quaker City (1956), 165 Ohio St. 120, 133 N.E. 2d 595, syllabus.

<sup>3</sup> Affidavit of Attorney Charles L. Payne, filed September 26, 2019, ¶ 2.

<sup>4</sup> Atwood v. Judge, Director (1977), 63 Ohio App. 2d 94, 103 (Ohio App. Dist. 7), 409 N.E. 2d 1022.

<sup>5</sup> R.C. § 731.28.

<sup>6</sup> Complaint, Exhibit 2.

17, 2017 AND CHAPTER 309 OF THE CODIFIED ORDINANCE OF EAST LIVERPOOL, OHIO.<sup>7</sup>

Central to this Court's consideration is R.C. § 731.28, a statute pertaining to ordinances and measures proposed by initiative petition. Among other things, R.C. § 731.28 states a board of elections shall submit a proposed ordinance or other measure for the approval or rejection of the electors of the municipal corporation at the next general election occurring subsequent to ninety days after the auditor or clerk certifies the sufficiency and validity of the initiative petition to the board of elections.

The City of East Liverpool maintains that Marilyn Bosco, Auditor of the City of East Liverpool, did not certify the sufficiency and validity of the Initiative Petition and therefore it cannot appear on the ballot for the November 5, 2019 General Election. The Board of Elections and the East Liverpool Citizens, on the other hand, maintain Ms. Bosco as Auditor did certify the sufficiency and validity of the Initiative Petition to the Board of Elections and therefore it must appear on the ballot for the November 5, 2019 General Election.

In her letter to the Board of Elections dated August 7, 2019, Ms. Bosco wrote, "I have reviewed the petition as required by law. I am filing pursuant to the order of the court in the case of East Liverpool Citizens Against Traffic Cameras, et. al. City of East Liverpool, et. al., Case Number 2017 CVI 481 (sic). Any certification on the sufficiency and validity of the petition will be revoked should the 7th (District) Court of Appeals reverse the lower court order."<sup>8</sup>

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<sup>7</sup> Complaint, Exhibit 2.

<sup>8</sup> Complaint, Exhibit 3B

The lower court order that Ms. Bosco refers to in her August 7, 2019 letter is the Opinion and Judgment Entry of Hon. Judge C. Ashley Pike, filed August 6, 2018, in Columbiana County Court of Common Pleas Case No. 2017-CV-481 (Case No. 2017-CV-481).<sup>9</sup> Clearly, Ms. Bosco was "filing" the Initiative Petition with the Board of Elections on August 7, 2019, pursuant to that Opinion and Judgment Entry in Case No. 2017-CV-481. In pertinent part, that Opinion and Judgment Entry provides, "Auditor Marilyn Bosco is *enjoined from refusing* to certify the validity and sufficiency of the Committee's (East Liverpool Citizens) Initiative Petitions to the Board of Elections simply because the effect of the initiative, if approved by the voters, would be to repeal existing legislation previously passed by City Council."<sup>10</sup>

Because Ms. Bosco was enjoined from refusing to certify the validity and sufficiency of the Initiative Petition, her action in filing the Initiative Petition on August 7, 2019 with the Board of Elections can be seen only as satisfying this requirement of R.C. § 731.28 as well as the order of Judge Pike. This conclusion is borne out in several ways based upon the record.

First is the language of the August 7, 2019 letter itself. It purports to reserve the right to revoke any certification based upon a future decision of the Seventh District Court of Appeals. If Ms. Bosco did not certify the Initiative Petition by virtue of her August 7, 2019 letter, it is hard to understand how she can claim to reserve any right to later revoke it. On its face, R.C. § 731.28 does

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<sup>9</sup> Complaint, Exhibit 3A.

<sup>10</sup> *Id.*, page 6 (Emphasis added).

not grant a city auditor or village clerk the right to revoke the certification of the sufficiency and validity of an initiative petition once granted.

Because R.C. § 731.28 confers no such authority on Ms. Bosco, her letter to the Board of Elections dated September 23, 2019 must be viewed as a legal nullity. It is through that letter that Ms. Bosco attempted to revoke "the implication, if any" that she certified the sufficiency and validity of the Initiative Petition by filing it with the Board of Elections on August 7, 2019.<sup>11</sup> In addition to being a legally ineffective, the September 23, 2019 letter serves as simply more evidence that certification of the sufficiency and validity as required by R.C. § 731.28 was accomplished through Ms. Bosco's letter of August 7, 2019 and her simultaneous "filing" of the Initiative Petition with the Board of Elections.

In addition, the September 23, 2019 letter of Ms. Bosco exceeded the authority conferred upon her by R.C. § 731.28. The statutory authority to certify the sufficiency and validity of an initiative petition has been described as "limited and discretionary" and "limited to form and not substance." A city auditor or village clerk exceeds this limited authority of R.C. § 731.28 by attempting to resolve substantive questions not evident on the face of the petition or by engaging in "judicial or quasi-judicial determinations."<sup>12</sup>

In her letter of September 23, 2019, Ms. Bosco again does not provide to the Board of Elections any reason substantiating her claim that she "cannot certify" the sufficiency and validity of the Initiative Petition. To the extent Ms. Bosco sought out or relied on a legal opinion of Attorney Payne or believed that

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<sup>11</sup> See, Complaint, Exhibit 3.

<sup>12</sup> State ex rel. North Main Street Coalition v. Webb (2005), 106 Ohio St. 3d 407, 835 N.E. 2d 1222, 2005-Ohio-5009, ¶ 27-30.

the Initiative Petition is actually a referendum petition, she engaged in a judicial or quasi-judicial determination and ran afoul of the limited authority conferred on her by R.C. § 731.28.<sup>13</sup>

Careful consideration of the record, including the City of East Liverpool's arguments, buttresses these conclusion. Attorney Payne urged that Ms. Bosco filed the Initiative Petition with the Board of Elections on August 7, 2019 so as to *comply* with the order of Judge Pike in Case No. 2017-CV-481.<sup>14</sup> Because Judge Pike's order enjoined Ms. Bosco from failing to certify the validity and sufficiency of the Initiative Petition, without a stay or other legal challenge, there was only one way for Ms. Bosco to comply. By certifying the validity and sufficiency of the Initiative Petition to the Board of Elections. Notably, the decision of Judge Pike in Case No. 2017-CV-481 was in effect for nearly a year before the City of East Liverpool sought any stay of that decision.<sup>15</sup>

At this juncture, laches also bars the argument of the City of East Liverpool as to R.C. § 731.28. According to the Ohio Supreme Court, laches may bar relief in an election-related matter if the person seeking relief fails to act with the "utmost diligence."<sup>16</sup> The elements of a laches defense are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an

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<sup>13</sup> Complaint, ¶ 6, 12.

<sup>14</sup> Emphasis added.

<sup>15</sup> See, Motion for Stay Pending Appeal with Memorandum and Request for an Expedited Hearing (Motion for Stay), filed June 28, 2019 in case No. 2017-CV-481.

<sup>16</sup> State ex. rel. Monroe v. Mahoning County Bd. of Elections (2013), 137 Ohio St. 3d 62, 997 N.E. 2d 524, 2013-Ohio-4490, ¶ 30 quoting State ex rel. Fuller v. Medina Cty. Bd. of Elections (2002), 97 Ohio St. 3d 221, 778 N.E. 2d 37, 2002-Ohio-5922, ¶ 7.

excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.<sup>17</sup>

The elements of laches apply here. The Opinion and Judgment Entry of Judge Pike in Case No. 2017-CV-481 was filed on August 6, 2018.<sup>18</sup> As of that date, Ms. Bosco was enjoined from failing to certify the sufficiency and validity of the Initiative Petition. Although the City of East Liverpool duly filed its Notice of Appeal on August 24, 2018, it unreasonably delayed seeking any stay until many, many months later, on June 28, 2019.<sup>19</sup> A stay was granted on August 15, 2019, but *only after* the August 7, 2019 deadline by which Ms. Bosco was obligated by R.C. § 731.28 to certify the sufficiency and validity of the Initiative Petition to the Board of Elections.<sup>20</sup>

The City of East Liverpool knew or should have known of the harm that would be caused by its unreasonable delay. August 7, 2019 was also the deadline for the Board of Elections to place the Initiative Petition on the ballot for the November 5, 2019 General Election. This fact was known to the City of East Liverpool.<sup>21</sup> Yet even without a stay, the City of East Liverpool delayed for nearly a year until that very deadline.

Upon receipt of the Initiative Petition at issue and Ms. Bosco's letter of August 7, 2019, the Board of Elections acted on it. The Board of Elections met on August 16, 2019 and certified the issue to the ballot for the November 5, 2019

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<sup>17</sup> State ex rel. Carrier v. Hilliard City Council (2016), 144 Ohio St. 3d 592, 45 N.E. 3d 1006, 2016-Ohio-155, ¶ 8.

<sup>18</sup> Complaint, Exhibit 3A.

<sup>19</sup> See, Motion for Stay, filed June 28, 2019 in case No. 2017-CV-481

<sup>20</sup> Complaint, Exhibit 3C.

<sup>21</sup> Motion for Stay, page 2; Complaint ¶ 6.

General Election. The ballot for the November 5, 2019 General Election is now printed and the language of the Initiative Petition appears thereon. The language of the Initiative Petition cannot now be removed from the ballot without interfering with and/or perhaps jeopardizing the integrity of the results of other matters to be decided at the November 5, 2019 General Election.

Under these circumstances, the delay of the City of East Liverpool and the resulting prejudice it caused cannot be excused. In reaching this conclusion this Court has considered the totality of the particular facts and circumstances of this case as it must do when considering the propriety of a TRO. The facts include that on August 7, 2019 Ms. Bosco continued to be enjoined from refusing to certify the sufficiency and validity of the Initiative Petition: she gave no reason for her claimed failure to do so; and she purportedly reserved her right to revoke "the implication, if any" of her certification. In light of these facts, the simultaneous filing of the Initiative Petition with the Board of Elections, coupled with the August 7, 2019 letter of Ms. Bosco, certainly serves as "something, however informal, in writing" which is a communication of record that the Board of Elections construed and accepted as a "request to place an issue before the electors."<sup>22</sup>

2. Temporarily Restraining the Board of Elections From Counting or Tabulating any Vote on the Initiative Petition if it Appears on the Ballot for the November 5, 2019 General Election.

The City of East Liverpool maintains that it is entitled to a TRO for other reasons, including that the Initiative Petition is a referendum that is time-barred

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<sup>22</sup> See, State of Ohio ex rel. Beckstedt v. Eyrich (1963), 120 Ohio App. 338, 343 (Ohio App. Dist. 1), 195 N.E. 3d 371, 375



as a matter of law.<sup>23</sup> Although addressed by the Seventh District Court of Appeals in a footnote, this Court does not view that issue as decided.<sup>24</sup> That issue, then, presents an ongoing justiciable case or controversy.

If the Initiative Petition is actually a referendum that is time-barred, the City of East Liverpool will sustain irreparable injury, loss, and/or damage if the votes on the Initiative Petition are counted or tabulated and the Initiative Petition prevails at the November 5, 2019 General Election.

#### Conclusion

For the reasons already stated, the City of East Liverpool is not entitled to an order preventing the Initiative Petition of the Citizens of East Liverpool from appearing on the ballot for the November 5, 2019 General Election.

Until further Order, the City of East Liverpool is hereby granted an order temporarily restraining the Board of Elections from counting or tabulating the vote on the Initiative Petition of the Citizens of East Liverpool that will appear on the ballot for the November 5, 2019 General Election. This should not be construed as restraining the Board of Elections from counting or tabulating the results of any other matter or contest to be decided at the November 5, 2019 General Election or taking any other action required by law.

The Complaint seeks relief, including a preliminary and permanent injunction.<sup>25</sup> Based upon its research, this Court concludes this decision is not a final appealable order.<sup>26</sup>

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<sup>23</sup> Complaint, ¶ 12.

<sup>24</sup> Complaint, Exhibit 3D, page 7, fn 4.

<sup>25</sup> Complaint, ¶ d of request for relief.

Pursuant to Civ. R. 65(B)(2), the Court gives notice of its intention to combine the request of the City of East Liverpool for a Preliminary and/or Permanent Injunction with a trial on the merits. At this juncture it appears that a legal issue remains for determination: whether the Initiative Petition is actually a referendum that is time barred as a matter of law. Counsel are invited to file their respective legal briefs targeting that issue and/or any other likely to be encountered at the time of the further hearing and/or trial on the merits, which is hereby scheduled for **October 16, 2019 at 9:00 a.m.**

IT IS SO ORDERED.

  
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Scott A. Washam, Judge

October 8, 2019

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<sup>26</sup> See, Nexus Gas Transmission, LLC v. Camelback, Ltd. (2016), 2016 WL 697594 (Ohio App. Dist. 5), 2016-Ohio-624, ¶ 22; See, also, Jacob v. Youngstown Ohio Hospital Co., LLC (2012), 2012 WL 1035018 (Ohio App. Dist. 7), 2012-Ohio-624, ¶ 24.