

CASE NO. 2014-CA-00231

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IN THE COURT OF APPEALS  
FIFTH APPELLATE DISTRICT  
STARK COUNTY, OHIO

(Appeal from Judgment Entered in  
Stark County Common Pleas Court  
Case No. 2014CV00757)

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CITY OF NORTH CANTON  
*Plaintiff/Appellee*

vs.

CHARLES OSBORNE, et al.  
*Defendants/Appellants*

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**BRIEF OF APPELLANTS**

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**ASSIGNMENTS OF ERROR**

**FIRST ASSIGNMENT OF ERROR:**

**THE TRIAL COURT ERRED IN FINDING THAT THE PEOPLE'S INITIATIVE HEALTHCARE ORDINANCE CONFLICTS WITH THE NORTH CANTON CHARTER.**

**SECOND ASSIGNMENT OF ERROR:**

**THE TRIAL COURT ERRED IN FINDING THAT AN AMBIGUITY IN THE NORTH CANTON CHARTER MUST BE RESOLVED IN FAVOR OF THE PLAINTIFF.**

## STATEMENT OF THE CASE

This action concerns the validity of that certain initiative petition overwhelmingly passed by the voters of the City of North Canton in the General Election held on November 6, 2012. (hereinafter “Initiative Healthcare Ordinance”) More than a year and a half after the electorate approved the Initiative Healthcare Ordinance, on March 28, 2014, the Appellee City of North Canton (hereinafter “North Canton”) filed a Complaint for Declaratory Judgment in the Stark County Court of Common Pleas, seeking a declaration that the Initiative Healthcare Ordinance violates the North Canton Charter and is thus void despite reflecting the clear will of the citizens of North Canton. The Appellants (hereinafter “Initiative Proponents”) filed their Answer and Counterclaim on May 23, 2014, seeking, *inter alia*, a declaration that the Initiative Healthcare Ordinance is in fact a valid and enforceable ordinance of North Canton, effective December 2, 2012. In doing so, Initiative Proponents sought to uphold the very principle of direct legislation guaranteed to the people by the Constitution of Ohio.

Pursuant to the trial court’s briefing schedule, the parties submitted written briefs in support of their respective positions on September 19, 2014. Each party also submitted reply briefs on October 10, 2014. On December 2, 2014, the trial court issued its Judgment Entry declaring the Initiative Healthcare Ordinance “invalid because it conflicts with the North Canton Charter.” Judgment Entry p. 4. Having found the people’s Initiative Healthcare Ordinance void, the trial court dismissed all remaining claims. Initiative Proponents filed a timely appeal to this Court on December 19, 2014.

## STATEMENT OF THE FACTS

In the months preceding the November 2012 General Election, Initiative Proponents circulated an initiative petition proposing an ordinance “ending city-paid family health insurance benefits received by family members of part-time elected officials and limiting city-paid health insurance benefits for individual part-time elected officials.” That proposal was widely known as Issue 5, but, for purposes of this Brief, has and will be referred to as the Initiative Healthcare Ordinance. The clearly expressed purpose of the initiative was to reduce the cost of city government by eliminating city-paid health insurance benefits to part-time elected officials who have health insurance benefits available from their full-time employers, and, in any event, eliminating family health insurance coverage for said part-time elected officials.

It is a fundamental tenet of our society that the people have an absolute right to initiate and adopt their own legislation. This right is expressly guaranteed and reserved to the people by the Constitution of Ohio. In advocating for the Initiative Healthcare Ordinance, Initiative Proponents acted out of civic concern. But, more importantly, they *acted under* the Constitutional authority afforded citizens who choose to constructively engage in the political process.

Following circulation of the initiative petition and in strict compliance with all applicable laws of the State of Ohio, the ballot language was approved by the Law Director for the City of North Canton, the North Canton Clerk of Council, the North Canton Director of Finance, the Secretary of State of Ohio, and the Board of Elections of Stark County, Ohio. There is no dispute that the Initiative Proponents complied with all procedural requirements and that the initiative was properly and lawfully submitted for the consideration of the people of North Canton.<sup>1</sup>

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<sup>1</sup> It should be noted that at no time during the initiative process did any representative of North Canton express any concern or belief that the proposed initiative was violative of the North Canton Charter.

The efforts of Initiative Proponents culminated on November 6, 2012, when the Initiative Healthcare Ordinance was placed on the ballot and submitted to the entire electorate of North Canton for ultimate determination. North Canton voters overwhelmingly endorsed the proposal with a seventy-two percent (72%) passage rate. The election results were then certified by the Stark County Board of Elections on November 27, 2012.

Under Ohio law, an “[o]rdinance proposed by initiative petition and referendums receiving an affirmative majority of votes cast thereon, shall become effective on the fifth day after the day on which the Board of Elections certified the official vote on such questions.” O.R.C. §731.31. Accordingly, pursuant to Ohio law, the Initiative Healthcare Ordinance was lawfully enacted on December 2, 2012. Since Ohio prohibits mid-term changes in compensation of elected officials (O.R.C. §731.07), the lawful effective date of the Initiative Healthcare Ordinance was December 1, 2013, concurrent with the biennial election of the North Canton Council and Mayor.

Nevertheless, in defiance of the plain statutory language, North Canton refused to recognize the Initiative Healthcare Ordinance as a valid and enforceable law. Despite the unequivocal will of the people of North Canton, and in outright defiance of the right of the people to initiate legislation, North Canton declared the Initiative Healthcare Ordinance void.

After being confronted by concerned citizens and the local media as to why elected officials continued to accept city-paid benefits in violation of the Initiative Healthcare Ordinance, on March 24, 2014, North Canton enacted Ordinance No. 23-14, which is substantively similar in effect to the Initiative Healthcare Ordinance, but which, by its terms, would not be effective until December 1, 2015. Ordinance No. 23-14 can only be described as a public relations cover-up. It was passed in an unsuccessful attempt to silence the public outcry

following North Canton's refusal to recognize and enforce the Initiative Healthcare Ordinance. Further, passed a mere four days prior to filing this action, Ordinance No. 23-14 was undoubtedly promulgated in anticipation of this litigation. North Canton's elected officials fail to recognize the electorate as the superior legislative authority. They insist, contrary to the law, that they alone have the authority to legislate the provision of health insurance benefits to elected officials. As demonstrated below, North Canton's position is without legal merit and pointedly wrong. To conclude otherwise is to reject one of the most basic principles of our democracy, that we are a government of the people, by the people and for the people.

### **LAW AND ARGUMENT**

#### **FIRST ASSIGNMENT OF ERROR:**

#### **THE TRIAL COURT ERRED IN FINDING THAT THE PEOPLE'S INITIATIVE HEALTHCARE ORDINANCE CONFLICTS WITH THE NORTH CANTON CHARTER.**

##### ***Issue Presented for Review:***

**The citizens of North Canton and the North Canton City Council hold a concurrent power to enact healthcare legislation and in finding otherwise the trial court effectively deprived the electorate of its Constitutional right to actively participate in the legislative process and effectively invalidated the initiative provision of the North Canton Charter.**

The trial court's decision not to recognize the concurrent legislative authority shared by the North Canton City Council and the citizens of North Canton reflects a failure to appreciate the proper function and weight of the municipal initiative power. In justifying its decision to invalidate the Initiative Healthcare Ordinance, the trial court states, "North Canton's charter does not conflict with Ohio's statutes regarding City Council setting compensation levels and with initiative actions. Additionally, [m]unicipal charters must be construed to give effect to all separate provisions and to harmonize them with statutory provisions whenever possible."

Judgment Entry p. 3. Initiative Proponents never argued that the North Canton Charter was in conflict with Ohio law. Rather, the Initiative Proponents posited that since the Charter did not expressly confer unto Council the sole and exclusive authority to set compensation, the initiative provision of the Charter must be interpreted to confer a concurrent authority on the citizens to also legislate on the subject.

The absolute right of the people to actively participate in the legislative process by exercising their initiative power is not an archaic relic of a past era. Just last year the United States Supreme Court recognized and enforced the initiative power exercised by the electorate of Michigan. In *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) the Court addressed the historic significance of the initiative power as follows:

Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; . . . or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. . . . It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine. *Id.* at 1637.

In Ohio, the power of the people to legislate by initiative petition has a rich history and has been closely protected by Ohio courts as an important democratic safeguard. When legislative power is held only by the few, tyranny is a step away. But when legislative power is shared by the lawmakers and the people, democracy is safe.

The people's power to legislate by initiative action at both the state and municipal levels is guaranteed by the Ohio Constitution. The state initiative power is derived from Section 1, Article II of the Constitution:

The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives *but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution*, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided (emphasis added).

The municipal initiative power is found in Section 1f, Article II of the Constitution:

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 (emphasis added).

The citizens of North Canton acted on these constitutionally enumerated rights when they adopted the Initiative Healthcare Ordinance. In holding said ordinance void, the trial court has effectively deprived the people of their constitutionally protected power to legislate by initiative. The Ohio Supreme Court has expressly held that, "The electors of a municipality may by the initiative enact a measure conflicting with or repealing legislation previously passed by the municipal council, so long as the subject of such initiative ordinance is within the powers of the municipality to control by legislative procedure." *State ex rel. Sharpe v. Hitt* (1951), 155 Ohio St. 529, 99 N.E.2d 659, paragraph three of the syllabus. North Canton, by ordinance, granted healthcare benefits to its part-time elected officials and, in accordance with the Constitution and

the Ohio Supreme Court, the people of North Canton may by initiative repeal that ordinance. By finding that the electorate has no power to legislate on the subject of compensation, the trial court's ruling is in direct contravention of the Constitution and laws of Ohio.

It is axiomatic that the citizens of a municipality "may reserve to themselves the power to have a direct democracy on all legislative and administrative functions of the city. The power of local self-government means nothing less." *Buckeye Community Hope Foundation v. City of Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 566, 692 N.E.2d 997. North Canton has been a charter municipality since November 8, 1960. In drafting its Charter, North Canton elected to adopt its own initiative provision, subjecting itself to the broad power and accompanying responsibility of O.R.C. §731.41. Section 5.07 of the North Canton Charter provides:

- (1) INITIATIVE. The electors of the municipality shall have the power to propose ordinances and other measures by initiative petition in accordance with the provisions of the Constitution and laws of Ohio now or hereafter in effect.

Through this Charter provision, the people of North Canton explicitly reserved unto themselves the power to legislate by the initiative process guaranteed by the Constitution and set forth in the Revised Code. Since the citizens of North Canton chose to include the initiative power in the Charter, it is important to recognize that the Ohio Supreme Court has repeatedly declared that "[p]rovisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object sought to be attained should be promoted rather than prevented or obstructed" *State ex rel. Rose v Lorain Cty. Bd. Of Elections*, 90 Ohio St. 3d 229, 230-231, 2000-Ohio-65, 736 N.E. 2d 886, citing *Christy v. Summit Cty. Bd. of Elections* (1996), 77 Ohio St.3d 35, 40, 671 N.E.2d 1, 5, quoting *State ex rel. King v. Portsmouth* (1986), 27 Ohio St.3d 1, 4, 27 OBR 73, 75, 497 N.E.2d

1126, 1128, quoting *State ex rel. Sharpe v. Hitt* (1951), 155 Ohio St. 529, 535, 44 O.O. 489, 491, 99 N.E.2d 659, 662.

The language of the North Canton initiative provision notably places **no limitation** on the people's right to initiate legislation. In drafting the Charter, the people could have carved out any number of exceptions to the initiative power, as some cities have. Because Ohio courts have consistently held that initiative provisions are to be liberally construed in favor of the people's power to legislate and the people of North Canton chose not to limit or restrict the electorate's initiative power, the current elected officials of North Canton should not be permitted to retroactively do so now.

Ohio courts have historically and zealously endorsed and protected the initiative process. In *State ex rel. Bond v. Montgomery*, 63 Ohio App. 3d 728, 580 N.E.2d 38 (1<sup>st</sup> Dist. 1989), the First District Court of Appeals noted that Section 2, Article I of the Ohio Constitution provides that "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter reform, or abolish the same, whenever they may deem it necessary,"<sup>2</sup> The Court then went on to call the initiative process "incidental to the exercise of governmental power." *Id.* at 733, 41.

In *State ex rel. Emrick v. Wasson*, 62 Ohio App. 3d 498, 576 N.E.2d 814 (2<sup>nd</sup> Dist. 1990), the Second District Court of Appeals called the initiative a "constitutional guarantee" that is "'an invaluable arm of the democratic process' in that it facilitates popular participation in the decisions of municipal governments." *Id.* at 503, 817.

The Supreme Court of Ohio agreed that "'where the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment applied to the

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<sup>2</sup> The First District viewed Section 2, Article I of the Ohio Constitution as a reinforcement of "[t]he right of the people to petition the government for any redress of grievances in the *First Amendment to the United States Constitution*" (emphasis in original). *Montgomery*, 63 Ohio App. 3d 728, 733, 580 N.E.2d 38, 41 (1<sup>st</sup> Dist. 1989).

states through the Fourteenth Amendment’ and that a state ‘may not impermissibly burden the exercise of the right to petition the government by initiative or referendum’” (emphasis removed). *State ex rel. Oster v. Lorain County Bd. Of Elections*, 93 Ohio St. 3d 480, 487, 756 N.E.2d 649, 656 (2001), citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 119 S. Ct. 636 (1999).

The Supreme Court’s holding in *Sharpe, supra*, eloquently expressed the significance of the electorate’s unlimited right to exercise their initiative power:

It is interesting to note that neither the Constitution of Ohio nor the statutes place any definite limitations on the use of the initiative. And the obvious purpose of the initiative as it affects municipalities is to reserve to the people of those municipalities the right to exercise their inherent or political power over the council or other legislative body as to local legislation. Moreover, especially in the light of Section 2, Article I of the Constitution, providing that ‘All political power is inherent in the people’, the adoption of the initiative and referendum as a part of the Constitution evidences a firm resolve on the part of the People that the legislative branch of the state or local government shall be subject to the control of the people with respect to legislative measures, except as otherwise provided. *Sharpe*, 155 Ohio St. at 535-536, 99 N.E.2d at 662.

Under Ohio law, a local charter government may not burden the initiative power of its citizens unless the people specifically limit that power in the text of their charter. To do otherwise is impermissible by both the Ohio and U.S. Constitutions. Moreover, implementing unspecified limitations permits elected officials to act outside the color of the law and calls into question basic assumptions about the true source of authority in a democratic society.

Appellee failed to demonstrate at the trial court level that the North Canton Charter actually prohibits the people from exercising their constitutionally protected initiative power to enact legislation on the subject of healthcare benefits. The Charter’s initiative provision is unequivocally limited only by the Constitution and the laws of the State of Ohio. Nothing within the Charter limits or restricts the subject matters on which the people may exercise their initiative

rights. As previously noted, the Ohio Constitution indicates the municipal initiative power is “reserved to the people in each municipality on *all questions* which such municipalities may now or hereafter be authorized by law to control by legislative action.” Thus by enacting the initiative provision of the Charter, and not restricting therein the people’s right to legislate on any subject, the initiative power of the citizens of North Canton is not limited. Since healthcare benefits fall within the category of “all questions which [North Canton] may now or hereafter be authorized by law to control by legislative action,” so to the citizens of North Canton have reserved unto themselves the right to legislate thereon.

In *State ex rel. Julnes v. S. Euclid City Council*, 2011-Ohio-4485 (2011), South Euclid argued a citizen’s petition was invalid because it sought referendum on an ordinance passed by emergency measures. Under O.R.C. §731.30, emergency ordinances are not subject to referendum. Citing to O.R.C. §731.41, however, the Supreme Court dismissed South Euclid’s argument, noting O.R.C. §731.30 did not apply because South Euclid is a charter municipality with a referendum section that does not exclude emergency legislation.

In the *Julnes* ruling, the Supreme Court awarded the South Euclid Charter the deference owed to it under Ohio law. In this case, much like the city officials in *Julnes*, North Canton asked, and the trial court agreed, to impermissibly limit the people’s power to legislate on a matter not excluded by the city Charter. If the trial court’s decision is allowed to stand, it will unreasonably restrict the electorate’s power to actively participate in the legislative process. In *Sharpe, supra*, the Court held that:

In adopting the initiative and referendum provisions of Section 1f, Article II of the Constitution of Ohio, it was certainly not the intention of the people to leave the voters of a municipality powerless to override legislation which might be obnoxious to them. Even though the referendum is not available because an objectionable ordinance was passed as an emergency measure, perhaps arbitrarily, the **initiative always remains as an authorized remedy**. Otherwise, the people

who elect the members of council and pay their salaries would occupy a place below the council in legislative power. Surely such was not the design and purpose of Section 1f, Article II of the Constitution. *Sharpe*, 155 Ohio St. at 536-537, 99 N.E.2d at 663. (emphasis added)

There can be no logical dispute that the initiative provisions of the North Canton Charter confers upon its citizens the absolute and unfettered right to enact any legislation conflicting with or repealing legislation previously passed by the North Canton City Council. As the Ohio Supreme Court stated in *Sharpe*,

The electors of a municipality may by the initiative enact a measure conflicting with or repealing legislation previously passed by the municipal council, so long as the subject matter of such initiative ordinance is within the power of the municipality to control by legislative procedure. *Id.* at Syllabus of the Court 3.

North Canton's Council had engaged in selfish and fiscally irresponsible conduct by granting healthcare benefits to themselves -- the part-time elected officials of North Canton -- by ordinances passed over a number of years. A majority of the citizens of North Canton found Council's self-serving generosity repugnant in times of economic decline and municipal belt-tightening and decided to exercise their inherent power over Council to enact the Initiative Healthcare Ordinance. In accordance with the Ohio Constitution, North Canton Charter and holdings of the Ohio and United States Supreme Courts, the people of North Canton acted entirely within their rights as the superior legislative authority.

The crux of the trial court's decision was that it was "not persuaded" by the contention that the power to legislate by initiative grants the people concurrent power with the North Canton City Council on the subject of healthcare benefits. Rather, the trial court chose to diminish the Constitutional significance of the right to initiative contained in Charter Section 5.07(1), by determining that Charter Section 4.04 implicitly imposes limitations and restrictions on the people's initiative power. Charter Section 4.04 provides in relevant part as follows:

The Council shall have the power to fix the compensation of its members and that of the Mayor, the Director of Administration, the Director of Finance, the Director of Law, officers of the municipality, of each job classification, and the members of any board or commission of the municipality, whether elected, appointed, or chosen.

The trial court erroneously found that because the Charter provided Council with the power to fix its own compensation, such a general delegation of authority precluded the people from exercising their initiative power with respect to any aspect of compensation, including the provision of city-paid health insurance. In doing so, the trial court ignored the fact that Charter Section 4.04 does not say that Council shall have the exclusive power to fix the compensation of its members. Nor does the initiative power provided in Section 5.07(1) restrict the people from exercising that inherent power with respect to matters of compensation or benefits.

The error of the trial court's logic is evident when applied to Charter Section 2.01, which provides:

All legislative power of the municipality under this charter, together with all powers conferred upon municipalities by the Constitution and laws of the State of Ohio, shall be vested in the Council.

If the use of the word "shall" in Section 4.04, with respect to setting compensation, is to be interpreted as an exclusive grant of authority, as the trial court suggests, then Section 2.01, which provides that all legislative power "shall be vested with Council," would thereby have to be interpreted as conferring unto Council the exclusive power to legislate. Carried to this logical extreme, Charter Section 5.07(1) would be abrogated by Section 2.01. If Council exclusively and solely has the legislative power, the people have no legislative power and the initiative power is effectively abolished and rendered meaningless. This is, of course, not the case and the people's right to legislate through the initiative process is sacrosanct.

At the urging of North Canton, the trial court minimized the people's initiative powers by taking the extraordinary step of adding words to Section 4.04 to create an exemption to the initiative power not contemplated by the Constitution or Ohio law. The trial court agreed that the general statement that Council "shall have the power to fix the compensation" in Section 4.04 somehow expressly and unambiguously precludes the people's exercise of their clear and unlimited initiative power expressly reserved to the people in Charter Section 5.07(1). North Canton seeks to have Section 4.04 rewritten to provide that Council has the exclusive power to set compensation. It wants the Section to be interpreted by this Court as "The Council shall have the exclusive power to fix the compensation ..." or "The Council alone shall have the power to fix the compensation ..." North Canton's efforts to distort the construction of Section 4.04 notwithstanding, Courts are not permitted to "insert words that are not used." *Bernardini v. Bd. of Ed. for Conneaut Area City School Dist.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979).

A city charter is the supreme law of the municipality. Charters reflect the will of the people. Therefore, the language of a particular charter provision has real implication as to how the city is to be governed. In this case, the drafters of the North Canton Charter unequivocally imposed no limitations or reservations upon the electorate's power of initiative when adopting its Charter in 1961. The simple fact is that the delegation of power to Council to legislate does not, in and of itself, negate or preclude the people's initiative powers guaranteed by the Ohio Constitution. The existence of concurrent legislative power is the foundation upon which this country was built.

Looking outside Ohio, *Glass v. Smith*, 150 Tex. 632, 244 S.W. 2d 645 (Tex. 1951), a ruling from the Texas Supreme Court, addresses this very issue. In *Glass*, respondents sought a writ of mandamus to compel the Austin City Council to submit to the electorate a proposed

ordinance classifying policemen and firemen, fixing their pay, and designating certain holidays. *Id.* at 647. Similar to this case, the Austin City Council argued that the Civil Service Commission and City Council had exclusive power to create classifications. *Id.* at 648. The *Glass* court dismissed the City of Austin's claims and found in favor of the initiative proponents.<sup>3</sup> In its holding, the Court stated that "the legislative direction that classification 'shall be provided by ordinance of the City Council,' does not negate the right and power of the people to pass the classification ordinance." *Id.* at 651. Echoing arguments made by Initiative Proponents, *Glass* offered further explanation for its holding:

The charter provisions to which we are referred as conferring exclusively on the city council authority to deal with the subject matter of this ordinance are those which vest in the city council power to control departmental organization, to manage the fiscal affairs of the city and to fix wages as salaries of officers and employees. The particular provisions are no different in their wording from the many other charter provisions which confer certain powers or imposed certain duties on the city council...If the mere fact that a particular provision directs that the City Council exercise a particular legislative power were held to exclude the right of the people to exercise the same power, it might well be argued that Section 1 of Article XI of the Charter completely nullifies the initiative provision of the Charter.<sup>4</sup> Of course it does not. The Charter is to be read as a whole and its various provisions harmonized as far as possible. *Id.* at 652.

*Glass*, therefore, provides a leading example of a factually similar case resolved in favor of the inherent power of the people to participate in direct legislation. Because Texas is a state that shares a judicial philosophy similar to Ohio (i.e., recognizes charter provisions should be

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<sup>3</sup> At the outset of its analysis, *Glass* tracks with Ohio case law, stating:

the power of initiative and referendum...is the exercise by the people of a power reserved to them, and not the exercise of a right granted, and that 'in order to protect the people of the city in the exercise of this reserved legislative power, such charter provisions should be liberally construed in favor of the power reserved' (emphasis added). *Id.* at 649.

<sup>4</sup> Section 1 of Article XI of the Austin City Charter reads as follows: "The City Council shall be vested with the power and chartered with the duty of adopting all laws and ordinances not inconsistent with the Constitution and laws of the State of Texas..." *Glass, supra*, at 652.

liberally construed in favor of the power reserved to the people), *Glass* is an appropriate guidepost for Ohio courts.

Instead of looking to cases with similar fact patterns, the trial court relied on *Reed v. Youngstown*, 173 Ohio St. 265, 181 N.E.2d 700 (1962), and *State ex rel. Werner v. Koontz*, 153 Ohio St. 325, 91 N.E.2d 473 (1950), to justify its reasoning. The trial court's reliance on these cases is misplaced. *Reed* and *Werner* are both cases where an actual conflict, not a contrived one, existed between the questioned ordinance and the city charter.

In *Reed*, the City Council passed an ordinance setting the civil service retirement age at sixty-five. That law directly conflicted with a charter provision stating, "the tenure of every employee in the classified service of a city *shall be* during good behavior and efficient service" (emphasis by the Court) *Id.* at 268, 702. Automatically terminating an employee at sixty-five would necessarily mean that certain employees would be terminated during good behavior and efficient service, violating the charter. Thus, the Court, in its syllabus, held that "No ordinance can conflict with the provisions of a city charter and be effective." No such conflict is presented by the Initiative Healthcare Ordinance passed overwhelmingly by the voters of North Canton. The City Council's right to legislate compensation, including healthcare benefits, is in no way compromised by the adoption of the Initiative Healthcare Ordinance. The power of both the City Council and the people to legislate runs concurrent, particularly in this instance where the Charter does not expressly grant exclusive power to the Council. While Council may enact ordinances relating to their compensation and benefits, and shield such legislative actions from referendum by arbitrarily passing same as emergency measures, the electorate's power of initiative "always remains as an authorized remedy." *Sharpe*, 155 Ohio St. at 536-537, 99 N.E.2d 663.

The trial court incorrectly stated that the Ohio Supreme Court's decision in *State ex rel. Werner v. Koontz*, 153 Ohio St. 325, 91 N.E.2d 473 (1950), previously ruled that compensation may not be set by initiative petition. However, the holding in *Werner* is easily distinguished from the issue on appeal. In *Werner*, a proposed initiative ordinance contained provisions establishing minimum staffing and salaries for the police and fire departments of Columbus. *Id.* at 331, 476. The Columbus City Charter, contained specific provisions relating to the issues of staffing and compensation as follows:

Section 14 of the charter reads: 'Except as herein otherwise provided, council shall by ordinance determine the number of officers and employees in each department of the city government' (The exceptions referred to are in no way applicable.).

Section 15 of the charter reads: 'Subject to the provision of this charter as to the salary of councilmen and mayor, council shall fix by ordinance, the salary or compensation of all officers and employees of the city government \* \* \*.' *Id.* at 331-332.

The *Werner* Court also observed that the Columbus City Charter contained a provision granting the initiative power to its citizens. However, critical to the Court's analysis, such initiative provision also contained the following language: "ordinances approved by an electoral vote shall not be repealed, amended or supplemented except by an electoral vote" *Id.* at 332. Thus, if the proposed initiative ordinance had passed by electoral vote, the result would have been to forever preclude the Columbus City Council from enacting any legislative measures concerning staffing and compensation of certain city departments. The consequence of such initiative would thus be to negate or repeal Sections 14 and 15 of the Columbus City Charter. As a result, the Court held that by virtue of the Charter mandate that "ordinances approved by an electoral vote shall not be repealed, amended or supplemented except by an electoral vote," the proposed initiative would

constitute an amendment to the Charter, which could only be accomplished by complying with the amendment provisions of the Charter, which the initiative proponents had not.

The holding in *Werner*, is not that the people have no voice in the compensation and benefits of its elected officials, but that an initiative ordinance that effectively and completely strips the legislative body of any say in matters vested in it by the charter must be pursued as an amendment to the charter, not an initiative ordinance. There can be no question but that if the Columbus City Charter had not contained the language that “ordinances approved by an electoral vote shall not be repealed, amended or supplemented except by an electoral vote”, the initiative ordinance would have been declared valid. Contrary to the trial court’s finding, the *Werner* Court recognized and accepted the concurrent legislative power of the people, just not under the circumstances presented in the *Werner* facts.

Unlike the Columbus City Charter at issue in *Werner*, the North Canton Charter contains no language mandating that an initiative ordinance enacted by a vote of the citizens cannot be repealed, amended or supplemented except by another electoral vote. Thus, the initiative power of the people and the legislative power of the Council run concurrently and the holding in *Werner* does in no way reject the principal of concurrent legislative authority envisioned by our founding fathers and protected by our Constitutions and laws. Both the Council and the electorate may, in accordance with the procedural mandates of the Charter, enact legislation on any subject within the authority of the municipality to control by legislative procedure. See, *Sharpe, supra*. Accordingly, it would have been entirely within the power of the North Canton Council to enact an ordinance after the voters’ enactment of the Initiative Healthcare Ordinance reinstating healthcare benefits to its elected officials. However, an elected official who seeks to contravene the express will of the people does so at the risk of his political future. Instead, while

simultaneously declaring the Initiative Healthcare Ordinance “void as in contravention to the City’s Charter” the Council enacted its own Ordinance 23-14 incorporating the substantive portions of the Initiative Healthcare Ordinance, just delaying its effective date.

The citizens of North Canton speak through their Charter. It must be assumed the citizens drafted that Charter with purpose and consideration. Thus, it seems clear the citizens intended to reserve to themselves a broad initiative power. To now allow North Canton officials to frustrate the purpose of its citizens is inexcusable and in contravention of the spirit of the United States Constitution, the Ohio Constitution, the duly enacted laws of this state and the clear decisions of the Ohio Courts. It is beyond rational dispute that Ohio has taken the view that both initiative and referendum powers are reserved to the people “on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action.” *Sharpe v. Hitt, supra*, (Syllabus of the Court 1). Though the power of referendum may be restricted in scope, the initiative is not. *Sharpe, supra*, 155 Ohio St. at 540, 99 N.E.2d at 664. This holding was confirmed in *Dubyak v. Kovach*, 164 Ohio St. 247, 129 N.E.2d 809 (1955), where the Court noted that the facts in the *Sharpe* case involved an ordinance passed under an emergency clause and therefore not subject to referendum, but went on to say without qualification:

This court held that, since the initiative applies to ordinances and other measures which can be enacted by a city council, and since such council has the power to pass an ordinance repealing a previous ordinance, such a repealing ordinance can be submitted to the electors under an initiative petition. It would seem there can be no question of the soundness of this rule. *Id.* at 252, 129 N.E.2d at 813.

Similarly there can be no question that the people of North Canton can lawfully repeal or modify any ordinance enacted by its Council, pursuant to its initiative power, including those relating to compensation and benefits of its elected officials. A concurrent power to legislate is shared by the electorate and the Council. To protect the basic precepts of a democratic society and preserve

unto the people the right to actively and equally participate in the legislative process, this Court must respectfully overturn the trial court's decision and find in favor of the Appellants/Initiative Proponents.

**SECOND ASSIGNMENT OF ERROR:**

**THE TRIAL COURT ERRED IN FINDING THAT AN AMBIGUITY IN THE NORTH CANTON CHARTER MUST BE RESOLVED IN FAVOR OF THE PLAINTIFF.**

*Issue Presented for Review*

**Any ambiguity in a Charter provision must be liberally construed in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the people's right to actively and meaningfully participate in the legislative process.**

In its cursory analysis of whether an ambiguity exists in the North Canton Charter, with respects to Sections 4.04 and the initiative provision in Section 5.07(1), the trial court found "that no ambiguity exists, and, even if there is an ambiguity, in harmonizing all provisions, it is clear that only council, as the legislative body, may set compensation for its members." Judgment Entry p. 3. First, Initiative Proponents submit that there is, in fact, no ambiguity within the Charter. The recognition and appreciation of the concurrent legislative power of the Council and the people effectively eliminates any ambiguity within the Charter. Council can pass ordinances setting its own compensation and benefits, in accordance with Section 4.04; and the people can pass competing ordinances through the initiative process guaranteed to the electorate by Section 5.07(1), which might repeal or modify any of Council's ordinances relating to the subject of compensation or benefits.

However, once the trial court rejected the existence of concurrent legislative power between Council and the people, it, by necessity, had to have concluded that an ambiguity did

exist between Sections 4.04 and 5.07(1).<sup>5</sup> “[A]n ambiguity exists if a reasonable person can find different meanings in the [statute] and if good arguments can be made for either of two contrary positions.” *State ex rel. Ernst v. Brunner*, 145 Ohio Misc.2d 74, 79 882 N.E.2d 990, 995 (2007), citing to *4522 Kenny Rd., LLC v. City of Columbus*, 152 Ohio App.3d 526, 789 N.E.2d 246 (2003). The trial court agreed with North Canton that Charter Section 4.04 limits the application of the people’s initiative power and chose to ignore the Initiative Proponents’ more logical assertion that the Charter, while granting Council the general authority to enact legislation concerning compensation and benefits, nevertheless still reserved unto the people their initiative power to repeal or change legislation deemed unacceptable or objectionable by the electorate. Thus, having determined that Sections 4.04 and 5.07(1) of the Charter are ambiguous, the trial court elected to “harmonize” these provisions by finding that Section 4.04 mandates that only Council can legislate on the subjects of compensation and benefits. Choosing one viable position over another viable position is most assuredly not “harmonizing” and is directly contrary to Ohio law.

Ohio Courts have universally held that any ambiguity in a charter should be liberally construed in favor of permitting the people to vote on the issue. See *Sharpe, supra*, (1951), 155 Ohio St. 529, 535, 44 O.O. 489, 491, 99 N.E.2d 659, 662 (“This and other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed.”), citing *State ex rel. Middletown v. Middletown City Comm.*

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<sup>5</sup> As previously noted, in the absence of concurrent legislative power, Charter Section 2.01 is likewise in direct conflict with the initiative powers provided in Section 5.07(1). If only Council has legislative power, then Section 5.07(1) is meaningless and pointless. One cannot presume that the drafters of the North Canton Charter adopted an initiative power that was without effect or purpose.

(1942), 140 Ohio St. 368, 24 O.O. 297, 44 N.E.2d 459. See, also, *State ex rel. Lewis v. Hamilton Cty. Bd. of Elections* (1995), 74 Ohio St.3d 1201, 1202, 655 N.E.2d 177, 178 (Moyer, C.J., concurring) ("Active participation in the election process is the foundation of democracy. Whether selecting a candidate for public office or deciding issues of public concern, voting is a basic right without which all other rights become meaningless. It follows that where the Ohio Constitution or statutes establishing the requirement for placing issues on election ballots create doubt, such doubt should be resolved in favor of providing the citizens with access to the ballot."); *Shryock v. Zanesville* (1915), 92 Ohio St. 375, 386, 110 N.E. 937, 940 ("Meanwhile it is the solemn duty of all courts to keep hands off and to avoid giving to the provisions of the constitution on that subject [initiative and referendum] a strained construction which, by reason of its very burdensomeness and unreasonableness, would tend to depopularize it. Such character of construction is as unwarranted as judicial construction tending to weaken or emasculate the theory [of initiative and referendum]."); *State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, 13, 2011-Ohio-4485, 955 N.E.2d 363, 371 citing to *State ex rel. Oster v. Lorain County Bd. Of Elections*, 93 Ohio St. 3d 480, 487, 756 N.E.2d 649, 656 (2001) ("oft-cited mandate to liberally construe municipal...provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained").

The object sought to be obtained by Initiative Proponents is to exercise political speech and meaningfully engage in the local political process. The North Canton Charter was enacted under the Constitution and laws of Ohio, both of which grant municipal citizens a broad initiative power. It is important to remember that "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter,

reform, or abolish the same, whenever they may deem it necessary.” Ohio Constitution Section 2, Article I.

The trial court, at the urging of North Canton has, in effect, thrown out a valid election whereby the people of North Canton overwhelmingly voted in favor of the Initiative Healthcare Ordinance. Either the people’s initiative power to engage in the legislative process exists in North Canton or it does not. This is the central issue before this Court. If the trial court’s decision is upheld, North Canton will have successfully eviscerated the initiative power reserved to the people by the Constitution and Charter of North Canton. If the unfettered initiative power reserved unto the people by Section 5.07(1) is inapplicable to matters of compensation and benefits by virtue of Section 4.04, or any legislative matter, by logical extension of the trial court’s reasoning to Section 2.01, the power of the people to partake of the legislative process is effectively eliminated. This Court must find that the constitutionally protected right of the people to legislate through initiative is inviolate and the Initiative Healthcare Ordinance is a valid and enforceable ordinance of the City of North Canton. Only in doing so can the Court preserve the integrity of the law and the rights of North Canton’s citizens.

### **CONCLUSION**

The trial court’s decision effectively deprives the citizens of North Canton of their Constitutional right to initiate legislation, a right that has not been abrogated by the Charter of North Canton, but rather expressly preserved therein. The people of North Canton have the absolute right through initiative to repeal previously passed municipal ordinances when the subject of the initiative ordinance is within the powers of and can be controlled by the municipal legislative authority. The rights of the citizens of North Canton to initiate legislation remain a cornerstone of our democracy. It is a remedy which must be held inviolate and thereby authorize

the people to override any ordinances enacted by the municipal legislative body that the citizens find repugnant or objectionable. When the court takes away this right, the citizens are relegated to a second-class status. This is clearly not the design and purpose of Section 1f, Article II of the Ohio Constitution.

Based upon the foregoing arguments, Appellant respectfully requests that the decision of the trial court be reversed; that the Court find that the Initiative Healthcare Ordinance is a valid and enforceable ordinance of the City of North Canton; and that the case be remanded to the trial court for further consideration of the remaining claims dismissed as part of the trial court's Judgment Entry.

Respectfully submitted,



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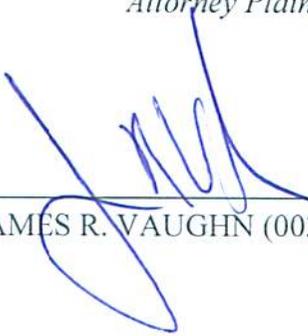
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CERTIFICATE OF SERVICE

I hereby certify that, on this 9<sup>th</sup> day of February, 2015, a true and accurate copy of the foregoing was served via email upon the following:

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**APPENDIX**

NANCY S. REINBOLD  
CLERK OF COURTS  
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**IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO**

**CITY OF NORTH CANTON,** )  
 )  
 **Plaintiff,** )  
 )  
 **VS.** )  
 )  
 **CHARLES OSBORNE, et al.,** )  
 )  
 **Defendants.** )

**CASE NO. 2014CV00757**  
**JUDGE HAAS**  
**JUDGMENT ENTRY**

This matter came on for consideration upon separate motions for declaratory judgment.

This action involves the validity of the Initiative Healthcare Ordinance passed by the voters of the City of North Canton in the General Election held on November 6, 2012. On March 28, 2014, North Canton initiated this action with the filing of a Complaint for Declaratory Judgment seeking a declaration that the Initiative Healthcare Ordinance is invalid.

The parties have filed stipulations leaving one disputed legal issue for the Court's consideration: whether the Defendants' initiative action is contrary to North Canton's Charter or whether the initiative ordinance is a valid and enforceable ordinance in the City of North Canton.

North Canton asserts that because the Defendants initiative action seeks to reduce or deny North Canton's elected officials' health care benefits, it conflicts with its Charter requirement that City Council shall set those compensation levels, which levels include health care benefits. Defendants, on the other hand, maintain that the Initiative Healthcare Ordinance is valid and enforceable municipal legislation.

**ENTERED BY**

It should be noted that, even though North Canton believes that the Charter conflict rendered the initiative action void, because it reflected the will of the electorate, North Canton enacted a mirror ordinance to repeal the initiative and enacted a mirror ordinance in its place. The parties have stipulated that North Canton's elected officials have not just reduced their health care benefits to comply with the mirror ordinance, all eight of them have completely waived North Canton-paid health care benefits for themselves and their families.

### **Declaratory Judgment**

In order to obtain a declaratory judgment, a moving party must show the following essential elements: 1) a real controversy exists between the parties; 2) the controversy is justiciable in character; and 3) speedy relief is necessary to preserve the rights of the parties.<sup>1</sup>

Given the facts as admitted in the pleadings and Joint Stipulations, the Court finds that all three elements have been met.

### **Initiative Healthcare Ordinance is Void**

North Canton has been a charter municipality since November 8, 1960. The Charter specifically adopts and incorporates the provisions of the Constitution and laws of Ohio regarding initiative petitions and setting compensation for council. The initiative provision contained in the Charter provides as follows,

(1) INITIATIVE. The electors of the municipality shall have the power to propose ordinances and other measures by initiative petition in

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<sup>1</sup> *Wymysulo v. Bartec, Inc.*, 132 Ohio St.3d 167, 176, 2012-Ohio-2187.

accordance with the provisions of the Constitution and laws of Ohio now or hereafter in effect. Article V, Section 5.07(1).

The initiative power is, without doubt, an important component of a democratic government. However, the power is not without limitation. It is a well-settled principle that that a municipal ordinance in conflict with its charter is void.<sup>2</sup> This is true whether passed by the legislative body or initiated by the electorate.<sup>3</sup> North Canton's Charter provides as follows:

The Council shall have the power to fix the compensation of its members and that of the Mayor, the Director of Administration, the Director of Finance, the Director of Law, officers of the municipality, of each job classification, and the members of any board of commission of the municipality, wither elected, appointed, or chosen. Article IV, Section 4.04.

Defendants contend that because Section 4.04 does not say that Council shall have **exclusive** power, the power of both city council and the people to legislate compensation runs concurrent. The Court is not persuaded by this argument. North Canton's charter does not conflict with Ohio's statutes regarding City Council setting compensation levels and with initiative actions.<sup>4</sup> Additionally, "[m]unicipal charters must be construed to give effect to all separate provisions and to harmonize them with statutory provisions whenever possible."<sup>5</sup> In applying these principles, the Court finds that no ambiguity exists, and, even if there is an ambiguity, in harmonizing all provisions, it is clear that only council, as the legislative body, may set compensation for its members.

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<sup>2</sup> *Reed v. City of Youngstown*, 173 Ohio St. 265 (1962).

<sup>3</sup> *Id.*

<sup>4</sup> See, ORC §§ 731.08 and 731.31.

<sup>5</sup> *State ex rel. Commt. For the Proposed Ordinance to Repeal Ordinance No. 146-02, W. End Blight Designation v. Lakewood*, 100 Ohio St.3d 252, 2003-Ohio-5771.

The Supreme Court of Ohio has spoken to the issues before this Court. In *State ex rel. Werner v. Koontz*, the Supreme Court examined an initiative petition for a proposed ordinance that five men filed with the City of Columbus Clerk of Council.<sup>6</sup> The initiative petition contained provisions fixing a minimum number of officers, members, and employees of the fire and police departments and fixing their minimum salaries.<sup>7</sup> After examining the initiative petition with respect to the Columbus Charter, the Court found that the charter provided that the city council shall fix the salary or compensation of council members, the mayor, and all other officers and employees. The Court found that “[I]t is perfectly plain that the designated proposed ordinance if adopted would be directly contra to the charter’s compensation provision.”<sup>8</sup> The Court held that the initiative was actually a proposed charter amendment, cloaked “under the guise of initiating and adopting an ordinance.”<sup>9</sup> The Court went on to say that any amendment to the charter could be effected only in the manner prescribed by the charter. Likewise, if the North Canton electorate wishes to amend the Charter, it may, but the proper procedure must be followed.

Based upon the foregoing, the Court finds that the Initiative Healthcare Ordinance is invalid because it conflicts with the North Canton Charter. Accordingly, it is hereby **ORDERED, ADJUDGED, AND DECREED** that Defendants’ Initiative Healthcare Ordinance is void, ab initio. Because Defendants’ remaining claims are contingent upon the validity of the ordinance, those claims are hereby **DISMISSED**. **This is a final appealable order and there is no just cause for delay.**

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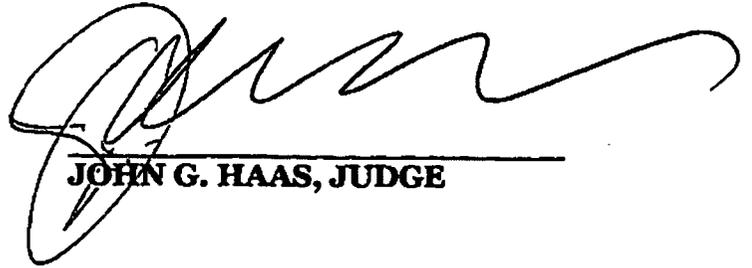
<sup>6</sup> 153 Ohio St. 325, 326 (1950).

<sup>7</sup> *Id.* at 331.

<sup>8</sup> *Id.* at 332

<sup>9</sup> *Id.*

**IT IS SO ORDERED.**



**JOHN G. HAAS, JUDGE**

To: Atty. Timothy L. Fox  
Atty. Neil D. Schor  
Atty. Robert Cyperski  
Atty. James R. Vaughn