

zones, limiting the use of each zone and limiting the height of buildings and the intensity of land use.” (§ 4.07(c).) Second, consistent with the Charter’s delegation of power, the Zoning Code states that “[w]ithin thirty days after the public hearing required in § 1131.11 or such longer period as is determined to be appropriate by Council, Council shall either adopt or deny the recommendation of the Planning and Zoning Commission or adopt some modification thereof.” (Zoning Code, § 1131.12, Ord. 98-42, Passed 10-6-98 (emphasis added).) The City Charter and Zoning Code clearly charge City Council with the responsibility to approve re-zonings – there is no third option to “pass” on the decision.

Because City Council must exercise its powers in the manner provided for in the Charter and the Zoning Code, City Council cannot abdicate its legislative responsibility over re-zonings and amendments to the zoning map.¹ It is well settled under Ohio law that both state and municipal legislative bodies “may not abdicate or transfer to others the essential legislative functions with which [they are] vested.” *State v. McGlone*, 1992 Ohio App. LEXIS 1206, *21–22, 1992 WL 50021 (4th Dist.1992) (quoting *Belden v. Union Central Life Ins. Co.*, 143 Ohio St. 329, ¶ 1 of the syllabus (1944)); *see also Cleveland v. Piskura*, 145 Ohio St. 144, 156 (1945) (“Insofar as the functions of the city of Cleveland are legislative, they are vested in the city council and that body cannot delegate the exercise of those functions to any other authority.” (emphasis added)). In fact, “[t]o abdicate the authority to make laws is unconstitutional . . . [.]” *Columbus v. State Emp’t Relations Bd.*, 29 Ohio Misc. 2d 35, 42, 505 N.E.2d 651, 659 (C.P. 1985) (emphasis added) (citing *Green v. State Civ. Serv. Comm.*, 90 Ohio St. 252, 107 N.E. 531(1914)).

¹ Notably, where the Charter gives the Council the power to submit an issue to the electorate, it does so *expressly*. For example, the Council’s duty to regulate zoning issues stands in stark contrast to its duty to submit Charter amendments to the electorate. Article XII § 12.01 of the Charter governs amendments to charter provisions. It states, “[a]s often as necessary, but no less frequently than every ten (10) years, the Council shall appoint a Charter Review Commission who shall review the Charter and make recommendations to the Council for proposed amendments, if any, to be submitted to the voters of the City.” (Charter § 12.01, “AMENDMENTS TO THE CHARTER.”) Thus, in the limited circumstances where the Council has the power to submit an issue to the electorate, that power is express in the Charter, not implied.

Further, this contrast – between the Council’s duty to vote on re-zoning issues and its duty to refer Charter amendments to the voters – illustrates the most fundamental limitation of the Council’s power: the Council may exercise its power *only* “in the manner prescribed in the Charter[.]” (Charter, § 1.03; *see also* § 4.07 (k).) Therefore, just as the Council cannot decide that it has the power to vote on Charter amendments where the Charter expressly reserves that right for the voters, the Council cannot evade its responsibility by referring a zoning decision to voters in the first instance where the Charter expressly delegates that duty to the Council.

Neither the Charter nor Ohio law provides any mechanism for the electorate to replace City Council and to approve, amend, or deny a recommendation by the Planning and Zoning Commission in the first instance. This responsibility is expressly delegated to the Council. (Charter § 4.07; Zoning Code, § 1131.12.) As Ohio courts have recognized, “[a] councilman is elected for the purpose of expressing an opinion. Action, and not inaction, is a duty that he assumes with the office.” *Babyak v. Allen*, 106 Ohio App. 191, 196–197, 154 N.E.2d 14, 18–19 (9th Dist.1958).

- b. **Article 6, § 6.06(B) of the Charter does not allow City Council to avoid its responsibility to vote on the Planning and Zoning Commission’s recommendation to approve Ordinance 2016-44.**

As described above, under the City’s Charter and Zoning Code, City Council has the express legislative duty to adopt, deny, or modify recommendations from the Planning and Zoning Commission. A narrow exception to the Council’s duty to vote on ordinances, Section 6.06(B), provides: “Ordinances rejected or repealed by an electoral vote shall not be re-enacted, in whole or in part, except by an electoral vote.” Ordinance 2016-44 has never been “rejected or repealed by an electoral vote” – in whole or in part. This ordinance is an independent, newly proposed ordinance that has made its way through the procedures set forth in § 1131.12 of the Zoning Code. On its face, Section 6.06(B) does not apply.

Ohio courts’ analysis of the doctrine of *res judicata* in the zoning context is informative. Under the doctrine of *res judicata*, a final judgment rendered on the merits on a claim or cause of action is a complete bar to a subsequent action on the same claim or cause of action. *Grava v. Parkman Township*, 73 Ohio St. 3d 379, 382, 653 N.E.2d 226, 228–229 (1995) (describing the claim-preclusive effect of the doctrine). In *Davis v. Coventry Township Board of Zoning Appeals*, the court examined whether a property owner’s request for a variance was barred by the doctrine of *res judicata* because he had previously submitted a request for variance which had been denied. 2001 Ohio App. LEXIS 513, *3, 2001 WL 123464 (9th Dist. Feb. 14, 2001). The court found that his second application for a variance was not barred, explaining that the property owner had “changed numerous characteristics of his proposed construction to alleviate the concerns that were raised in regard to his initial plan.” *Id.* at *6. His second application increased the setbacks from the adjoining and rear lots, changed the location of the garage and

driveway, and slightly increased the setback from the road. *Id.* Such changes led the court to conclude that the property owner's "second application for a variance was not barred by *res judicata* as it arose from different operative facts than his first application[.]" *Id.* at *7 (finding that the property owner's second application was "substantially different" than his first).

As in *Davis*, Ordinance 2016-44 is substantially different from Ordinance 2015-18, both in form and substance. This was clarified in the August 10, 2016 Staff Report of the Planning and Zoning Commission:

In order to bring the proposal back before P&Z the applicant is required to make substantial enough changes to be considered a new application. The developer has since made the necessary changes to the initial proposal in order to bring it back before P&Z for review. To ensure the proposal meets the substantial change test, the city's Law Director provided a verbal determination to ensure it indeed meets the criteria to bring it back before P&Z.

(Emphasis added.) Therefore, the City's Law Director determined that Ordinance 2016-44 constitutes a "new application."

A comparison of Ordinance 2016-44 and Ordinance 2015-18 demonstrates that the City's Law Director was correct in that determination – these ordinances do not share the same operative facts. Among other things, changes in the "new application" include, but are not limited to:

- 1) **Zoning District Differs** – Property is currently zoned Planned Commercial (PC) and Residential (R); Unlike Ordinance 2015-18, Ordinance 2016-44 seeks to have the property re-zoned a Planned Residence (PR) within the Downtown Residential (DR) District, an entirely different zoning classification. (Staff Report, Aug. 10, 2016, at p. 1.)
- 2) **Ownership Style Differs** – "Before it was going to be condominium type ownership. Now, it is proposed for fee-simple single family lots with a HOA maintaining the yards and common areas." (Staff Report, Aug. 10, 2016, at p. 1.)
- 3) **Number of Units Differs** – The 2015 application was for 47 single family condominium homes. The current 2016 application is for 48 single family homes owned in fee simple with a large pond in the middle. (Cf. Ordinance 2015-18; Staff Report, Aug. 10, 2016, at pp. 1–2.)
- 4) **Structure and Layout Differs** – "[T]he entryway has changed[.]" (Cf. Ordinance 2015-18; Staff Report, Aug. 10, 2016, at pp. 1–2.) The 2016 application moves the entry and exit gates as well

as the guardhouse closer to Beach Ridge Road. (Cf. Ordinance 2015-18; Ordinance 2016-44 Preliminary Development Plan and Zoning Map, at Ex. C-1 and C-2.)

- 5) **Access Differs** – “The most substantial change is that the proposal no longer has a road going through the development and through the Powell Center plaza to the west to Grace Drive.” (Staff Report, Aug. 10, 2016, at p. 1.)

The City’s own admissions and the plain texts of Ordinance 2016-44 and Ordinance 2015-18 establish that the ordinances are substantively different. Ordinance 2016-44 simply cannot be considered a “reenactment” – in whole or in part. The fact that the property would be rezoned to an entirely different zoning classification than in Ordinance 2015-18 alone means that Section 6.06(B) of the Charter does not apply. Further, as recognized by members of the City Council and the City’s Law Director at Council’s October 18, 2016 meeting, Ordinance 2015-18 involved final development plan approval of a specific site plan. This is not at issue in Ordinance 2016-44, a straight rezoning to a wholly separate zoning classification with different standards and regulations. Having been presented with this new and different ordinance, City Council must now vote on it pursuant to the City’s Charter. (*See* Charter, § 1131.12.)

To be sure, in the event Council abdicates its responsibility over this zoning decision and arbitrarily departs from the procedures codified in its Charter and Zoning Code, Council exposes the City to liability under 42 U.S.C. § 1983 for deprivation of due process and equal protection of the law. Unlike other prior land use decisions made by this Council, this property and its owner cannot be singled out and subjected to a process that is not authorized by law and has been divined from an arbitrary whim.

City Council cannot rely on Article 6, § 6.06(B) to avoid voting on Ordinance 2016-44.

III. CONCLUSION

City Council must vote on Ordinance 2016-44 because the Charter and the Zoning Code charge City Council with the legislative power to regulate zoning and the responsibility to approve re-zonings. City Council cannot delegate that responsibility to any other person or entity, including the electorate. Furthermore, Section 6.06(B) of the Charter is inapplicable to Ordinance 2016-44. It does not allow City Council to avoid its responsibility to vote on the Planning and Zoning Commission’s recommendation to approve Ordinance 2016-44.

Respectfully submitted,

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