

## PRESS RELEASE

FOR IMMEDIATE RELEASE

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### City Uses False Statement To Justify \$1.8 Million Settlement With Developer

Ebersole And Valvona Demand New Hearing

**Powell, Ohio -- September 24, 2017 --** Powell City Council relied upon a materially false statement issued in the City's press release last Tuesday night when it approved a \$1.8 million payout to The Center For Powell Crossing, LLC ("the Developer"). Prior to Council's unannounced, surprise vote, City Manager Steven Lutz represented to Council and the public that a court determined that the Developer was entitled to "damages and fees" in litigation with the City. This statement is false and was reproduced in the City's Press Release, Exhibit 1.

No court ever determined that the Developer was entitled to damages or attorney's fees, let alone \$1.8 million. The truth is that a federal appeals court reviewed the matter and determined that the Developer "sought no compensation whatsoever." See, Court Decision I, Exhibit 2, Page 7. When a lower court determined that a 2014 Powell City Charter Amendment was unconstitutional in March 2016, it provided a different kind of relief and struck down the law. See, Court Decision II, Exhibit 3, Pages 7, 53. The lower court reserved issues regarding damages and fees for later and the appeals court has since foreclosed such relief by its ruling (though the Developer is still entitled to a hearing on damages and fees).

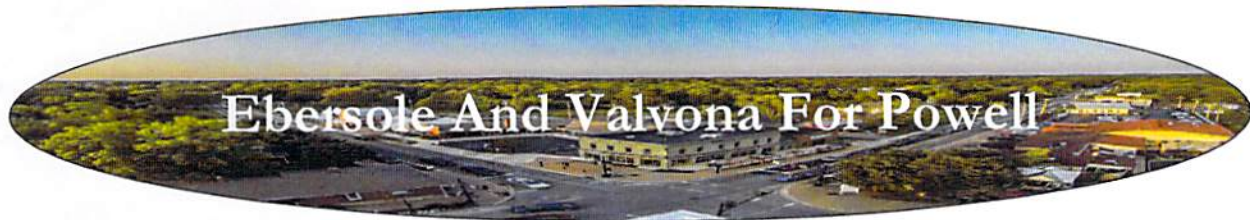
The settlement is a bad deal because the City agreed to pay damages that the federal appeals court already determined the Developer could not obtain. By its "no compensation" statement, the federal appeals court held that the Developer did not seek money from the City for its lost use of the land at issue. Nonetheless, the City's Press Release states that the settlement payout is for "damages and lost income from the delays in construction of the Powell Crossing development."

#### City At Fault

Had the City defended the Charter Amendment, it would have been upheld and they would not be paying for a settlement. However, the City chose instead to agree with the Developer that the charter amendment is unconstitutional and the Court recognized the City's agreement in its decision. See, Court Decision II, Exhibit 3, Page 7.

By way of background, 56% of Powell voters enacted the Charter Amendment at the polls on Election Day 2014. The Amendment bans high-density housing in Downtown Powell due to





public concerns for traffic congestion and public safety. The Amendment also specifically prohibits a 64-unit apartment project called "The Center For Powell Crossing" that the Developer proposed near the Old Yellow House on Powell Road. See, The Charter Amendment, Exhibit 4.

After the Developer lost the 2014 Election, it sued the City to have a non-elected judge reverse the popular vote. The Developer argued that a non-binding, advisory committee of citizens created under the Amendment actually had lawmaking power that could not be delegated to citizens. The lower court judge agreed with the Developer and struck the law down on the erroneous premise that the committee's "recommendations" had the force of law.

Powell resident Brian Ebersole moved to intervene in the case to defend the law. Concerned that the Amendment might be upheld, the City strenuously argued that Ebersole should not be allowed to defend it. The audio recording of attorney Melanie Williamson arguing on behalf of the City that Ebersole does not have standing is available as Exhibit 5, Minute 22:26.

Ebersole's motion to intervene was denied for lack of "standing," though the decision is not yet final as he has a window of time to appeal. Even though Ebersole pays taxes, votes, owns land, and maintains his permanent residence 650 feet from the Downtown area where the Amendment bans high-density housing, the City alleges that he does not have enough skin in the game.

Had the City defended the law, the federal appeals court would have upheld the Charter Amendment. The federal appeals court ruled that the citizens' committee at issue was merely "an advisory committee to make land-use recommendations to the city council." See, Court Decision I, Exhibit 2, Page 2.

The court's words - "advisory" and "recommendations" - mean that the committee did not have lawmaking power. Because the citizens' committee has no lawmaking power, the Amendment is constitutional and should be upheld. Several additional reasons the court would have upheld the Amendment are detailed in one of Ebersole's motions, here as Exhibit 6.

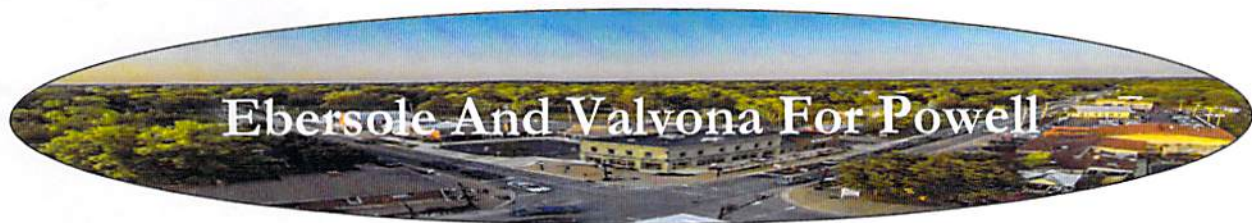
But the federal appeals court did not address whether the Amendment should be upheld because the City would not appeal the lower court decision and fought Ebersole's right to do so. Due to the City, the appeals court slammed the courthouse doors shut and never addressed the merits.

### **Funny Math**

The Developer is not entitled to any damages. But the \$1.8 million settlement figure for damages and attorney's fees is clearly excessive even if they were. Further, citizens do not know how the City computed the \$1.8 million amount because the City has not satisfied its burden to disclose or explain it.

City Clerk Karen Mitchell told David Ebersole that she is currently "finalizing" an exhibit to the Ordinance approving the settlement, which she says explains the settlement amount. The exhibit did not contain any details when read at the Council meeting and the City is withholding it at this





time. See, David Ebersole's record request and correspondence, Exhibit 7, and Brian Ebersole's request for the settlement agreement, Exhibit 8.

If Council did not know the basis and details of the settlement amount when they voted, they should not have voted for and agreed to the settlement. If they do know, then they should have disclosed and explained it prior to the vote.

### **No Notice To Citizens**

The City provided no notice to the public prior to its September 19 meeting that it would vote to settle the Powell Crossing litigation. The City disclosed only a "blank" form ordinance (as the Mayor called it), which was first posted to Council's agenda the day of the meeting and made no reference to litigation. Ordinance 2017-46, Exhibit 9. The blank ordinance was amended with the settlement amount immediately before Council passed it into law on its first public reading.

Because the \$1.8 million payout was a surprise, citizens had no real opportunity to be heard before Council voted on it. City Officials leaked the information only to ABC6 News and their close personal friends who appeared at the meeting. Evidence confirms the leak. Private citizens made social media postings about the bad deal on September 16, 2017. See, Shear and Eddy posts discussing Council's upcoming vote, Exhibit 10. In addition, former Councilman Richard Cline prepared a long written statement that he read into the record for almost four minutes.

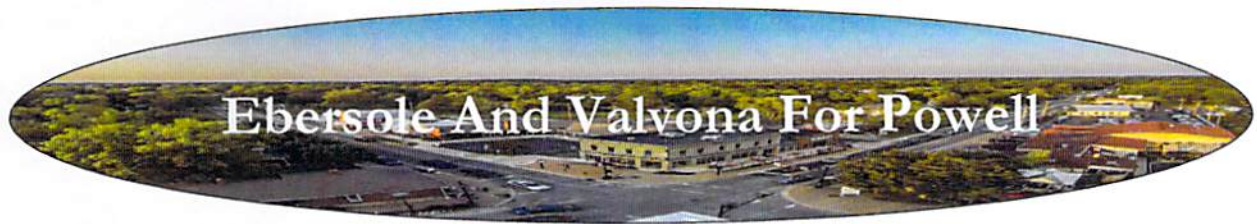
David Ebersole happened to be attending the meeting and publicly spoke against the settlement, articulately raising serious concerns. See, video, Exhibit 11. Unfortunately, he was unable to fully address Council or inquire into the unexplained \$1.8 million amount because Mayor Brian Lorenz removed him, purportedly for exceeding Council's three minute time limit on remarks.

The time limit was selectively enforced upon Ebersole but not others such as Cline. Ebersole was removed despite explaining that he had a constitutional right to free speech that was being infringed because the surprise announcement afforded him no ability to submit written remarks.

Council enacted Ordinance 2017-46 to approve the settlement at its September 19 meeting even though the settlement was previously unannounced. Council suspended the rules to enable the Ordinance's approval through only one meeting, further precluding citizens' opportunity to be heard.

### **Ebersole And Valvona Demand New Hearing**

The City's surprise announcement to pay \$1.8 million is a matter of major public concern and Powell citizens deserve a full explanation of the settlement and fair opportunity to weigh-in. Equally concerning is the City's press release that materially misleads the public to justify the payout. If the vote stands under these circumstances, the City could have exposure for misappropriating public funds.



To avoid such exposure, and give the people a voice, David Ebersole and Sharon Valvona are calling for Powell City Council to vacate Ordinance 2017-46 approving the settlement. If the City wishes to move forward with the settlement, they should provide citizens with a detailed justification for the settlement and notice of a future Council meeting where all citizens will have a full and fair opportunity to speak on this matter of major public concern.





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### **\$1.8 Million Settlement: City Yet To Explain Settlement Amount Or Insurance Coverage**

Ebersole-Valvona Obtain Settlement Agreement

**Powell, Ohio -- October 3, 2017 --** Over three weeks have now passed since the City of Powell agreed to resolve litigation through a \$1.8 million payment to The Center for Powell Crossing, LLC ("The Developer"). The [settlement agreement](#) shows that the Developer signed it on September 11, 2017, eight days before the City Council meeting where settlement agreement was announced without any public notice. Details still have not been disclosed to the public.

At this time the citizens of Powell remain in the dark as to how the City of Powell justified the \$1.8 million settlement amount for a delay in using a [\\$575,000 tract of land](#). The settlement was not ordered by any court and is a [voluntary agreement](#) on the part of Powell City Council. Therefore, the City has an obligation to the citizens of Powell to explain how it computed the \$1.8 million settlement amount.

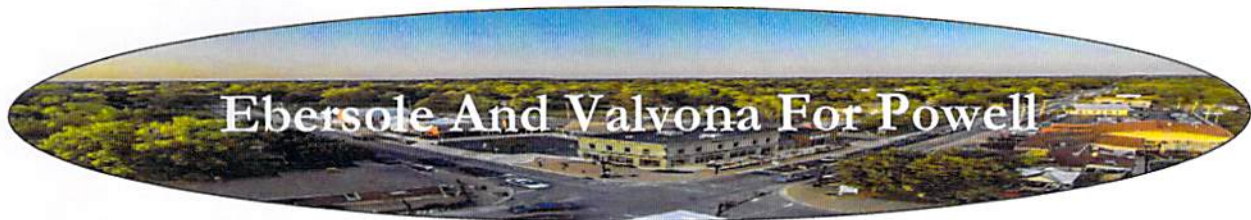
The City's September 19, 2017 Press Release announcing the settlement provides few details. According to the Press Release, the City will contribute \$950,000 of the settlement amount and Great American Insurance Group will contribute \$850,000. The Press Release further states that the settlement payout is for "damages and lost income from the delays in construction of the Powell Crossing development." There are several unanswered questions with respect to the settlement amount and the City's insurance coverage.

#### **Excessive Settlement Amount**

The \$1.8 million settlement amount is excessive and the City has not yet responded to requests for details. On September 24, 2017, Ebersole-Valvona issued a [Press Release](#) to the City, the media, and the public, explaining that the Developer is not entitled to any damages. David Ebersole has also made [written requests](#) to the City for documents including those showing how the City computed the \$1.8 million amount. To date, the City has not responded with any explanation of the settlement amount.

Assuming the Developer were entitled to damages, the \$1.8 million is unreasonably high. The City's Press Release attributes the amount to "lost income from delays in construction." However, the Developer is not entitled to compensation for "lost income" because the delay does not affect the project's useful life, perhaps 30 years or a shorter time period if the Developer plans to sell the project at some point. Because the delay only affects the timing of any profits, only the potential interest earned on the hypothetical profits is conceivably awardable as





damages. The delay does not affect the usefulness or value of planning materials such as project designs, drawings, and other preparation materials. Given current interest rates, the lost interest income on potential profits would be less than fifteen thousand dollars.

The settlement agreement shows that the entire \$1.8 million settlement amount is attributable solely to damages from the lost use of the land, not attorney's fees or punitive damages. The agreement shows that the amount is not for attorney's fees by its statement that ["Each party shall bear its own costs and attorney's fees"](#) except for \$400 in court costs and the costs of a settlement mediator. Further, [courts may not award punitive damages against municipalities](#).

If there were other damages from the delay, the Developer and the City have an obligation to the citizens of Powell to clearly describe and quantify them. The Developer and Powell City Council have a responsibility to the citizens of Powell to clearly outline each item contributing to the damages, why each item is relevant, and the amount of each item.

### **Insurance Still Unexplained**

Despite repeated requests, the City still has not identified the insurance policy providing coverage or disclosed how the \$850,000 insurance payment amount was computed. The City of Powell belongs to a consortium of eight Columbus-area municipalities in a self-insurance pool (the Central Ohio Risk Management Association, or "CORMA."). CORMA contracts with private insurers to provide insurance coverage above the self-insured amount. According to the [policies provided by The City of Powell](#), these policies cover many forms of liability and include umbrella coverage for amounts above that covered by an individual policy.

The City did not identify which policy covers the \$850,000 settlement payment. Nor has the City explained why the umbrella coverage did not cover the entire settlement amount. Once again, the City should fully disclose and explain this information to the public.

### **Request For New Hearing**

Powell City Council suspended its own rules on September 19, 2017 and voted to approve the \$1.8 million settlement on only one reading and without any public notice. The discussion of the litigation, settlement vote, and settlement amount were not included on the agenda for the September 19 Council meeting. David Ebersole and Sharon Valvona have requested that City Council vacate its approval for the settlement and hold a true public hearing. The citizens of Powell have not had any opportunity to ask critical questions about the settlement, which remain unanswered today. Despite these concerns, the City still has not responded to the request for a new public hearing.

There may still be time. The City has not provided documentation showing that it has signed the settlement agreement. Nor has it responded to inquiries asking whether the \$1.8 million has been paid yet. Please contact members of City Council to request a new hearing and ask questions regarding the settlement, including those that have been outlined here and in the Ebersole-Valvona September 24, 2017 [Press Release](#).