TOWNSHIP ZONING REFERENDA; SUFFICIENCY OF CONTENTS OF PETITION

Industrial, commercial and residential progress throughout Ohio has stimulated increasing interest in the open land of rural counties. In many instances, prior to any expansion into these areas, developers must obtain zoning changes in order to accommodate proposed uses of land. The final stage of a required zoning change is approval by the board of township trustees. However, after the adoption of a new zoning amendment, electors of the township may submit a petition to the board of trustees requesting that the zoning amendment be placed on the ballot for the voters to decide at the next election.

A discussion of the sufficiency of referenda petitions raises two considerations. The first of these is the means by which the validity of signatures appearing on the face of the petition is ascertained.[1] While this problem raises its own difficulties, they are beyond the scope of the present analysis. The second issue, the topic of this note, concerns the extent of information, if any, that is required to be contained in a petition in order to provide the prospective signer with notice of the issue to which he is asked to lend his support. Recent cases by the Ohio appellate and supreme courts suggest that there are inherent inequities in the petitioning process that have been detrimental to both the developer and the residents of a township area. In particular, the sufficiency of the petitioning statement, that is, the description of the issue to be placed on the petition, is of concern.

Section 519.12 of the Ohio Revised Code sets forth the procedure by which amendments or supplements to township zoning resolutions are to be made,[2] and the procedure by which a referendum may be effected. An

[1] There are other questions which could also be considered under this general heading, such as whether referenda of this type are constitutional under the Ohio Constitution or whether zoning by popular vote is practical if a planned expansion program is desired. In Ohio, the question of constitutionality under the state constitution has been specifically decided in the affirmative. *See* Cook-Johnson Realty v. Bertolini, 15 Ohio St. 2d 195, 239 N.E.2d 80 (1968). The question of practicality is beyond the scope of this study. For a discussion of that issue, see Comment, 1969 LAW AND THE SOCIAL ORDER 453.

[2] OHIO REV. CODE § 519.12 (Page Supp. 1970) in pertinent parts provides:

> Amendments or supplements . . . may be initiated by motion of the township rural zoning commission, by the passage of a resolution therefore by the board of township trustees or by the filing of an application therefor by one or more of the owners or lessees of property within the area proposed to be changed or affected by the proposed amendment or supplement with the township zoning commission. . . .
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> Upon the adoption of such motion, or the certification of such resolution or the filing of such application the township zoning commission shall set a date for a public hearing thereon. . . .
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> Within five days after the adoption of such motion or the certification of such resolution or the filing of such application the township zoning commission shall transmit a copy thereof together with text and map pertaining thereto to the county or regional planning commission, if there is such a commission. The county or regional planning commission shall recommend the approval or denial of the proposed amendment or

amendment or supplement adopted under the above procedure by a township board of trustees can be prevented from taking effect at the end of 30 days, if, within 30 days after adoption

> there is presented to the board of township trustees a petition, signed by a number of qualified voters residing in the unincorporated area of the township . . . equal to not less than eight percent of the total vote cast for all candidates for governor in such areas at the last preceding general election at which a governor was elected, requesting the board of township trustees to submit the amendment or supplement to the electors of such area for approval or rejection at the next primary or general election.[3]

On May 5, 1970, the trustees of Union Township, Clermont County, Ohio, rejected the zoning commission's recommendation for approval of Amendment 5, amending Article XV of the zoning code which concerned the requirements for floor areas. Since the board's vote was not unanimous, the recommendation of the zoning commission would have taken effect 30 days after the trustee's action, had not a petition with the required number of signatures been filed requesting submission of the amendment to the electors at the next election. The sufficiency of the contents of those petitions[4] was later challenged in *Sidwell v. Clepper*.[5]

The Common Pleas Court of Clermont County in *Sidwell* applied the reasoning of *Markus v. Trumbull County Board of Elections*[6] and held that since the second page of each part of the referendum petitions contained an exact copy of the proposed amendment to the zoning code, and since

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supplement or the approval of some modifications thereof and shall submit such recommendation to the township zoning commission. Such recommendation shall be considered at the public hearing held by the township zoning commission on such proposed amendment or supplement.

The township zoning commission shall, within thirty days after such hearing, recommend the approval or denial of the proposed amendment or supplement . . . and submit such recommendation together with such application or resolution, the text and map pertaining thereto and the recommendation of the county or regional planning commission thereon to the board of township trustees.

The board of township trustees shall upon receipt of such recommendations, set a time for a public hearing. . . .

. . . .

Within twenty days after such public hearing the board shall either adopt or deny the recommendations of the zoning commission or adopt some modification thereof. In the event the board denies or modifies the recommendation of the township zoning commission the unanimous vote of the board shall be required.

[3] OHIO REV. CODE § 519.12 (Page Supp. 1970).

[4] In this case it was stipulated that there were a sufficient number of valid signatures.

[5] 25 Ohio Misc. 104 (C.P. Clermont County 1970).

[6] 22 Ohio St. 2d 197, 259 N.E.2d 501 (1970). In this instance the court did not specifically rely on *Markus* because that case more clearly addressed the question of ballot sufficiency. The rationale by which the court in *Sidwell* based its decision was articulated in the 4th syllabus of the *Markus* case. The court in *Sidwell* stated:

> . . . [T]he 4th syllabus of the *Markus* case cited above, . . . states, "the text of the ballot statement resulting from a referendum petition must fairly and accurately present the question or issue to be tried in order to assure a free, intelligent and informed vote by the average citizen affected." The court feels that the same criterion should be followed in the wording of the referendum petitions. *See* 25 Ohio Misc. 104, 108.

the wording of the petition specifically referred to the "Union Township Zoning Regulations," which were a matter of public record, the petitions "present[ed] to the signers thereof sufficient information for which to have a free, intelligent and informed signature thereon."[7] The court, however, noted that "the requirements on this petition are not spelled out in O.R.C. 519.12 . . . [T]he Code, itself, does not require an exacting form for these referendum petitions. . . ."[8] Therefore, it is apparent that the court, on its own initiative developed some guidelines on which to test the sufficency of the information.

Since § 519.12[9] "does not require an exacting form for these referendum petitions. . . ."[10] considerable difficulty is raised, as was discussed in *Pioneer Development & Resources Corp. v. Delaware County Board of Elections*.[11] There, the court, by distinguishing the *Markus* case, held zoning referendum petitions to lower standards of content than were required in *Sidwell*. The *Pioneer* court said that *Markus* did not apply to the question of sufficiency.[12] Therefore, the court assumed the burden of developing its own standard of sufficiency by drawing an analogy between § 519.12[13] and § 731.31,[14] which sets forth the standards required of referendum petitions for municipal ordinances. Since § 731.31 requires that a petition seeking to have a municipal ordinance referred need only "contain the number and a full and correct copy of the title of the ordinance or measure sought to be referred,"[15] the *Pioneer* court concluded:

> Thus, it would seem by analogy that under the provisions of Section 519.12,

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[7] 25 Ohio Misc. 104, 109.

[8] *Id.*

[9] OHIO REV. CODE § 519.12 (Page Supp. 1970).

[10] 25 Ohio Misc. 104, 109.

[11] Civil Action No. 464, (Ct. App., Delaware County, April 14, 1971), *appeal denied* No. 71-541 (Ohio, Sept. 29, 1971).

[12] In *Markus*, the referendum petition contained a statement which purported to state the substance of the issue to be referred. The appellees in that case owned property, part of which was zoned for commercial use and part of which was zoned for residential use. They succeeded in getting a resolution passed which changed that part zoned residential to commercial. When petitions were ciruclated regarding a referendum of that resolution, the statement purporting to explain the issue gave the impression that the entire property, rather than a portion, has been rezoned. In enjoining submission of the issue to the electors, the trial court stated that the petitions were *insufficient*, inaccurate, and misleading. In affirming, the supreme court stated only that judicial intervention was warranted ". . . because the petitions failed to contain an accurate and unambiguous statement of the issue sought to be submitted to the electorate." 22 Ohio St. 2nd 197, 202. The trial court's finding of insufficiency was thus deleted from the opinion of the supreme court, a fact which caused the court in *Pioneer* to state:

> In the *Markus* case, the petitions were inaccurate, ambiguous and misleading. . . . We are unable to determine from a reading of the case that the petition would have been held insufficient had the inaccuracy been omitted.

Civil Action 464, (Ct. App., Delaware County, April 14, 1971), *appeal denied* No. 71-541 (Ohio, Sept. 29, 1971).

[13] OHIO REV. CODE § 519.12 (Page Supp. 1970).

[14] OHIO REV. CODE § 731.31 (Page 1954).

[15] *Id.*

> Revised Code, only the amendment or supplement to be referred to the voters need be sufficiently designated without the necessity of setting forth the text thereof. *In the instant case, the referendum petition sets forth the date the amendment or supplement was adopted by the Board of Trustees and quotes verbatum the minutes of the Board by which such change of zoning was adopted.*[16]

Therefore the *Pioneer* court held that a zoning referendum petition is sufficient if a single reference to the minutes of the meeting at which the board of trustees approved the amendment is made.

It is apparent from the discussion of the above cases that the standards for the content of referendum zoning petitions are not prescribed by statute and have thus been decided by the courts on an ad hoc basis. Both *Sidwell* and *Pioneer* suggest standards, but not only are those standards conflicting, the cases themselves simply hold the respective challenged petitions to be sufficient, which suggests that a somewhat lower standard might also be permissible. The remainder of this note will therefore attempt to develop guidelines from which a uniform standard may be derived. Thereafter the standards provided by *Sidwell* and *Pioneer* will be compared to the model.[17]

The basis for deriving a minimum standard may be approached by a three-step process. First, by knowing what interest is protected by requiring minimum standards of content in the petitions for various kinds of referenda; second, by evaluating the interest in relation to the size of the electorate (state wide referenda, municipal referenda, township zoning referenda); and third, by determining whether that interest is protected in cases, unlike township zoning referenda, when the standards are clearly stated by statute.

The interest protected by requiring the petition (or circulator) to inform the prospective signer of the precise issue is the right of the majority to have the legislation enacted by their elected representatives take effect.[18]

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[16] Civil Action No. 464, (Ct. App., Delaware County, April 14, 1971), *appeal denied* No. 71-541 (Ohio, Sept. 29, 1971). In this case the minutes of the board of trustees, quoted in the petitions, were not informative as to the precise issue. They merely stated:

> Mr. Schuette moved a motion to accept the Zoning Commission recommendation on the application of Pioneer Development and Resources Corporation to re-zone 198 acres to R-S. Mr. Davidson seconded the motion. Roll call vote—Mr. Tone, yes; Mr. Davidson, yes; Mr. Schuette, yes.

[17] The development of this standard for township zoning referenda appears to be a legislative function. Since the general assembly has so far declined to set the standards, the task must be undertaken by the courts.

[18] There appear to be several values and interests protectd by requiring the petition statement to be minimally informative. There is, for example, the prospective signer's interest in avoiding being defrauded, and the interest of the circulator in getting electors to sign the petition (since prospective signers are often unlikely to sign if they are insufficiently informed). Given the narrow scope of this note, however, these and other such interests may be negated for purposes of analysis.

The interests of the signer in avoiding fraud is protected by the requirement that the statement of the issue on the *ballot* be clear, unambiguous, and informative. An investigation into the standards for the ballot statement is beyond the scope of this paper. The interest of the cir-

While it is obvious that a referendum election is an exercise in pure democracy, the procedure by which such an election is procured is essentially unrepresentative, that is, overriding for a time the rights of the majority. This point was recognized in *Ohio Valley Electric Railway Co. v. Hagerty*,[19] when the court stated:

> Care was taken by the general assembly, as will be hereafter pointed out, to protect the voice of the majority, once an election is had, from being stifled by technical objections. The power and rights of a majority duly expressed at an election, however, are not to be confused with the power and rights of a minority seeking an election. It is not a majority, but [a small minority][20] of the voting population that calls a referendum. This minority of one-tenth of the voters, by the filing of a proper petition, . . . suspend[s] the legislative power of the council, representing all the people, for a period as short as forty days or as long as thirteen months and more. This extraordinary power, given so small a proportion of the voting public, it would seem, is not to be exercised by it except by a full and strict compliance with the statute from which that power is derived. It is a grant of a special right to the minority and cannot be enlarged by construction.[21]

To protect the interests of the majority, it was felt therefore that certain safeguards should be required, insuring that the minority be so informed as to the issue that they could make an intelligent decision; that legislation should not "be suspended and a referendum had by securing the casual signatures of voters unacquainted with purport and possible effect of the proposed referendum."[22] The importance of protecting the rights of the majority by requiring the petitioning minority to be adequately informed varies under existing law according to the number of people affected. At the state level, where statutes passed by the General Assembly are subjected to referenda, the matter was "deemed so important that it was not left to mere statute, nor was it left to be determined by the courts upon extrinsic evidence that the voters were correctly advised of the object of the proposed referendum."[23] The standards by which the prospective signers of the petitions were to be advised of the issues are enumerated in the Ohio Constitution.[24] Thus at the state level, where the entire population

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culator in getting signers to sign is one which is not properly cognizable by the court, since it is easily correctable by the circulator himself.

[19] 14 Ohio App. 398 (Ct. App., Lawrence County 1921).

[20] The case presented to the court in *Hagerty* concerned petitions for a referendum of a municipal ordinance. The relevant statute, § 4227-4, Ohio General Code, provides that a number equal to ten percent of the votes cast at the last gubernatorial election sign the petition. Section 519.12 of the Ohio Revised Code, requires only a number equal to eight percent.

[21] 14 Ohio App. at 400-401.

[22] *Id.* at 403.

[23] *Id.*

[24] OHIO CONST. art. 2, § 1(g). This sets out several requirements for notice to the electorate. Not all of those requirements are directly related to the petitions, but the intent to advise the public as to the issue can clearly be seen. In point, it requires:

(1) That full and correct copy of the *title* and *text* of the law to be referred

of the state is affected by the referendum, the standards for the contents of a petition are strict and are clearly aimed at requiring the signer to make an intelligent informed choice. At the municipal level, where the number of persons subjected to the counter-representative effect of the petition phase of the referenda is significantly reduced, the formal requirements are correspondingly reduced. The framers of the constitution decided not to require that municipal referenda petitions be subject to the same requirements as petitions asking for statewide referenda. Section 1(f) of article II of the Ohio Constitution specifically provides that powers of referendum are to be regulated by statute.[25] Section 731.31[26] was enacted pursuant to article II, § 1(f) and provides the standards for petition content at the municipal level. Petitions are required to contain only the number and correct *title* of the ordinance, a reduced requirement from the state level when the full text is required. The other requirement of § 731.31 is that the affidavit of the circulator must state that the circulator believed the signers to have signed "with knowledge of the contents thereof."[27]

Since § 519.12 fails to require any standard whatever for the contents of the petition, it would seem reasonable to follow the logical progression and lower the standard still further for the township zoning cases. Analysis of the rationale of the *Pioneer* decision shows however, that the lowest productive standard has been reached at the municipal level. To lower the standards any further would be contrary to the goals of having an informed signer and avoiding any possible fraud or misrepresentation. As stated above, the petitions in *Pioneer* contained only the date of the meeting at which the resolution passed the township board of trustees, and the minutes of that meeting.[28] If the standards were reduced below the minimum required at the municipal level, a full and correct title of the resolution and an affidavit by the circulator that each signer "signed with knowledge of the contents thereof," there would be no assurance whatever that the majority's interest would not "be suspended and a referendum had by securing the casual signatures of voters unacquainted with the purport and possible effect of the proposed referendum."[29]

It is apparent that the court in *Pioneer* lowered the standard below

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(2) That the circulator of the petition swear that the signers signed with knowledge of the contents thereof

(3) Petitions come from ½ the counties of the state

(4) That arguments for and against the issue be published and sent to the electorate.

[25] *Id.* at § 1(f). In pertinent part § 1(f) states that "[t]he initiative and referendum powers are hereby reserved to the people of each municipality . . . such powers shall be exercised in the manner now or hereafter provided by law."

[26] OHIO REV. CODE § 731.31 (Page 1954).

[27] *Id.* This second requirement, which is a significant factor regarding the amount of notice required, was apparently overlooked by the court in *Pioneer* when it drew the analogy between § 731.31 and § 519.12.

[28] *See supra* note 16.

[29] 14 Ohio App. 398, 403.

that required at the municipal level. It did so, however, through an incomplete reasoning process. In drawing the analogy between § 731.31 and the township zoning statute, § 519.12, the court failed to consider the second requirement in § 731.31, that signators "sign such petitions with knowledge of the contents thereof." In the case of municipal ordinances, where only the title, and not the text, of the ordinance is required to be reproduced on the face of the petition, this second requirement is the most substantial safeguard, insuring that the signers have made a fair, intelligent and informed decision. The same is true of township zoning cases, like *Pioneer*, when only a reference to the meeting at which the Board of Trustees passed the resolution is made to introduce the prospective signer to the issue.

The court in *Sidwell* affirmed the validity of petitions which conformed to higher standards than those required by § 731.31. The petitions in that case contained a copy of the text of the proposed amendment (although again no mention was made of requiring the circulator's affidavit). While the standard attained by the petitions in *Sidwell* may be desirable, it is inconsistent to require that standard at the township level in the face of a lower statutory standard at the municipal level.

The result should, therefore, be a synthesis of the standards allowed in *Pioneer* and the one attained in *Sidwell*. The reasoning of the court in *Pioneer* should be adopted; that is, the analogy between § 731.31 and § 519.12 should be drawn, but the entire standard as detailed in § 731.31 should be adopted and applied to § 519.12. Therefore, in order for a zoning petition to be sufficient, it must contain:

(1) Full and correct copy of the title of the zoning resolution, and
(2) Circulator's affidavit that signers "signed such petition with knowledge of contents thereof."

The difficulty of such an incorporation of standards into § 519.12 is, of course, that it is not required by the statutory language. That problem can only be remedied by the General Assembly. On the other hand, a minimum standard is required by common sense, and until enacted by the General Assembly should be incorporated into § 519.12 by the courts.

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