

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30736
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

June 22, 2016
Via Hand Delivery

Clerk of the Court
Michigan Court of Claims
Hall of Justice
Lansing, Michigan 48933

Re: Committee to Ban Fracking in Michigan, et al v Thomas, et al
Court of Claims No. 16-000122-MM

Dear Clerk:

Enclosed please find Defendants' June 22, 2016 (6/22/16) Motion for Summary Disposition and Brief in Support of Defendants' June 22, 2016 (6/22/16) Motion for Summary Disposition with Proof of Service thereon for filing in the above-captioned matter.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Denise C. Barton".

Denise C. Barton
Assistant Attorney General
517.373.6434

DCB/lsa
Enclosures

cc: Hon. Stephen L. Borrello
Ellis Boal (via US Mail & electronic mail (ellisboal@voyager.net))

STATE OF MICHIGAN
COURT OF CLAIMS

COMMITTEE TO BAN FRACKING IN
MICHIGAN and LUANNE KOZMA,

Plaintiffs,

No. 16-000122-MM

v

HON. STEPHEN L. BORRELLO

CHRISTOPHER THOMAS, Director of
Elections, RUTH JOHNSON, Secretary of
State, and BOARD OF STATE CANVASSERS,

Defendants.

Ellis Boal (P10913)
Attorney for Plaintiffs
9330 Woods Road
Charlevoix, Michigan 49720
231.547.2626

Denise C. Barton (P41535)
Erik A. Grill (P64713)
Adam Fracassi (P79546)
Joseph Y. Ho (P77390)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
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517.373.6434

**DEFENDANTS' JUNE 22, 2016 (6/22/16) MOTION FOR
SUMMARY DISPOSITION**

Defendants Michigan Secretary of State Ruth Johnson, Christopher M.
Thomas, as Michigan Elections Bureau Director, and the Michigan Board of State
Canvassers, by their attorneys, move under MCR 2.116(C)(4), (5) and (8) for the

dismissal of Plaintiff's complaint on the grounds that the claims are barred by immunity, and in support of their motion state as follows:

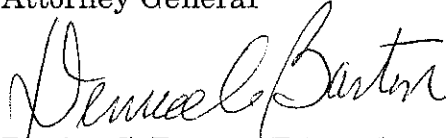
1. This case presents a challenge to the validity of SB 776, which was signed by the Governor on June 9, 2016, and which amended M.C.L. 168.472a.
2. Plaintiff is seeking declaratory and injunctive relief voiding M.C.L. 168.472a.
3. The Complaint alleges that the statute, which requires that petition signatures more than 180 days old not be counted, is unconstitutional.
4. Plaintiffs have not filed a petition to initiate legislation that would be subject to M.C.L. 168.472a.
5. Plaintiffs lack standing to bring this action.
6. Plaintiffs' claims are not yet ripe for review by this or any other Court.
7. Plaintiffs' have not stated an actual controversy that would entitle to them to declaratory or injunctive relief.
8. Plaintiffs' Complaint fails to make allegations stating a claim against Christopher Thomas or the Board of State Canvassers.

RELIEF REQUESTED

For these reasons and the reasons more fully stated in the accompanying brief, the Defendants respectfully request that this Honorable Court order granting summary disposition and dismissing Plaintiffs' Complaint in its entirety and with prejudice, together with any other relief that the Court determines to appropriate under the circumstances.

Respectfully submitted,

BILL SCHUETTE
Attorney General

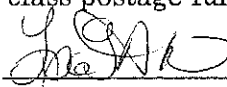


Denise C. Barton (P41535)
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517.373.6434

Dated: June 22, 2016

PROOF OF SERVICE

Lisa S. Albro certifies that on the 22nd day of June, 2016, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* at their last known addresses via first class mail by depositing same in a United States Post Office depository in Lansing, Michigan with first class postage fully paid.



Lisa S. Albro

STATE OF MICHIGAN
COURT OF CLAIMS

COMMITTEE TO BAN FRACKING IN
MICHIGAN and LUANNE KOZMA,

Plaintiffs,

No. 16-000122-MM

v

HON. STEPHEN L. BORRELLO

CHRISTOPHER THOMAS, Director of
Elections, RUTH JOHNSON, Secretary of
State, and BOARD OF STATE CANVASSERS,

Defendants:

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**BRIEF IN SUPPORT OF DEFENDANTS' JUNE 22, 2016 (6/22/16)
MOTION FOR SUMMARY DISPOSITION**

INTRODUCTION

This case does not present an actual case or controversy for this Court to decide. Plaintiff Committee to Ban Fracking in Michigan and its director, Plaintiff LuAnne Kozma, have filed a complaint with this Court seeking to overturn the

statutory time limit on petition signatures. However, Plaintiffs have not yet obtained even the minimum number of signatures necessary to have their proposed initiative placed on the ballot, and the deadline for doing so in the 2016 election has already passed. Because they have not filed their petitions with the Secretary of State, the statute has not yet been applied to them in any way. Under these circumstances, Plaintiffs lack standing, and their claims are not yet ripe. Dismissal is warranted under MCR 2.116(C)(4), (5) and/or (8).

STATEMENT OF FACTS

On April 14, 2015—over one year ago—the Board of State Canvassers approved the form of Plaintiffs' initiative petition. (Compl. ¶41). For reasons not immediately clear, Plaintiffs did not begin circulating their petition until May 22, 2015. (Compl. ¶42). Nonetheless, Plaintiffs allege that by November 18, 2015, they had collected over 150,000 signatures. (Compl. ¶43). However, in the roughly six months between that time and the filing of this lawsuit, Plaintiffs collected only about another 50,000 signatures. (Compl. ¶45). They are still over 50,000 signatures short of the minimum number of signatures required to have the question placed on the ballot. (Compl. ¶¶43, 45). The deadline to submit ballot questions for the November 2016 election passed on June 1, 2016. (Compl. ¶11; MCL 168.471). The deadline to submit initiative petitions for the next November election is May 30, 2018. (Compl. ¶11).

On June 9, 2016, Governor Snyder signed 2016 PA 142, which enacted Senate Bill 776:

The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state.

The law took immediate effect.

ARGUMENT

- I. **The Plaintiffs' challenge to 2016 PA 142 must be rejected because they lack standing, their claims are not yet ripe, and there is no genuine case or controversy upon which this Court could issue a declaratory judgment.**

Plaintiffs' complaint does not state any cognizable cause of action, and instead consists only of a demand for relief untethered to any legal claim. Plaintiffs are seeking to declare a statute unconstitutional, despite the fact that it has not yet—and may never—be applied to them. Accordingly, they lack standing to challenge the law in question, their claims are not ripe, and the complaint does not satisfy the requirements for declaratory actions.

A. **Plaintiffs lack standing to challenge 2016 PA 142.**

Plaintiffs lack standing to sue because they have not been affected by PA 142 until they file a petition. Under Michigan's standing doctrine:

[A] litigant has standing whenever there is a legal cause of action. . . . Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Lansing Sch Educ Ass'n v Lansing Bd of Educ, 487 Mich 349, 372 (2010). Here, Plaintiffs have not pleaded a legal cause of action, and their complaint does not

allege any “special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large”; and does not show that, “in the context of a statutory scheme, the Legislature had intended to confer standing” on them. *Id.* at 359.

Even if Plaintiffs had pleaded a cognizable cause of action, the only conceivable injury is that the statutory 180-day expiration of petition signatures might be applied to their petitions if they ever obtain a sufficient number of signatures to file. But, they have not filed their petition yet, and—withstanding the Plaintiffs’ optimism in reaching the requisite number of signatures “soon,” the 180-day expiration period for petition signatures has not yet been applied to them. Indeed, it may never be applied to them if they are unable to collect the tens of thousands of additional signatures they require.

Plaintiffs, therefore, are positioned no differently than any other citizen. As a result, the issues they seek to raise in this lawsuit are abstract and unconnected to any actual injury or right. Plaintiffs in essence are seeking what amounts to an advisory opinion from this Court. However, Const 1963, art. 3, § 8 provides only that the Governor or either house of the Legislature may request an opinion of the Supreme Court, and—even then—such requests must be made before the legislation takes effect. It does not provide for private citizens to make such a request to this Court after the effective date of the law. This Court should dismiss the instant suit for lack of standing under MCR 2.116 (C)(4), (5) and (8).

B. Plaintiffs' claims are not yet ripe.

A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all. *Citizens Protecting Mich's Constitution v Sec'y of State*, 280 Mich App 273, 282 (2008)(citing *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615-616 (2008)). In the context of ballot proposals, a controversy is ripe if, "it is not dependent upon the Board of Canvassers' counting or consideration of the petitions but rather involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance," and where "[a]ll of the information necessary to resolve the controversy ... is presently available." *Citizens Protecting*, 280 Mich App at 283 (internal quotations and citation omitted).

Here, Plaintiffs have not filed their petition yet, and unless they collect tens of thousands of additional signatures, their petition may never be filed. But, under MCL 168.473b, signatures collected prior to a general election in which a governor is elected cannot be filed after that election. So, even were this Court to accept Plaintiffs' argument regarding PA 142, they must collect all of the necessary signatures in time to be on the ballot for the 2018 election, or any signatures they have collected will be discarded anyway. It is entirely unclear when—or even if—Plaintiffs' petition will be filed.

Alternatively, it is also possible that Plaintiffs may suddenly benefit from a wave of popular support and quickly collect all of the necessary signatures within a six month span of time. That would render the earlier and outdated signatures unnecessary to a determination of whether the proposal reaches the ballot. In any

event, Plaintiffs' claims presently depend upon contingent future events that may not occur or may occur in an unexpected way.

Also, this is not a case involving a "threshold question" about the satisfaction of constitutional requirements, and instead is entirely about the counting or consideration of the petitions. Likewise, this is not a case involving an examination of the face of the petitions—again, the petitions have not been filed and so the "face" of the petitions is not before this Court. In addition, the information necessary for the Court to make a determination—the date of filing, how many signatures were collected, whether the signatures belong to valid registered voters, or whether the Plaintiffs would have a sufficient number of valid signatures even without the 180-day expiration law—is not presently available.

In short, Plaintiffs' claims are premised entirely upon hypothetical and contingent future events that have not—and may not ever—come to pass. By every measure, the claims are not yet ripe and should be dismissed under MCR 2.116 (C)(4), (5) and/or (8).

C. Plaintiffs have not stated an actual controversy sufficient to support a declaratory judgment.

Declaratory judgment is a form of relief, not an independent cause of action. It is axiomatic that declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. Plaintiffs' complaint must be dismissed because it seeks declaratory relief but does not assert a substantive claim or cause of action. Plaintiffs attempt to skip the requirement of an actual

controversy and move directly to the granting of relief. However, without an actual controversy, there is no basis for this Court to grant relief.

An “actual controversy” under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. *UAW v Central Michigan Univ Tr*, 295 Mich App 486, 495 (2012). “MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness.” *UAW*, 295 Mich App at 495. “The existence of an ‘actual controversy’ is a condition precedent to invocation of declaratory relief.” *Shavers v Attorney General*, 402 Mich 554, 588 (1978); *see also Genesis Ctr, PLC v Comm’r of Fin & Ins Servs*, 246 Mich App 531, 544 (2001).

Here, there is no actual controversy. Plaintiffs may continue to circulate their petition without any interference from the Defendants. And, unless and until Plaintiffs obtain the requisite number of signatures to file, a declaratory judgment is unnecessary to guide their future conduct or preserve their rights. If and when Plaintiffs obtain the additional signatures they require, they will be able to file their petition. If necessary or appropriate, they may decide at the time their petition is filed whether there is a legal issue worth raising in the courts. However, a declaratory judgment at this time is unnecessary to guide any future conduct or preserve any legal rights. Plaintiffs’ claim for declaratory judgment should be rejected, under MCR 2.116(C)(4), (5) and (8) because there is no actual controversy.

II. The complaint fails to make any allegations supporting any kind of claim against members of the Board of State Canvassers or the Director of Elections.

Under the Michigan Court Rules, a complaint must include a statement of facts “with specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called upon to defend.” MCR 2.111(B)(1). However, Plaintiffs’ complaint names several individuals as Defendants without including any allegations stating what they have done that would give rise to a lawsuit against them.

The complaint names Christopher Thomas, the Director of the Bureau of Elections, and the Board of State Canvassers. Plaintiffs’ Complaint includes allegations about *proposed* policy changes in December of 2015 and April of 2016. (Compl. ¶¶33, 36). However, neither proposal was adopted by the Board of State Canvassers (Exhibit A, Board Minutes dated 12/3/15; 12/14/15; 05/12/16).

There is no indication of what the Board of State Canvassers did, or what the Director of Elections did, that would support a cause of action against them. The complaint simply fails to state a claim against the members of the Board of State Canvassers or Director Thomas, and the complaint against them must be dismissed under MCR 2.116 (C)(8).

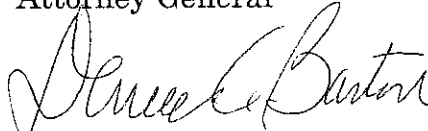
CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Director of Elections Christopher Thomas, Secretary of State Ruth Johnson, and the Board of State Canvassers respectfully request that this Honorable Court enter an order dismissing Plaintiffs’ complaint in

its entirety and with prejudice, together with any other relief that this Court determines to be appropriate.

Respectfully submitted,

BILL SCHUETTE
Attorney General



Denise C. Barton (P41535)
Erik A. Grill (P64713)
Adam Fracassi (P79546)
Joseph Y. Ho (P77390)
Assistant Attorneys General
Attorneys for Defendants
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517.373.6434

Dated: June 22, 2016

PROOF OF SERVICE

Lisa S. Albro certifies that on the 22nd day of June, 2016, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* at their last known addresses via first class mail by depositing same in a United States Post Office depository in Lansing, Michigan with first class postage fully paid.



Lisa S. Albro





STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

Meeting
of the
Board of State Canvassers

December 3, 2015
State Capitol Building, Room 426
Lansing, Michigan

Called to order: 9:05 a.m.

Members present: Jeannette Bradshaw – Chairperson
Norman Shinkle – Vice-Chairperson
Julie Matuzak
Colleen Pero

Members absent: None.

Agenda item: Consideration of meeting minutes for approval.

Board action on agenda item: Motion to approve the minutes of the November 13, 2015 meeting as submitted. Moved by Shinkle; supported by Matuzak. Ayes: Bradshaw, Shinkle, Matuzak, Pero. Nays: None. Motion carried.

Agenda item: Consideration of whether a recall petition filed on November 23, 2015 by Angelo Scott Brown states factually and clearly each reason for the recall of Governor Rick Snyder.

Board action on agenda item: The Board moved to determine that the recall petition filed by Angelo Scott Brown on November 23, 2015 does not state factually and clearly each reason for the recall of Governor Rick Snyder. Moved by Shinkle; supported by Matuzak. Ayes: Bradshaw, Shinkle, Matuzak, Pero. Nays: None. Motion carried.

Agenda item: Consideration of a new political party petition form submitted for approval by the Working Class Party, 9200 Gratiot Avenue, Detroit, Michigan 48213.

Board action on agenda item: The Board moved to approve the new political party petition form submitted by the Working Class Party. Moved by Matuzak; supported by Pero. Ayes: Bradshaw, Shinkle, Matuzak, Pero. Nays: None. Motion carried.


Agenda item: Discussion of petition canvassing procedure for the out-of-state circulator check box.

Board action on agenda item: None.

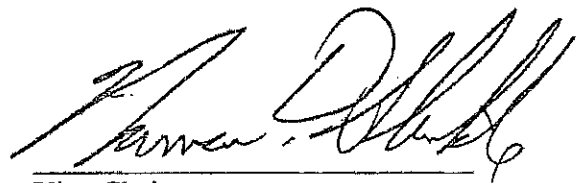
Agenda item: Such other and further business as may be properly presented to the Board.

Board action on agenda item: The Board received a request from Jeffrey Hank to revise the procedure for rebutting the presumption that signatures on a constitutional amendment or initiative petition that were affixed to the petition more than 180 days prior to the date of filing are stale and void, but took no action.

Adjourned: 9:57 a.m.



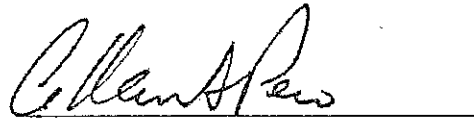
Chairperson



Vice-Chairperson



Member



Member

12-14-2015
Date



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

Meeting
of the
Board of State Canvassers

December 14, 2015
State Capitol Building, Room 426
Lansing, Michigan

Called to order: 1:32 p.m.

Members present: Jeannette Bradshaw – Chairperson
Norman Shinkle – Vice-Chairperson
Julie Matuzak
Colleen Pero

Members absent: None.

Agenda item: Consideration of meeting minutes for approval.

Board action on agenda item: Motion to approve the minutes of the December 3, 2015 meeting as submitted. Moved by Pero; supported by Shinkle. Ayes: Bradshaw, Shinkle, Matuzak, Pero. Nays: None. Motion carried.

Agenda item: Consideration of whether the recall petition filed on December 2, 2015 by William Bailey states factually and clearly each reason for the recall of State Senator Wayne Schmidt.

Board action on agenda item: The Board moved to determine that the recall petition filed by William Bailey on December 2, 2015 does not state factually and clearly each reason for the recall of Senator Wayne Schmidt. Moved by Matuzak; supported by Pero. Ayes: Bradshaw, Shinkle, Matuzak, Pero. Nays: None. Motion carried.

Agenda item: Consideration of whether the recall petition filed on December 3, 2015 by Angelo Scott Brown states factually and clearly each reason for the recall of Governor Rick Snyder.

Board action on agenda item: The Board moved to determine that the recall petition filed by Angelo Scott Brown on December 3, 2015 does not state factually and clearly each reason for the recall of Governor Rick Snyder. Moved by Pero; supported by Matuzak. Ayes: Bradshaw, Shinkle, Matuzak, Pero. Nays: None. Motion carried.

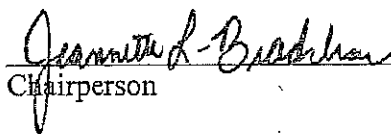
Agenda item: Discussion of request submitted by Jeffrey Hank, asking the Board to revise its policy regarding the method for rebutting the statutory presumption that a signature on a petition that proposes an amendment to the constitution or to initiate legislation is stale and void if made more than 180 days before the petition was filed.

Board action on agenda item: None.

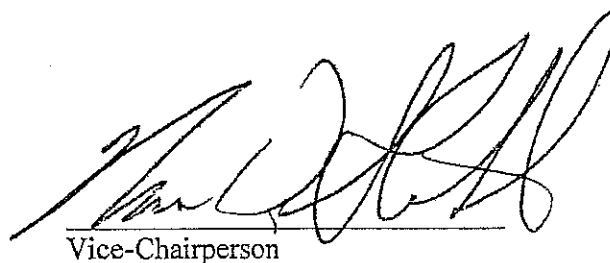
Agenda item: Such other and further business as may be properly presented to the Board.

Board action on agenda item: None.

Adjourned: 2:03 p.m.



Chairperson



Vice-Chairperson



Member



Member

12-29-2015
Date



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

Meeting
of the
Board of State Canvassers

May 12, 2016
State Capitol Building
Lansing, Michigan

Called to order: 10:08 a.m.

Members present: Jeannette Bradshaw – Chairperson
Norman Shinkle – Vice-Chairperson
Julie Matuzak
Colleen Pero

Members absent: None.

Agenda item: Consideration of meeting minutes for approval.

Board action on agenda item: Motion to approve the minutes of the April 25, 2016 meeting as submitted. Moved by Matuzak; supported by Shinkle. Ayes: Bradshaw, Shinkle, Matuzak. Nays: None. Pass: Pero. Motion carried.

Agenda item: Consideration of whether the recall petition submitted by Angelo Brown on May 2, 2016 states factually and clearly each reason for the recall of Governor Rick Snyder. The reasons for recall printed in the heading of the petition are as follows:

Governor Rick Snyder has drawn international shame to the State of Michigan. News coverage, about a governor made disaster in which thousands of Flint children may face long-term developmental problems from exposure to lead in the City of Flint drinking water.

Board action on agenda item: The Board moved to determine that the above referenced recall petition submitted by Angelo Brown on May 2, 2016 does not state factually and clearly each reason for the recall of Governor Rick Snyder. Members explained on the record why the petition did not state factually and clearly each reason for the Governor's recall.

Moved by Matuzak; supported by Pero. Ayes: Bradshaw, Shinkle, Matuzak, Pero. Nays: None. Motion carried.

Agenda item:

Presentation by the Board Secretary of (1) a proposed procedure for rebutting the statutory presumption that a signature on an initiative or constitutional amendment petition is stale and void if made more than 180 days before the petition was filed under the Board's current policy, and (2) a proposed revision of that policy.

Board action on agenda item: Several motions were offered.

First, the Board moved to approve the staff proposal to revise the Board's 1986 policy for rebutting the presumption under MCL 168.472a that a signature is stale and void if it is affixed to a constitutional amendment or initiative petition more than 180 days prior to filing. Moved by Matuzak; supported by Bradshaw.

Second, the Board moved to table the motion made by Member Matuzak for two weeks. Moved by Shinkle; supported by Pero. Ayes: Shinkle, Pero. Nays: Bradshaw, Matuzak. Motion failed.

Member Matuzak called the question on the adoption of her motion and the motion failed. Ayes: Bradshaw, Matuzak. Nays: Shinkle, Pero.

Next, the Board moved to approve the staff proposal regarding the procedure to be used under the Board's 1986 policy for rebutting the presumption under MCL 168.472a that a signature is stale and void if it is affixed to a constitutional amendment or initiative petition more than 180 days prior to filing. Moved by Matuzak; supported by Bradshaw.

Member Matuzak called the question on the adoption of her second motion and the motion failed. Ayes: Bradshaw, Matuzak. Nays: Shinkle, Pero.

Agenda item:

Vote on whether to convene a closed session in accordance with the Open Meetings Act to discuss a report from Board counsel regarding pending litigation (*Davis v Bradshaw et al.*).

Board action on agenda item: The Board moved to meet in closed session under section 8(h) of the Open Meetings Act to discuss a report from Board counsel. This report is exempt from public disclosure under section 13(1)(g) of the Freedom of Information Act because it is an attorney-client privileged communication. Moved by Pero; supported by Shinkle. A record roll call vote was taken: Bradshaw (aye), Shinkle (aye), Matuzak (aye), Pero (aye). Motion carried. Time: 10:51 a.m.

(Discussion held off the record.)

The Board moved to conclude the closed session and reconvene in open session. Moved by Pero; supported by Matuzak. A record roll call vote was taken: Bradshaw (aye), Shinkle (aye), Matuzak (aye), Pero (aye). Motion carried. Time: 11:26 a.m.

Agenda item: Such other and further business as may be properly presented to the Board.

Board action on agenda item: None.

Adjourned: 11:33 a.m.

Jeanette L. Bradshaw
Chairperson

Paul D. Hull
Vice-Chairperson

John J. Murt
Member

C. Keith Pava
Member

5-26-16
Date