

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

CITY OF MADEIRA,	:	Case No. A1802415
	:	
Plaintiff,	:	JUDGE MEGAN SHANAHAN
	:	
vs.	:	
	:	
PHILIP DOUGLAS OPPENHEIMER,	:	RESPONSE IN OPPOSITION TO
	:	DEFENDANT’S MOTION TO DISMISS
Defendant.	:	

By filing yet another meritless motion, Defendant Philip Douglas Oppenheimer (“Oppenheimer”) provides this Court with more evidence to tuck into his already-voluminous vexatious conduct file. As has been documented, the City of Madeira (“Madeira”) brought the instant action with a proverbial heavy heart. Oppenheimer clearly considers himself a crusader of sorts, someone who is following in the noble tradition of citizen-activists who wait patiently in city council meetings to speak their mind and advance the common good.

In reality, however, this is not *Mr. Smith Goes To Washington*. This is *Mr. Oppenheimer Goes To The Courthouse*. And each time he does so, he comes armed with increasingly outlandish legal theories presented in increasingly frivolous pleadings – with Madeira taxpayers footing the bill every time.

Under Ohio law, Madeira need not indefinitely dig into the pockets of its taxpayers to finance Oppenheimer’s litigation hobby. The City was well within its rights to initiate the instant lawsuit - Madeira’s final resort - to declare Oppenheimer a “vexatious litigator” as defined R.C. § 2323.52, *et seq.* Indeed, it would have been irresponsible for Madeira to incur additional expenses in yet further meaningless legal battles over the difference between a “resident” and an “elector” and whether the word “structure” includes “land” (real world examples, both). And

like the unresearched and haphazard arguments of Oppenheimer's previously dismissed lawsuits and appeals, this Motion depletes taxpayer resources and wastes this Court's time.

Attempting to unilaterally rewrite controlling legal authorities, Oppenheimer argues Madeira must pass some sort of legislative enactment as a procedural pre-condition to filing any lawsuit. Otherwise, Oppenheimer opines, the filing is "*ultra vires*." Oppenheimer attacks Proclamation No. 18-01 in which City Council made known its intention to pursue this lawsuit. The proclamation, however, was never intended to satisfy some procedural pre-condition to initiate the lawsuit – none was needed. With his Motion, Oppenheimer does battle with a straw man as Proclamation No. 18-01 (like many other proclamations) is not legislation, at all. It is functionally no different than proclamations declaring "National Payroll Week" or acknowledging a citizen with "John Doe Day." Accordingly, this Motion should be denied for, at least, the following three reasons:

- I. Pursuant to R.C. 2323.52, the City Law Director has express statutory authority to file a vexatious litigator lawsuit without any procedural pre-conditions or legislative enactments;
- II. The Madeira City Charter authorized the initiation of this lawsuit and there is no Charter language requiring some specific advanced legislative authorization prior to filing lawsuits; and
- III. The self-serving arguments upon which Oppenheimer's Motion are premised are a "house of cards" directly contradicted by common sense and Ohio legal authorities.

For ease of review, I'll discuss each of the foregoing grounds for denying Oppenheimer's Motion, in turn.

I. **PURSUANT TO R.C. 2323.52, THE CITY LAW DIRECTOR HAS EXPRESS STATUTORY AUTHORITY TO FILE A VEXATIOUS LITIGATOR LAWSUIT WITHOUT ANY PROCEDURAL PRE-CONDITIONS OR SPECIFIC LEGISLATIVE ENACTMENTS.**

In his motion, Oppenheimer makes no effort to oppose the express language of R.C. 2323.52, which inarguably vests a City Law Director with the authority to initiate a lawsuit on behalf of the City to declare someone a “vexatious litigator.” Oppenheimer, instead, cherry picks self-serving language from misread statutes pertaining to the legislative authority of a municipality, and bizarrely argues that Madeira needed to pass an authorizing ordinance to initiate a lawsuit. R.C. 2323.52(B) expressly states:

“A person, the office of the attorney general, or ... **city director of law** ... or similar chief legal officer of a municipal corporation who has defended against habitual and persistent vexatious conduct in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court **may commence a civil action in a court of common pleas with jurisdiction** over the person who allegedly engaged in the habitual and persistent vexatious conduct **to have that person declared a vexatious litigator.**”

Emphasis added. Madeira has diligently searched Ohio jurisprudence for cases where litigants questioned a city law director’s authority to initiate a lawsuit, pursuant to R.C. 2323.52, and has not located a single case. One suspects that’s likely because few have so boldly endeavored to argue, with a straight face, against the plain language of the statute.

II. **THE MADEIRA CITY CHARTER AUTHORIZED THE INITIATION OF THIS LAWSUIT AND THERE IS NO CHARTER LANGUAGE REQUIRING SOME SPECIFIC ADVANCED LEGISLATIVE AUTHORIZATION PRIOR TO FILING LAWSUITS.**

Beyond the express statutory authority to file the above-captioned lawsuit under R.C.2323.52, Madeira (as a chartered, home-rule municipality) is not beholden to the language

cited and misapplied by Oppenheimer (R.C. 715.03) and may file without any specific legislative authorization under the Madeira City Charter. Ohio courts consistently look to a city's charter for authority on whether an action requires council approval. What's more, when presented with language from other city charters nearly identical to Madeira's, Ohio courts have rejected the notion that City Council must first pass any authorizing ordinance before a city law director can take action.

Specifically, Articles II, IV, V, and VII demonstrate this point. To begin, Article II establishes Madeira's home-rule status:

Under this charter the municipality shall have home rule and all the powers of local self-government and all other powers possible for it to have under the Constitution of the State of Ohio, and all powers that now are or may hereafter be granted it by the laws of Ohio....

Article IV, Section 2, describes the City Manager's ability to act without the consent of City Council, vesting certain authority in the City Manager. Specifically, it provides that "[t]he Manager shall be responsible...for the proper administration of all the affairs of the municipality...." Initiating a lawsuit – particularly in light of City Council's proclaimed desire to explore one – certainly falls within "the affairs of the municipality."

Further (and like other Ohio city charters), the Madeira City Charter vests powers in the City Law Director, and provides that "[t]he Law Director ... shall represent the municipality in all litigation to which it may be a party..." *Madeira City Charter*, Article V, Section III. The power vested in the City Manager to provide for the "proper administration" of the City's affairs, coupled with the provision requiring the Law Director to represent the City in all litigation, permits the Law Director, at the City Manager's instruction, to initiate a lawsuit under the requisite authority, R.C. 2323.52.

Finally, the Charter is not silent about specific actions requiring legislative action by Council (*i.e.*, “Action of Council Necessary”). Article VII, Section III, and only this section provides for those actions requiring preliminary legislative action by Council. Commencing a lawsuit is not mentioned. *See generally*, Article VII, Section III.

Critically, the Madeira City Charter is not unique, and there are many like it. In fact, Ohio courts have deemed many of these charters to vest authority in the city law director to initiate a vexatious litigator lawsuit. For instance, in *City of Green v. Helms*, 9th Dist. Summit No. 26371, 2013-Ohio-2075 (May 22, 2013), the defendant made a similar argument to Oppenheimer, except he relied upon R.C. 733.53, which provides, “[t]he city director of law, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city ... as he is, by resolution or ordinance, directed to prosecute.” The defendant argued that statute prohibited the law director in that case from bringing claim against him, as he was not “authorized” to do so. The Ninth District, finding this statute inapplicable to the issue, noted that the statute sets forth the actions that a law director must take “when required to do so[.]”

Turning then to the Green City Charter, the Ninth District found that the Charter authorized the law director to take action on behalf of the City because it stated:

The Director of Law shall be the legal advisor on all legal matters coming before the City and shall represent or direct the representation of the City in all litigation, cases or suits coming before the City. He shall prepare and review all contracts, ordinance, resolutions and other documents or instruments as required by the Mayor and Council. He will have other powers and duties performed by Directors of Law of general statutory planned cities under the general laws of the State of Ohio.

In addition, the Director of Law shall perform other duties specified for City solicitors by the laws of the State of Ohio.

Id. Obviously that language reads similar to the Madeira City Charter.

In *Marysville v. Boerger*, 20 Ohio App. 2d 61, 64, 251 N.E.2d 628 (3rd Dist. Union Oct. 15, 1969), the Court considered whether the city manager of Marysville, under its Charter, possessed the power to enjoin an alleged use violation of the village zoning ordinance, without specific legislative authorization by the village council. Section 1.03 of the Marysville City Charter generally vested municipal powers in an elective council, which “shall enact local ordinances and resolutions * * * and appoint a city manager who shall be the chief executive and administrative officer and shall see that the policies and legislation adopted by council are enforced.” In other words, it is an express duty of the Marysville city manager to enforce the ordinances. The Madeira City Charter imposes that same duty upon its City Manager: “[The City Manager] shall be responsible to Council for the proper administration of all the affairs of the municipality and the enforcement of all its laws and ordinances.” Construing the Marysville City Charter, the Court held that under the Marysville Charter, the law director had authority to initiate the lawsuit in that case due to the following provision: “[s]ubject to the direction of the city manager, he [the city attorney] shall represent the municipality in all suits or cases in which the municipality may be a party.” The Court concluded that “only the direction of the city manager, not the resolution of the village council, is required by this charter...” Distinguishing the case from *In re King*, 14 Ohio App. 88 (9th Dist. Lorain April 16, 1921), the Court found that unlike *King* – where the officials were governed only by general statutes vesting in the solicitor the authority to institute an action only upon resolution of council – the Marysville City Charter did not include such a limitation. The same is true of the Madeira City Charter.

Summarizing, the Madeira City Charter authorized the initiation of this lawsuit and there is no Charter language requiring some specific advanced legislative authorization prior to filing this (or any) lawsuit.

III. THE SELF-SERVING ARGUMENTS UPON WHICH OPPENHEIMER'S MOTION ARE PREMISED ARE A "HOUSE OF CARDS" DIRECTLY CONTRADICTED BY COMMON SENSE AND OHIO LEGAL AUTHORITIES.

Ohio municipalities do indeed face certain restrictions upon their ability to act, and they, as Oppenheimer rightfully notes, speak through their ordinances. That said, the Ohio Revised Code does not require legislative action for every routine administrative action, or every piece of litigation. Common sense serves as a guide, here. If Oppenheimer's contention was correct, then Cincinnati City Council's meetings should take hours as it painstakingly approves ordinances for the thousands of collection and building code enforcement actions it undertakes each year.

Oppenheimer's entire argument hinges upon a tortured misreading of R.C. 715.03 and some vague misapplication of *ultra vires*. R.C. 715.03 states only that "municipal corporations have the general powers mentioned in sections 715.01 to 715.67" (*i.e.*, the power to sue and be sued, lease, enter into agreements, *etc.*) and that "the legislative authority" (*i.e.*, City Council) "may provide by ordinance or resolution for the exercise and enforcement of such powers." It does not state that council "must" or "shall" enforce such powers only by ordinance or resolution. To the contrary – the statutory language is permissive.

IV. CONCLUSION.

Given this express statutory authority, the authority vested by the Madeira City Charter, and affirming case law, no Council approval was necessary for the initiation of this lawsuit. Cities like Madeira are simply allowed to file actions such as this one. For these reasons, and

those set forth more fully above, Oppenheimer's Motion To Dismiss must be denied and the case should proceed, at last, to discovery and adjudication.

Respectfully submitted,

/s/ Brian W. Fox

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon all counsel of record by email this 28th day of May, 2019.

/s/ Brian W. Fox

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