City of Madeira ex rel. Douglas Oppenheimer, Relator,

V.

City of Madeira, et al, Respondents.

August 27, 2016

12) July 12, 2016, Respondents (City of Madeira) Motion For Judgement On The Pleadings.
13) August 3, 2016, Relator's (Oppenheimer) Memorandum in Opposition To Motion for Judgement on the Pleadings.
14) August 17, 2016, Respondents' (City of Madeira) Reply to Relator's Memorandum in Opposition To Motion for Judgement On The Pleadings.
15) Tracy Winkler, Clerk of Courts, Case History & Case Schedules.

The Honorable Judge Patrick T. Dinkelacker, will hear, oral arguments on Motions 12, 13, 14, on September 6, 2016, 1 PM, Hamilton County Courthouse, RM. 360.

Please Scroll Down.....

12

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA *ex rel.* DOUGLAS OPPENHEIMER,	:	**Case No. A-15-06891**
Relator,	:	**Judge Dinkelacker**
v.	:	**(ORAL ARGUMENT REQUESTED)**
CITY OF MADEIRA, *et al.*,	:	
Respondents.	:	

RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Ohio Civil Rule 12(C), Respondents City of Madeira and Tom Moeller (collectively, "Madeira" or the "City") hereby move this Court to grant declaratory judgment in its favor.

Article XVI of the Madeira City Charter seeks to preserve three buildings in the City. Unlike other historic preservation codes, Article XVI consists of just four sentences, each narrow in scope. The drafters of Article XVI included nothing to prevent Madeira from selling any of its property. On the contrary, the plain language of Article XVI provides only for the preservation of certain structures – and is silent as to whether they must remain in public hands. Thus, Madeira's subsequent (and since abandoned) efforts to sell a piece of land next to one of these structures did not violate the Charter.

Relator's Verified Complaint (and its incorporated exhibits) provides the relevant legislative history regarding Article XVI and Ordinance 15-30. Should the Court find it necessary to look beyond the plain language of Article XVI to consider its "spirit" and "intent," these averments and exhibits inexorably lead to the same conclusion. Under either analysis, the

Court must – on the pleadings, and as a matter of law – grant declaratory judgment in favor of the City.

A Memorandum of Law in Support of this Motion and Proposed Order are attached hereto.

Respectfully submitted,

/s/ Steven P. Goodin

Steven P. Goodin (0071713)
Brian W. Fox (0086851)
Attorneys for Defendant
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Direct: (513) 629-2845
Fax: (513) 651-3836
sgoodin@graydon.com
bfox@graydon.com

OF COUNSEL:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

MEMORANDUM IN SUPPORT

I. Introduction

The matter before the Court constitutes a legal rarity on several counts.

First and foremost, this is the rare case in which the responding municipality has a more pressing need to have its rights and obligations adjudicated than does the Relator who originally petitioned this Court for declaratory judgment. The property in question is in limbo at present, and may remain so indefinitely pending resolution of this case. While Relator may argue that this controversy is moot to delay the subsequent sale of the land in question,[1] Madeira asserts that the question triggered by Relator's allegations in this case presents a classic scenario evading temporary review but capable of repetition. *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000), citing *Spencer v. Kemna*, 523 U.S. 1, 17-18, 118 S.Ct. 978, 140 L.Ed.2d. 43 (1998). In other words, Relator's arguments will be raised anew in a subsequent complaint whenever the next private citizen expresses even a hint of interest in purchasing any of the City's land or buildings. Therefore, Madeira respectfully requests the Court's determination on the merits at this time.

Secondly, the case at bar is a piece of "taxpayer" litigation in which the purported protector of the public trust – the Relator – seeks to waste taxpayer dollars litigating a matter on dubious grounds in which the facts are not in dispute. Given that the Verified Complaint and its incorporated exhibits set forth the relevant facts, Madeira respectfully submits that this dispute is ripe for resolution on the pleadings as they sit before Court today.

* * *

[1] For the purposes of this Motion, the Court may take judicial notice of the March 10, 2016 averments of counsel in court that the sales contract identified in Relator's Verified Complaint (and which was the subject of the controverted Ordinance) has been withdrawn.

Relator's arguments notwithstanding, Madeira Ordinance No. 15-30 (the "Ordinance") simply does not conflict with Article XVI of Madeira's City Charter ("Article XVI" or "Charter Amendment"). By its plain terms, Article XVI sets forth no provision, either express or implied, that would prevent the City from selling, leasing, or otherwise conveying any parcel under the City's ownership. Thus, Article XVI unambiguously allowed for the sale of a portion of the small vacant lot adjacent to this structure.

Given the lack of ambiguity in the Ordinance or Article XVI, there is absolutely no need for either party to adduce or proffer additional evidence. The matter is postured such that the Court can and should render a dispositive decision based upon the four corners of the Verified Complaint and the exhibits appended thereto. The taxpayers of Madeira need not finance lengthy depositions and paper discovery when the answer – in plain and unambiguous terms – lies in the legislative enactments already before the Court.

Even assuming *arguendo* that the Court does indeed find some ambiguity in these provisions, Madeira is nonetheless entitled to judgment on the pleadings. Relator's Verified Complaint includes factual averments which must, for the purposes of this Motion, be taken as true. Moreover, Relator has appended multiple official municipal documents which relate the relevant legislative history, as well as the City's previous interpretations of the provisions. For purposes of this Motion, these documents and averments provide the necessary factual predicate to resolve this dispute. Thus, even allowing for some theoretical ambiguity in the controverted language, the City is still entitled to judgment on the pleadings.

II. Standard of Review

Given that Relator seeks a purely legal determination of his rights under the Charter Amendment – and that Madeira seeks a purely legal review of the matter as currently pled before the Court – a motion of judgment on the pleadings under Ohio Civil Rule 12(C) is the

appropriate – if not exclusive – vehicle to resolve this dispute. "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." *Kallaus v. Allen*, 5th Dist. Licking No. 07CA0153, 2008-Ohio-5081, ¶ 12, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165, 297 N.E.2d 113.

It is also well-established in Ohio courts that the same standard of review is to be applied to both Ohio Civil Rule 12(B)(6) and 12(C) motions. *Gawloski v. Miller Brewing Co.*, 96 Ohio App.3d 160, 162-163, 644 N.E.2d 731 (9th Dist. 1994). In applying Ohio Civil Rule 12(C), this Court should grant this Motion "where no material factual issue exists and the moving party is entitled to judgment as a matter of law." *Amadasu v. O'Neal*, 176 Ohio App.3d 217, 2008-Ohio-1730, 891 N.E.2d 802, ¶ 5 (1st Dist.). Moreover, this Court must determine the merits of this Motion by reviewing the allegations of the pleadings, and construing material allegations in the Verified Complaint as true. *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591, 592-93. However, "unsupported conclusions of a complaint are *** not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots* (1989), 45 Ohio St. 3d 324, 324, 544 N.E.2d 639, 639; accord *Mitchell v. Lawson Milk Co.* (1998), 40 Ohio St.3d 190, 192–93, 532 N.E.2d 753 (noting that a complaint's facts, not its unsupported legal conclusions, should drive the Court's analysis).

Ohio law is clear that judgment in this case would be appropriate if this Court: "(1) construes the material allegations in the [Verified Complaint], with all reasonable inferences to be drawn therefrom, in favor of [Relator] as true, and (2) finds beyond doubt, that [Relator] could prove no set of facts in support of his claim that would entitle him to relief." *Kallaus v. Allen*, 5th Dist. Licking No. 07CA0153, 2008-Ohio-5081, ¶ 12, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 1996 Ohio 459, 664 N.E.2d 931.

Lastly, the Court is obligated to give the legislative enactments involved in this matter their common meaning, and to assume that such enactments express the intent of the municipality which passed them (absent same patent ambiguity). "'The intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.'" *Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio-5333, 979 N.E.2d 1246, ¶ 10, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902).

After reviewing the Verified Complaint and related legislative enactments, this Court should find that Relator can prove no set of facts entitling him to stop the transaction authorized by the Ordinance, or any similar transaction contemplated in the future.

III. Statement of Undisputed Material Facts

While the issue before the Court is primarily one of statutory interpretation – and, thus, one of law – the Court nevertheless may need to consider certain undisputed background facts.

Accepting for the purposes of this Motion the averments set forth in the Verified Complaint, several important facts emerge. On April 3, 1989, a private citizen transferred the Muchmore House and its adjacent land to the City of Madeira. Verified Complaint at ¶ 5. In November, 2014, the citizens of Madeira voted, via initiative, to create a "Historic District" which would include the Muchmore House and two other structures (the so-called "Hosbrook House" and the Railroad Depot). Verified Complaint at ¶¶ 6-7. This Charter Amendment is the so-called Article XVI which forms the basis of Relator's claim for declaratory judgment. Relator alleges that he was a "leader" in the petition-drive initiative effort which resulted in the adoption of Article XVI. Verified Complaint at ¶ 9. It is also uncontroverted that Madeira City Council

passed Resolution No. 10-14 in opposition to the initiative – noting, *inter alia*, that the resulting Charter Amendment would lead to unnecessary litigation regarding the land. Verified Complaint at ¶¶ 10-11; *see also* Exhibit B.

On November 9, 2015, Madeira City Council adopted Ordinance 15-30 (the aforementioned "Ordinance") which authorized a sales contract for the "vacant land" adjacent to the Muchmore House. Verified Complaint at ¶¶ 13-14; *see also* Exhibit C. Relator admits that neither the Ordinance nor the sales contract included the specific portion of the land to be sold. Verified Complaint at ¶ 15.

On November 30, 2105, Relator served a "taxpayer letter" on the City of Madeira Law Director objecting to the content of the Ordinance, and thus laying the groundwork for the instant litigation. Verified Complaint at ¶ 17.

IV. Law and Argument

The Madeira voters who approved Article XVI had no idea they were voting to end all development in their city's growing central area or to otherwise curtail the City's fundamental rights as a property owner. Instead, they voted – based upon the plain and unambiguous language of Article XVI – to "preserve" three specific structures, and to set up a special district to guide future development of those three specified properties. Relator asks this Court to read new terms and new meaning into this very simple provision. Ohio law demands that the Court decline to do so.

A. *Given the lack of 'patent ambiguity' in either Article XVI or the Ordinance, Madeira is entitled to declaratory judgment in its favor.*

Under Ohio law, "absent some patent 'ambiguity,' a statute is to be applied without resort to the process of 'statutory construction.' Courts lack the authority to ignore the plain and unambiguous language of a statue under the guise of 'judicial interpretation.'" *State v. Knox*,

10th Dist. Franklin No. 89AP-1168, 1991 Ohio App. LEXIS 2957, at *4 (June 11, 1991), quoting *State* v. *Hix,* 38 Ohio St. 3d 129, 131 (1988) and *Board of Edn.* v. *Fulton County Budget Comm.*, 41 Ohio St. 2d 147, 156 (1973). Given that Article XVI and the Ordinance lack any patent or obvious ambiguity regarding whether Madeira may sell its duly-owned property, the Court need not – indeed *may* not – seek further guidance outside the provisions themselves.

The language of Article XVI could hardly be clearer or plainer. It contains no language which could ever be remotely construed as a restriction on the transfer of the properties described therein:

> The City of Madeira was deeded and assumed ownership of the "Hosbrook House" located at 7014 Miami Ave. and the "Muchmore House" located at 7010 Miami Ave. In addition to these two properties the City also has ownership of the historic Railroad Depot located at 7701 Railroad Ave. These three important and historic properties are to be preserved, protected, and left standing on the same ground that the structures were built upon. These three historic structures will be included in the "Historic District".

(Complaint, ¶ 7, emphasis added).

At most, Article XVI requires the owner of these properties to leave them standing – irrespective of who that owner may be. Article XVI is silent as to public ownership, and appropriately so – *most* historical properties, regardless of the process by which they were so designated, are owned by *private* entities. *See, e.g., Diocese of Toledo v. Toledo City-Lucas Cnty. Plan Comm'ns*, 6th Dist. Lucas Court of Appeals No. L-98-1150, 1999 Ohio App. LEXIS 868 (Mar. 12, 1999); *Holy Trinity Greek Orthodox Cathedral v. City of Toledo Plan Comm'n*, 6th Dist. Lucas No. L-06-1119, 2006-Ohio-6631 (cases in which private owners of Ohio historically-designated properties sought to ascertain their rights to demolish same). Thus, Relator's repeated conclusory assertions that Article XVI contains some sort of unspoken public ownership requirement are baseless, unavailing and just plain wrong.

It is noteworthy that both the Relator and the plain language of Article XVI expressly concede that Madeira *owns* the structures and land in question. This concession is a significant one – as a property owner, Madeira possesses several distinct rights, including the fundamental right to alienation. *See, e.g, Anderson v. Cary*, 36 Ohio St. 506, 1881 LEXIS 226 (1881) (under Ohio law, *ex post facto* deed restrictions are "repugnant" to fee simple estates). Even if Madeira voters could have theoretically curtailed this fundamental right via initiative, they would have been required to do so expressly as constraints upon municipalities cannot be imposed by mere inference. *See, e.g., State ex rel. Horvath v. State Teachers Retirement Board* (1998), 83 Ohio St.3d 67. 76, 697 N.E.2d 644, 654 (holding that municipalities may only be bound by express language).

A review of the "home rule" provisions in the Ohio Constitution and Madeira City Charter offers further – and conclusive – support for Madeira's inherent right to sell any property in its possession. "The power to convey property owned by a municipal corporation and no longer needed by it for municipal purposes is included within the *** powers of local self-government conferred by Article XVIII of the Ohio Constitution ..." *State ex rel. Leach v. Redick*, 168 Ohio St. 543; 157 N.E.2d 106 (1959). Article IV of the Madeira Charter clearly acknowledges and reserves these home-rule property rights for the City:

> The Manager shall execute and deliver all contracts and make all purchases for the municipality, except franchise or public utility services. All contracts and purchases involving an expenditure for more than $10,000 shall be authorized by ordinance of Council ... All contracts shall be approved as to form by the Solicitor before they are executed by the Manager.

Relator makes no allegation that the City acted outside its home rule and charter-enabled process in the attempted sale of the controverted property. Moreover, there is no provision in Article XVI which would even arguably repeal or curtail this fundamental right. Irrespective of the

"historical" designation now accorded these properties, there can be no serious argument that Madeira is proscribed from conveying them at will.

Even if the Court were to somehow construe this language as a constraint upon Madeira's right to alienation, such a construction would necessarily be a narrow one. By its own terms, Article XVI applies only to the historical structures identified therein – and not to any adjacent land. It exclusively refers to two "houses" and a "depot" and further denominates the buildings as "historical *structures*." (emphasis added) Moreover, the passage requires Madeira to protect and preserve "historic properties . . . left standing on the same ground that the structures were built on." The terms "properties" and "structures" therefore must refer to the buildings themselves, as there would be no need to otherwise reference "the same ground" where it was built.

Even so construed, the Ordinance would not violate Article XVI. It authorizes the City Manager to sell only "a portion of the vacant land located . . . at 7010 Miami Avenue" — not the Muchmore House structure, the "ground" upon which it stands, or any of the other structures or "ground" protected by Article XVI. Ordinance No. 15-30, Section 1, attached to Verified Complaint as Exhibit C. The Ordinance is thus consistent with Article XVI – it neither threatens any historical structural nor abrogates the City's duty to preserve and protect the Muchmore House.

As he led the petition-drive initiative effort resulting in Article XVI, Relator could have – with the stroke of a pen – included unambiguous language attempting to repeal Article IV. For reasons unknown (and irrelevant), he did not. The voters instead approved language which does not address the future sale of the properties and which clearly distinguishes between the structures and the land surrounding them. Accordingly, the Court need go no further in its

analysis. Under either construction, the Ordinance does not run afoul of Article XVI, and Relator's Verified Complaint is left without meaning or merit.

B. ***Even assuming some ambiguity for the sake of argument, the record still requires judgment in favor of Madeira.***

While Madeira strongly contends that the Court need only review the unambiguous provisions at issue, it would nonetheless welcome judicial review of – and the application of Ohio's canons of construction to – the legislative and interpretative record set forth in the Verified Complaint and its incorporated exhibits. Even under this analysis, the City remains entitled to judgment on the pleadings.

It must be preliminarily noted that, under Ohio's canons of construction, any ambiguity or vagueness must be construed against the drafter of the controverted provision. Either Relator wrote Article XVI, caused it to be written, or adopted it *ex post facto* as a leading proponent of the ballot initiative which placed it before Madeira voters. Accordingly, any ambiguities in Article XVI – including, but not limited to, the drafter's confusing use of the term "properties" – must inure to the benefit of Madeira, which had no role in drafting it. *Charles Behler Sons' Co. v. Ricketts*, 30 Ohio App. 167, 171 (1st Dist. 1928).

Moreover, the Court must also note that *none* of the relevant legislative enactments contain even a scintilla of evidence that *any* party intended to constrain the City's right to alienation *vis-à-vis* these buildings or the adjacent land. The record is utterly devoid of any such statement, query or consideration.

If the Court nonetheless finds some ambiguity in these provisions, the incorporated legislative documents still speak for themselves – and wholly undermine Relator's creative and self-serving constructions.

For instance, Relator seeks to obscure Madeira's distinct use of the terms "structures," "houses" and "properties" throughout its official documents. Each term is accorded a clearly delineated meaning, with "properties" clearly referring to "land." Relator nevertheless employs a selective quotation of Madeira Resolution No. 10-14 in Paragraph 12 of his Verified Complaint; deprived of its proper context, this quotation appears to incorrectly imply that Madeira City Council used the terms interchangeably. Note also his clever conflation of "Muchmore Property" with the "Muchmore House" in Paragraph 13 – an obvious effort to create the impression that Madeira viewed the "house" as a broader "property."

To Relator's credit, however, he appended the entirety of Resolution No. 10-14 to his Verified Complaint as Exhibit B. This resolution refers unambiguously to "two city-owned houses, along with – the Railroad Depot." Exhibit B at ¶4. Paragraph four likewise distinguishes between "the properties" (land) and "the buildings" (houses). This document affirms Madeira's conceptualization of these terms, and unmasks Relator's quotations as cherry-picked and out-of-context.

Relator has little choice but to go down this path because Article XVI uses the terms "properties" and "structures" interchangeably and without regard for Madeira's prior usage: "These … properties are to be preserved, protected and left standing on the same ground that the structures were built upon." In this context, the term "structures" relates back to the term "properties" and cannot be synonymous with "land" (as it was in the resolution). Given the grammatical structure of this sentence, Relator would have us believe that "properties" are to be preserved "on the same ground … that they were built." Insert the word "land" for "properties," and the impossibility of a parallel construction becomes obvious. Relator's arguments in this regard amount to word games – nothing more and nothing less.

Relator will undoubtedly also argue that Resolution No. 10-14 constitutes a sort of "smoking gun" of adverse legislative intent inasmuch as the resolution acknowledges that Article XVI is "vague" in terms of what, precisely, it protects. Yet when the resolution is considered in its self-evident context, it sets forth no such contradictory intent.

By adopting Resolution No. 10-14, Council was grappling with the impossible-to-predict practical effects of Article XVI. In doing so, the councilmembers speculated that the Charter Amendment might be "vague" in two distinct respects. First, they posited whether it was "vague" in that it "references items not present within the City of Madeira" – a clear reference to the "Historic District" portion of Article XVI, which is not at issue for purposes of this construction. Verified Complaint at Exhibit C, ¶ 3. Second, the resolution notes that Article XVI is "vague" only inasmuch as it might arguably obligate the City to construct replicas of the structures should they be destroyed by *force majeure* (i.e., the meaning of the requirement to "preserve and protect" the structures indefinitely).

Relator's selective reading of Resolution No. 10-14 aside, it manifestly does *not* constitute some sort of legislative admission that Article XVI is so vague and ambiguous that Relator's subjective intent ought to determine its scope. The idea that Madeira would have entered into the sales agreement authorized by the Ordinance after *admitting* that the sale of the properties could be proscribed by Article XVI is mind-boggling, and runs counter to the position set forth in the City Solicitor's response to Relator's demand letters. The City's position has always been clearly articulated – namely, that Article XVI does nothing to prevent the City from selling a portion of vacant land adjacent to those structures.

C. *Sale of the Madeira properties would not violate the "spirit" of Article XVI.*

As noted *supra*, Relator pre-emptively cites to the purported "spirit" and "intent" of the Charter Amendment in Paragraph 15 of his Verified Complaint. This argument – clearly

designed to distract from the obvious construction of Article XVI adopted by the City – is likewise unavailing.

The "spirit" and "intent" of Article XVI is most clearly evinced in the distinct portion of the provision calling for a "Historic District." On its face, it requires efforts to preserve and protect the three structures, *and* to more generally create an overlaying area focused on historic preservation. This "Historic District" is clearly meant to encompass the three protected structures as well as a larger, still-to-be-defined portion of the central Madeira business district – an area which would necessarily include numerous privately-owned properties. The inclusion of the "Historic District" concept provides further proof that the Madeira "historical" properties can be privately owned. Otherwise, there would have been no need to create a separate "District" – only the buildings could have been so designated.

Nothing about the sale of a portion of vacant land to a private citizen jeopardizes the City's ability to implement the "Historic District," or violates the "spirit" or "intent" of Article XVI that the buildings be "preserved" and "protected." Despite Relator's illogical construction of the enactment, the Charter Amendment does not operate as a legislative deed restriction indefinitely preventing the City from ever selling any of the land it owns. Thus, even if the Court were to find the controverted enactments to be ambiguous in some fashion, the incorporated legislative record nonetheless entitles Madeira to judgment on the pleadings.

IV. Conclusion

Article XVI simply does not proscribe Madeira's right to sell its property. Even if the Court were to find some ambiguity in its scant provisions, however, the legislative history incorporated into Relator's Verified Complaint conclusively supports to the City's construction. And even the most liberal construction would apply such a restriction to "structures" only, and not the land which was the subject of the Ordinance in question.

Accordingly, the City respectfully requests judgment on the pleadings in its favor on all claims. A Proposed Order is attached hereto.

Respectfully submitted,

OF COUNSEL:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

/s/ Steven P. Goodin

Steven P. Goodin (0071713)
Brian W. Fox (0086851)
Attorneys for Defendant
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Direct: (513) 629-2845
Fax: (513) 651-3836
sgoodin@graydon.com
bfox@graydon.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the following via Regular U.S. Mail, postage prepaid, and by email on this 12th day of July, 2016 pursuant to Ohio R. Civ. P. 5(B)(2)(c):

Curt Hartman
hartmanlawfirm@fuse.net
3749 Fox Point Court
Amelia, OH 45102

/s/ Steven P. Goodin
Steven P. Goodin (0071713)

6483641.3

IT IS HEREBY DECLARED:

1. Respondents City of Madeira's and Tom Moeller's Motion for Judgment on the Pleadings is granted in its entirety.

2. Relator City of Madeira ex rel. Oppenheimer's Verified Complaint is hereby dismissed on its merits and with prejudice.

3. Article XVI of the Madeira Charter does not prohibit the City from selling, alienating or otherwise conveying any buildings, structures or real property within its possession.

IT IS SO ORDERED.

_____
Judge Patrick T. Dinkelacker

Submitted by:

/s/ Steven P. Goodin
Steven P. Goodin (0071713)
Brian W. Fox (0086851)
Attorneys for Defendant
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Direct: (513) 629-2845
Fax: (513) 651-3836
sgoodin@graydon.com
bfox@graydon.com

Distribution:

Curt Hartman
3749 Fox Point Court
Amelia, OH 45102

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA *ex rel.* DOUGLAS OPPENHEIMER,	:	**Case No. A-15-06891**
	:	
Relator,	:	**Judge Dinkelacker**
	:	
v.	:	
	:	
CITY OF MADEIRA, *et al.*,	:	
	:	
Respondents.	:	

ORDER GRANTING
CITY OF MADEIRA AND CITY MANAGER TOM MOELLER'S
MOTION FOR JUDGMENT ON THE PLEADINGS

This matter is before the Court on the Motion of Respondents City of Madeira and Tom Moeller for Judgment on the Pleadings pursuant to Civil Rule 12(C). Having considered the record, including the memoranda submitted by counsel, this Court finds said Motion well-taken.

Under Ohio law, if a statute is unambiguous, a court need not go outside the plain language of the statute or resort to other means of interpretation. Here, Article XVI of the Madeira's City Charter, included in the Relator's Complaint, is unambiguous. The Article requires the City of Madeira to "preserve and protect" certain historical structures. The statute does not bar the sale or transfer of historical structures to a private citizen, nor does it require the City to preserve and protect the land surrounding certain historical structures. Therefore, Madeira Ordinance No. 15-30, that describes the sale of a vacant lot near a certain historical structure to a private citizen, does not conflict with Article XVI. Because there is no conflict, Relators Complaint must fail, and Respondents are entitled to judgment in their favor.

13

TRACY WINKLER
HAMILTON COUNTY CLERK OF COURTS

COMMON PLEAS DIVISION

ELECTRONICALLY FILED
August 3, 2016 08:57 PM
TRACY WINKLER
Clerk of Courts
Hamilton County, Ohio
CONFIRMATION 545384

CITY OF MADEIRA EX REL
DOUGLAS OPPENHEIMER
vs.
CITY OF MADEIRA

A 1506891

JUDGE
PATRICK T DINKELACKER

FILING TYPE: MEMORANDUM

PAGES FILED: 14

EFR200

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA *ex rel.* DOUGLAS OPPENHEIMER	:	**Case No. A-15-06891**
	:	
	:	**Judge Dinkelacker**
Relator,	:	
	:	
v.	:	**RELATOR'S MEMORANDUM IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS**
	:	
CITY OF MADEIRA, *et al.*,	:	
	:	
Respondents.	:	
	:	

Now comes the CITY OF MADEIRA, by and through Relator DOUGLAS OPPENHEIMER, and hereby tenders the following memorandum in opposition to Respondents' motion for judgment on the pleadings.

MEMORANUDM IN OPPOSITION

As developed below, in seeking judgment on the pleadings, Respondents have not met and established the standards by which they might be entitled to judgment on Relator's declaratory judgment action; and Respondents only offer vague linguistic gymnastics in an effort to undermine and frustrate the intent of the voters of the City of Madeira in adopting Article XVI to the City Charter.

In the context of the declaratory judgment action brought by the Relator, Respondents are not entitled to judgment as a matter of law nor issuance of a non-descript declaratory judgment in their favor.

As an initial matter, Respondents create multiple procedural *non sequiturs* by moving for judgment on the pleadings but then making a general prayer for the Court to "grant declaratory

judgment in [their] favor". (Motion, at 1.) *Firstly,* Respondents fail to state with any detail the declaratory judgment to which they claim entitlement. *See Hall v. Strzelecki*, 2002-Ohio-2258 (8th Dist.)("a trial court fails to fulfill its function when it disposes of the issues in a declaratory judgment action by journalizing an order sustaining or overruling a motion for summary judgment without setting forth any construction of the document under consideration"). As such, by Respondents proceeding in such a vague and non-specific manner, Relator is precluded from even being able to address or respond whatsoever to the non-specific declaratory judgment to which Respondents ultimately claim entitlement and this Court is similarly treading into the unknown. And as the movant, Respondents have not demonstrated their entitlement to such relief.

Secondly and more significantly, by couching their present effort in the context of seeking judgment on the pleadings but then seeking a non-specific declaratory judgment, Respondents demonstrate a failure to appreciate the limited scope of a defendant-respondent seeking judgment on the pleadings vis-à-vis a claim for declaratory judgment and an injunction arising therefrom. For the legal standard on whether to grant a motion for judgment on the pleadings is the same as dismissal based upon failure to state a claim upon which relief may be granted and, thus, simply considers whether a plaintiff (or, in this case, the relator) can prove any set of facts to support the claim. *See Sullivan v. Anderson Township*, 2009-Ohio-6646 ¶7 (1st Dist.)("judgment on the pleadings is proper where the court construes all material allegations in the amended complaint, along with all reasonable inferences, as true and in favor of the plaintiff

and concludes, beyond doubt, that the plaintiff can prove no set of facts to support the claims for relief").[1] Thus, in the specific context of a declaratory judgment action:

> The motion for judgment on the pleadings is in the nature of a demurrer. The only question presented by such motion is whether or not the facts alleged are sufficient to give the court jurisdiction to enter a declaratory judgment.

Zepp v. City of Columbus, 112 N.E.2d 46, 47 (Franklin Cty. C.P. 1951); see *Parker v. City of Upper Arlington*, 2006-Ohio-1649 ¶17 (10th Dist.)("[a] court may dismiss a declaratory judgment claim upon a Civ.R. 12(C) motion if a plaintiff fails to plead a justiciable issue or actual controversy between the parties, or if declaratory relief will not terminate the uncertainty or controversy").

---

[1] Respondents call upon this Court to improperly go outside of the pleadings by improperly taking judicial notice and considering, *inter alia*, the legislative enactments involved in this matter. (Motion, at 6.)

Firstly, Respondents call upon this Court to improperly take judicial notice of a purported averment made by some unidentified counsel during a conference or hearing with the Court. Any such representation by counsel does not establish, under the ambit of Evidence Rule 201, as an undisputed factual matter that which supposedly was stated. Relator is entitled to conduct discovery concerning such alleged representation, including the adoption by the Madeira City Council that, if this present action is dismissed, it has every intention of proceeding with the contract under Ordinance No. 15-30. That is far removed from any unequivocal declaration that the subject contract has been withdrawn; it is being held in abeyance in the wishful hope that this Court will dismiss this action.

And Respondents further compound this error by wrongfully claiming that, in considering the present motion, the Court is also "to assume such [legislative] enactments express the intent of the municipality which passed them". (Motion, at 6.) But as developed in the Complaint and more fully below, this case involves a provision of the Madeira City Charter which was adopted by the people of the City of Madeira in their role as the ultimate sovereign of the municipality. Thus, Respondents effort to argue for any interpretation of specific terms within the City Charter based upon the same or similar language used in legislative enactments (*see* Motion, at 11-13) is misplaced. *See Toledo v. Lynch*, 88 Ohio St. 71, 101, 102 N.E. 670 (1913)("[t]he purpose of the home-rule amendment (Article XVIII) is to pass the sovereign power of municipal government (within certain subjective limitations) directly from the people of the state to the people of the city, if the latter choose to exercise it").

In this context, Respondents have not claim that the facts alleged in the complaint (together with all reasonable inferences therefrom) are not sufficient to vest this Court with jurisdiction or that Relator can prove no set of facts to support the claims for relief. Instead, Respondents would simply have this Court decreed something (whatever it might be) solely as an abstract principle without the development of an evidentiary record; but a fully developed evidentiary record is appropriate in a case such as this. *See Scott v. Houk*, 127 Ohio St.3d 317, 939 N.E.2d 835, 2010-Ohio-5805 ¶¶50 & 52 (Brown, C.J., dissenting)("[a] declaratory-judgment action permits evidentiary discovery and hearings, which would create a thorough record of facts.... A declaratory-judgment action would allow the creation of a record on which a court may base its ruling").

Applying the proper legal standard to a motion for judgment on the pleadings (and not withstanding Respondents' *non sequiturs* within their motion), Respondents have not established beyond doubt that Relator can prove no set of facts to support the claims for relief and, as such, the motion for judgment on the pleadings must be denied. *See Graham v. Perkins*, 2015-Ohio-3943 ¶13 (6th Dist.)("[a] Civ.R. 12(C) motion essentially tests the sufficiency of the complaint as written.... In order to prevail on a motion for judgment on the pleadings pursuant to Civ.R. 12(C), 'it must appear beyond doubt that [appellant] can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [appellant's] favor'" (quoting *State ex rel. Fuqua v. Alexander,* 79 Ohio St.3d. 206, 207, 680 N.E.2d 985 (1997))).

Respondents only offer vague linguistic gymnastics in an effort to grant the Madeira City Council with absolute authority over the people of the City of Madeira even though adoption of a city charter is an act of sovereignty by the people themselves.

Notwithstanding the failure of Respondents to demonstrate beyond doubt that Relator cannot prove no set of facts warranting relief, as Respondents have proceeded to discuss abstractly issues concerning the City Charter, Relator would respond with his own academic discussion in rebuttal.

But through nothing more than linguistic gymnastics, Respondents argue for this Court rewrite the Madeira City Charter adopted by the voters of the City of Madeira (and not by the City Council) such that the Madeira City Council can dispose, without any restriction or limitation whatsoever, the real property on which historic structures were built and on which they were located when the voters amended the City Charter. For Respondents would allow the Madeira City Council, through nothing more than *ad hoc* and *post facto* fiats, to assume a power and authority it does not possess so as to dictate the content and meaning of the City Charter and in contravention of the intent of the voters in adopting the pertinent provision to the City Charter.

Through a selective, out-of-context and contradictory reading of an isolated portion of Article XVI of the Madeira City Charter, Respondents claim that the Madeira City Council has the unlimited power to alienate or otherwise transfer all the real estate referenced therein just so long as they do nothing to the actual structures thereon. But in order to posit such a contention, Respondents: (i) fail to consider the entirety of Article XVI so as to assess the context of the language throughout; (ii) wrongfully construe different words within Article XVI synonymously; and (iii) fail to even consider or address the purpose and intent of the voters in adopting Article XVI which clearly does not include the constrained and absurd position taken by Respondents herein.

As an initial matter, the nature of municipal charters must be considered and appreciated. "A municipal charter is the constitution of a municipality." *Deluca v. Aurora*, 144 Ohio App.3d 501, 510, 760 N.E.2d 880, 2002-Ohio-1056 (11 h Dist.); *accord City of Cleveland ex rel. Neelon v. Locher*, 25 Ohio St.2d 49, 51, 266 N.E.2d 831 (1971). "Accordingly, when provisions of a city's charter and its ordinances conflict, the charter provision prevails, and the ordinance in conflict is void." *City of North Canton v. Osborne*, 2015-Ohio-2942 ¶13 (5th Dist.)

Furthermore, just as "[i]t is the role of the judiciary to interpret our constitution and such interpretation does not rise or fall upon the view of the General Assembly," *Village of Lucas v. Lucas Local School Dist.*, 2 Ohio St.3d 13, 16 n.2, 442 N.E.2d 449 (1982), so too is the role of the judiciary to interpret the constitution of a municipality, *i.e.*, the city charter, and such interpretation does not rise or fall upon the fiat of the city council.[2] For "no court has permitted

---

[2] Respondents premise their argument upon the proposition that what is controlling is "the obvious construction of Article XVI adopted by the City". (Motion, at 13-14.) As developed above, any position taken or adopted by the Madeira City Council as to the meaning or scope of the Madeira City Charter is illusory and a nullity. Just like a constitution, a city charter is the embodiment of the will of the people themselves to control and limit those who govern:

> What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land... The life-giving principle and the death-doing stroke must proceed from the same hand.... The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity.... In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve.

Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308 (Cir. Ct. Pa. Dist. 1795). Yet, the Madeira City Council would have it be the center of the universe. Such an argument or position demonstrates a fundamental misunderstanding as to whose government the government really is. Spoken like those who have held elective office for way too long, Respondents appear to take the position that they lord over the people. Respondents clearly need a basic civics lesson:

(continued on next page)

the exercise of any powers not granted in [a] charter, or powers contrary to or inconsistent with the plain provisions of the charter." *State ex rel. Pawlowicz v. Edy*, 60 Ohio App. 159, 164-65, 20 N.E.2d 260 (6th Dist. 1938). Yet, in the present case and through their effort to summarily dispose of the case through the present dispositive motion, Respondents improperly attempt to afford the Madeira City Council with the ultimate and absolute authority to decree what is and is not permitted by the City Charter, in general, and Article XVI, in particular, all without any judicial authority or review. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

The critical issue in this case concerns the scope and limitations imposed upon the Madeira City Council by Article XVI of the Madeira City Charter. "In interpreting a city charter provision, the general principles of statutory construction will be applied; the objective is to give effect to the intention behind the provision." *Hayslip v. City of Akron*, 21 Ohio App.3d 165, 486 N.E.2d 1160 (9th Dist. 1984)(syllabus ¶1); *accord Fisher v. Amberley Village*, 2015-Ohio-2384 ¶32 (1st Dist.). Additionally, though, appreciation must be given to the different roles and functions served by a city charter versus a statute or ordinance. For in interpreting a city charter provision, the Court must proceed from a perspective that that considers the the role and function of a city charter, *i.e.*, the constitution for the municipality:

> What is this Government, whose power is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, "Governments are instituted among Men, deriving their just powers from the consent of the governed." I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government. This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence....

Perez v. Brownell, 356 U.S. 44, 64 (1958).

> [C]onstitutions do not legislate. They locate and limit the powers of government and define the modes of their exercise....
>
> The essential difference between a constitution and a statute or ordinance is that a constitution usually states general principles, and establishes a foundation of the law and government, whereas a statute or ordinance must provide the details of the subject of which it treats. A constitution, unlike a law, is intended not merely to meet existing conditions, but to govern future contingencies.
>
> The Constitution must be interpreted and effect given it as the paramount law of the land, according to the spirit and intent of its framers, as indicated by its terms. A legislative enactment which violates the true intent and meaning of the instrument, although it may not be within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden. The fundamental law of the State is to be construed in no narrow and illiberal spirit. It is to be construed according to its intention, where that is clear; and that which clearly falls within the reason of a constitutional prohibition may be regarded as embodied within it.
>
> It is a well recognized rule of construction that such interpretation will be given to a provision of the Constitution as will promote the object of the people in adopting it. It is the duty of the Court, and its only proper purpose, in the construction of constitutional provisions, to ascertain and give effect to the intent of the people when they wrote them into their constitution. The rule of constitutional interpretation that, a purpose being clearly indicated, provisions should, so far as their terms will permit, be construed so as to further that purpose, will not justify a court in denying the plain meaning of an unambiguous provision because of the belief that its natural consequences should not have been intended.
>
> Although a constitutional provision is usually a declaration of principles of the fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing. Obviously there is a distinction between constitutional provisions which are self-executing and those which are not. One of the recognized rules is that constitutional provisions are not self-executing, if they merely enact a line of policies or principles, without supplying the means by which such policies or principles are to be effectuated. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void.

Kraus v. City of Cleveland, 94 N.E.2d 814, 817-18 (Cuyahoga Cty. C.P. 1950)(internal citations omitted).

Respondents wrongfully couch the issue before the Court as whether Article XVI operates as an absolute ban on the transfer by the City of the properties described therein, *i.e.*, whether "Article XVI contains some sort of unspoken public ownership requirement". (Motion, at 8.) But Relator has never claimed or asserted that the properties described in Article XVI must be maintained in public ownership – and Respondents have not cited to any such claim other than their own, though inaccurate, *ipse dixit*. Instead, as a statutory taxpayer action brought pursuant to R.C. 733.56 *et seq.*, the issue is simply whether the effort and attempt by the Madeira City Council to sell or transfer a portion of the properties *without any restrictions or limitations whatsoever* constitutes an abuse of corporate powers and/or the execution or performance of a contract in contravention of the laws governing it. (*See* Complaint ¶21.) Specifically, the issue is whether the effort and attempt by the Madeira City Council to sell or transfer a portion of the properties *without any restrictions or limitations whatsoever* is consistent with the intent of the voters of the City of Madeira in adopting Article XVI of the City Charter wherein the voters, as the ultimate sovereign, imposed the mandate upon the City that the "three important and historic properties" specifically identified by name and address in the City Charter "are to be preserved, protected, and left standing on the same ground that the structures were built upon." Relator maintains that Article XVI imposes, at a minimum, the mandatory duty upon the City of Madeira, regardless of how the parcels may be titled, to ensure that the three properties identified therein are, *inter alia*, preserved and protected against waste, neglect or deterioration, either in terms of the structures themselves or the real estate on which they sit;[3] this may be accomplished

[3] Through Ordinance No. 15-30 and otherwise, Respondents have apparently (though wrongfully) taken the position that the Madeira City Council can alienate all or part of the properties without any restriction whatsoever. Such a contention would make Article XVI ring hollow and undermine the will and intent of the voters of the City of Madeira.

through deed restrictions, *etc.*, but not through the present effort by the City to sell or transfer a portion of the properties.

While Respondents would have this Court lexicographer as it relates only to a few isolated (and different) terms (Motion, at 9-10), doing so improperly seeks to consider a few words in isolation and out of context. In fact, Respondents go so far as to call upon this Court to treat different terms within Article XVI ("structures" and "properties") as being synonymous even "the use of different words indicates an intention that the words possess different meanings." *Andover Village Retirement Community v. Cole*, 2014-Ohio-4983 ¶15 (11th Dist.); *accord Jewish Hosp., Inc. v. Secretary of Health & Human Services*, 19 F.3d 270 (6th Cir. 1994)("[a]djacent provisions utilizing different terms, however, must connote different meanings").

Additionally, as the Ohio Supreme Court has recognized, even "[t]he [U.S.] Supreme Court has specifically rejected the isolation and decontextualization of specific terms within a statute as a valid mode of statutory interpretation." *In re Timken Mercy Medical Ctr.*, 61 Ohio St.3d 81, 84 n.2, 572 N.E.2d 673 (1991); *see id.* ("[t]o take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute" (quoting *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 542 (1940))). In fact, the First District has recognized that "charter provisions, like statutes and constitutions, must be read as a whole and in context. We are not permitted...to look at the first sentence and disassociate it from the context of the entire section." *McQueen v. Dohoney*, 2013-Ohio-2424 ¶48 (1st Dist.). Thus, the entirety of Article XIV and the different terms used therein must be considered, with the ultimate

goal and purpose being to ascertain and effectuate the intent of the voters in adopting that provision.

In its entirety, Article XVI of the Madeira City Charter provides:

> The City of Madeira was deeded and assumed ownership of the "Hosbrook House" located at 7014 Miami Ave. and the "Muchmore House" located at 7010 Miami Ave. In addition to these two properties the City also has ownership of the historic Railroad Depot located at 7701 Railroad Ave. These three important and historic properties are to be preserved, protected, and left standing on the same ground that the structures were built upon. These three historic structures will be included in the "Historic District".

Thus, in considering what limitations, if any, exist with respect to efforts by the City of Madeira to sell or transfer a portion of the real properties referenced therein, consideration must be given to the language utilized and the context of the entire provision.[4]

Article XVI identifies three specific properties previously acquired by the City, *viz.*, the Hosbrook House, the Muchmore House and the Railroad Depot. But beyond simply given an appellation to these three properties, Article XVI sets forth the specific address of each of these properties, *viz.*, 7014 Miami Avenue, 7010 Miami Avenue and 7701 Railroad Avenue. Thus, when the voters of the City of Madeira adopted Article XVI, they not only recognized the appellation given to the structures themselves but also expressed an understanding and intent that these three structures were then-existing on three distinct parcels of real property which had been

---

[4] Respondents also make an argument essentially that the City's home-rule authority preclude the imposition of any restriction on the City's ability to sell any property. (Motion, at 9-10.) Such an argument demonstrates further a lack of appreciation and respect for the sovereignty of the people in an municipality and the people's authority, as the ultimate sovereign, to limit and restrict their municipal government, including limiting or restricting the use or disposition of municipal-owned property. Additionally, the arguments by Respondents concerning *ex post facto* imposition of restrictions on the alienation of real property (Motion, at 9) are not applicable as this case does not involve efforts by the government to impose such a restriction on private property. Instead, this case involves the people of a municipality, in their role and function as the ultimate sovereign thereof, imposing a restriction or limitation upon themselves *qua* the municipal corporation. In fact, nothing prohibits a private property owner from imposing a restriction or limitation upon the real property he or she may own.

deed to or acquired by the City, *i.e.*, the parcels with the addresses of 7014 Miami Avenue, 7010 Miami Avenue and 7701 Railroad Avenue.[5] And at the time of the adoption of Article XVI, the contours of these three parcels were clearly a matter of public record in the office of the Hamilton County Auditor. Thus, by including not only the appellation given to the three structures themselves, but also the addresses thereof, the voters of the City of Madeira clearly were intending to address both the historic structures and the property on which they were located.[6] Such a reading and interpretation is consistent with the intent of the people in adopting that provision. But, at a minimum, a sufficient issue exists to preclude the entry of judgment on the pleadings.

Conclusion

Failing to afford due respect and deference to the people of the City of Madeira as the ultimate sovereign of the municipal corporation, Respondents seek to assume a supremacy over them when it comes to the City Charter. Akin to the municipal constitution, a city charter can limit and restrict the authority of the municipal government (including limiting rights as it relates

---

[5] Respondents acknowledge that the language of Article XVI actually recognizes that the City "owns the structures and land in question." (Motion, at 9.) Later in their motion, Respondents attempt to divorce themselves from this concession by claiming Article XVI only relates to the structures or buildings themselves, and nothing to do with the land associated therewith.

[6] Respondents also attempt to claim that any ambiguity must be read against Relator because he was one of the petitioners supporting the charter amendment that became Article XVI. (Motion, at 11.) Such an argument fails to appreciate that, in the present case, the City of Madeira *qua* a municipal corporation, and not the Relator, is the real party-in-interest. *Schulman v. City of Shaker Heights*, 29 O.O.2d 373, 196 N.E.2d 102 (8th Dist. 1964). This fact was actually acknowledged by Respondents in the Agreed Preliminary Injunction entered herein. Furthermore, such an argument fails to appreciate that the adoption and amendment of a charter itself is undertaken, not by an individual, but by the people of a municipality in their act as ultimate sovereign.

to real property) and any provision in a city charter must be interpreted to effect the intent and will of the people, not the government officials the charter seeks to govern and limit.

The people of the City of Madeira clearly intended to impose limitations and restrictions on the historic properties identified in Article XVI both by structure and the parcels on which they were located. Respondents' effort to preclude the development of an evidentiary record from which this Court may provide clear pronouncement is inappropriate; Respondents have not and cannot establish entitlement to judgment on the pleadings (let alone whatever unidentified declaratory judgment to which they believe they are entitled). As such, the present motion must be denied.

Respectfully submitted,

/s/ Curt C. Hartman
Curt C. Hartman (0064242)
THE LAW FIRM OF CURT C. HARTMAN
7394 Ridgepoint Drive, Suite 8
Cincinnati, OH 45230
(513) 379-2923
hartmanlawfirm@fuse.net

Attorneys for Relators

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following on the 3rd day of August 2016, via e-mail:

Steve Goodin
Bryan Fox
Graydon Head & Ritchey
1900 Fifth Third Center
511 Walnut Street
sgoodin@graydon.com
bfox@graydon.com

/s/ Curt C. Hartman

ELECTRONICALLY FILED 08/03/2016 20:57 / MEMO / A 1506891 / CONFIRMATION NUMBER 545384

14

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA *ex rel.* DOUGLAS OPPENHEIMER,	:	**Case No. A-15-06891**
	:	
	:	**Judge Dinkelacker**
Relator,	:	
	:	
v.	:	
	:	
CITY OF MADEIRA, *et al.*,	:	
	:	
Respondents.	:	

RESPONDENTS' REPLY TO RELATOR'S MEMORANDUM IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Without question, opposing counsel possesses formidable powers of ratiocination and advocacy. Yet even these powers fail when put to work on behalf of the specious arguments advanced by Relator Douglas Oppenheimer ("Relator"). In his Response to the City of Madeira's ("Madeira") dispositive motion, even opposing counsel has little choice but to concede the essence of Madeira's argument – namely, that the controverted Article XVI of the Madeira City Charter does not, by its own plain and unambiguous terms, require that the three "historic properties" in question remain under public ownership. (*See, e.g.*, Relator's "Memorandum in Opposition to Motion for Judgment on the Pleadings," at p. 9: "Relator has never claimed or asserted that the properties described in Article XVI must be maintained in public ownership …").

With the issue of public ownership – the nub and nexus of Relator's so-called taxpayer lawsuit – off the table, there is truly nothing left for the Court to decide. If ever a motion for judgment on the pleadings presented an appropriate vehicle for disposing of a supposedly-thorny piece of municipal litigation, such is the case here. The path forward is as simple and

unambiguous as the Charter language Relator tries to complicate with his artful pleading. This case begs to be put out of its own misery.

* * *

If one were to read Relator's arguments opposing Madeira's dispositive motion without the "benefit" of having read his Verified Complaint for Declaratory Judgment and Injunctive Relief (filed with this Court on December 18, 2015), he or she would be excused from thinking that public ownership was never at issue – that, instead, Madeira was somehow moved to expend pages of text on an irrelevant argument of its own creation. Even a cursory review of his Verified Complaint, however, gives lie to this proposition. Relator's Verified Complaint is directly premised upon the erroneous belief that any "sale or transfer" of the subject properties would violate Article XVI, and thus violate Ohio law. (*See, e.g.,* ¶ 16: "The proposed sale or transfer of the Muchmore House Property would violate the prohibition with [sic] Article XVI of the City Charter of the City of Madeira.") Relator's attempts to re-plead his Verified Complaint are unavailing – public ownership was always the central issue in this case, despite Relator's late-breaking admission that such is not proscribed by Article XVI.

Backed into a corner, Relator is left with nothing more than creative arguments regarding the supposedly elusive "true" meaning of Article XVI – a curious stance given that Relator apparently drafted it. He concurrently advances an irrelevant line of argument regarding whether any future transfer of the property must include a recitation of the restrictions supposedly imposed by Article XVI – and claims that this, really, was his true concern all along. (Relator's Memorandum in Opposition, at p. 9). Relator apparently forgets that the entirety of the relief he has sought in this matter – going back to his original "taxpayer demand letter" (attached to his Verified Complaint as Exhibit D) – involved stopping the sales contract authorized by Madeira

Ordinance No. 15-30 (Verified Complaint at ¶ 26). Regardless, Madeira has *never* claimed that the properties, if transferred, would be exempt from Article XVI. This purely conjectural "issue" was not raised in the Verified Complaint, and is not properly before the Court now.

Relator is left to argue that the prospective sale of a piece of vacant land adjacent to one of the parties would result in an illegal "diminution" of the parcel. (Verified Complaint at ¶ 15). Madeira refers the Court to the plain and unambiguous language of Relator's own Article XVI. As was discussed *ad nauseum* in Madeira's dispositive motion, Article XVI refers only to "structures." Thus, any declaration of rights regarding "adjacent vacant land" must – as a matter of law – be decided in Madeira's favor. Anything less would disregard not only Ohio law – it would disregard the will of the majority of Madeira voters who approved Article XVI assuming it meant what it said.

As a last resort, Relator argues that the inclusion of the addresses of the properties in the text of Article XVI evinces a clear intention to likewise "preserve" the vacant land. This argument also runs afoul of Relator's own use of the term "structures," and defies Relator's facile attempt to extra-contextually conflate it with the term "properties." Article XVI clearly uses the terms interchangeably, with both referencing the controverted buildings themselves:

> These three important and historic *properties* are to be preserved, protected, and left standing on the same ground that the *structures* were built upon. These three historic *structures* will be included in the "Historic District."

(emphasis added). Based upon this language, the English language allows only one construction:

- "Vacant land" cannot be "left standing on the same ground" as which it were built.
- "Vacant land" cannot be "built."
- Indeed, only "structures" can be "built" or "left standing."

Accordingly, Relator's arguments in this regard once again fall prey to the plain meaning of the language he himself drafted and placed before Madeira voters.

In the end, Madeira is a home-rule municipality, indisputably possessed of certain inalienable rights – including, fittingly, the right to alienate any property lawfully in its possession. *See, e.g., State ex rel. Leach v. Redick*, 169 Ohio St. 543; 157 N.E.2d 106 (1959). It is likewise well-established Ohio law that municipalities can be bound only by express and unambiguous enactments – vague and tortured inference-dependent constructions need not apply. *See, e.g., State ex rel. Horvath v. State Teachers Retirement Board* (1998), 83 Ohio St. 3d 67, 76, 697 N.E.2d 644, 654.

Despite his most recent pivot, Relator still fails to set forth a cogent construction of Article XVI that would support his increasingly obscure demands. He has abandoned his initial "public ownership" argument for a claim that Madeira must impose mandatory deed restrictions on future transfers of "vacant land" – even though Article XVI applies only to "structures." If the Court is experiencing difficulties following this line of reasoning, it is not alone.

Relator assures us, however, that he will be able to develop a theory of his case if only he is allowed to depose the city manager and the entire city council – all, presumably, at taxpayer expense. Put simply, this is not how this game is played. Suing a municipality in Ohio is not unlike seeking a writ of prohibition against a judge – the law must be exceedingly clear, and the relief sought finely-articulated. Here, Relator appears confused about the language he claims to have propounded. There can simply be no basis for granting any relief based upon the plain language of Article XVI, and Madeira should not be forced to waste additional taxpayer dollars entertaining Relator's futile pursuits. Indeed, it is unfortunate that the taxpayers Relator purports to represent have been forced to underwrite Madeira's defense to date.

* * *

Throughout his Response, Relator accuses Madeira of "linguistic gymnastics." With apologies to Shakespeare, wethinks Mr. Oppenheimer doth protest too much. The arguments set forth in his Response grow more hysterical and far-fetched by the page. If the matter were indeed so plain, he would not have to produce a new set of legal theories for each pleading.

Accordingly, Madeira respectfully requests that this Court issue declaratory judgment in its favor as set forth in the Proposed Order and Entry appended to its original Motion for Judgment on the Pleadings – and that the Court accordingly dismiss Relator's Verified Complaint, on the merits and as a matter of law.

Respectfully submitted,

/s/ Steven P. Goodin

Steven P. Goodin (0071713)
Brian W. Fox (0086851)
Attorneys for Defendant
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Direct: (513) 629-2845
Fax: (513) 651-3836
sgoodin@graydon.com
bfox@graydon.com

OF COUNSEL:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the following via Regular U.S. Mail, postage prepaid, and by email on this 17th day of August, 2016 pursuant to Ohio R. Civ. P. 5(B)(2)(c):

Curt Hartman
hartmanlawfirm@fuse.net
3749 Fox Point Court
Amelia, OH 45102
hartmanlawfirm@fuse.net

/s/ Steven P. Goodin
Steven P. Goodin (0071713)

6582117.2

15

Tracy Winkler
CLERK OF COURTS

Hamilton County Courthouse
1000 Main St, Cincinnati, OH 45202

Case Summary

Case Number:	A 1506891
Case Caption:	CITY OF MADEIRA EX REL DOUGLAS OPPENHEIMER vs. CITY OF MADEIRA
Judge:	PATRICK T DINKELACKER
Filed Date:	12/18/2015
Case Type:	H840 - INJUNCTION- OC
Total Deposits:	$ 400.00 Credit
Total Costs:	$ 405.00

Case Options

Case History
Case Schedules
Case Documents
Party / Attorney Information
Certified Mail Service
New Case Search
New Name Search
Return to My Portfolio

Case Schedules

Status	Date	Time	Location	Judge	Action
Active	12/8/2016	09:00 AM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	BENCH TRIAL
Active	12/8/2016	09:00 AM	HAM CO COURT HOUSE RM 481	JUDGE VISITING	BENCH TRIAL
Active	11/17/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	PRE-TRIAL
Active	9/6/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	HEARING ON MOTION
Active	4/11/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	REPORT
Active	4/11/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	CASE MANAGEMENT CONFERENCE
Active	3/10/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	CASE MANAGEMENT CONFERENCE
Active	3/10/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	HEARING ON MOTION
Active	3/8/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	DECISION
Cancel	3/8/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	CMC INITIAL CASE MANAGEMENT
Active	2/23/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	CASE MANAGEMENT CONFERENCE
Active	2/23/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	HEARING ON MOTION

Inactive	2/4/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	REPORT
Cancel	2/4/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	CASE MANAGEMENT CONFERENCE
Cancel	2/4/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	REPORT
Active	1/11/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	ENTRY
Active	1/4/2016	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	ENTRY
Active	12/21/2015	01:00 PM	H.C. COURT HOUSE ROOM 360	PATRICK T DINKELACKER	TEMPORARY RESTRAINING ORDER