

City of Madeira ex rel. Douglas Oppenheimer

Relator,

v.

City of Madeira, et al,

Respondents.

- 1) December 17, 2015, Motion to Establish Amount of Security for Cost.
- 2) December 18, 2015, Relator's Motion for a Temporary Restraining Order.
- 3) December 18, 2015, Verified Complaint For Declaratory Judgement.
- 4) January 6, 2016, Agreed Preliminary Injunction.
- 5) January 15, 2016, Powers Motion To Dismiss.
- 6) January 17, 2016, Relators Memorandum, in Opposition to Powers.
- 7) January 18, 2016, Answer And Counterclaim of Respondents.
- 8) January 26, 2016, Relator's Motion, to Dismiss Counterclaim.
- 9) February 5, 2016, Memorandum in Opposition to Relators Motion.
- 10) February 12, 2016, Relator's Reply Memorandum in Support of Motion.
- 11) February 25, 2016, Judge Dinkelacker; Entry Granting Relators Motion to Dismiss.

See Hamilton County Clerk of Courts, Tracy Winkler, Case # A1506891

Court Date, March 8, 2016, "Decision". 1 PM

March 10, 2016 "Hearing on Motion". 1 PM

March 10, 2016 "Case Management Conference". 1 PM

H.C. Court House, Room 360, Judge Patrick T. Dinkelacker.

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

CITY OF MADEIRA <i>ex rel.</i>	:	Case No. _____
DOUGLAS OPPENHEIMER	:	
	:	Judge Dinkelacker
Relator,	:	
	:	
v.	:	MOTION TO ESTABLISH
	:	AMOUNT OF SECURITY FOR
CITY OF MADEIRA, et al.,	:	COSTS OF PROCEEDING
	:	PURSUANT TO R.C. 733.59
Respondents.	:	

Now comes the CITY OF MADEIRA, by and through Relator DOUGLAS OPPENHEIMER as a taxpayer and resident of the City of Madeira, and hereby moves for an Order establishing the amount of security that is required to be deposited by Relator for the costs of this taxpayer action pursuant to R.C. 733.59. That section provides, *inter alia*, that “[n]o [taxpayer] suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.” As the statutory-taxpayer-action provisions do not specify the amount of security that must be given by a relator in a taxpayer action, Relator seeks confirmation from the Court that Relator’s compliance with the explicit language and requirements of Local Rule 9(A) meets the statutory requirement of R.C. 733.59.

This Court, pursuant to its power to promulgate local rules, has set forth in Local Rule 9(A) a schedule of amounts that must be posted “[u]pon the filing of civil actions or proceedings” and has declared such amounts to be “security for costs.” For civil actions, that fee has been set by this Court as \$325.00 which Relators has deposited upon the filing of this action. Accordingly, Relator has tendered the amount which the Court has previously and specifically promulgated as necessary security for costs. Relators seek

confirmation from the Court that Relator's compliance with Local Rule 9(A) meets the statutory requirement of R.C. 733.59. See *Schulman v. City of Shaker Heights*, 29 O.O.2d 373, 196 N.E.2d 102 (1964) ("Section 733.59, Revised Code, which only provides that a taxpayer give security for the costs of the proceeding"). If the Court believes an additional deposit is required above and beyond the initial deposit for filing the Complaint, Relators request that said amount be established at one dollar (\$1.00), or such other amount as the Court deems appropriate.

Respectfully submitted,


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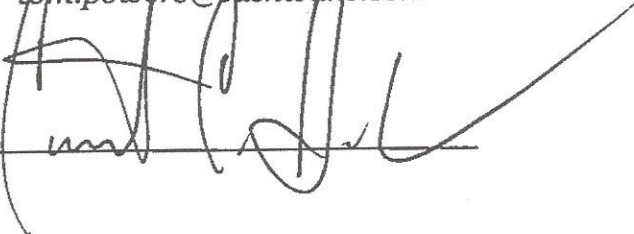
Attorneys for Relators

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following on the 17th day of December 2015, via e-mail:

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

**CITY OF MADEIRA *ex rel.*
DOUGLAS OPPENHEIMER**

Relator,

v.

CITY OF MADEIRA, et al.,

Respondents.

Case No. _____

Judge Dinkelacker

**RELATOR'S MOTION FOR A
TEMPROARY RESTRAINING
ORDER AND/OR PRELIMINARY
AND PERMANENT INJUNCTION**

Now comes the CITY OF MADEIRA, by and through Relator DOUGLAS OPPENHEIMER, and hereby moves, pursuant to Rule 65 of the Ohio Rules of Civil Procedure, for a temporary restraining order and/or a preliminary and permanent injunction enjoining Respondents, including those acting at their behest, direction or control, from: (i) from executing or performing any acts whatsoever in furtherance of any contract or prospective contract authorized by Ordinance No. 15-30 as passed by the City Council of the City of Madeira; and (ii) from executing any deed or otherwise transferring any portion of the Muchmore House Property. In support hereof, Relator has tendered a Verified Complaint, together with the following memorandum in support.

MEMORANUDM IN SUPPORT

In Ohio, the people are the ultimate sovereign within their respective municipalities. For "[u]nder the Home Rule Amendment, Article XVIII, adopted after being proposed by the Constitutional Convention of 1912, 'the sovereign people of the

state expressly delegated to the sovereign people of the municipalities of the state full and complete political power in all matters of "local self-government." *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 294 737 N.E.2d 529, 2000-Ohio-169 (Hadley, J., dissenting and quoting *Perrysburg v. Ridgway*, 108 Ohio St. 245, 255, 140 N.E. 595, 598 (1923)). And this act of sovereignty by the people within a municipality is effectuated through the adoption of a municipal charter.

Thus, "[a] municipal charter acts as the constitution of the municipality." *City of North Canton v. Osborne*, 2015-Ohio-2942 ¶13 (5th Dist.); accord *Nagel v. Avon*, 2002-Ohio-5427 (9th Dist.), such that "[n]o ordinance can conflict with the provisions of a city charter and be effective." *Reed v. Youngstown* (1962), 173 Ohio St. 265, 181 N.E.2d 700 (1962)(syllabus ¶2). "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*, 2015-Ohio-2942 ¶13.

I. FACTS

In an act ratifying their role as being the ultimate sovereign within a municipality, the people of the City of Madeira adopted the City Charter and in November 2014, approved an amendment thereto. This charter amendment became Article XVI of the City Charter of the City of Madeira and provides as follows:

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".

The property on which the Muchmore House is located was first deeded to the City of Madeira in 1989. Thus, when the people of the City of Madeira adopted this charter amendment in 2014, the City's ownership of the property had been long-standing such that the people clearly would have or should have known of the referenced property; and by their adoption of this charter amendment, the people clearly expressed their desire and direction that such property, *inter alia*, be preserved and protected.

From the outset, though, the City Council of the City of Madeira opposed the expressed desire and direction that the people of the City were providing to their government. For in the month before the election at which the people ultimately approved the charter amendment, the City Council passed a resolution expressing its opposition to the proposal. In so doing, however, the City Council expressly recognized that Article XVI of the City Charter of the City of Madeira "obligate[s]...[the] preserv[ation]and maint[enance] [of] the properties and buildings" located on, *inter alia*, the Muchmore House Property.

Now, a year later and in plain disregard of the restrictions and limitations within Article XVI of the City Charter, the City Council has adopted Ordinance No. 15-30 which provides for and authorizes the execution of a contract for the sale or transfer by the City of Madeira of a portion the Muchmore House Property.

Recognizing the violation of Article XVI of the City Charter that would result if such sale or transfer would occur, Relator Douglas Oppenheimer, through his legal counsel, tendered a written demand (the "Taxpayer Demand Letter") upon Robert P. Malloy, who at the time was the Law Director for the City of Madeira, seeking, "pursuant to Sections 733.56 *et seq.* of the Ohio Revised Code ...[for Law Director Malloy] [t]o

make application to a court of competent jurisdiction for an order of injunction to restrain the abuse of corporate powers of the City of Madeira as it relates to the effort to sell or transfer a portion of the Muchmore House property located at 7010 Miami Avenue.” In response to the Taxpayer Demand Letter, the Interim Law Director for the City, Jeffrey D. Forbes, responded on December 8, 2015, via a written letter, rejecting the contention that the action envisioned, authorized or anticipated by the contract authorized by Ordinance No. 15-30 violates Article XVI of the City Charter. With the Interim Law Director refusing to initiate an action to stop the illegal actions by the City Council, Mr. Oppenheimer, as a taxpayer and resident of the City of Madeira and pursuant to R.C. 733.59, commenced this action on behalf of the City so as to stop and restrain the abuse of corporate power by the City and the execution or performance of a municipal contract made in violation of the laws governing it.

II. LAW and ARGUMENT

A temporary restraining order and a preliminary injunction serve as an equitable policing measure and may be used to halt on-going or threatened illegal activities. *Turner Const. Co. v. United States*, 645 F.3d 1377 (Fed Cir. 2011)(“[i]njunctive relief is appropriate if it ‘enjoin[s] the illegal action’”(quoting *Parcel 49C Ltd. P’ship v. United States*, 31 F.3d 1147, 1153 (Fed. Cir. 1994)); *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 565 (8th Cir. 1998)(“injunctive relief is available to halt illegal gambling activity under Nebraska State law”).

And as is well-established, in considering whether to issue a temporary restraining order or preliminary injunction, this Court must consider and balance the following factors: (i) whether plaintiff has demonstrated a substantial likelihood of

success on the merits; (ii) whether plaintiff will suffer irreparable harm if the relief is not granted; (iii) whether unjustifiable harm would result to third parties by the issuance of such relief; and (iv) whether the public interest would be served by issuance of the requested relief. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 673 N.E.2d 183 (1996). These four factors “do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief”; rather, they are “factors to be balanced, not prerequisites that must be met.” *Frisch’s Rest., Inc. v. Schoney’s, Inc.*, 759 F2d 1262, 1263 (6th Cir. 1985). A balance of these four factors shows that Relator is entitled to injunctive relief.

A. A substantial likelihood of success has been demonstrated in light of the Madeira City Council authorizing a contract that does not preserve or protect the real property mandated by the City Charter to be preserved and protected.

As developed in the Verified Complaint and above, the undisputed facts reveal that the City of Madeira is proceeding to transfer a fee simple interest in and to a portion of the property known as the Muchmore House Property. Consisting of just over one-fifth of an acre when the people of the City of Madeira adopted a provision to the City Charter that mandated such property be, *inter alia*, preserved and protected, the diminution of such an already-small parcel would clearly run counter to the letter, spirit or intent of Article XVI of the 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). With the City of Madeira already owning the Muchmore House Property for over 25 years when the citizens thereof adopted Article VXI of the City

Charter, the voters clearly knew what property was the subject of the amendment and intended the preservation of the property without diminution thereof. In fact, the City Council itself recognized at the time (in opposing the proposed amendment) that such a charter provision “obligate[s]...[the] preserv[ation]and maint[enance] [of] the properties and buildings” located on the three properties designated therein, including the Muchmore House Property. Furthermore, Relator himself was one of leaders of the effort behind the initiative petition that submitted the charter amendment to the people and, thus, is in a position to indicate the intent of the Article XVI of the City Charter. *See State ex rel. Billis v. Summers*, 76 Ohio App.3d 848, 603 N.E.2d 410 (Ohio App. 6 Dist. 1992)(“[i]f respondent’s interpretation of the charter had been intended, the solicitor need look no further than his own city council or the commission members who drafted the charter”).

Clearly, the effort by the City Council to sell or transfer a portion of the Muchmore House Property is not consistent with a charter provision to which the Council has always been hostile. The people of the City of Madeira, in an ultimate act of their sovereignty within the municipality, placed an obligation and limitation upon their government. The City Council must respect and operate within the parameters of that limitation; they have not done so with respect to Ordinance No. 15-30 and the Muchmore House Property.

B. As this taxpayer action is brought on behalf of the City itself to ensure compliance with constitutional obligations and restraints, the public interest will be served by issues of the requested relief.

Without immediate relief by this Court, Respondents will be able to proceed with efforts to finalize the contract for the sale or transfer of a portion of the Muchmore House Property, as well as the ultimate closing thereon. Allowing such actions to occur

in spite of and in contravention of Article XVI of the City Charter would directly undermine the foundational principle that we are a nation of law, not of men. Ensuring respect for the law, including the constitutional limitations and imposed by the people upon their government, is always in the public interest and would be served and advanced by the issuance of the temporary restraining order and preliminary injunction. For if government may operate without restraint, not only will the public interest not be served, but the people themselves will suffer injury as their role as the ultimate sovereign in our republic will be diminished unilaterally. *See Williams v. City of Columbus*, 33 Ohio St.2d 75, 294 N.E.2d 891 (Ohio 1973)(Gray, J., dissenting)(“[t]he people have spoken. Ultimate sovereignty, as far as the state is concerned, rests in its people, and as long as the government established by them exists, that sovereignty remains with them”).

C. Issuance of preliminary relief will not injury third parties.

And while the third party to the contract authorized or envision by Ordinance No. 15-30 may claim harm arising from a delay, such an argument fails to recognize a well-established principle: a person contracting with a governmental body “must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril.” *The Lathrop Co. v. City of Toledo*, 5 Ohio St.2d 165, 173, 34 O.O.2d 278 (1966). “An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit.” *Union Stock*

Yards v. Hillsboro, 191 Ohio App.3d 564, 947 N.E.2d 183, 2010-Ohio-5975 (4th Dist.)(quoting *Shampton v. Springboro*, 98 Ohio St.3d 457, 786 N.E.2d 883 , 2003-Ohio-1913 ¶35 (quoting *Lathrop*, 5 Ohio St.2d at 173 (quoting *McCloud & Geigle v. Columbus*, 54 Ohio St. 439, 452-453, 44 N.E. 95 (1896))))). In this instance, the parties to the contract envisioned by Ordinance No. 15-30 have elected to proceed in clear disregard of the limitations and restrictions therein. As case law clearly establishes, they proceed at their own risk.

III. CONCLUSION

The evidence developed to date clearly shows that the City of Madeira, through the adoption of Ordinance No. 15-30, has exceeded its corporate power and/or is seeking to execute and performance of a contract in violation of the laws governing it. In this case, the public interest of ensuring respect for the voice of the people through their adoption of Article XVI of the City Charter of the City of Madeira must be protected. The contract envisioned by the Ordinance is not consistent with the letter, spirit or intent of Article XVI of the City Charter. In order to prevent further harm to the people of the City of Madeira, a temporary restraining order and preliminary injunction should issue, enjoining Respondents, including those acting at their behest, direction or control, from: (i) from executing or performing any acts whatsoever in furtherance of any contract or prospective contract authorized by Ordinance No. 15-30 as passed by the City Council of the City of Madeira; and (ii) from executing any deed or otherwise transferring any portion of the Muchmore House Property

Respectfully submitted,



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Attorneys for Relators

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following on the 18th day of December 2015, via e-mail:

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INTRODUCTION

Relator, as a taxpayer and resident of the City of Madeira, and on relation to the CITY OF MADEIRA, hereby seeks (i) a declaratory judgment relating to the limitation contained within Article XVI of the Charter of the City of Madeira as it relates to the efforts of the CITY OF MADEIRA to sell a portion of the property known as the Muchmore House Property; and (ii) the issuance of an injunction in order to restrain the abuse of corporate and/or the execution or performance of a contract made on behalf of the municipal corporation in contravention of the laws or ordinances governing it.

PARTIES

1. Relator DOUGLAS OPPENHEIMER is a resident and taxpayer of and within the CITY OF MADEIRA.
2. Respondent CITY OF MADEIRA is a municipal corporation in the State of Ohio and, as such, is a body corporate and politic, capable of being sued and organized and existing under Chapter 715 of the Revised Code.
3. Respondent THOMAS E. MOELLER is the City Manager of the CITY OF MADEIRA.
4. Based upon information and belief, Respondent THOMAS POWERS is a resident of Hamilton County, Ohio, and may have or claim an interest in and to the property that is the subject of this action, either directly or through a separate legal entity.

STATEMENT OF FACTS

5. On about April 3, 1989, Cleo Hosbrook transferred to the CITY OF MADEIRA the real property located at 7010 Miami Avenue in the City of Madeira. This real property (referred herein as the Muchmore House Property) consists of approximately 0.215 acres of land together with a historic house located thereon known as the Muchmore House. A true and accurate copy of the deed transferring the real property to the CITY OF MADEIRA as obtained from the website of the Hamilton County Recorder is attached hereto as Exhibit A.

6. With the foregoing real property already owned by the City of Madeira, the citizens of the CITY OF MADEIRA adopted Article XVI of the City Charter in November 2014.

7. In toto, Article XVI of the City Charter of the City of Madeira provides as follows:

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".

8. Thus, Article XVI of the City Charter of the City of Madeira imposes limitations and restrictions on the disposition of the Muchmore House Property.

9. The adoption of Article XVI of the City Charter of the City of Madeira by the voters of the CITY OF MADEIRA was undertaken pursuant to an initiative-petition process of which the Relator was one of leaders of such effort.

10. The adoption of Article XVI of the City Charter of the City of Madeira by the voters of the CITY OF MADEIRA was undertaken notwithstanding the expressed opposition of the City Council of the City of Madeira to the proposed charter amendment.

11. In fact, in advance of the election held in November 2014 (when the voters approved Article XVI of the City Charter of the City of Madeira), the City Council of the City of Madeira adopted, in October 2014, Resolution No. 10-14 which was entitled "A Resolution in Opposition to Issue 13 Madeira Charter Amendment Historic District/Preservation". A true and accurate copy of Resolution No. 10-14 as obtained from the website of the CITY OF MADEIRA is attached hereto as Exhibit B.

12. As acknowledged by the City Council of the City of Madeira in Resolution No. 10-14, Article XVI of the City Charter of the City of Madeira "obligate[s]...[the] preserv[ation]and maint[enance] [of] the properties and buildings" located on the three properties designated therein.

13. Notwithstanding the limitation in Article XVI of the City Charter of the City of Madeira, as well as its own acknowledgment of such limitation, the City Council of the City of Madeira adopted Ordinance No. 15-30 on November 9, 2015. This Ordinance specifically concerns and relates to the Muchmore House Property. A true and accurate copy of Ordinance No. 15-30 as certified by the clerk of the City Council is attached hereto as Exhibit C.

14. Ordinance No. 15-30 provides for and authorizes the execution of a contract for the sale or transfer by the CITY OF MADEIRA of a portion the Muchmore House Property.

15. While the contract authorized by Ordinance No. 15-30 does not include the specific area of the Muchmore House property that would be sold (as that amount is left blank on the contract authorized by the Ordinance), the diminution of a parcel already consisting of approximately one-fifth-of-an-acre does not comply with the letter, spirit or intent of Article XVI of the City Charter.

16. The proposed sale or transfer of the Muchmore House Property would violate the prohibition with Article XVI of the City Charter of the City of Madeira.

17. Thus, on November 30, 2015, and pursuant to section 733.56 *et seq.* of the Revised Code, counsel for and on behalf of the Relator tendered a written demand (the "Taxpayer Demand Letter") upon Robert P. Malloy, who at the time was the Law Director for the CITY OF MADEIRA, "pursuant to Sections 733.56 *et seq.* of the Ohio Revised Code ... [t]o make application to a court of competent jurisdiction for an order of injunction to restrain the abuse of corporate powers of the City of Madeira as it relates to the effort to sell or transfer a portion of the Muchmore House property located at 7010 Miami Avenue." A true and accurate copy of the Taxpayer Demand Letter is attached hereto as Exhibit D.

18. In response to the Taxpayer Demand Letter, the Interim Law Director for the CITY OF MADEIRA, Jeffrey D. Forbes responded on December 8, 2015, via a written letter (the "Response to the Taxpayer Demand Letter"). A true and accurate copy of the Response to the Taxpayer Demand Letter is attached hereto as Exhibit E.

19. Within the Response to the Taxpayer Demand Letter, Mr. Forbes as the Interim Law Director for the CITY OF MADEIRA, rejected the contention that the action envisioned, authorized or anticipated by the contract authorized by Ordinance No. 15-30 violates Article XVI of the City Charter of the City of Madeira.

20. Thus, Mr. Mr. Forbes, as the Interim Law Director for the CITY OF MADEIRA, refused to bring a lawsuit to enjoin said contract pursuant to R.C. § 733.56.

21. While the Taxpayer Demand Letter indicated that Ordinance No. 15-30 and the action envisioned, authorized or anticipated by the contract authorized by Ordinance No. 15-30 constituted an abuse of corporate powers, the contract envisioned, authorized or anticipated by Ordinance No. 15-30 is also in contravention of the laws or ordinances governing it, *viz.*, Article XVI of the City Charter of the City of Madeira, the premise of which was clearly set forth in the Taxpayer Demand Letter.

22. In light of the Response to the Taxpayer Demand Letter wherein Mr. Forbes rejected the contention that the action envisioned, authorized or anticipated by the contract authorized by Ordinance No. 15-30 violates Article XVI of the City Charter of the City of Madeira, it would be vain, futile and unavailing to undertake any effort, if even necessary, to supplement the Taxpayer Demand Letter so as to request the bringing of an action for an injunction based also upon said contract being in contravention of the laws or ordinances governing it.

23. On December 15, 2015, in a conversation with Relator, THOMAS MOELLER indicated that final revisions to the contract authorized by Ordinance No. 15-30 are being made and, once finalized, the CITY OF MADEIRA will be proceeding forward with the signing of the contract and its ultimate execution.

**FIRST CAUSE OF ACTION
(Declaratory Judgment)**

24. Relator restates and incorporates by reference all of the foregoing paragraphs as if fully restated.

25. A real and justiciable dispute exists between the parties regarding the rights, status, and other legal relations arising from the foregoing facts.

26. Relator seeks a declaratory judgment regarding said rights, status and other legal relations, including, *inter alia*, a declaratory judgment that the prohibitions, restrictions and/or limitations within Article XVI of the Charter of the City of Madeira prohibit and/or preclude the CITY OF MADEIRA from proceeding forward with the contract authorized by Ordinance No. 15-30.

**SECOND CAUSE OF ACTION
(Injunction)**

27. Relators restate and incorporate by reference all of the foregoing paragraphs as if fully restated.

28. Relator is entitled to the issuance of an injunction against and restraining the CITY OF MADEIRA and THOMAS MOELLER, the City Manager for the City of Madeira, or those acting at their behest or direction, from executing or performing any other acts whatsoever in furtherance of any contract or prospective contract authorized by Ordinance No. 15-30.

29. Relator is entitled to the issuance of an injunction against and restraining the CITY OF MADEIRA and THOMAS MOELLER, the City Manager for the City of Madeira, or those acting at their behest or direction, from executing any deed transferring any portion of the Muchmore House Property

WHEREFORE, Relator, on relation to and on behalf of the CITY OF MADEIRA, pray for the entry of judgment in his favor and against Respondents granting the declaratory judgment and injunctive relief sought in the preceding paragraphs, together

with court costs, attorney fees, as well as such other relief to which Relator may be entitled in law or in equity.

Respectfully submitted,



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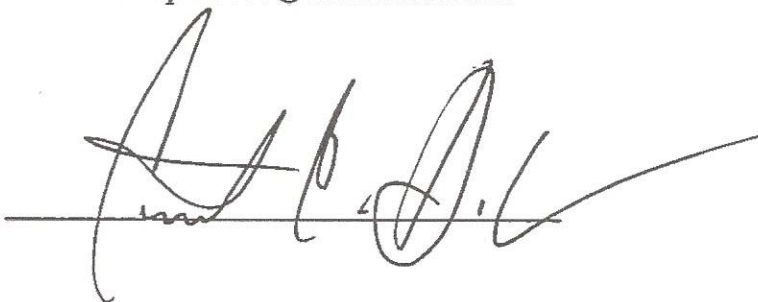
Attorneys for Relators

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following on the 18th day of December 2015, via e-mail:

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VERIFICATION

State of Ohio, County of Hamilton) ss:

Now comes DOUGLAS OPPENHEIMER, having been duly cautioned and sworn, and declares that he has reviewed the foregoing complaint and that the factual allegations therein are true and accurate.



Sworn to and subscribed before me, a Notary Public in and for the State of Ohio, on this the 17th day of December 2015.



Curt C. Harpman
Attorney-at-law
my commission has
no expiration

535-a-57
KNOW ALL MEN BY THESE PRESENTS:

62-276E

That this Deed made this 3rd day of April 1989, between CLEO J. HOSBROOK, unmarried, herein called "Donor-Grantor", and the CITY OF MADEIRA, a municipal corporation under the laws of Ohio, herein called "Donee-Grantee", in consideration of her affection for the community known as the "City of Madeira", does hereby give, grant and convey to the Donee-Grantee, its successors and assigns, all of the Donor-Grantor's interest in the following real estate:

Situated in the City of Madeira, Hamilton County, Ohio, being part of Lot number eighteen (18) of Madeira as laid out by Moore and Hosbrook, the plat of which is recorded in Plat Book 3, Page 231, Hamilton County, Ohio records and bounded as follows:

Beginning at the southwest corner of said Lot number eighteen (18); thence with the Section Line north 1°24'21" east, 36.13 feet; thence north 69°38' east parallel to Laurel Avenue, 158.17 feet; thence south 1°24'21" west 99.84 feet to the north line of Railroad Street; thence with the north line of said street north 88°35'39" west one hundred and forty-four and 75/100 (144.75) feet to the point of beginning, subject to all legal highways and being the same premises set forth in deed recorded in Deed Book 2534, Page 365, Hamilton County records.

Being part of the same premises passing to the Donor-Grantor as set forth in Certificate of Transfer recorded in Deed Book 2534, Page 365; Hamilton County Recorder's Office.

and all the estate, right, title and interest of the Donor-Grantor in and to said premises, to have and to hold the same with all of the privileges and appurtenances thereto belonging to the said Donee-Grantee, its successors and assigns forever.

P. 2. 05

P. 2. 05

HAMILTON COUNTY RECORDERS OFFICE
FRONT DESK
DOC # 89-126310 TYPE DEED
FILED 10-11-89 2 02:15:15PM \$ 10.00
OFF REC: 5115 1165 F.-R21 334

JOSE L. DE COURCY, JR. HAMILTON COUNTY, OHIO

Exhibit A

And the said CLEO J. HOSBROOK, for herself and her heirs, executors and administrators, does hereby covenant with the CITY OF MADEIRA, its successors and assigns, that she is the true and lawful owner of said premises and has full power to convey the same, and that the title so conveyed is clear, free and unencumbered; and further that she does warrant and will defend the same against all claim or claims, of all persons whomsoever.

IN WITNESS WHEREOF, the said CLEO J. HOSBROOK, unmarried, has hereunto set her hand this 3rd day of April 1989, in the year of Our Lord One Thousand Nine Hundred Eighty-Nine (1989).

Cleo J. Hosbrook

Signed and acknowledged in the presence of:

Rebecca A. Curtis
John W. Hudson

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

Be it remembered that on this 3rd day of April 1989, before me, the subscriber, a Notary Public in and for said County, personally came CLEO J. HOSBROOK, the Grantor in the foregoing Deed, and acknowledged the signing thereof to be her voluntary act and deed.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

John W. Hudson
NOTARY PUBLIC

RESOLUTION NO. 10-14

A RESOLUTION IN OPPOSITION TO
ISSUE 13 MADEIRA CHARTER AMENDMENT HISTORIC DISTRICT/PRESERVATION

WHEREAS, a petition was circulated to amend the Madeira City Charter to add Article XVI – Madeira Historic District / Preservation, and

WHEREAS, the proposed amendment to the Madeira City Charter is identified as Issue 13 on the November 2014 ballot, and

WHEREAS, The wording in Issue 13 is vague and references items not present within the City of Madeira which will cause confusion about requirements for the properties referenced, and may lead to expensive court challenges for years to come, and

WHEREAS, Issue 13 states that the two city-owned houses, along with the Railroad Depot will be added to “the Historic District” and no such district” exists in the City of Madeira code of ordinances or city policies, and

WHEREAS, Issue 13 will obligate the residents of Madeira preserve and maintain the properties and buildings indefinitely such that if one or more of the buildings sustains some form of significant structural damage, the vague language of proposed charter amendment may require construction of buildings that are merely historic replicas with little or no benefit to the community and which could result in expenses that put extreme pressure on how Madeira pays for basic services such as police, fire, roads, and parks, and

WHEREAS, The Madeira City Charter is a document that defines the governing principles of the city, much like the Constitution for the United States of America and, as such, it is not an appropriate vehicle for issues such as property management. These types of initiatives that do not focus on the governing operation of our city will only weaken our charter and lead to uncertainty and higher cost to our community, and

WHEREAS, This initiative is only the first step by special interest groups to assume control over the two houses and train station as language for a second charter amendment that would establish a five (5) person “Historical District Commission” has been presented to City Council; and special interest groups would hold a controlling four (4) seats on the Commission that will, “dictate the construction, remodeling, and other interior and exterior changes to the structures or grounds”. This unelected commission could impose significant unfunded mandated expenditures on the City of Madeira taxpayers.

NOW, THEREFORE BE IT RESOLVED, by the Council of the City of Madeira, Ohio

Section 1. That this Council hereby declares its strong opposition to Issue 13 and urges all Madeira voters to vote “NO” on Issue 13 on the November 2014 ballot.

Section 2. That this resolution shall take effect and be in force from and after the earliest period allowed by law.

This Resolution is not subject to referendum per Article XII, Section 3 of the Madeira Home Rule Charter.

PASSED ON THE 27TH DAY OF OCTOBER, 2014 BY THE FOLLOWING 7-0 VOTE:

YEA:	NAY:	ABSTAIN:	ABSENT:
Melisa Adrien			
Tom Ashmore			
Ken Born			
Nancy Spencer			
Rob Steier			
Mike Steur			
Traci Theis			

Mike Steur, Mayor

Diane D. Novakov, Clerk of Council

CERTIFIED COPY

STATE OF OHIO

City of Madeira, Ohio SS
County Hamilton

I, Diane D. Novakov Clerk of the City of Madeira, Ohio do hereby certify that the attached is a true and correct copy of Ordinance No. 15-30 adopted by the legislative Authority of the said City on the 9th day of November, 2015.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal, this 11th day of November, 2015.
(SEAL)



Diane D. Novakov, Clerk of Council

City of Madeira, Ohio

Exhibit C

ORDINANCE NO. 15-30

**AUTHORIZING THE CITY MANAGER TO ENTER INTO THE FIRST CONTRACT FOR
SALE AND PURCHASE FOR THE PROPERTY LOCATED AT
7010 MIAMI AVENUE, MADEIRA, OHIO**

WHEREAS, the City of Madeira, Ohio owns certain real property ("Property") located at 7010 Miami Avenue; and

WHEREAS, Council intends to sell a portion of the vacant land located on the Property to Thomas M. Powers and/or his related affiliates; and

WHEREAS, the Council of the City of Madeira recognizes the benefit that will continue to accrue to the community by the use that would be able to be made of that portion of the vacant Property located at 7010 Miami Avenue; and

WHEREAS, the basic terms and conditions of the proposed Contract for Sale and Purchase ("Contract") are acceptable to the City.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Madeira, State of Ohio:

Section 1. That the City Manager is hereby authorized and directed to enter into a Contract with Thomas M. Powers, and/or his related affiliates, for the sale and purchase of a portion of the vacant land located on the Property located at 7010 Miami Avenue in a form substantially the same as set forth in the Contract for Sale and Purchase attached hereto and incorporated herein as if fully set forth.

Section 2. That this Ordinance shall take effect from and after the earliest period allowed by law.

Section 3. That the City Manager is further authorized to execute any and all other documents necessary and related to the contract for sale and purchase.

Section 4. That the City Manager is further authorized to take any and all steps necessary to effectuate the terms of this Ordinance.

PASSED ON THE 9TH DAY OF NOVEMBER, 2015 BY THE FOLLOWING 6-1 VOTE:

<i>YEA:</i>	<i>NAY:</i>	<i>ABSTAIN:</i>	<i>ABSENT:</i>
Melisa Adrien	Tom Ashmore		
Nancy Spencer			
Rob Steier			
Mike Steur			
Traci Theis			
Ken Born			

Mike Steur, Mayor



Diane D. Novakov, Clerk of Council

ORDINANCE NO. 15-30
EXHIBIT "A"

FIRST CONTRACT FOR SALE AND PURCHASE

This First Contract for Sale and Purchase ("Contract") is entered into as of this ____ day of November, 2015 ("Effective Date") and made by and between the **City of Madeira, Ohio, an Ohio municipal corporation**, 7141 Miami Avenue, Madeira, Ohio 45243, (hereafter, "Seller") and **Thomas M. Powers**, having an address of _____ (hereafter, "Purchaser" and upon the Closing of the purchase under this Contract between Seller and Purchaser, the "Company"), under the following terms and conditions:

RECITALS:

A. Seller has determined it to be a public purpose for certain long-term strategic economic development and planning efforts to enter into the Contract with Purchaser and Company and to provide additional public parking spaces in the Central Business District, as generally depicted in Exhibit "A". Seller and Purchaser have further outlined future development plans in the area known as the Madeira Historical District which includes a portion of Seller's Property, as more fully identified in Exhibit B below, and Purchaser intends to make a good faith effort to preserve or create jobs and employment opportunities within the City Of Madeira, Ohio.

B. Seller owns certain real property consisting of approximately ____ square footage of land, (or that which is found to be the actual square footage by survey pursuant to Section 4), as set forth in Exhibit "B", being a portion of the unimproved land located at 7010 Miami Avenue, Madeira, Ohio 45243, but shall, in no event, exceed ____ square feet, as more fully described in Section 4 below. The land is located in Hamilton County, Ohio and is generally described in Exhibit "C" attached hereto. Said land and all appurtenant rights, privileges, and easements thereto are hereinafter referred to as the "Property."

C. Seller has determined that the agreements and transactions provided for in this Contract will facilitate positive long-term development planning and encourage development that will benefit the people of the City of Madeira, Ohio by increasing opportunities for employment and strengthening the economic welfare of the City of Madeira, Ohio.

D. Purchaser has been in negotiations with the B & B Mower Service, Inc. ("B&B") to purchase the B&B Property, located at 7710 Railroad Avenue, Madeira, Ohio 45243.

E. Purchaser and Seller intend to enter into this Contract along with a second, separate contract ("Second Contract") for the Seller's purchase of real property from the Purchaser.

F. The sale and purchase of the Property and the closing contemplated by this Contract shall be contemporaneous and in conjunction with the the sale of purchase of the real property identified in the Second Contract.

G. Purchaser has the financial capability to purchase the Property from Seller in order to induce the City of Madeira, Ohio to sell the Property to Purchaser.

H. Purchaser under this Contract, may choose to transfer and assign his rights and obligations under this Contract to his affiliated land holding company, and shall have the right to assign all of Purchaser's obligations under this Agreement, as approved by Seller, and as more fully set forth in Section 16 J below.

NOW, THEREFORE, in consideration of the premises and mutual covenants and promises contained herein, the sufficiency of which is hereby acknowledged by the parties, Seller and Purchaser hereby agree as follows:

1. **Real Estate.** Purchaser shall purchase from Seller the currently unimproved real estate being located at the north side of Railroad Avenue and just east of Miami Avenue containing approximately +/- ___square feet of land, as further described in Section 4 below, located on the site in the City of Madeira, Hamilton County, Ohio and as described in Exhibit "C," attached hereto, with all appurtenant rights, privileges and easements ("Property").

2. **Seller's Certifications.** Seller certifies the following facts regarding the Property.

A. Seller is the sole owner of the entire undivided fee simple interest in the Property.

B. The Property is free from any City, County, State or Federal orders affecting the Property.

C. Subject to the approval of the City of Madeira, Ohio City Council, as more fully set forth in Sections 12 and 15B of this Contract, Seller has full power and authority to execute, deliver and carry out the terms and provisions of this Contract and has taken all necessary action to authorize the execution, delivery and performance of this Contract. The individuals executing this Contract on behalf of Seller have the authority to bind Seller to the terms and conditions of this Contract. This Contract and all documents required hereby to be executed by Seller, when so executed, shall be legal, valid, and binding obligations of Seller enforceable against Seller in accordance with their respective terms. Seller is deemed to have made the certifications contained in this Section 2 again as of the time and date of the Closing, except that Seller shall not be in default hereof if any representation or warranty contained herein cannot be made at the Closing because of the acts or fault of Purchaser.

3. **Purchaser's Certification.** Purchaser hereby certifies to Seller that each of the following statements is true and correct as of the date of this Contract and shall be true and correct on each Closing Date:

A. Purchaser has the full power and authority to enter into this Agreement, to purchase the Property from Seller as provided in this Agreement, and to carry out Purchaser's obligations hereunder.

B. All requisite action necessary to authorize Purchaser to enter into and perform this Agreement in accordance with its terms and to carry out Purchaser's obligations has been obtained.

C. This Contract has been duly authorized, executed and delivered by Purchaser and is enforceable against Purchaser in accordance with its terms.

D. Purchaser or Purchaser's assignee has the financial capability to purchase the Property and to pay the Purchase Price in immediately available funds and construct the proposed project as outlined in Exhibit "D," ("Project") on the Property. Upon request, Purchaser, Purchaser's assignee, or their accounting firm, or Purchaser's lender will provide Seller with reasonable proof of financial capability, as determined by Seller in Seller's sole discretion. Purchaser must demonstrate financial capability and allow Seller, at Seller's option, to verify financial capability with _____ and/or at Seller's option and sole cost, to undertake, and/or to engage _____ to perform, a confidential financial verification and analysis of the purchasing entity, to ensure Purchaser has the financial capability (through equity and financing resources in the form of commercial financing), in Seller's reasonable discretion, to purchase the Property and construct the proposed Project, as outlined in Exhibit "D," on the Property.

E. Neither the execution and delivery of this Agreement nor the performance hereof will (i) be in violation of Purchaser's affiliated entity's organizational documents including its bylaws, Articles of Organization and its operating agreement, (ii) conflict with any law, decree, judgment, regulation or decree of any court or governmental agency, or (iii) conflict with any agreement or instrument to which Purchaser is a party or by which Purchaser is or may be bound.

F. Purchaser has conducted an environmental inspection and is satisfied with the results and shall hold Seller harmless as to the results thereof.

G. Purchaser shall construct a new restaurant generally consistent with design character, building materials and construction quality as outlined in drawings dated _____, 2015 and attached herein as Exhibit "D".

H. Purchaser is deemed to have made the certifications contained in this Section 3 again as of the time and date of the Closing, except that Purchaser shall not be in default hereof if any certification contained herein cannot be made at the Closing because of the acts or fault of Seller.

4. **Purchase Price and Terms.**

A. The Purchase Price for all of the Property will be based on a price of \$43.00 per square foot for the +/- _____ square feet for a total purchase price of approximately \$_____. The Purchase Price shall be subject to final determination of the total square footage of the Property and shall be mutually agreed upon by Seller and Purchaser based on final survey and approved sub-division/cut-up plat materially consistent with the Site Plan set forth on Exhibit "D" attached hereto. Exhibit "D" provides an approximation of the _____ square feet area described, as well as the approximate location of the building and setbacks.

B. There shall be no earnest money deposit payable from Purchaser to Seller.

C. In addition to the Conditions to Close set forth in Section 10, Purchaser's obligation to pay the Purchase Price and the Closing are contingent upon the Contingencies set forth in Section 7.

D. The Purchase Price will be payable by Purchaser to Seller by wire transfer/cashier's check at Closing.

5. **Due Diligence.** Purchaser shall have a period of up to ____ (____) days after the _____ Date to:

A. Obtain, a current commitment for title insurance issued with respect to the Property in the amount of the Purchase Price (the "Title Commitment").

B. Review and approve the cut-up survey and Legal Description of the Property, as more fully described in Section 6. The cut-up survey and Legal Description shall also be reviewed and approved by Seller.

6. **Cut-up Survey; Legal Description.** Purchaser shall obtain, and shall pay the expense of a metes and bounds legal description for the cut up of the Property, so that the Property can be conveyed to Purchaser and be subject to a separate tax bill. Seller and Purchaser shall have the right to approve the survey and legal descriptions, which approval shall not be unreasonably withheld. Purchaser may select the engineer/surveyor that will prepare the cut up survey, metes and bounds description, and easement plat. Purchaser shall be solely responsible for, and shall bear all expenses related to, any approvals required to sub-divide the Property and for recording all sub-division plats necessary to carry out the intent of this Contract.

7. **Contingencies.** Purchaser's obligation to buy the Property from Seller, and Seller's obligation to sell the Property to Purchaser shall be subject to the following Contingencies:

A. Review and approval by the City of Madeira Planning Commission of the sub-division of the Property, site plan, design concept, character, building materials, and construction quality of the Project, zoning, proposed setbacks; parking areas, and

- B. Review and approval by the City of Madeira Historical Preservation Commission ("MHPC") of the Project and use of that portion of the land within the Madeira Historic District; and
- C. Issuance of building permits by the City of Madeira, Ohio to Purchaser for the Project; and
- D. Approval of the legal descriptions of the Property by Seller and Purchaser; and
- E. Location of easement(s) for any access deemed necessary by Seller and Purchaser; and
- F. Review and approval of Seller and Purchaser of any easements required between the parties; and
- G. Approval of liquor license to be issued to Purchaser as required by the State of Ohio and City of Madeira, Ohio; and
- H. Review and approval for capacity by the Hamilton County Metropolitan Sewer District; and
- I. Coordination of Project landscaping with requirements of the City of Madeira, Ohio; and
- J. Any other approvals required and deemed necessary by the City of Madeira, Ohio Planning Commission for the Project.

During the term of the Contract, Purchaser and its representatives shall be entitled to enter on to the Property and to conduct such inspections thereon as Purchaser may deem appropriate in order to determine the suitability of the Property for the Project. Purchaser will keep the Property free and clear of any mechanic's or materialmen's liens, shall pay all expenses incurred, shall restore any damage to the Property caused by Purchaser or its agents.

8. Closing ("Closing") shall be on or before _____ () days/weeks/months following _____, as applicable or on such other reasonable date as the parties may agree.

A. Marketable title to the Property will be conveyed by Seller to Purchaser by special or limited warranty deed at Closing, subject to easements and restrictions of record and any easements that existed prior to Seller's ownership of the Property and merged due to Seller's acquisition of the Property, as reflected in the Title Commitment, and as confirmed by Seller, which shall be required as the result of the new division of ownership between Seller as the owner of the Property and Seller as the beneficiary of the easements. At Closing, Purchaser shall execute any and all unplatted easements necessary to Seller for the Property, provided such easements were provided to Purchaser for review prior to Closing. Seller and Purchaser will also execute any other appropriate documents at Closing. Title shall be conveyed subject to no monetary liens except for the lien for non-delinquent real property

taxes, assessments, or improvement district liens, but otherwise subject to all matters of record as specified above.

B. The costs incurred in connection with the transaction contemplated by the Contract shall be allocated between Seller and Purchaser as follows:

<u>Requirement</u>	<u>Responsibility</u>
Survey-ALTA	Purchaser
Survey-Cut Up/Boundary	Purchaser
Title Search	Purchaser
Title Insurance Commitment/Policy	Purchaser
Grantor's Tax	Seller
Grantee's Tax	Purchaser
Brokerage Commissions	N/A
Inspection Costs	Purchaser
Attorneys' Fees	Each Party Pays Own
Environmental	Purchaser
Recordation	Purchaser
Financial review	Seller
Remainder/residual survey, if necessary	Purchaser

C. Real property taxes and any other matters to be prorated will be prorated as of date of Closing. Seller will pay all expenses and taxes applicable to the period prior to Closing; Purchaser will pay all expenses and taxes applicable to the period on or following Closing.

NOTE: Property taxes and assessments are subject to change. Purchaser and Seller agree that the taxes and any assessments shall be based on the latest tax information available through the Hamilton County, Ohio Auditor and Treasurer's records. Purchaser and Seller acknowledge that property taxes and assessments may not be pro-ratable at Closing as they will be based upon a large tract or parcel from which the subject Property has been cut-out. Seller shall continue to pay the property taxes and assessments on the large tract until such time as they are assessed on the subject Property, at which time, Seller and Purchaser shall handle any proration of the property taxes and assessments, as appropriate. Purchaser acknowledges that the entirety of Seller's property is currently benefitted by a property tax exemption and that the property tax exemption will not be applicable to the cut-up portion of the Property.

9. **Default.** In the event of a default by Purchaser under the Contract, Seller shall be entitled, as Seller's sole and exclusive remedies, to either terminate the Contract or to request a court in Hamilton County, Ohio to specifically enforce the obligations of Purchaser under this Contract. In the event of a default by Seller under the Contract, Purchaser shall be entitled, as Purchaser's sole and exclusive remedies, to declare the Contract terminated, or to request a court in Hamilton County, Ohio to specifically enforce the obligations of Seller under this Contract.

10. **Conditions to Close.**

A. Conditions Precedent to Obligations of Seller. The obligations of the Seller hereunder are subject to satisfaction, at or prior to the Closing, as applicable, of each of the following conditions:

(i) Purchaser's sale to Seller and a closing on the Seller's purchase of the Purchaser's real property according to the provisions as set forth in the Second Contract.

(ii) The certifications of Purchaser made in Section 3 of this Contract shall be true and complete in all material respects as of the Closing Date as if made on and as of that date.

(iii) All of the terms, covenants and conditions to be complied with and performed by Purchaser on or prior to the Closing Date shall have been complied with or performed in all material respects.

(iv) Seller has received adequate and sufficient information, as required herein, to ensure itself that Purchaser or its assignee has the financial capability to fulfill the terms of the Contract and to construct the proposed Project as outlined in Exhibit "E", on the Property.

(v) Purchaser and its assignee shall have executed the easements to Seller as required and described in this Agreement.

(vi) Purchaser shall have paid the Purchase Price as required herein.

B. Conditions Precedent to Obligations of Purchaser. The obligations of Purchaser hereunder are subject to satisfaction, at or prior to the Closing, of each of the following conditions:

(i) Purchaser's successful closing and acquisition of the B&B Property.

(ii) Seller's purchase and closing on the Purchaser's real property according to the provisions as set forth in the Second Contract.

(iii) The certifications of Seller made in Section 2 of this Contract shall be true and complete in all material respects as of the date hereof and on and as of the Closing Date as if made on and as of that date.

(iv) All of the terms, covenants and conditions to be complied with and performed by Seller on or prior to the Closing Date shall have been complied with or performed in all material respects.

(v) Seller shall have delivered to Purchaser each of the documents and other items required to be delivered by Seller as required by the title company, and pursuant to this Contract.

8.A. (vi) Seller shall have delivered title to Purchaser as required by Section

11. **Delivery of Notice.** Any notice to be given hereunder shall be hand delivered, given by registered or certified mail (return receipt requested), or via electronic mail addressed to the party in question at the addresses appearing in the introductory paragraph of this Contract except as is otherwise expressly provided herein. The effective date of any such notice shall be the date on which such notice is delivered (in the case of hand delivery) or mailed (in the case of use of registered or certified mail) to such addresses or the date of actual receipt in any other case. Any address set forth herein may be changed by notice to the other party hereto.

A copy of any notice to Seller shall also be given to:

Robert P. Malloy, Law Director
Wood and Lamping LLP
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202
rpmalloy@woodlamping.com

A copy of any notice to Purchaser shall also be given to:

12. **Offer to Purchase.** If Purchaser executes this Contract prior to Seller, then this Contract shall constitute and be an Offer to Purchase by the Purchaser that shall remain open to acceptance by Seller, based upon approval by City Council of Seller, until 5 p.m. eastern daylight savings time, on _____, 2015. Upon Seller's acceptance, execution, and delivery of this Contract, this Contract shall constitute and be a valid Contract for Sale and Purchase that is binding upon all parties hereto.

13. **Broker Commissions.** Seller and Purchaser shall be responsible for the payment of any and all broker's commissions, if any, that may be due pursuant to any existing broker agreements, and each party shall protect and save harmless the other party against the claim of any broker hired with respect to this Contract. The parties acknowledge that there shall be no brokerage commissions or fees related to Seller's sale of the Property to Purchaser. Purchaser shall pay the brokerage fees of any broker used by Purchaser.

14. **Failure to Perform.** If Purchaser fails to meet any of its obligations under this Contract, at no fault of Seller, Seller, at its option, can exercise any of its rights under this Contract including but not limited to: (a) may elect to enforce the terms hereof by action for specific performance, and/or exercise any other right or remedy available to it at law or in equity, or (b) may terminate this Contract by notice to Purchaser. If Seller fails to meet any of its

obligations under this Contract, at no fault of Purchaser, Purchaser, at its option, can exercise any of its rights under this Contract including but not limited to: (a) may elect to enforce the terms hereof by action for specific performance, and/or exercise any other right or remedy available to it at law or in equity, or (b) may terminate this Contract by notice to Seller and to receive the refund of the Deposit, in which case Seller shall have no further obligations under the Contract to Purchase.

15. **Additional Contingency Clause.** Notwithstanding anything herein or elsewhere to the contrary, it is expressly understood by the parties hereto that the Seller and Purchaser's obligation to consummate the Closing and purchase the Property is contingent upon the occurrence of the following event:

Approval by all necessary action of the City Council of Seller (including approval by resolution and/or ordinance, as applicable) of the Contract and Second Contract and approval by the MHPC, as set forth in Section 7B.

16. **Miscellaneous.**

A. Press Release. Both parties agree not to issue or make any public announcement, whether oral or written, of the sale of the Property without first giving the other party the opportunity to review and comment upon the contents of the notice or other statement.

B. Gender. Words of any gender used in this Contract shall be held and construed to include any other gender, any words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise.

C. Captions. The captions in this Contract are inserted only for the purpose of convenient reference and in no way define, limit, or prescribe the scope or intent of this Agreement or any part hereof.

D. Construction. No provisions of this Contract shall be construed by any court or other judicial authority against any party hereto by reason of such party's being deemed to have drafted or structured such provisions.

E. Entire Agreement. This Contract, including Exhibits "A" through "D" constitutes the entire contract between the parties hereto and supersede all prior understandings, if any, there being no other oral or written promises, conditions, representations, understandings or terms of any kind as conditions or inducements to the execution hereof and none have been relied upon by either party. Any subsequent conditions, representations, warranties, or agreements shall not be valid and binding upon the parties unless in writing and signed by both parties.

F. Time is of the Essence. Time is of the essence in this transaction.

G. Recitals. The above-stated Recitals shall be an integral part of this Contract.

H. Original Document/Counterparts. This Contract shall be executed by both parties in counterparts, each of which shall be deemed an original, but all of such counterparts taken together shall constitute one and the same Agreement.

I. Governing Law. This Contract shall be construed, and the rights and obligations of Seller and Purchaser hereunder shall be determined, in accordance with the laws of the State of Ohio.

J. Non-Merger. In addition to any specific language of non-merger found in certain sections of this Contract, any provision hereof which by its terms would be performed after the Closing shall survive the Closing and shall not merge in the Closing or in the deed, except as specifically provided to the contrary herein.

K. Assignment. Purchaser, as the current Purchaser under his Agreement, shall have the right to assign all of Purchaser's rights and obligations under this Contract to an affiliated land holding company created by Purchaser, intended to act as title holder for the Property, provided Seller approves of the proposed assignee based on the requirements set forth in Section 3D, with Seller's approval not to be unreasonably withheld or delayed. Purchaser, Company and their affiliates shall be obligated under the terms of this Contract and the Second Contract.

L. Severability. In the event that any provision or clause in this Contract shall be ruled invalid and severed by a court of competent jurisdiction, such severability shall not affect other provisions of this Contract and they shall remain in full force and effect. This provision shall survive the Closing or any termination hereof.

The parties have executed this Contract as of the respective dates set forth below.

SELLER:
City of Madeira, Ohio, an Ohio municipal corporation

Date

By: _____
Thomas W. Moeller, City Manager

PURCHASER:

Date

Thomas M. Powers

APPROVED AS TO FORM:

Robert P. Malloy, Law Director

EXHIBITS TABLE OF CONTENTS (Contract for Sale and Purchase)

- Exhibit A Depiction of Parking Spaces**
- Exhibit B Depiction for cut up of property/Muchmore House**
- Exhibit C Legal Description for Property to be conveyed (to be determined by survey)**
- Exhibit D Project Site Plan**

Exhibit A
Depiction of Parking Spaces

Exhibit B

Depiction for cut up of property/Muchmore House

Exhibit C

Legal Description for Property to be conveyed (to be determined by survey)

Exhibit D
Project Site Plan

The Law Firm of Curt C. Hartman

7394 Ridgepoint Drive, Suite 8
Cincinnati, Ohio 45230
hartmanlawfirm@fuse.net

November 30, 2015

BY EMAIL (rpmallov@woodlamping.com)

Robert P. Malloy
Law Director, City of Madeira
Wood & Lamping LLP
600 Vine St. Suite 2500
Cincinnati, OH 45202

Re: Request for Initiation of Civil Action Pursuant to R.C. 733.56 et seq.

Mr. Malloy:

This firm represents Douglas Oppenheimer (aka Philip Douglas Oppenheimer), a resident and taxpayer of the City of Madeira, and on whose behalf this letter is tendered. Specifically, I am writing to you on behalf of Mr. Oppenheimer pursuant to the taxpayer lawsuit provisions of the Ohio Revised Code due to the recent actions by the City Council of the City of Madeira that constitute an abuse of corporate powers. In particular, the recent passage of Ordinance No. 15-30 by the City Council authorizing a contract for the sale of real property owned by the City of Maderia notwithstanding that the Charter of the City of Madeira mandates that the specific property must, *inter alia*, be preserved and protected.

In toto, Article XVI of the Charter of the City of Madeira provides that:

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".

The property specifically identified in Article XVI of the City Charter as the Muchmore House consists of approximately 0.215 transferred to the City of Madeira by Cleo Hosbrook by a deed dated April 3, 1989. With the foregoing Muchmore House property already owned by the City of Madeira, the citizens of the City of Madeira adopted Article XVI of the City Charter in November 2014. And pursuant to the provision of the City Charter, the Muchmore House property must, *inter alia*, be "preserved [and] protected."

However, on November 9, 2015, the City Council adopted Ordinance No. 15-30. This Ordinance specifically concerns and relates to the Muchmore House property.

Exhibit D

Specifically, Ordinance No. 15-30 provides for and authorizes the execution of a contract for the sale by the City of Madeira of a portion the Muchmore House property – property that already consist just over one-fifth-of-an-acre. While the contract authorized by Ordinance No. 15-30 does not include the specific area of the Muchmore House property that would be sold (as that amount is left blank on the contract authorized by the Ordinance), the diminution of a parcel already consisting of one-fifth-of-an-acre does not comply with the letter, spirit or intent of Article XVI of the City Charter. (Additionally, if the Muchmore House property is presently nonconforming under the City's Zoning Code, the sale of a portion of the property would also constitute an unauthorized alteration to an existing nonconforming parcel.)

As the foregoing demonstrates, at a minimum, the foregoing, including the adoption of Ordinance No. 15-30 and any action to implement and effectuate a sale of a portion of the Muchmore House property clearly violates Article XVI of the City Charter so as to constitute an abuse of corporate powers. Accordingly, pursuant to Sections 733.56 *et seq.* of the Ohio Revised Code, Mr. Oppenheimer, as a resident and taxpayer of the City of Madeira, hereby requests that you, as the City Law Director, make application to a court of competent jurisdiction for an order of injunction to restrain the abuse of corporate powers of the City of Madeira as it relates to the effort to sell or transfer a portion of the Muchmore House property located at 7010 Miami Avenue.

I am sure you appreciate that time is of the essence and, thus, would ask for a prompt and immediate response as to whether you will file such an action.

Sincerely,

/s/ Curt C. Hartman
Curt C. Hartman

cc: Thomas W. Moeller, City Manager (via e-mail, tmoeller@madeiracity.com)
Douglas Oppenheimer

WOOD & LAMPING LLP

SINCE 1927

ATTORNEYS AT LAW

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December 8, 2015

Curt C. Hartman
The Law Firm of Curt C. Hartman
7394 Ridgpoint Drive, Suite 8
Cincinnati, OH 45230

RE: City of Madeira - Request for Initiation of Civil Action

Dear Curt:

As of December 1, 2015, I have appointed Interim Law Director for the City of Madeira. Your letter of November 30, 2015, has been forwarded to me for response.

As you stated, Ordinance No. 15-30, adopted by City Council on November 9, 2015, authorizes the sale of a portion of the property referred to as the Muchmore House. This was done after a thorough review of the relevant provisions of the Madeira City Charter and other relevant laws, ordinances, and documents.

As you have indicated, Article XVI of the Charter states as follows:

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".

As you can see, there is no express prohibition against selling any portion of the identified properties. The only requirement is that the properties be "preserved [and] protected."

Exhibit E

Preservation and protection can be, and are being, achieved through other legislative measures. More specifically, the Charter provision also created the Historic District. City Council approved legislation after the passage of the Charter Amendment which created the Madeira Historical Preservation Commission (MHPC). One of the responsibilities of the MHPC is to recommend standards and regulations which will oversee the future of the properties. City Council is in the process of reviewing those standards in order to finalize them so they can be enforced by the MHPC. While it is possible that the Historic Preservation Commission may one day recommend further restrictions on the properties in the Historic District, no such regulations exist at this time. So again, there is no express restriction that would prohibit the City from selling any portion of the property. The strict and specific purpose of the proposed standards and regulations are to "preserve" and "protect" the properties located within the Madeira Historic District. As such, the only requirement of the Charter (to preserve and protect) is being fulfilled.

Next we examined the 2012 Muchmore Historic Area legislation. This legislation specifically retains the right to convey some of the property as long as it meets the two main goals of the legislation: respect the historical significance of the property and assist in business development. This ordinance is an example of the theme of restraint that exists around these properties. However, there is no express restriction that would prohibit the City from selling the property.

Finally, we examined the deeds and accompanying letters of donation that the City received when initially acquiring the properties. There are no restrictions that came in the deeds when the City acquired the property. The most that accompanied the deeds is the letter from Cleo Hosbrook expressing her hope about the preservation of the buildings. Again, while this may support the theme of restraint and the hope and expectation of preservation, it is not a specific legal requirement. Therefore, there is no express restriction in the conveyance documents that would prohibit the City from selling the property or subdividing it for additional public parking.

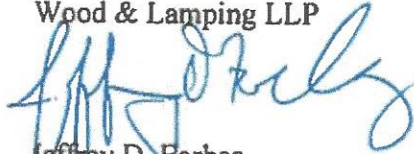
Your letter also questions whether the existing parcel is conforming to the Zoning Code. The parcel is located within the Main Street Core District. There are no lot/area limitations; therefore, the reduction in the area of the lot would not make the lot non-conforming. As well, building setbacks within the MSC District are 5 ft.; the proposed reduction in the size/area of the lot will not cause there to be a non-conforming building setback issue.

Based on the foregoing, I do not believe that Madeira City Council abused its corporate authority in enacting Ordinance No. 15-30. As such, I am declining to initiate a civil action pursuant to R.C. 733.56 *et seq.*

Curt C. Hartman
December 8, 2015
Page 3

Very truly yours,

Wood & Lamping LLP



Jeffrey D. Forbes
Interim Law Director

cc: Tom Moeller, City Manager

2229745.1

4

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



CITY OF MADEIRA *ex rel.*
DOUGLAS OPPENHEIMER,

Relator,

v.

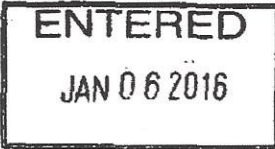
CITY OF MADEIRA, *et al.*,

Respondents.

: Case No. A-15-06891

:
: Judge Dinkelacker

:
: AGREED PRELIMINARY INJUNCTION



Pursuant to Relator's motion for a temporary restraining order/preliminary injunction and upon the agreement of the parties hereto, IT IS HEREBY ORDERED that:

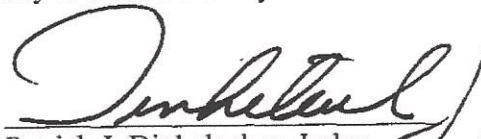
- the City of Madeira, as well as its officials, employees, officers or agents, or others acting at their direction or in concert with them, are hereby enjoined and restrained from executing or implementing any contract to sell or transfer any portion of the real property known as the Muchmore House Property located at 7010 Miami Avenue in the City of Madeira, said contract being authorized by City of Madeira Ordinance No. 15-30 or otherwise.

Nothing herein shall be construed to limit, restrain or otherwise prohibit the City of Madeira, as well as its officials, employees, officers or agents, or others acting at their direction or in concert with them, from undertaking negotiations to sell or transfer any portion of the foregoing real property, provided that no contract to sell or transfer any portion of the Muchmore House Property located at 7010 Miami Avenue in the City of Madeira may, without further order of the Court, be executed or implemented.

As the City of Madeira is the real-party-in-interest in this taxpayer action brought pursuant to R.C. 733.56 *et seq.* and pursuant to Rule 65(C), no bond or security is required. *Schulman v. City of Shaker Heights*, 29 O.O.2d 373, 196 N.E.2d 102 (8th Dist. 1964).

This Order shall remain in place and effective throughout the pendency of this case and any appeal hereof without prejudice to any party to seek to modify or vacate said Order.

SO ORDERED.


 Patrick J. Dinkelacker, Judge, 1-6-16
 Hamilton County Common Pleas Court

Reviewed and agreed to form:

/s/ Curt C. Hartman
Counsel for Relator

/s/ Jeffrey Forbes
Counsel for Respondents
City of Madeira and
Tom Moeller

Tendered without response
Respondent Thomas Powers

5

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA *ex rel.*
DOUGLAS OPPENHEIMER,

Relator,

v.

CITY OF MADEIRA, *et al.*,

Respondents.

: Case No. A-15-06891

:
: Judge Dinkelacker

:
: RESPONDENT THOMAS POWERS'
: MOTION TO DISMISS FOR
: FAILURE TO STATE A CLAIM

Pursuant to Ohio Rules 12(b)(2) and 12(b)(6), Defendant Thomas Powers moves this Court to dismiss all purported claims against him with prejudice, because Relator, City of Madeira *ex rel.* Douglas Oppenheimer, ("Relator") has failed to state a claim upon which relief can be granted. A brief Memorandum in Support of this Motion is attached.

OF COUNSEL:

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Respectfully submitted,

/s/ Steven P. Goodin
Steven P. Goodin (0071713)
Attorney for Respondent Thomas Powers
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MEMORANDUM IN SUPPORT

Relator seeks a declaratory judgment that Madeira Ordinance 15-30 is invalid because it allegedly violates Article VII of the Madeira Charter and Madeira Resolution No. 10-14. Relator also seeks an injunction against Defendant City of Madeira (the "City") from entering into a real estate contract with Defendant Thomas Powers ("Mr. Powers") that is described and authorized by Ordinance 15-30.

The only entity that can provide any relief to the Relator is the City, thus, neither count states a claim against Mr. Powers for which relief could be granted.

Moreover, Relator brings this action pursuant to R.C. 733.56, a statute that, by its terms, is only applicable to municipalities, and does not apply to private citizens such as Mr. Powers. *See Brauer v. City of Cleveland*, 119 Ohio App. 159, 163 (8th Dist. 1963) (where statute is described as protecting taxpayers from "unauthorized acts on the part of municipalities") and *Cleveland v. Walsh*, 67 Ohio App. 479, 489, 37 N.E.2d 397 (8th Dist. 1941) (where purpose of the statute is described as a vehicle for "securing. . . final adjudication of the rights of the municipality.")

As is clear from the attachments to the Complaint, Mr. Powers has no duty or obligation under Article VII of the Madeira Charter or Madeira Resolution No. 10-14. Needless to say, if this Court should rule that the City may not legally enter into the proposed contract with Mr. Powers described in Ordinance 15-30, then Mr. Powers will be unable to consummate that deal. Alternatively, should this Court rule that the proposed contract is legal, the Relator has no cause of action against Mr. Powers to enjoin him from entering into the proposed contract.

Due to the fact that the Relator can receive no relief or remedy from Mr. Powers, the Relator has not stated a claim upon which relief can be granted, and purported claims against Mr. Powers should be dismissed with prejudice.

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Fax: (513) 651-3836

Respectfully submitted,

/s/ Steven P. Goodin
Steven P. Goodin (0071713)
Attorney for Respondent Thomas Powers
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the following via Regular U.S. Mail, postage prepaid, on this 15th day of January, 2016 pursuant to Ohio R. Civ. P. 5(B)(2)(c).

Curt C. Hartman, Esq.
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Cincinnati, OH 45230

Christopher P. Finney, Esq.
Finney Law Firm, LLC
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Cincinnati, OH 45245

Jeffrey Forbes, Esq.
Interim Law Director
City of Madeira
Wood & Lamping LLP
600 Vine Street, Suite 2500
Cincinnati, OH 45202

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

6

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

CITY OF MADEIRA <i>ex rel.</i>	:	Case No. A-15-6891
DOUGLAS OPPENHEIMER	:	
	:	Judge Dinkelacker
Relator,	:	
	:	
v.	:	
	:	RELATOR'S MEMORANDUM
CITY OF MADEIRA, et al.,	:	IN OPPOSITION TO POWERS'
	:	MOTION TO DISMISS
Respondents.	:	

Now comes the CITY OF MADEIRA, by and through Relator DOUGLAS OPPENHEIMER, and hereby tenders the following memorandum in opposition to the Motion to Dismiss filed by Respondent Powers.

MEMORANDUM IN OPPOSITION

R.C. 2721.12(A) provides that, when a declaratory judgment is sought, "all person who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." Similarly, Ohio R. Civ. P. 19(A)(2) provides that, if a person is subject to service of process, he "shall be joined as a party in the action if ... he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may ... as a practical matter impair or impede his ability to protect that interest."¹ In this case, the inclusion of Mr. Powers is required

¹ It is noteworthy, too, that Ohio R. Civ. P. 19(A)(1) provides that, if a person is subject to service of process, he "shall be joined as a party in the action if ... in his absence complete relief cannot be accorded among those already parties." Because the language of Ohio R. Civ. P. 19(A) is in the disjunctive, the criteria under Ohio R. Civ. P. 19(A)(2) has to be different than that required under Ohio R. Civ. P. 19(A)(1), less the two divisions of Ohio R. Civ. P. 19(A) be redundant of each other. Mr. Powers essentially argues from the perspective of Ohio R. Civ. P. 19(A)(1), *i.e.*, that he is not necessary in order for complete relief to be afforded, while he ignores the separate bases for his inclusion as a party herein, *i.e.*, Ohio R. Civ. P. 19(A)(2) and R.C. 2721.12(A).

pursuant to these two provisions. See Complaint ¶5 (Mr. Powers “may have or claim an interest in and to the property that is the subject of this action, either directly or through a separate legal entity”).

This action is brought in order to obtain both a prohibitory injunction and a declaratory judgment, which is appropriate in municipal taxpayer actions. See *City of Cincinnati ex rel. Smitherman v. City of Cincinnati*, 188 Ohio App.3d 171, 934 N.E.2d 985, 2010-Ohio-2768 ¶26 (1st Dist.)(in a municipal taxpayer action, “[a] party may institute an action for a declaratory judgment *and* a prohibitory injunction to challenge legislation”); see also *State ex rel Satow v. Gausse-Milliken*, 98 Ohio St.3d 478, 786 N.E.2d 1289, 2003-Ohio-2074 ¶22 (“Relators have an adequate remedy to challenge this new legislation by an action for declaratory judgment and prohibitory injunction”); *State ex rel. Beane v. Dayton*, 112 Ohio St.3d 553, 862 N.E.2d 97, 2007-Ohio-811 ¶31 (“Relators here have an adequate remedy in the ordinary course of law by an action for declaratory judgment and prohibitory injunction in [common pleas court], seeking (1) a judgment declaring that [the state law] is constitutional and supersedes [the city’s] conflicting charter residency requirement and (2) an injunction preventing [the city] from applying the city’s charter requirement conditioning municipal employment on city residency”). And while Mr. Powers focuses exclusively upon the relief being sought as it concerns efforts to enjoin the City and its officials from proceeding with Ordinance No. 15-30, he ignores the declaratory judgment aspects of this case which directly impacts him. For the underlying issue and the declaratory judgment action itself concern the legality *vel non* of a proposed contract to which Mr. Powers is a party. See Complaint ¶26 (claim for declaratory judgment includes judgment “that the prohibitions, restrictions and/or limitation within [the Madeira City Charter] prohibit

and/or preclude the CITY OF MADEIRA from proceeding forward with the contract” with Mr. Powers). Thus, in the language of the mandatory requirement within R.C. 2721.12(A), Mr. Powers is a person “who [has] or claim[s] any interest that would be affected by the declaration” being sought; for if this Court should issue such a declaratory judgment, Mr. Powers, who has a direct interest in and to said proposed contract, would be affected by such declaratory judgment. As such, Respondent Power is properly joined as party herein; the Motion to Dismiss, therefore, must be DENIED.²

Respectfully submitted,

/s/ Curt C. Hartman
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chris@finneylawfirm.com

Attorneys for Relator

² Of course, if he truly believes he has no interest to be protected herein, Mr. Powers is free to default on answering the Complaint and simply allow the resolution of this case, including the issuance of a declaratory judgment, be litigated solely by Relator and the City even though the outcome thereof will dictate and control his ability to entered into the proposed contract.

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10. Respondents admit that Madeira City Council opposed the adoption of the charter amendment and deny the remainder of the allegations contained in Paragraph 10 of the Complaint.
11. Respondents admit that Resolution No. 10-14 was adopted, the resolution speaks for itself and Respondents deny the remaining allegations contained in Paragraph 11 of the Complaint.
12. Respondents admit that the Resolution speaks for itself and deny all the remaining allegations contained in Paragraph 12 of the Complaint.
13. Respondents admit to the adoption of Ordinance No. 15-30 and deny the remaining allegations contained in Paragraph 13 of the Complaint.
14. Respondents admit the allegations contained in Paragraph 14 of the Complaint.
15. Respondents deny the allegations contained in Paragraph 15 of the Complaint.
16. Respondents deny the allegations contained in Paragraph 16 of the Complaint.
17. Respondents admit that the copy of a letter attached to the Complaint dated November 30, 2015 is a true and accurate copy of the correspondence sent by Mr. Hartman to Mr. Malloy and deny the remaining allegations contained in Paragraph 17 of the Complaint.
18. Respondents admit that a copy of a letter attached to the Complaint dated December 8, 2015 is a true and accurate copy of correspondence sent by Mr. Forbes to Mr. Hartman and deny the remaining allegations contained in Paragraph 18 of the Complaint.
19. Respondents admit the allegations contained in Paragraph 19 of the Complaint.
20. Respondents admit the allegations contained in Paragraph 20 of the Complaint.
21. Respondents deny the allegations contained in Paragraph 21 of the Complaint as it states a legal conclusion.

22. Respondents are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 22 of the Complaint, and therefore deny the same.

23. Respondents are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint, and therefore deny the same.

24. Respondents deny the allegations contained in Paragraph 24 of the Complaint.

25. Respondents deny the allegations contained in Paragraph 25 of the Complaint.

26. Respondents deny the allegations contained in Paragraph 26 of the Complaint.

27. Respondents deny the allegations contained in Paragraph 27 of the Complaint.

28. Respondents deny the allegations contained in Paragraph 28 of the Complaint.

29. Respondents deny the allegations contained in Paragraph 29 of the Complaint.

30. Respondents specifically deny any other allegations in the Complaint that have not been specifically denied.

SECOND DEFENSE

31. Relator has failed to exhaust his administrative remedies.

THIRD DEFENSE

32. Relator has failed to join necessary parties pursuant to Rules 19 and 19.1 of the Ohio Rules of Civil Procedure.

FOURTH DEFENSE

33. Relator's Complaint fails to state a claim upon which relief can be granted against Respondents.

FIFTH DEFENSE

34. Relator's Complaint should be dismissed as it is barred by the statute of limitations.

SIXTH DEFENSE

35. Relator's Complaint should be dismissed based upon waiver and laches.

SEVENTH DEFENSE

36. Relator's Complaint should be dismissed for insufficiency of process and insufficiency of service of process.

COUNTERCLAIM

1. Respondent's restate their allegations, admissions and denials contained in their Answer as if fully rewritten herein.
2. Ordinance No. 15-30, adopted by the Madeira City Council on November 9, 2015, authorizes the sale of a small portion of vacant land which is part of the Muchmore House Property.
3. Ordinance No. 15-30 was adopted by the Respondent City after thorough review of the relevant portions of the Madeira City Charter and other relevant laws, ordinances, and documents.
4. There is no express prohibition stated in Article XVI of the Madeira City Charter against selling any portion of the identified properties, only that they are to be preserved, protected, and left standing on the same ground that the structures were built upon.
5. Preservation and protection can be and are being achieved through other legislative measures including the creation of the Muchmore Historical Area ("MHA") that was created by passage of Ordinance No. 12-27. Copy is attached as Exhibit 1.

6. There are two major objectives promoted by Ordinance No. 12-27 which are preserving the significance of historical landmarks while promoting compatible business uses within the MHA.
7. Respondent City has also passed legislation (Ordinance No. 15-05) which created the Madeira Historic District ("MHD") and the Madeira Historical Preservation Commission ("MHPC"). Copy of Ordinance No. 15-05 is attached as Exhibit 2.
8. As part of its responsibilities, the MHPC is to recommend standards and regulations which will oversee the future of these properties including the Muchmore House.
9. While it is possible that the MHPC may in the future recommend further restrictions regarding the subject properties located in the MHD, no such regulations exist at this time. As a result, there are no express restrictions that would prohibit the Respondent City from selling any portion of the subject properties.
10. The strict and specific purpose of the proposed standards and regulations are to preserve and protect the properties located within the MHD.
11. There are no expressed restrictions contained in the deeds transferring ownership to Respondent City regarding these subject properties including the Muchmore House that would prohibit Respondent from selling the property for any purpose.
12. Respondent City had the authority to enact Ordinance No. 15-30 and did not violate the provisions of the Madeira City Charter or any other laws in doing so.
13. A real and justiciable dispute exists between the parties regarding the rights, status and other legal relations arising from the foregoing facts. Respondents seek a declaratory judgment regarding said rights, status and other legal relations, including a declaratory judgment that they have every right under the law to proceed with the sale of a vacant portion of the

Muchmore House Property pursuant to Madeira City Ordinance No. 15-30 and any other property located within the MHA and MHD.

WHEREFORE, Respondents demand that the claims made against them in Relator's Complaint be dismissed in their entirety with prejudice, attorney's fees and any other further relief that the Court may deem just and appropriate. Respondents further pray for entry of judgment in their favor on their Counterclaim, attorneys' fees and any other relief that this Court may deem just and appropriate.

Respectfully submitted,



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Kevin C. McDonough (0041646)
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(Email) jdforbes@woodlamping.com
(Email) kcmcdonough@woodlamping.com

Attorneys for Respondents
City of Madeira and Thomas E. Moeller

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by ordinary and electronic mail upon the following on this 1st day of January, 2016.

Curt C. Hartman, Esq. (0064242)
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
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hartmanlawfirm@fuse.net

and ordinary mail

Christopher P. Finney, Esq. (0038998)
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chris@finneylawfirm.com
Attorneys for Relators


Kevin C. McDonough

ORDINANCE NO. 12-27

RECOGNIZING IMPORTANCE OF PRESERVING HISTORICAL LANDMARKS WHILE
ENCOURAGING MIXED USE IN THE SAME VICINITY THAT ENHANCES ECONOMIC
VITALITY IN SEGMENT OF THE CITY THAT IS NOT ONLY COMPELLING BUT IS
COMPATIBLE WITH USES IN THE IMMEDIATE AREA

WHEREAS, the City of Madeira recognizes the strength, vitality, and multi-generational interest that is preserved and promoted by designating areas that connect the City's historical roots; and

WHEREAS, one primary objective of the recently adopted Downtown Core District regulations, which includes buildings of significant historical landmarks, is to encourage the active initiative of developers to propose uses that plan for economic destination points that thrive in part because of the integration of significant historical features; and

WHEREAS, "mixed use," as a planning tool, envisions residential, retail, and office uses thriving within the same neighborhood, it does not mandate that each parcel or building provide components of each use. Rather, "mixed use" can be achieved, perhaps with a better balance, by encouraging the focus of each new development to achieve the single highest and best zoning use for each parcel/development. In the end, individual residential, commercial and office uses better retain their own identity while becoming a welcome component to a mixed use zoning district; and

WHEREAS, the City is entrusted with historically significant property that is also the center of its downtown retail activities. Careful management is necessary to preserve this historical doorway to our past, present and future. Careful planning is necessary to encourage development that preserves the vital historical links while celebrating the desirability of the retail epicenter of the City.

NOW, THEREFORE, BE IT ORDAINED that in order to balance the competing but complementary uses inherent in retail and historical uses so that such uses co-exist to complement each type of use in such a way as be a benefit to the citizens of Madeira, both business and residential, the Council of the City of Madeira hereby adopts the following plan to enhance the public good of the historical and vibrant community of Madeira:

Section 1. That the City, for planning purposes, hereby designates the following described area as the Muchmore Historical Area: It is outlined on the attachment as Exhibit A. It is bound on the West by Miami Ave, on the south by the railroad tracks, on the east by the storm water culvert and on the north by Laurel Avenue.

Section 2. That the City hereby commits to preserving historical significant landmarks within the Muchmore Historical Area while seeking ideas that would combine destination retail businesses that complement certain historical landmarks as accessory destinations. In furtherance of this objective, the City shall reserve its authority under constitutional home rule provisions of the Ohio Constitution to acquire or convey such interests in real estate within the Muchmore Historical Area to preserve and promote the two objectives of this Ordinance: Preserving the



significance of historical landmarks while promoting compatible business uses within the Muchmore Historical Area (MHA). This Ordinance is a measure relating to Council's determination to proceed with public improvements compatible with the stated objectives.

Section 3. That the City hereby commits to providing a vision of the MHA, after consultation with developers and with persons and organizations committed to preserving the significant historical landmarks of this area and developers who share this mixed use vision. While reserving its obligations to make decisions consistent with the long term good of the community, which meet the two prong goal stated herein (preservation of historical significant landmarks and creating a compatible retail destination) the City shall commit to the best available plan that achieves its objectives.

Section 4. That in furtherance of accomplishing its two prong public improvement plan described herein, the City may acquire or convey, without bidding, such interests in real estate within the area that the City deems appropriate to fulfill this public improvement. This plan of public improvements may include private real estate within the described area, with or without improvements. Such acquisitions or conveyances may be for the purpose of assemblage of property that the City deems incidental and consistent with the purposes of this plan for public improvements. Property conveyed by the City shall contain provisions for restriction of uses of any property interest conveyed to those consistent with this public improvement and shall contain clauses causing the reversion of such property to the City of Madeira should the property not be used in a manner consistent with the public improvement plans.


PASSED ON THE 22ND DAY OF OCTOBER, 2012,
BY THE FOLLOWING 6-0 VOTE:

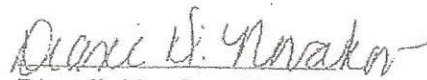
YEA:
Melisa Adrien
Brasington
Tim Dicke
Rick Staubach
Rob Steier
Mike Steur

NAY:

ABSTAIN:

ABSENT:
Ken Born


Rick Brasington, Mayor


Diane D. Novakov, Clerk of
Council

THIRD READING

ORDINANCE NUMBER 15-05

AN ORDINANCE CREATING THE MADEIRA HISTORIC DISTRICT AND ESTABLISHING THE MADEIRA HISTORICAL COMMISSION

WHEREAS, the Madeira voters approved an amendment to the Madeira Home Rule Charter requiring the creation of an historic district for certain city-owned properties on Miami Avenue; and

WHEREAS, the charter amendment specified the desire of the voters to preserve and maintain the city-owned properties in a manner that may require specific oversight of any modifications or improvements to the buildings; and

WHEREAS, it is the desire of City Council to address the issues identified in the charter amendment; and

WHEREAS, it is the intent of this legislation to first identify the boundaries of the Madeira Historic District as well as create the review board known as the Madeira Historical Preservation Commission; and

WHEREAS, once the members to the Commission are appointed to serve, they shall commence to provide to City Council recommendations as to the procedures and standards that will be used when reviewing modifications and improvements to those properties.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Madeira, State of Ohio:

Section 1. That there is hereby adopted into the Madeira Code the creation of the Madeira Historic District as described in the attached Exhibit A.

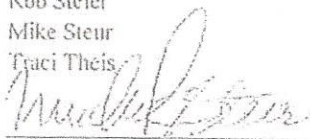

Section 2. That there is hereby created the Madeira Historical Preservation Commission as provided in the attached Exhibit A.

Section 3. That, upon the final appointments to the Commission, the Commission will have 90 days from the effective date of this ordinance to make recommendations to City Council as to the procedures and standards for the review of modifications and improvements to the properties located in the Madeira Historic District.

Section 4. That this Ordinance shall take effect and be in force from and after the earliest period allowed by law.

This Ordinance is subject to referendum per Article XII, Section 3 of the Madeira Home Rule Charter.

PASSED ON THE 9TH DAY OF MARCH, 2015 BY THE FOLLOWING 6-0 VOTE:

YEA:	NAY:	ABSTAIN:	ABSENT:
Melisa Adrien			Nancy Spencer
Tom Ashmore			
Ken Born			
Rob Steier			
Mike Steur			
Traci Theis			
			
Mike Steur, Mayor			
			
			Diane D. Novakov, Clerk of Council



ORDINANCE NO. 15-05
EXHIBIT B

September 22, 2014

Dear Elector,

On July 28, 2014, Ordinance No 14-23 was adopted by the Madeira City Council accepting an initiative by Madeira voters to amend the Madeira Home Rule Charter and directing the Hamilton County Board of Elections to place the proposed Charter Amendment on the November 4, 2014 ballot. Below is a copy of the text that will be on the ballot and is being sent to you in accordance with Section 5, Article XIV of the Madeira Home Rule Charter.

Thomas W. Moeller
City Manager
City of Madeira, Ohio

Diane Novakov
Clerk of Council
City of Madeira, Ohio

PROPOSED CHARTER AMENDMENT

CITY OF MADEIRA, OHIO

A majority affirmative vote is necessary for passage.

Shall the Charter of the City of Madeira be amended by adding the new ARTICLE XVI –
MADEIRA HISTORIC DISTRICT/PRESERVATION as follows:

Article XVI. Madeira Historic District/Preservation

1. 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".

YES

NO

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

CITY OF MADEIRA <i>ex rel.</i>	:	Case No. A-15-6891
DOUGLAS OPPENHEIMER	:	
	:	Judge Dinkelacker
Relator,	:	
	:	
v.	:	
	:	RELATOR'S MOTION
CITY OF MADEIRA, <i>et al.</i>,	:	TO DISMISS COUNTERCLAIM
	:	
Respondents.	:	

Now comes the CITY OF MADEIRA, by and through Relator DOUGLAS OPPENHEIMER, and hereby moves to dismiss the Counterclaim due to the lack of jurisdiction and the failure to state a claim upon which relief may be granted.

MEMORANDUM IN SUPPORT OF MOTION

“It is axiomatic that a party cannot sue itself.” *Ohio Dep’t of Human Serv. v. Ohio Dep’t of Transp.*, 78 Ohio App.3d 658, 661, 605 N.E.2d 1007 (10th Dist. 1992)(“all the parties to this action are members of the ‘state’ as defined in R.C. 2743.01(A) and are not distinct for purposes of R.C. Chapter 2743”). Yet, in filing the present Counterclaim without any legal authority for doing so under either statutory law or the common law, Respondents have essentially sued themselves in order to obtain an advisory opinion from this Court. As such, this Court lacks jurisdiction over the putative counterclaim and such putative counterclaim fails to state a claim upon which relief may be granted.

As the First District has recognized, “[a] taxpayer’s action is a derivative action, created by statute, that is brought on behalf of the municipality to ensure that its officers comply with the law, do not misapply funds, or do not abuse the municipality’s corporate powers.” *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.*, 150 Ohio App.3d

728, 782 N.E.2d 1225, 2002-Ohio-7078 ¶20 (1st Dist.); see *State ex rel. Nimon v. Village of Springdale*, 6 Ohio St.2d 1, 5, 215 N.E.2d 592 (1966)(in statutory taxpayer action, “Relators’ rights are derived from the right of the municipal corporation”). Thus, the taxpayer bringing such an action is simply a nominal party; the real-party-in-interest is the municipal corporation on whose behalf the action is brought. See *Laituri v. Nero*, 138 Ohio App.3d 348, 351, 741 N.E.2d 228, 2001-Ohio-230 (11th Dist.)(“the city is the real party in interest in a taxpayer lawsuit”); see also *Barrett v. S. Connecticut Gas Co.*, 172 Conn. 362, 370, 374 A.2d 1051 (1977)(“[a] shareholder’s derivative suit is an equitable action by the corporation as the real party in interest with a stockholder as a nominal plaintiff representing the corporation”).

And in a derivative action – be it a taxpayer action on behalf of a municipal corporation or a corporate shareholder suit – “[t]he corporation is a necessary party to the action; without it, the case cannot proceed. Although named a defendant, it is the real party in interest, the [party bringing the claim on behalf of the corporation] being at best the nominal plaintiff. The proceeds of the action belong to the corporation and it is bound by the result of the suit.” *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

In this action, the Respondents are the City of Madeira and certain city officials in their official capacity.¹ In other words, the Respondents are simply the municipal corporation itself. See *Range v. Douglas*, 878 F.Supp.2d 869, 875 (S.D. Ohio 2012) (“[a] suit against an individual in his or her official capacity is the equivalent of a suit against the governmental entity”). And as developed above, the real-party-in-interest bringing this action in the first instance is the municipal corporation. But because a counterclaim

¹ This statement is limited to those Respondents bringing the Counterclaim. For Relator recognizes that Respondent Thomas Powers is not a city official, but the Counterclaim was not filed on his behalf.

asserts “any claim which at the time of serving [a responsive pleading] the pleader has against any opposing party”, a *sine qua non* for the bringing of a counterclaim is the existence of an “opposing party” which does not exist in derivative actions.² Instead, what the City of Madeira is seeking to do through the Counterclaim is to sue itself so as to have this Court issue an advisory opinion. But “a party cannot sue itself”, *Ohio Dep’t of Human Serv.*, 78 Ohio App.3d at 661, and “it is a well-established principle of law that a court cannot issue an advisory opinion.” *Pointe at Gateway Condominium Owner’s Association, Inc. v. Schmelzer*, 2013-Ohio-3615 ¶27 (8th Dist.). Yet Respondents improperly seek to do both things through the Counterclaim. Accordingly, the Counterclaim must be DISMISSED.

² And a closely related, though distinct, requirement for bringing a declaratory judgment action that does not exist herein is that “a real controversy exists between the parties.” *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 970 N.E.2d 898, 2012-Ohio-2187 ¶31. Firstly, there is no actual controversy between the City and itself that would allow for a declaratory judgment. *See Mallory v. City of Cincinnati*, 2012-Ohio-2861 ¶14-16 (1st Dist.)(Fischer, J., with Sundermann and Dinkelacker, JJ., concurring)(trial court lacked subject-matter jurisdiction over declaratory judgment action because no justiciable controversy existed between mayor and the City over car allowance; “[mayor] had not been subject to any adverse conduct by the City because the City had not been treating [mayor’s] car allowance and health-insurance benefits as compensation under the Charter” and no allegation “that the City had ever indicated that the City intended to treat the car allowance and health-insurance benefits as compensation. Instead, [mayor] alleged only that he had ‘endeavored to determine’ whether his car allowance and health-insurance benefits were considered part of his compensation before he filed his action”). Additionally, because the City of Madeira is the real-party-in-interest in the underlying taxpayer lawsuit brought by Relator, there cannot exist *a fortiori* a real controversy between the same entity to support the bringing of a declaratory judgment action as a counterclaim absent statutory authority for doing so.

Respectfully submitted,

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Attorneys for Relators

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following on the 26th day of January 2016, via e-mail:

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/s/ Curt C. Hartman

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA ex rel.	:	
DOUGLAS OPPENHEIMER aka	:	Case No. A1506891
PHILIP DOUGLAS OPPENHEIMER,	:	
	:	(Judge Dinkelacker)
Relator,	:	
	:	<u>MEMORANDUM IN OPPOSITION</u>
vs.	:	<u>TO RELATOR'S MOTION TO</u>
	:	<u>DISMISS COUNTERCLAIM ON</u>
CITY OF MADEIRA, et al.,	:	<u>BEHALF OF RESPONDENTS</u>
	:	<u>CITY OF MADEIRA AND</u>
Respondents.	:	<u>THOMAS E. MOELLER</u>

Now comes Respondents City of Madeira and Thomas E. Moeller ("Respondents") who respectfully request that the Court overrule Relator's Motion to dismiss Respondents' counterclaim for the reasons set forth below.

In their Motion, Relator immediately directs the Court to *Ohio Dept. of Human Serv. v. Ohio Dept. of Transp.*, 78 Ohio App.3d 658, 605 N.E.2d 1007 (10th Dist. 1992) for the proposition that a party cannot sue itself. This case cited by Relator involved whether one state department could bring a subrogation claim under Section 2743 of the Ohio Revised Code in the Court of Claims against another state department for the recovery of medical expenses paid to Medicaid recipients. The Tenth District held that one state department could not bring such a claim against another state department. The instant case involves a counterclaim where Respondents are seeking a determination that they can proceed with the sale of the small portion of vacant land at issue and any other land located within the Madeira Historic District ("MHD") and Muchmore Historical Area ("MHA").

Relator also claims that Respondents are without legal authority to bring the counterclaim. A municipal corporation has the authority to sue or be sued pursuant to Section

715.01 of the Ohio Revised Code. Therefore, this Court has jurisdiction to rule on Respondents' Counterclaim.

Relator also cites the Court to *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.*, 150 Ohio App.3d 728, 782 N.E.2d 1225, 2002-Ohio-7078 (1st Dist.). In that case a taxpayer filed an action against the City of Cincinnati and the Cincinnati Reds challenging the City's failure to enforce a stadium lease agreement and collection of rents due. The City of Cincinnati did not file a counterclaim in that case. The court stated that in a taxpayer action the taxpayer's rights or claims are no greater than the rights or interests of the municipality. *Id.* at 739. As a result, the issue as to whether a city could assert a counterclaim in a taxpayer action was never addressed in that case. It is also important to note that none of the cases cited by Relator involve the issue as to whether a municipal corporation could file a counterclaim in a taxpayer action seeking a declaration of what rights it has to convey property that it rightfully owns.

Relator cites the Court to the case of *Mallory v. City of Cincinnati*, 2012-Ohio-2861 (1st Dist.) for the proposition that since Respondent is the real party in interest, it cannot bring a counterclaim against itself since there is no opposing party in a derivative action. In *Mallory*, the Mayor of Cincinnati sought a declaratory judgment regarding whether his car allowance and health insurance benefits were part of his compensation under the City Charter. The court held that there was no justiciable controversy between the parties because there was no adverse action or threat of adverse action made by the City. That case involved a city-elected official filing an action against the City of Cincinnati. It did not involve a taxpayer action and there was no issue regarding whether the City of Cincinnati could bring a counterclaim.

In the instant action, the Respondents are seeking a declaration as to what rights they have to convey the small portion of vacant land at issue in this case and their rights with regard

to the subject properties located within the historical areas. In essence, Relator argues in its Motion to Dismiss that there is no justiciable controversy between the parties and that the Respondents are seeking an improper advisory opinion. However, in paragraph 25 of its Verified Complaint for Declaratory Judgment and Injunctive Relief, Relator states that "A real and justiciable dispute exists between the parties regarding the rights, status, and other legal relations arising from the foregoing facts."

There is a justiciable controversy between the parties. Respondents desire to sell a small portion of vacant land to a party to this action who will utilize that portion of land for the purposes of opening a new restaurant that will benefit economic development and serve the public interest while preserving the historical significance of this property. Relator Douglas Oppenheimer has filed this action in an attempt to prevent Respondents from lawfully selling the land. In conclusion, Respondents respectfully request the Court to overrule Relator's Motion to Dismiss their Counterclaim.

Respectfully submitted,

/s/ Kevin C. McDonough

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Kevin C. McDonough (0041646)

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Attorneys for Respondents

City of Madeira and Thomas E. Moeller

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by ordinary and electronic mail upon the following on this 5th day of February, 2016.

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

CITY OF MADEIRA <i>ex rel.</i>	:	Case No. A-15-6891
DOUGLAS OPPENHEIMER	:	
	:	Judge Dinkelacker
Relator,	:	
	:	
v.	:	
	:	RELATOR’S REPLY MEMORANDUM
CITY OF MADEIRA, <i>et al.</i>,	:	IN SUPPORT OF MOTION TO
	:	DISMISS COUNTERCLAIM
Respondents.	:	

Now comes the CITY OF MADEIRA, by and through Relator DOUGLAS OPPENHEIMER, and hereby tenders the following reply memorandum in support of the Motion to Dismiss Counterclaim.

REPLY MEMORANDUM IN SUPPORT OF MOTION

In opposing the Motion to Dismiss, Respondents offer no substantive analysis of the well-established legal principles supporting the motion, *i.e.*, a party cannot sue itself and the municipal corporation itself is the real party-in-interest on whose behalf the action is brought though it is aligned as a defendant/respondent. Instead, Respondents simply provide a perfunctory summary of some of the cases cited to by Relator and, then, conclude by attempting to distinguish such cases by summarily declaring those cases did not involve a counterclaim. Whether the cases involved counterclaims *vel non* does not alter the legal principles set forth therein and their direct application to this case.¹

¹ If one would utilize Respondents’ manner of argument, what is noteworthy is that they have not and cannot cite to any case involving a municipal taxpayer action wherein the municipal corporation filed a counterclaim against itself seeking a declaratory judgment.

Additionally, Respondents confuse and conflate the concept of a party's capacity to sue with a court possessing jurisdiction. Under Respondents' argument (Memo. in Opp., at 1-2), the existence of the former automatically results in the latter. But "[c]apacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance." *National City Mtge. v. Skipper*, 2009-Ohio-5940, ¶11 (9th Dist.); accord *JDI Murray Hill, LLC v. Flynn Properties, LLC*, 2011-Ohio-301 ¶11 (8th Dist.). For there is no dispute that, under Ohio law, a municipal corporation has the capacity to sue; but having such capacity does not result in this Court automatically having subject matter jurisdiction over any and every claim such municipal corporation may bring. Capacity to sue and subject matter jurisdiction are two separate and distinct concepts.

The bottom line is that Respondents have not and cannot offer any argument or legal basis for this Court to exercise subject matter jurisdiction over the counterclaim. "[I]t has been consistently held that once the existence of subject matter jurisdiction has been challenged, the burden of establishing it always rests on the party asserting jurisdiction." *Collins v. Hamilton Cty. Dep't of Human Serv.*, 2002-Ohio-1325 (10th Dist.)(quoting *Linkous v. Mayfield*, Scioto App. No. CA1894, unreported (4th Dist. June 4, 1991)). Respondents' memorandum is devoid of any effort to satisfy its burden to establish this Court's subject matter jurisdiction over its counterclaim. Accordingly, the Motion to dismiss should be GRANTED and the Counterclaim DISMISSED.

Respectfully submitted,

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I certify that a copy of the foregoing was or will be served upon the following on the 12th day of February 2016, via e-mail:

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/s/ Curt C. Hartman

11, See Hamilton County Clerk of Courts

Case # A1506891 Entry