

October 21, 2016

My letter, sent to the Cincinnati Enquirer, included in this posting, addresses, Mayor Adrien's intimidation effort. To understand, my law suit, referenced by Adrien, I have included the entire trial transcript. The transcript will be the basis for the appeal, as the legal proceedings move through the Hamilton County Courts. Many legal proceedings are moved forward or settled in the Appeals court, including at least two other legal proceedings involving the City of Madeira that I am familiar with. The city of Madeira lost both of those proceedings.

After scrolling through and reviewing the trial transcript, please read the letter authored by Businessman James Tepe. Mr. James Tepe, is days from filing a Lawsuit against our city that will threaten, for good reasons, the development of Railroad Avenue, (The Swingline Grill) Mr. Tepe, in his letter lays out in detail, the role that our city manager and many elected, and appointed Madeira officials have played in the continuing effort to enrich developer, Thomas Powers, at the expense of Madeira tax payers. The ongoing plot will rob our schools of thousands of dollars indefinitely, because of Mayor Adrien, and City Manager Moeller's phony "Public Parking Lot". *This is only the beginning!*

Scroll Down Please.....

Cincinnati Enquirer

Letter to the Editor

October 19, 2016

It is imperative, that comments expressed by Madeira Mayor, Melisa Adrien, in the October 15, 2016 Enquirer, news story, titled, "Lawsuit against Madeira dismissed", be addressed. Mayor Adrien would have you believe that one resident, unelected, and holding no appointed position, has the power to expend Madeira Tax Payer dollars. Not so, and in fact Mayor Adrien, and six council members always determine, how tax dollars will be spent and for what purpose, (mostly behind closed doors). Recently, a local Businessman, James Tepe, has publicly leveled allegations of "Collusion and Political Favors", regarding six years of dealings with local land, and restaurant developer, Mr. Thomas Powers. Those allegations have merit, and the attempt to sell off a portion of the Madeira Historic District, reeked with the stench of "collusion and Political Favors".

My Lawsuit was filed when Adrien, and six council members passed Resolution number 15-30, a resolution that can only be construed as an attempt at destroying the Madeira Historic District, while enriching Developer Powers, at the expense of Madeira Taxpayers. The Lawsuit could have been dismissed, shortly after April 25th of this year, the day that Adrien repealed Resolution 15-30, but Adrien's attorneys, took no action, asking for a dismissal. Maybe that's because Adrien and her city attorneys had "orchestrated a shell game".

Here is how the scheme developed. Mayor Adrien presented, at the April 25th City Council meeting, ordinance number 16-03, repealing resolution 15-30, that included a contract with Powers, to "buy and sell", involving the vacant B&B Mower property, and the sale of Historic District property, (the cause for my Lawsuit). Immediately, at the same April 25th council meeting, Adrien brought forth a new resolution, number 17-16, identical to 15-30, except for one important section in the "new" contract, section E. Section E stated that if my

Lawsuit were to be dismissed, or if the city wins the suit, the city would than revert back to the contract associated with resolution 15-30, thus “the shell game” created by our Mayor. The game was created to fool the court, and the residents of Madeira. My Lawsuit was justified, just as the appeal is justified. This is all about political power, favors, and six years of collusion, and irresponsible decisions, made by Mayor Adrien, former Mayors, City Lawyers, City Manager Moeller, various City Council members, and Planning Commission members. This is all about, misappropriating and spending more than \$700,000.00 of Madeira tax payer dollars. This kind of political behavior should never be tolerated, and intimidation coming from Mayor Adrien will not be tolerated.

Douglas Oppenheimer

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

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CITY OF MADEIRA, ex rel.
OPPENHEIMER,

Plaintiff,

Appeal No. C1600762
Case No. A1506891

vs.

CITY OF MADEIRA, et al.,

Defendant.

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

APPEARANCES:

CURT HARTMAN, ESQ.,
On behalf of the Plaintiff.

KEVIN MCDONOUGH, ESQ.,
On behalf of the Defendant.

BE IT REMEMBERED that upon the
motions hearing in this cause, heard on
Tuesday, February 23, 2016, before the
Honorable Patrick T. Dinkelacker, a said Judge
of the Court of Common Pleas, the following
proceedings were had, to wit:

1 MORNING SESSION - Tuesday, February 23, 2016

2 MR. MCDONOUGH: Kevin McDonough,
3 City of Madeira. One of the motions set
4 today for hearing is a motion to dismiss
5 Mr. Powers. We called his office and
6 they can't seem to locate him, and we
7 were wondering if, for some reason, he
8 doesn't have it on his calendar. I
9 notice the listing only lists me and Mr.
10 Hartman on this case, for some reason.

11 Has anyone heard from Mr. Goodin on
12 this case?

13 THE COURT: He is real good about
14 showing up.

15 MR. MCDONOUGH: Yes, he is. I have
16 a feeling that for some reason maybe he
17 thought March 8 -- if you want to set
18 this over for another date.

19 MR. HARTMAN: I am fine submitting
20 on the paper. I can check with Mr.
21 Goodin and see if he is fine. Not a
22 complex issue.

23 THE COURT: Do you want to argue
24 the other motion, then?

25 MR. HARTMAN: I am fine with it on

1 paper. We both kind of agreed there is
2 no case law out there indicating --

3 MR. MCDONOUGH: There is nothing
4 directly on point regarding, under a
5 taxpayer action like this, whether the
6 Respondent can actually counterclaim
7 against, technically. Basically, we will
8 submit.

9 THE COURT: Let me talk to you in
10 chambers for a second.

11 (Discussion was held off the
12 record in chambers.)

13 (End of proceedings.)
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1 CERTIFICATE

2 I, Ann Marie Stowers, RPR, the
3 undersigned, an Official Court Reporter for the
4 Hamilton County Court of Common Pleas, do
5 hereby certify that at the same time and place
6 stated herein, I recorded in stenotype and
7 thereafter transcribed the within 3 pages, and
8 that the foregoing Transcript of Proceedings is
9 a true, complete, and accurate transcript of my
10 said stenotype notes.

11 IN WITNESS WHEREOF, I hereunto set my
12 hand this 11th day of October, 2016

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15 _____
16 Ann Marie Stowers, RPR
17 Official Court Reporter
18 Court of Common Pleas
19 Hamilton County, Ohio
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COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

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CITY OF MADEIRA, ex rel.
OPPENHEIMER,

Plaintiff,

vs.

Appeal No. C1600762
Case No. A1506891

CITY OF MADEIRA, et al.,

Defendant.

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TRANSCRIPT OF PROCEEDINGS

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APPEARANCES:

CURT HARTMAN, ESQ.,
On behalf of the Plaintiff.

KEVIN MCDONOUGH, ESQ., STEVEN GOODIN, ESQ.,
On behalf of the Defendant.

BE IT REMEMBERED that upon the
motions hearing in this cause, heard on
Thursday, March 10, 2016, before the Honorable
Patrick T. Dinkelacker, a said Judge of the
Court of Common Pleas, the following
proceedings were had, to wit:

1 MORNING SESSION - Thursday, March 10, 2016

2 THE COURT: For the record, City of
3 Madeira, ex rel Douglas Oppenheimer
4 versus City of Madeira, Case Number
5 A1506891.

6 Mr. Goodin, you showed up today.

7 MR. GOODIN: Thank you, Judge. I
8 apologize for the last time. I don't
9 know how we messed that up. We are
10 honored to be here.

11 THE COURT: I do apologize for the
12 delay. We are here today in response to
13 the motion filed on behalf of Mr. Powers;
14 is that correct?

15 MR. GOODIN: Yes, Judge.

16 THE COURT: Okay. I have read that
17 and you have responded to the Memorandum
18 in Opposition to the Motion to Dismiss.
19 Is there anything you want to say in
20 regards to it?

21 MR. GOODIN: Judge, 30 seconds. I
22 think from our standpoint, this was a
23 taxpayer lawsuit basically filed between
24 Mr. Oppenheimer and the City of Madeira.

25 My client, at one point, had a

1 contract to buy the property that was in
2 question. That contract is dead. The
3 option has expired. Our view is, we are
4 not in this anymore, basically. There is
5 really no relief that can be sought for
6 my client. He is the only guy here that
7 lost money. He lost \$10,000 and
8 different options he put on the property
9 that are now gone.

10 His concern, just being very frank,
11 was facing an attorney fee award at the
12 end of this if Mr. Hartman's client were
13 to be successful. I know Mr. Hartman
14 doesn't intend to seek fees against him
15 but that's his primary concern.

16 We feel this is really a matter
17 between Mr. Oppenheimer and the City of
18 Madeira. My client supports the City of
19 Madeira's position, but we don't see a
20 road for us going forward.

21 MR. HARTMAN: And as I indicated in
22 our response, I think Mr. Powers is
23 included because of that interest in that
24 existing contract. I would indicate to
25 Mr. Goodin right off the bat that if we

1 were successful, the attorney fees under
2 the fee shifting statute would be against
3 the City, not against his client.

4 In terms of the existence or
5 non-existence of a contract, I kind of
6 just came up here actually in the hallway
7 earlier here so that may have put a
8 wrinkle into it. Our concern was, I
9 didn't want to be told Mr. Powers was a
10 necessary party that should have been in,
11 and without him, the Court could not
12 issue --

13 THE COURT: You complied with the
14 service aspect?

15 MR. HARTMAN: Exactly. Yes.
16 Whether or not he gets out, I suggested
17 to Mr. Goodin, just have him default. We
18 won't take a default judgment. He just
19 lives with the final judgment of the
20 Court was another option. His presence
21 is not significant. Again, whether or
22 not it is still necessary, I am not sure.

23 MR. GOODIN: A potential way out
24 might be for the Court to hold the claim
25 in abeyance in regards to Mr. Powers. He

1 doesn't want to be in a default
2 situation, but he doesn't want to pay me
3 to come here in a matter, so that's where
4 we are.

5 THE COURT: There is a lawsuit
6 hanging over his head. He is not on that
7 contract anymore. He has no legal
8 connection right now other than maybe he
9 lives in Madeira but within the City of
10 Madeira.

11 I would be inclined to sign an
12 entry granting the Motion to Dismiss. If
13 you want to come up with some alternate,
14 that's fine. But I think he deserves to
15 be out. You have done your job. I think
16 it is time for Mr. Powers to move on.

17 MR. GOODIN: We will figure
18 something out.

19 THE COURT: A week from today?

20 MR. GOODIN: That's perfect.

21 MR. MCDONOUGH: I don't need to say
22 much. On behalf of the City of Madeira,
23 Kevin McDonough. We certainly don't
24 oppose the motion to dismiss Mr. Powers
25 out, number one.

1 Number two, there certainly is an
2 issue regarding whether this entire case
3 is moot at this point because Mr. Powers'
4 contract is gone with the prospective
5 sellers. It is my understanding the
6 contract, there is no reason for him to
7 enter into a contract with Madeira any
8 longer for the sale of that small portion
9 of the piece of property that's located
10 in the historic district.

11 As we discussed when we were last
12 here and Mr. Hartman stated that I was
13 seeking an advisory opinion of the Court
14 and my counterclaim has been dismissed by
15 the Court. This case may be moot. We
16 need to look into that.

17 MR. HARTMAN: I think we just need
18 a little bit more evidence just in terms
19 of what the current status is, what
20 future plans are. It may become a moot
21 issue. Of course, there are always the
22 exceptions in terms of great general
23 public interest. That is an exception
24 and may be applicable here. We can visit
25 that down the road; not today.

1 THE COURT: I want to keep it
2 moving, obviously. If we set it out for
3 30 days for something/CMC because if you
4 don't work it out, so to speak, then we
5 need to pick dates to keep this thing
6 moving.

7 MR. HARTMAN: I would argue even in
8 the next 30 days, try to work out what
9 the factual record is. If we have to do
10 counter-motions in the meantime, nothing
11 prevents us from filing those motions
12 before the 30 days.

13 THE COURT: That's an arbitrary 30
14 days, but that's just my way of keeping
15 it moving.

16 MR. GOODIN: Judge, in fairness, I
17 think the contract ran since we were last
18 here.

19 MR. MCDONOUGH: It has expired.

20 MR. GOODIN: But I don't think that
21 was known to anyone when I was last here.

22 MR. MCDONOUGH: It wasn't.

23 THE COURT: I appreciate that.
24 Okay. Talk with Emily. Thanks for your
25 patience.

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(Proceedings concluded.)

1 CERTIFICATE

2 I, Ann Marie Stowers, RPR, the
3 undersigned, an Official Court Reporter for the
4 Hamilton County Court of Common Pleas, do
5 hereby certify that at the same time and place
6 stated herein, I recorded in stenotype and
7 thereafter transcribed the within 9 pages, and
8 that the foregoing Transcript of Proceedings is
9 a true, complete, and accurate transcript of my
10 said stenotype notes.

11 IN WITNESS WHEREOF, I hereunto set my
12 hand this 11th day of October, 2016

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15 _____
16 Ann Marie Stowers, RPR
17 Official Court Reporter
18 Court of Common Pleas
19 Hamilton County, Ohio
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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

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CITY OF MADEIRA, ex rel.
OPPENHEIMER,

Plaintiff,

vs.

Appeal No. C1600762
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CITY OF MADEIRA, et al.,

Defendant.

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TRANSCRIPT OF PROCEEDINGS

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APPEARANCES:

CURT HARTMAN, ESQ.,
On behalf of the Plaintiff.

STEVEN GOODIN, ESQ.,
BRIAN FOX, ESQ.,
On behalf of the Defendant.

BE IT REMEMBERED that upon the
motions hearing in this cause, heard on
Tuesday, September 6, 2016, before the
Honorable Patrick T. Dinkelacker, a said Judge
of the Court of Common Pleas, the following
proceedings were had, to wit:

1 AFTERNOON SESSION - Tuesday, September 6, 2016

2 THE COURT: For the record, City of
3 Madeira, ex rel Oppenheimer versus City
4 of Madeira, Case Number A1506891.

5 Mr. Fox, Mr. Goodin, you represent
6 the City of Madeira as well as Tom
7 Moeller; is that correct?

8 MR. FOX: We do, Your Honor.

9 MR. GOODIN: Yes, Your Honor.

10 THE COURT: Thank you.

11 And, Mr. Hartman, you represent
12 Mr. Oppenheimer; is that correct?

13 MR. OPPENHEIMER: That's correct.

14 THE COURT: Thank you.

15 Matter is on the docket today
16 regarding Respondent's Motion For
17 Judgment on the Pleadings. I have read
18 that motion as well as Relator's
19 Memorandum In Opposition to Motion for
20 Judgment on the Pleadings, as well as
21 Respondent's Reply to Relator's
22 Memorandum In Opposition to Motion For
23 Judgment on the Pleadings, as well as the
24 other things that I needed to read. So I
25 am ready to proceed.

1 Mr. Fox, Mr. Goodin, is there
2 anything you wanted to say in regards to
3 your motion?

4 MR. GOODIN: Your Honor, if I might
5 address the Court for a few moments.

6 THE COURT: Yes, sir.

7 MR. GOODIN: Judge, we appreciate
8 the Court's time in hearing us on these
9 motions. I know the Court's time is
10 limited. I know you get these motions
11 all the time. This case is a big deal to
12 the City of Madeira and we appreciate you
13 letting us be heard on this. Judge, we
14 will cut right to the point.

15 We are not trying to be cute by
16 filing this motion or waste anyone's
17 time. We believe this matter is ripe for
18 decision now without any additional
19 discovery. We feel the rule in Ohio in
20 these kinds of cases is very simple.
21 Basically, it is this. A piece of
22 legislation, a law, charter amendment,
23 anything that has been adopted by a
24 municipality, if that language is not
25 ambiguous, the Court must give it its

1 plain meaning.

2 Judge, in this case, the charter
3 amendment which Mr. Oppenheimer
4 apparently drafted, it doesn't even
5 mention public ownership or any kind of
6 prohibition of transfer of the property
7 or against selling any portion of any of
8 the parcels involved.

9 It clearly only applies to the
10 structures of the building, ask that they
11 be deemed historic and the buildings
12 themselves be allowed to stand. And
13 that's something Madeira simply does not
14 argue or contradict.

15 Judge, we would argue that even if
16 somehow the language were contradictory
17 or ambiguous, it would still have to be
18 construed against Mr. Oppenheimer as the
19 drafter.

20 Now, what we think the Court is
21 faced with and what Madeira is faced with
22 here is this. Mr. Oppenheimer apparently
23 wants to depose current former City
24 Council members kind of in hopes that
25 they will give some sort of contrary

1 interpretation and I don't believe that's
2 going to be the case but we think that is
3 the concern here. We believe that
4 decision, how this works, under Ohio law,
5 he is stuck with the words that he
6 drafted and put before the voters and
7 that the voters approved and those words,
8 Judge, they are in the materials. It is
9 short and sweet. City of Madeira "was
10 deeded and assumed ownership of Hosbrook
11 House located at 7014 Miami Avenue and
12 Muchmore House located at 7010 Miami
13 Avenue.

14 In addition to these two
15 properties, the City also has ownership
16 of historic Railroad Depot located at
17 7701 Railroad Avenue. These three
18 important historic properties are to be
19 preserved, protected and left standing on
20 the same ground these structures were
21 built on. These three historic
22 structures would be included in the,
23 quote, unquote, historic district.

24 That's it. This isn't a typical
25 historic preservation code with pages of

1 detailed regulations. It is one
2 paragraph. That's what Mr. Oppenheimer's
3 group put out, approved by the voters and
4 that's what we stand by.

5 Factually, Judge, how we got here,
6 I believe this is in the pleadings, we
7 are not speaking outside the pleadings,
8 is that we got an individual who came
9 forward and wanted to buy a parcel, a
10 small parcel that was adjacent to or part
11 of one of these pieces of land, did not
12 want to buy the structure, take away from
13 the structure. This lawsuit was filed.

14 That deal has since fallen apart,
15 as the Court knows, but we would still
16 argue there is controversy here because
17 this is something that is capable of
18 repetition. We have the feeling we will
19 be back in court, even if the City were
20 to try to sell these.

21 Again, we are not trying to argue
22 that the properties aren't historic or
23 that the properties can be torn down or
24 anything of the sort. But like most
25 historic properties, they can be

1 transferred to public hands with certain
2 restrictions that are required by the
3 charter.

4 So, in terms of relief, Judge, we
5 do believe we are here properly. We
6 don't believe further discovery is
7 necessary. We believe the language is
8 clear. If these folks, voters had
9 intended to prescribe or cut off or
10 prohibit any kind of public ownership,
11 and we put the plain language in here,
12 we believe it did not, so we maintain
13 declaratory judgment can be rendered now
14 as a matter of law for the City of
15 Madeira.

16 THE COURT: This contract, Article
17 16, was voted on and in ordinance 15-30,
18 they are meant to counteract each other,
19 whatever, in a way. 15-30 is really no
20 longer applicable because at least as far
21 as this lawsuit is concerned, Mr. Powers,
22 that contract which was attached to that
23 ordinance is done, gone, over; is that
24 correct?

25 MR. GOODIN: That is correct, Your

1 Honor.

2 THE COURT: And in the Complaint,
3 the Complaint is asking, in part, under
4 the first cause of action, the
5 declaratory judgment aspect that, in
6 part, preclude the City of Madeira from
7 proceeding forward with the contract
8 authorized by Ordinance Number 15-30.
9 That contract is gone.

10 Is there any basis for declaratory
11 judgment in regards to that?

12 MR. GOODIN: In regards to that
13 specific contract, no, Your Honor.

14 THE COURT: Thank you.

15 As far as the second cause of
16 action, which is the injunction against
17 Madeira and Thomas Moeller as the
18 manager, in part, and I quote from part
19 of it, "This is to order the City of
20 Madeira as far as an injunction from
21 executing or performing any other acts
22 whatsoever in furtherance of any contract
23 or prospective contract authorized by
24 ordinance number 15-30."

25 MR. GOODIN: In regards strictly to

1 that ordinance, Your Honor, no. That
2 ordinance is dead. You are absolutely
3 correct.

4 THE COURT: So what is, in your
5 opinion, if you would help me with that,
6 the justiciable with why is this lawsuit
7 still here, then? I understand that you
8 want me to move on and make it a further
9 order regarding future thing. I am just
10 talking about this lawsuit, the language
11 of this lawsuit, what's before the Court?

12 MR. GOODIN: That is the key
13 question. I will tell you what our
14 position on that is, very
15 straightforward. The Court is correct,
16 the contract that brought this issue to a
17 head is dead. It is not happening. It
18 has been withdrawn. Ordinance was never
19 enacted. It was never acted upon, I
20 should say.

21 The City's concern is this, is that
22 the issue underlying it, though, is one
23 that is capable of repetition. It is
24 kind of an exception to the mootness
25 doctrine via the standard of the Ohio and

1 Federal law that if you have a situation,
2 that appellate review, court review is
3 capable of repetition, this is a classic
4 case.

5 Our understanding, Judge, is if
6 they ever tried to sell one of these
7 pieces of land again, we will be right
8 back in front of this Court or another
9 court on the exact same issue, which is,
10 does Article 16 prohibit public
11 ownership.

12 So we are, essentially, Judge,
13 trying to call the question. We believe
14 that we found this exception to the
15 mootness doctrine that allows us to do
16 that.

17 Our view was that, later it was
18 moved for declaratory judgment so,
19 therefore, declaratory judgment could be
20 appropriate either way under the Ohio
21 law, so that's what we are trying to do
22 here, Judge.

23 So in terms of, the Court is
24 absolutely correct, the contract really
25 at issue is gone. We believe there is a

1 broader issue as to whether another
2 contract could be entered into. And
3 that's what we are asking the Court, in
4 its discretion, to take up.

5 THE COURT: If, in fact, I was to
6 rule that because there is no basis for
7 this Court to enter any type of
8 declaratory judgment, there is no basis
9 for this Court in this particular lawsuit
10 as it is right now to issue any
11 injunctive order, I issue that order, I
12 believe you can help me with it. Let's
13 do it this way. Do I have jurisdiction
14 to do anything further in regard to this
15 case?

16 MR. GOODIN: In regards to, if you
17 deny the declaratory judgment as written
18 and don't take up the other issue --

19 THE COURT: Right. What you are
20 asking me to do in addition to what's
21 before me. If I say, you know what, your
22 motion is correct. I am granting the
23 motion on the pleadings, there is nothing
24 for me to decide, it is over, what
25 jurisdiction do I have then to extend any

1 other type of ruling? I am done.

2 MR. GOODIN: You do not. Judge, it
3 would effectively end the case. It would
4 be tantamount to a 12(b)(6) dismissal of
5 pleadings or dismissal as a matter of
6 law. So, it would have the effect of
7 ending the case. We would leave with an
8 entry stating the Court's interpretation
9 of the ordinance or the charter as
10 written.

11 The way we see it, Judge, under
12 Ohio law, the Court has two choices, or
13 three choices. One would be to rule for
14 the relator and issue declaratory
15 judgment saying that there is some sort
16 of public ownership, people are required
17 to comply here, which we strongly
18 disagree with.

19 Secondly, the Court could find
20 the matter to be moot because the
21 contract is dead and simply dismiss the
22 case.

23 Or, third, we could issue a
24 declaratory judgment in Madeira's favor
25 saying that there is no public ownership

1 requirement and dismiss the case that
2 way. So we think there are really three
3 paths under Ohio law the Court could go
4 down.

5 THE COURT: Thank you very much,
6 Mr. Goodin. I appreciate your responses.

7 MR. GOODIN: We would like to
8 reserve a couple moments for Mr. Fox to
9 reply.

10 THE COURT: It is your motion. I
11 always give the movant another chance.

12 Mr. Hartman, I know I have read
13 everything you have brought before me and
14 you always do a good job of laying out
15 what you want the Court to read. I guess
16 I am back to the, you know, what is still
17 here?

18 MR. HARTMAN: I think there is
19 still a live controversy actually with
20 respect to Ordinance 15-30.

21 With all due respect, Mr. Goodin's
22 representation that that is over, dead
23 and done with, I don't believe that's
24 accurate.

25 THE COURT: Tell me why.

1 MR. HARTMAN: May I approach?

2 THE COURT: Yes, sir.

3 MR. HARTMAN: This, Your Honor, is
4 a copy of a resolution from the Madeira
5 City Council. It is 17 there -- 16, that
6 was passed this year. This was actually
7 to approve a contract related to the
8 development that's at issue in 15-30
9 ordinance.

10 In light of this lawsuit, they look
11 to do some other things not involving
12 these historic properties.

13 THE COURT: Before you go on, am I
14 allowed to consider this in regards to a
15 12(c)?

16 MR. HARTMAN: I believe you are for
17 two reasons. One, questioning mootness.
18 Mootness actually becomes an evidentiary.
19 Mr. Goodin simply getting up here and
20 saying, it is over and done with is not
21 sufficient evidence to find a case moot.

22 THE COURT: I am not considering it
23 moot. I am considering moot, if I grant
24 their motion and the case is over, then I
25 certainly consider their request for me

1 to make a further ruling moot.

2 Go ahead with your argument.

3 MR. HARTMAN: First issue, the
4 Court has to say is the case moot. If it
5 doesn't, it lacks any case or controversy
6 by which to make any further ruling or
7 decision.

8 And so like I said, with mootness,
9 the party claiming mootness, which is
10 usually the defendant, has to come in and
11 establish factually that the case is
12 moot, that there is no likelihood that
13 the ordinance will be adopted, et cetera.
14 So Mr. Goodin coming in here and simply
15 saying it is over and done with, the deal
16 has fallen apart, is not evidence, is not
17 sufficient to make it moot.

18 Before you, Your Honor, is
19 Resolution 17-16, which isn't public
20 record of the City of Madeira. I believe
21 it is available on their website. So,
22 therefore, the Court can take judicial
23 notice of it both in terms of the 12(c)
24 motion or otherwise.

25 And if you look at this contract,

1 City Council of the City of Madeira
2 authorized on the recital page of this
3 contract they approved, paragraph E talks
4 about this lawsuit and the contract at
5 issue in 15-30.

6 It says, "A lawsuit has been filed
7 that references this lawsuit" and then it
8 goes on "which attempts to prevent the
9 seller hereunder and the purchaser
10 hereunder to enter into another contract
11 captioned the first contract for sale.
12 That is the contract at issue in 15-30.

13 It then goes on, "This recital
14 states that the parties hereto intended
15 to enter into the first contract, but
16 based upon the filing of the lawsuit" --
17 this lawsuit -- "the parties were
18 temporarily prevented from doing so
19 pursuant to the agreed preliminary
20 injunction."

21 This is the key phrase in this
22 recital.

23 "If a lawsuit is dismissed or
24 decided in favor of the purchaser, the
25 parties intend to enter into the first

1 contract."

2 The parties, the City of Madeira
3 has declared by this contract their
4 intentions to proceed forward with the
5 contract authorized by 15-30. The case
6 is not moot. They have not totally
7 disavowed any interest to pursue that
8 contract. They have actually declared
9 the opposite. So I believe that clearly
10 establishes and repudiates any claim that
11 the case is moot. So, therefore, there
12 is a live justiciable controversy.

13 Mr. Goodin talks about this case as
14 capable of repetition yet in danger of
15 review. That concept requires
16 fact-specific issues. Simply saying the
17 issue of the charter may come up again is
18 not enough to be, if the case is moot, to
19 be capable of repetition yet in danger of
20 review. It has to be the same or similar
21 factual scenario that has to arise.

22 And this factual scenario, and the
23 issue really becomes, what is the scope
24 of the authority of the City of Madeira
25 to do with these historic properties, the

1 properties designated by address, i.e.,
2 by parcel, and declaration in the city
3 charter, not only that the three historic
4 properties are to be preserved, protected
5 and left standing on the same ground and
6 that the historic structures will be
7 included in this historic district.

8 Simply trying to give a broad
9 declaration as to what that means is not
10 the proper role of the Court. The Court
11 must make that ruling based on specific
12 facts, specific instances before it. We
13 brought that to this Court in the context
14 of Resolution 15-30 where the City of
15 Madeira sought to sell, to transfer free
16 and clear a portion of those historic
17 properties without any restrictions
18 whatsoever.

19 As we indicate in our reply, it is
20 not a question of who owns the property.
21 It is a question of what is done and must
22 be done in order to allow for those
23 properties to be preserved, protected and
24 left standing on the same ground.

25 We believe the case is ripe and

1 should adjudicated. It is ripe for
2 adjudication. The question becomes, it
3 is not ripe for motion -- judgment on the
4 pleadings with the declaratory judgment
5 of some declaratory judgment that I don't
6 know what they want.

7 All this Court can declare, based
8 upon the facts in the case presented, is
9 whether the proposed contract under
10 Resolution 15-30 violates or does not
11 violate that charter provision.

12 That's all the Court can do. It
13 can only make the ruling and declaratory
14 judgment based on the facts and the
15 issues presented by those facts.

16 So, at this stage, I don't believe
17 the Respondents are entitled to their
18 judgment on the pleadings. I think we
19 need to develop, really, the scope and
20 the intent of that thing. It is
21 interesting and it is not in the record,
22 but we have come across the legal opinion
23 from the Madeira City Hall director where
24 he opined that the parties -- he says,
25 there is no prohibition against selling

1 the property but it should be noted that
2 any party acquiring the property would be
3 subject to the restriction that the
4 properties be preserved, protected and
5 left standing.

6 Our whole issue has been that
7 Resolution 15-30 provided no such
8 requirement upon the purchaser.

9 The charter provision is not going
10 to be in the chain of title. Whether or
11 not they do it by restrictive covenant or
12 whatnot, that's what we need at any sale,
13 at any deed transferring any portion of
14 those properties. The properties
15 themselves have to be preserved,
16 protected and left standing on the same
17 ground. How they do that, that's
18 discretionary to the City. But to simply
19 give a fee simple removal or dividing of
20 the property in fee simple with no
21 restrictions whatsoever, that's the
22 issue. 15-30 had no such restrictions,
23 no such limitations upon the purchaser.
24 That's the issue. It is a live issue.
25 And the Court can rule on that live

1 issue.

2 I indicated the City charter is
3 akin to a constitution. Courts, in
4 adjudicating constitutional questions
5 rule on the issues that are presented to
6 them and from that, people can start
7 learning and garnering what the
8 constitution means, doesn't mean.

9 Courts don't open up the door or
10 broadly say, here is what the
11 constitution means, theoretically. Here
12 are the facts. Here is the ruling. And
13 over time, the people learn what the
14 First Amendment means, the 14th and in
15 this case, it will over time based on the
16 specific facts. I believe we need to
17 present the case to the Court probably by
18 cross-motions for summary judgment as to
19 what the scope is and the permissibility
20 or not of the contract authorized by
21 15-30.

22 If the Court has any further
23 questions on that, on the mootness
24 question, et cetera --

25 THE COURT: I go through these

1 cases. March 24th, the Court put on an
2 entry granting Defendant Thomas Powers'
3 Motion to Dismiss. He is out. So it is
4 not a question of fact where that stands
5 and not just because Mr. Goodin or
6 somebody stood up and said, Judge, it is
7 over and done with. He is out of this
8 lawsuit. If he is out of the lawsuit and
9 the two causes of actions that you filed
10 on behalf of your client, there is
11 nothing I can do about them, I am back
12 to, why does this lawsuit need to
13 continue at all? He is out. That's not
14 a fact issue anymore. There are no facts
15 to be determined, developed, in regards
16 to that. He is out. That's what the
17 cause of action was brought to this Court
18 on, injunctive declaratory relief. I
19 went through it again last night. why am
20 I doing this?

21 MR. HARTMAN: Because the question
22 is really, this comes up as a taxpayer in
23 an action challenging an abuse of
24 corporate power. Mr. Powers is in only
25 because he may or have claimed interest

1 in that contract. Mr. Goodin came in
2 representing Mr. Powers at the time
3 saying, he doesn't need to be in there,
4 so whether or not Mr. Powers is or is not
5 in this lawsuit is irrelevant because the
6 impression is it is an abuse of corporate
7 power. Has the City or is the City
8 exceeding or threatening to exceed its
9 corporate powers by entering into the
10 contract authorized by 15-30. And that
11 the Court can say, City, you cannot do
12 that.

13 whether or not Mr. Powers is in the
14 case doesn't matter. We believe 15-30 is
15 still reliable based upon the recitals in
16 the most recent contract and, therefore,
17 the Court can declare whether or not the
18 contract proposed by 15-30 does or does
19 not preserve, protect and leave standing
20 on the same ground the property at issue.

21 THE COURT: I appreciate the
22 argument.

23 Mr. Fox.

24 MR. FOX: Thank you, Your Honor.
25 You were correct in identifying for

1 purposes of this motion today the Court
2 is really constrained to the pleadings
3 under Rule 12(c). Rule 12(c) motions are
4 to be treated just like a Rule 12(b)(6)
5 would, so the Court is really constrained
6 to what was actually pled here. If you
7 look at what's actually pled here, this
8 case is really relatively simple.

9 If you look at the Complaint,
10 paragraphs 8, 15, 16, there is the
11 request by the relator that the Court
12 prevent the City from transferring this
13 property because there was some sort of,
14 I would argue, erroneous belief the local
15 governments, municipalities under home
16 rule are not allowed to transfer property
17 where there is a charter amendment
18 stating that certain properties are to be
19 preserved and protected.

20 Nowhere in the pleadings, either in
21 the Complaint, either in the motion for
22 preliminary injunction is there any sort
23 of connection between the argument that
24 the diminution in value is actually
25 violative of the charter amendment. The

1 charter amendment is not a work of art.
2 The City didn't write it. Counsel didn't
3 cause it to be written. The charter
4 amendment is not a work of art. But it
5 is unambiguous inasmuch as it does
6 nothing to constrain or prevent the City
7 from disposing of this property whether
8 it be a sliver or whether it be the whole
9 property, the whole address.

10 what is of paramount importance
11 with the charter amendment is that so
12 long as these properties exist, they are
13 to be preserved and protected.

14 Mr. Powers was dismissed out, so
15 the new resolution that we just saw has
16 no bearing or effect on this Court. It
17 is the City's argument that there are
18 really only two options in this case.

19 One is to dismiss this case for
20 mootness.

21 The other option is that the Court
22 would grant our motion for judgment on
23 the pleadings and construe this charter
24 amendment such that it acknowledges that
25 the City does have the power to dispose

1 of this property, that the City does have
2 the power and that there is nothing
3 contained in that charter amendment that
4 would prevent or limit the City's ability
5 to dispose of the property.

6 THE COURT: Thank you very much,
7 Mr. Fox.

8 I have read everything I am
9 supposed to read. I thought about this.
10 Interesting arguments from both sides. I
11 appreciate that. It is a 12(c) motion.
12 The standard for a motion for judgment on
13 the pleadings pursuant to Civil Rule
14 12(c) is similar to a standard for
15 evaluating Civil Rule 12(b)(6) motion.

16 Under Civil Rule 12(c) dismissal is
17 appropriate where the Court, number one,
18 construes the material allegations in the
19 Complaint with all reasonable inferences
20 to be drawn therefrom in favor of the
21 nonmoving party as true and finds beyond
22 doubt that the plaintiff can prove no set
23 of facts in support of its claim that
24 would entitle him to relief. I cite as
25 authority, State ex rel Midwest Pride,

1 IV, Inc. versus Pontious, 75 Ohio St. 3d
2 565. It is a 1996 Ohio Supreme Court
3 case. Civil Rule 12(c) motion presents
4 on the questions of law. It may be
5 granted only when no issues of material
6 fact exist and the movement is entitled
7 to judgment as a matter of law.

8 The Respondent is asking for three
9 things in the motion.

10 Number one, their motion be granted
11 in its entirety. That relator's
12 Complaint be dismissed on the merits and
13 the prejudice and that a ruling for
14 future possible lawsuits coming from
15 Article 16 do not prohibit the City from
16 selling any property in its possession.

17 I have already done a little bit of
18 the complaint situation. Declaratory
19 judgment, from the outset, this lawsuit
20 was brought to preclude the City of
21 Madeira from proceeding forward with the
22 contract authorized by 15-30. That is a
23 contract which is attached as part of the
24 pleadings with regards to Mr. Powers.
25 According to Mr. Powers being dismissed

1 from this lawsuit on March 24th, that is
2 no longer pending before the Court.

3 The second cause of action was the
4 injunction against Madeira and Thomas
5 Moeller, in part, from executing or
6 performing any other acts in furtherance
7 of any contract or prospective contract
8 authorized by Ordinance Number 15-30.

9 Again, 15-30 is not something that
10 is pending before the Court. There is no
11 contract pending. There is no deed
12 transfer pending. There is nothing with
13 Mr. Powers. He is out of this case
14 pursuant to the filings in this case. So
15 the Court has trouble with finding what
16 justiciable issue is pending at this
17 point. I think I know which way I have
18 to go on that.

19 As far as the Respondent's further
20 motion asking the Court for the issuance
21 of a declaratory judgment because, in
22 part, and I am quoting, in part, which is
23 the property in question is in limbo. I
24 understand that.

25 Drawing a part from my days in the

1 Court of Appeals, there is no pending
2 issue before this Court. There is no
3 agreed party left. If I, in fact, grant
4 the motion, there may be a grievance in
5 the future, and it certainly looks like
6 it is heading that way, but I don't
7 believe the Court is empowered with the
8 authority or the jurisdiction maybe even
9 to decide the case at this point.

10 What I have before me, I am
11 persuaded that the motion -- Respondent's
12 Motion to Dismiss is appropriate. I will
13 grant that motion. Relator's Complaint
14 is dismissed on the merits and with
15 prejudice at this point.

16 I find the other request because
17 there is no justiciable issue before the
18 Court, the Court is not in the business
19 of and should not be in the business of
20 making preemptive anticipatory ruling so
21 I am not going to rule on that.

22 The case is dismissed. Cost to
23 plaintiff. I would ask for an entry
24 within two weeks.

25 Anything further for the record at

1 this point, Mr. Fox, Mr. Goodin?

2 MR. FOX: Nothing, Your Honor.

3 MR. GOODIN: No, Your Honor.

4 THE COURT: Mr. Hartman.

5 MR. HARTMAN: If I can seek
6 clarification on your ruling. I was a
7 little lost. You indicate the Motion to
8 Dismiss is granted on the merits and as
9 otherwise stated. I am a little bit
10 lost. If the case is moot --

11 THE COURT: You are absolutely
12 right. It is dismissed, but I am not
13 ruling on the merits. The merits could
14 be construed to be some type of factual
15 situation. There are not facts I am
16 ruling on because the party that's
17 subject -- that's a good point. If you
18 are providing the Court with an entry, I
19 asked both counsel to provide it to me,
20 but if you are providing it to me, please
21 do not put in there on the merits because
22 I think Mr. Hartman is absolutely
23 correct, it is not on the merits.

24 MR. FOX: Dismissed with prejudice?

25 MR. HARTMAN: You are saying 15-30

1 is no longer applicable. There is no
2 longer controversy. It is not a
3 disposition on the merits, not with
4 prejudice because if the issue rearises
5 again, with prejudice would be on the
6 merits. There is a res judicata effect.
7 If they reenact the ordinance --

8 THE COURT: I have to admit, I did
9 not recently look up what prejudice
10 means. I apologize to everybody.
11 Perhaps the Court should know that. I do
12 not. I do not want to grant this on the
13 merits. I actually took that language,
14 which I wrote out, from your suggested
15 entry.

16 It will be dismissed. I am
17 dismissing the case based upon the
18 granting of the motion. There is nothing
19 there for me to do. It is over. Help me
20 with the prejudice.

21 MR. FOX: We will work it out. It
22 was before the Court on motion for
23 judgment on the pleadings so as a matter
24 of clarity, you are granting the motion
25 for judgment on the pleadings as to

1 points one and two of our attached order,
2 but not to three?

3 THE COURT: That's correct. I am
4 not ruling on three. You are just asking
5 the motion be granted, which I am doing,
6 and second, the case is dismissed because
7 there is nothing left.

8 MR. FOX: That's what we are asking
9 for.

10 THE COURT: The prejudice, you want
11 to take the prejudice out? I don't have
12 a problem. I did not do my homework but
13 I appreciate him bringing that up.

14 MR. FOX: I think the concern he
15 has with respect to some sort of
16 collateral effect or res judicata effect
17 I think is not something to be concerned
18 about but I will check. We will work on
19 it together.

20 THE COURT: I appreciate that. If
21 it needs to come back, come on back and I
22 can do my homework. I have done it
23 before. Off the top of my head, I didn't
24 think to do my research on that. Good
25 point.

1 MR. FOX: Hopefully, we will work
2 it out and won't need to approach the
3 Court.

4 THE COURT: Two weeks? Put the
5 appropriate language on there. If you
6 need to do what you got to do, just let
7 me know. I appreciate the
8 professionalism, the way it was
9 presented. We will see what happens.

10 Thank you very much.

11 (Proceedings concluded.)
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1 CERTIFICATE

2 I, Ann Marie Stowers, RPR, the
3 undersigned, an Official Court Reporter for the
4 Hamilton County Court of Common Pleas, do
5 hereby certify that at the same time and place
6 stated herein, I recorded in stenotype and
7 thereafter transcribed the within 34 pages, and
8 that the foregoing Transcript of Proceedings is
9 a true, complete, and accurate transcript of my
10 said stenotype notes.

11 IN WITNESS WHEREOF, I hereunto set my
12 hand this 11th day of October, 2016

13
14
15 _____
16 Ann Marie Stowers, RPR
17 Official Court Reporter
18 Court of Common Pleas
19 Hamilton County, Ohio
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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

- - -

CITY OF MADEIRA, ex rel.
OPPENHEIMER,

Plaintiff,

vs.

Appeal No. C1600762
Case No. A1506891

CITY OF MADEIRA, et al.,

Defendant.

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

APPEARANCES:

CURT HARTMAN, ESQ.,
On behalf of the Plaintiff.

STEVEN GOODIN, ESQ.,
BRIAN FOX, ESQ.,

On behalf of the Defendant.

BE IT REMEMBERED that upon the
motions hearing in this cause, heard on
Tuesday, September 20, 2016, before the
Honorable Patrick T. Dinkelacker, a said Judge
of the Court of Common Pleas, the following
proceedings were had, to wit:

EXHIBIT INDEX

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COURT'S

RECEIVED

1 Entry Dismissing Action
Without Prejudice

Page 13, Line 14

1 MORNING SESSION - Tuesday, September 20, 2016

2 THE COURT: Anybody here on
3 Oppenheimer versus City of Madeira?
4 Come up, gentlemen. We may have a little
5 problem here. It is on the docket for
6 hearing. But in checking my notes, the
7 docket, I am not sure what it is here
8 for.

9 MR. GOODIN: We had a hearing and
10 you asked us to kind of figure out the
11 entry how this case has gone.

12 We took the prejudice out. What we
13 did, we have dueling entries, I guess,
14 unfortunately.

15 Basically, what we understood Your
16 Honor to say was, we had three prongs.
17 Our motion is granted, case dismissed and
18 then a third thing about declaratory
19 judgment. We took three out and then we
20 went to the second prong, said prejudice,
21 and we took that out, which is what we
22 thought the Court wanted.

23 THE COURT: That's what I said.

24 MR. GOODIN: So that's what we
25 proffered.

1 Mr. Hartman has a different take.

2 MR. HARTMAN: Gets into the, on the
3 merits, not on the merits, et cetera,
4 because is there going to be res judicata
5 effect to this entry.

6 The entry that the Respondents
7 tendered indicate firstly, the motion for
8 the judgment on the pleadings is granted,
9 but then the Complaint is dismissed,
10 which is legally incompatible. You can't
11 dismiss a Complaint and then grant a
12 judgment. You either grant a judgment,
13 which is an adjudication on the merits or
14 you dismiss the case.

15 And under Rule 41(b)(3), and I have
16 got a copy of the rules for the Court on
17 that, Rule 41(b)(3) says that dismissal
18 under division B of this rule, which
19 doesn't apply, and any dismissal not
20 provided for in this rule except as
21 provided below, which isn't applicable,
22 operates as an adjudication upon the
23 merits unless the Court, in its order for
24 dismissal otherwise specifies.

25 Therefore, I think that it is

1 critical that the entry indicate that it
2 is without prejudice. I have a few cases
3 I pulled that I can show the Court.

4 THE COURT: You are okay with their
5 entry if I put without prejudice on it?

6 MR. HARTMAN: No, I don't think --
7 I don't think, in essence, legally what
8 the Court did do, it did not grant their
9 motion for judgment on the pleadings. If
10 you granted their motion for judgment on
11 the pleadings, you are entering judgment
12 in their favor.

13 THE COURT: I thought that's what I
14 did.

15 MR. HARTMAN: But I think
16 substantively -- because if you grant
17 judgment on the pleadings, you can't
18 dismiss the Complaint.

19 THE COURT: But I thought granting
20 the motion for judgment on the pleadings
21 in their favor, then the Complaint needs
22 to be dismissed.

23 MR. HARTMAN: What you really did
24 substantively is you accepted their
25 arguments, which is the entry I tendered

1 which basically says that having
2 considered the briefing oral arguments,
3 Court finds that in light of the City
4 having proceeded in a manner no longer
5 involving the sale of the real estate as
6 authorized by the Ordinance 15-30, there
7 is no longer a live case or controversy.
8 There is no longer a justiciable issue.
9 It is no longer, in essence, a ripe case
10 anymore. You accepted their arguments in
11 the motion for judgment on the pleadings.
12 I just don't want a judgment entered that
13 becomes an adjudicatory thing.
14 Otherwise, I have to take it up on
15 appeal. Without prejudice, it is not
16 even an appealable order.

17 MR. GOODIN: Judge, if I could
18 address this. Another option that we
19 offered which seems to me the simplest
20 way out of it, if you were inclined to go
21 down this path, we have tendered an order
22 that just says, the case is hereby
23 dismissed, period. No prejudice either
24 way. Nothing about a judgment. Nothing
25 about anything, which struck us as the

1 easiest way out of this thing. If they
2 try to move this property, there will be
3 a refiling.

4 MR. HARTMAN: You will argue res
5 judicata. You look at Court of Appeals
6 decisions. There are cases where the
7 Court of Appeals bemoan that trial courts
8 did not say whether or not the dismissal
9 was with or without prejudice and then
10 the Courts of Appeals are going through
11 machinations trying to figure out was it
12 with or without prejudice. We know
13 that's a potential issue.

14 THE COURT: I thought if you did
15 not put with prejudice, the law presumes
16 that it was done without prejudice.

17 MR. GOODIN: That was my
18 understanding.

19 MR. HARTMAN: If I may refer you to
20 Rule 41(b)(3).

21 I have a copy for the Court.

22 THE COURT: 41(b)(3).

23 MR. HARTMAN: When the party
24 voluntarily dismisses its Complaint, that
25 it is without prejudice, Rule 41(A)(1).

1 That's where the default is without
2 prejudice.

3 I have a case, Deutsche Bank
4 National Trust versus Eddington, 2014
5 Ohio 1769 from the Fourth District,
6 paragraph 11.

7 "It is generally true that under
8 Rule 41(b)(3) when a trial court
9 dismisses a complaint, but the entry is
10 silent about whether the dismissal is
11 with or without prejudice, the dismissal
12 is with prejudice. The presumption that
13 when a dismissal is without prejudice is
14 only under 41(A) when a plaintiff files a
15 notice of dismissal voluntarily.

16 My concern is without the entry,
17 the argument for dismissal is with
18 prejudice because the entry doesn't
19 indicate such under (b)(3).

20 THE COURT: All I know is my
21 attempt was to grant the motion for
22 judgment on the pleadings, which I
23 believe then results in the Complaint
24 being dismissed and I am not dismissing
25 it on the merits or with prejudice per

1 the entry.

2 That's what I meant to do. That's
3 what I am telling the Court of Appeals,
4 which will take a look at this and that's
5 fine. That is what I am saying to the
6 Court of Appeals. That was my intention.
7 And I think the entry that you have
8 reflects that. Is that correct?

9 MR. GOODIN: Judge, we didn't say
10 prejudice either way. We are not trying
11 to be funny or pull any trick here. We
12 originally had in there with prejudice so
13 we took that out, and I thought what the
14 Court, I think, thought which that means
15 it is a junk ball, effectively, if it is
16 refiled.

17 MR. HARTMAN: And if we agree on
18 that conclusion, why not state it?

19 MR. GOODYEAR: Well, candidly, we
20 also don't want to get beat up with this
21 back and forth. Judge, this may seem
22 like kind of a silly case, but over in
23 Madeira, it is a big deal. Sometimes it
24 has that --

25 THE COURT: Taking a lot of my

1 time.

2 MR. GOODIN: I do apologize for
3 that.

4 Judge, all I can say is, we
5 proffered an order that we thought was to
6 the "T" what you asked for. We can have
7 it reviewed.

8 MR. FOX: It was consistent, when I
9 confirmed at the hearing, you are
10 granting one, two, but not three? Yeah.
11 So that's what we did. We included
12 within the order that language.

13 MR. HARTMAN: Part of the problem,
14 I think, is what City of Madeira is being
15 told because the City manager reports to
16 City Council that Judge Dinkelacker
17 granted our Motion for Summary Judgment.
18 This is in court, in the case involving
19 the City's legal ability to sell a
20 portion of the property within the
21 historic district. They are viewing it
22 as a win.

23 MR. GOODIN: There was never
24 summary judgment. I don't know where he
25 got that.

1 THE COURT: I don't care what the
2 guy says.

3 MR. HARTMAN: We agree that it is
4 not an adjudication on the merits, that
5 there is no res judicata effect. Why not
6 have language? We are all on the same
7 page there. That's what I understand the
8 Court's rule is.

9 THE COURT: I am going to go with
10 this. What would you want me to pencil
11 in here to make it part of this hearing?

12 MR. HARTMAN: I think the
13 clarification, basically, that this entry
14 does not constitute an adjudication on
15 the merits and is, therefore, without
16 prejudice. If I get that entry, I have
17 to appeal it to preserve my rights.
18 Otherwise, res judicata.

19 THE COURT: I learned as a trial
20 judge, appeal what you want.

21 MR. HARTMAN: I am trying to
22 promote judicial economy, though. We all
23 agree it is not on the merits.

24 THE COURT: Doesn't mean they are
25 right. It just means they got the last

1 say. I know all about the Court of
2 Appeals.

3 MR. HARTMAN: But we all agree it
4 is not on the merits and without
5 prejudicial effect. Why not put it in
6 the entry? That's what I want. We all
7 agree on it.

8 MR. FOX: We don't all agree.

9 MR. HARTMAN: You do think there is
10 prejudicial effect. See, that's my
11 problem.

12 MR. GOODIN: Judge, we submit it to
13 the Court.

14 MR. HARTMAN: If I can tender mine
15 as an alternative.

16 THE COURT: I will tell you what.
17 Mark it as -- we will make it a part of
18 the record.

19 I am not going to second-guess
20 myself. I understand you are doing your
21 job as an attorney. Good for you. You
22 always do. This is what I said. And,
23 you know what, maybe for clarification,
24 you have a Fourth District case there. I
25 didn't hear our First District. I would

1 religiously follow what the First
2 District did.

3 MR. HARTMAN: I got that entry last
4 evening so I didn't have much time.

5 THE COURT: No problem.

6 I signed the order that was
7 proffered by the defendants. I do want
8 to make part of the record, Ann Marie,
9 Mr. Hartman's Entry Dismissing Action
10 without Prejudice, so if this goes to the
11 Court of Appeals, they have a chance to
12 look at that and see what they have to
13 say.

14 (Court's Exhibit 1 was marked and
15 received into evidence.)

16 MR. HARTMAN: That raises then a
17 second issue of a stay pending appeal.
18 We did have the agreed injunction in
19 place during the course of this case with
20 the Court entering the entry disposing of
21 the case that would vacate that
22 injunction. I will be asking then for
23 that stay or similar injunction pending
24 appeal.

25 MR. GOODIN: That goes to the Court

1 of Appeals?

2 MR. HARTMAN: Goes to trial court
3 first.

4 MR. GOODIN: I am unaware of any --

5 MR. HARTMAN: Not to belabor this
6 case any further for you.

7 THE COURT: I try to get it right.
8 Once I dismiss the case, especially when
9 and if you file your Notice of Appeal, I
10 have lost all jurisdiction to do
11 anything.

12 MR. HARTMAN: Except for a stay
13 pending appeal.

14 MR. GOODIN: I think that's right.
15 He can file a stay before the appeal goes
16 on. Then he has to renew it up there.

17 MR. HARTMAN: If you deny it, then
18 I go to the Court of Appeals.

19 MR. FOX: We will most certainly
20 object to any preliminary injunction on
21 the merits based on the arguments that we
22 set forth in our motion.

23 MR. HARTMAN: I want to give you a
24 heads up. I will file that motion, then.
25 I have to file the Notice of Appeal first

1 and then I file the motion for stay.

2 MR. GOODIN: We will talk again.

3 THE COURT: You could ask them
4 first over there, couldn't you?

5 MR. HARTMAN: No, trial court
6 first. Rule requires got to go to the
7 trial court first.

8 THE COURT: I know on the motion
9 docket, we did that after asking the
10 trial court.

11 MR. HARTMAN: I had that with the
12 abolishment of registered land.

13 THE COURT: Thank you, gentlemen.

14 MR. HARTMAN: Do we need to set a
15 hearing date or tentative hearing date
16 for the stay pending appeal?

17 MR. GOODIN: We'll have an
18 additional conversation.

19 THE COURT: Call Emily. She will
20 take care of you.

21 Thank you.

22 (Proceedings concluded.)

23

24

25

1 CERTIFICATE

2 I, Ann Marie Stowers, RPR, the
3 undersigned, an Official Court Reporter for the
4 Hamilton County Court of Common Pleas, do
5 hereby certify that at the same time and place
6 stated herein, I recorded in stenotype and
7 thereafter transcribed the within 16 pages, and
8 that the foregoing Transcript of Proceedings is
9 a true, complete, and accurate transcript of my
10 said stenotype notes.

11 IN WITNESS WHEREOF, I hereunto set my
12 hand this 12th day of October, 2016

13
14
15 _____
16 Ann Marie Stowers, RPR
17 Official Court Reporter
18 Court of Common Pleas
19 Hamilton County, Ohio
20
21
22
23
24
25

James R. Tepe
7450 Baywind Drive
Cincinnati, Ohio 45242
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October 21, 2016

HAND DELIVERED

Page 1 of 5

Mr. Thomas Moeller, Madeira City Manager,
and,
Members of the Madeira City Council,
and,
Members of the Madeira Planning Commission
City of Madeira
7141 Miami Avenue
Madeira, Ohio 45243

Subject: A CLEAR DISPLAY OF UNBRIDLED ARROGANCE BY THE MADEIRA CITY MANAGER

Dear Mr. Moeller, and, Ladies and Gentlemen of the Madeira City Council and Madeira Planning Commission:

During the Public Hearing on October 17, 2016, the Madeira City Manager Mr. Thomas Moeller was asked to explain how he could completely ignore the words – “and other operations which serve alcoholic beverages.” – which are printed in Section 150.24, page 33 of the Madeira Zoning Code. Mr. Moeller responded that – “It was his interpretation that Swing Line Grill will be a “Restaurant”. Further supporting his interpretation, Mr. Moeller said: “most restaurants today serve alcoholic beverages.” “Its a matter of interpretation, Mr. Tepe.”

Supporting Mr. Moeller’s newly exposed interpretation, the City Law Director Mr. Brian Fox interrupted the conversation between Mr. Moeller and myself and stated that Mr. Moeller’s interpretation was properly based on the Ohio Revised Code Section 4301.01. Mr. Fox’s statement is totally incorrect. I will address this misrepresentation later in this letter. I believe five City Council Members, Chris Hilberg, Scott Gehring, Melisa Adrien, Traci Theis, and Tom Ashmore were present and witnessed the above described conversations.

Neither Mr. Moeller or Mr. Fox are stupid men. In general, I would give them the proverbial “benefit of the doubt” in normal situations because they are both quite intelligent. However, in this case Mr. Moeller has taken upon himself the authority as Madeira City Manager and has “interpreted” and declared that the very clear and decisive words, “and other operations which serve alcoholic beverages.” which are printed in the Madeira Zoning Code, are to be totally disregarded and ignored because he, the powerful City Manager, has interpreted otherwise. The absolutely “scary” situation here is that Mr. Moeller actually believes that he has the authority to override the written words of the Zoning Code.

This display of unbridled arrogance begs one simple question: either the understandable language of the Madeira Zoning Code speaks for itself, or, Mr. Moeller has somehow been granted the authority and ultimate control of “interpreting” the Zoning Code as he sees fit regardless of the Code’s written words.

I believe Mr. Moeller’s “interpretation” that the Swing Line Grill is to be classified as a “Restaurant” is clearly and intentionally wrong. It is no secret that Mr. Moeller and Mr. Powers have been working together to make this Swing Line Grill evolution a reality for more than five years. The impact of Mr. Moeller’s “interpretation” favors Mr. Powers and his Swing Line Grill by reducing the Zoning Code’s parking requirement calculation from 87 spaces down to 68 spaces – an improper reduction of the parking requirement by 19 parking spaces.

October 21, 2016

Page 2 of 5

To: Mr. Thomas Moeller, Madeira City Council, and, Madeira Planning Commission
From: James R. Tepe

As available parking in the immediate area of the Swing Line Grill / B & B Mower property, is and will be in very short supply and is of considerable importance, this serious misinterpretation amounts to a 28% increase in required parking and 19 additional required parking spaces that have not been rightfully considered by the Planning Commission during their June 20, 2016 Granted Zoning Variance.

The Granted 100% 'off-site' Parking Variance for Shared Parking, previously based on 68 required spaces, must now be somehow corrected, or the Approved Variance Request Denied, based on 87 spaces so to adjust for the 19 additional required spaces. What would the Planning Commission have done on June 20, 2016 if they knew that the Madeira Code accurately required 87 parking spaces for this project rather than the 68 spaces they were told by Mr. Moeller? It is common knowledge that the Planning Commission is only permitted to consider information submitted to them by "Staff" and the ARO when considering requested variances. Can everyone see the ongoing problem now? Does this error result in the striking down of the validity of the Planning Commission's misguided Approval?

The Madeira Zoning Code, as well as all other Laws, Codes and Ordinances are to be fully respected and enforced, unless or until these Laws, Codes and Ordinances are repealed or altered by due process. The City Council is fully responsible for all operations and actions of all employees and Commissions. It is absolutely essential that the acting City Manager, considering the substantial authority granted to him or her within the documents directing the operation of the City, must act with the highest level of Idealistic Principles and Ethical Behavior so to advance the respectful efforts and reputation of the City of Madeira.

I believe I have well defined and substantiated in this letter, as well as the 10 previous letters I have written to you in the last five months, **that your City is on an absolute collision course with a long series of justified lawsuits mostly caused by less than acceptable actions and "interpretations" by your City Manager.**

If Mr. Moeller has been singled out as the City Council's "Sacrificial Lamb" because of special desires of the collective members of City Council regarding the Swing Line Grill project, then you had better take a real hard look at yourselves in the mirror and give yourselves "A Full Blown Conscience Check". If Mr. Moeller is and has been acting on his own in his ongoing display of unbridled arrogance honestly believing that his "interpretations" are more important than written words of the Code, then City Council is obligated to promptly correct this situation by taking actions to reverse the effects of Mr. Moeller's wrongdoings and set the stage for required future improvement in his Idealistic Principles and Ethical Behavior.

As I explained during the Oct. 17, 2016 Planning Commission Public Hearing, I have concluded that Mr. Moeller has consistently "**Frustrated the Zoning Process**" of the Swing Line Grill project by acting as the "Information Gate-Keeper" and wrongly interpreting and wrongly limiting information which should flow without limitation to the Planning Commission for their consideration. They never get to see the whole picture at one time before they are required to act.. They never see all the relative pieces of the puzzle at one time before they are required to act. They receive it "piece by piece" as Mr. Moeller wants them to have it. Knowing that Mr. Moeller knows the Zoning Code better than anyone in the City administration, I find no reasonable excuse for what has been going on. Here are a few examples:

1) June 20, 2016, Only 2 Variances Requested, should have been at least 10 as defined in my 8-1-16 letter,

October 21, 2016

Page 3 of 5

To: Mr. Thomas Moeller, Madeira City Council, and, Madeira Planning Commission

From: James R. Tepe

- 2) June 20, 2016, Only 68 parking spaces required rather than the legitimate 87 parking space requirement because of Mr. Moeller's wrong "interpretation" as explained above,
- 3) Aug. 15, 2016, Mr. Moeller's statement that "This could be the Final Plan Approval if the Planning Commission fully approves the newly submitted plans and information." Mr. Moeller knew the required "Land Survey" and the "Final Parking Plan" had not yet been submitted to the Commission for their required review and consideration.
- 4) In my Aug. 22, 2016 letter to you I pointed out that the 1 page cover sheet / explanation authored by Amanda Zimmerlin (Assistant City Manager) stated; "Land Survey will be completed after PC Approval in conjunction with City on Approved Lot Split." My letter asked; "Who instructed Ms. Zimmerlin to type this statement". Seeing that Sect. #166.06(B) states: "Final Applications for Planning Commission or Administrative Review for Zoning Approval or Building Permits shall include a Land Survey." There can be no doubt that Ms. Zimmerlin encountered this conflicting requirement. Did Mr. Moeller instruct Ms. Zimmerlin to insert the above conflicting statement into the 1 page cover sheet / explanation she authored? Does this occasion or the effects of this occasion have any connection to her recent departure from employment with the City?
- 5) The Aug. 15, 2016 "Staff Report" included a 2 page ARO Memo from Mr. Ballweg which included 12 Review Items and recommended tentative approval of the Swing Line Grill development contingent on compliance with Mr. Ballweg's requests. However, Mr. Ballweg's review and comments Related to The Wrong Drawings. Was this completely unresponsive ARO Memo intended to withhold the proper ARO analysis of the new Aug. 5, 2016 drawings from the Planning Commission on Aug. 15, 2016 during their Public Hearing? No one realized this blatant error had occurred during that Public Hearing. Does this fact alone strike down the validity of the Planning Commission's Approval of the Aug. 5, 2016 Drawings as the "Approved Preliminary Development Plan"? The ARO had never seen or commented on those Aug. 5, 2016 drawings. How much involvement did Mr. Moeller really have in this calamity? The Aug.5, 2016 Drawings were different than the Drawings Mr. Ballweg had reviewed and commented on.
- 6) At the recent Oct. 17, 2016 Planning Commission Meeting, Mr. Moeller again, by design, withheld the involvement of the Final Parking Plan from the Planning Commission stating that consideration of the Swing Line Grill Final Application tonight only applies to the Building Plans and the Lot Depicted on the Abercrombie Final Site Layout Plan dated Sept. 21, 2016. This Final Site Layout Plan was signed by Craig Abercrombie, Registered Professional Surveyor. Although I have never heard of a Registered Professional Surveyor being wrong, Mr. Moeller stated that "Railroad Avenue will remain a 2 lane, 2 way roadway and **"the Abercrombie "Sealed" Final Site Layout Plan"**, which was included in the Staff Report for the Planning Commission's consideration at this Public Hearing, **"was wrong"**. The Abercrombie "Plan" is identical to the Aug. 5, 2016 Preliminary Plan Approved by the Planning Commission at their Aug. 15, 2016 Public Hearing. How, according to Mr. Moeller, can this Abercrombie Plan be wrong but essentially Approved by the Planning Commission? I'm sorry but I really can't follow this "Double-talk" and reach a logical conclusion.

October 21, 2016

Page 4 of 5

To: Mr. Thomas Moeller, Madeira City Council, and, Madeira Planning Commission
From: James R. Tepe

- 7) When I asked why the Parking Plan was not to be considered by the Planning Commission and those in attendance at this Public Hearing, Chair-person Tammy Schlagbaum quickly informed me that any parking lot questions were not to be asked or considered tonight – (Case Closed). That is when I openly accused Mr. Moeller of consistently “Frustrating” this Swing Line Grill Zoning Process by wrongly limiting vital information that should automatically flow to the Planning Commission in a timely fashion. Essentially, Mr. Moeller has, by way of the authority vested in him, become the “Puppet Master” of the Planning Commission by limiting the flow of information. Knowing that Mr. Moeller is “Staff”, it is common accepted knowledge that the Planning Commission is only permitted to consider information submitted by “Staff” and the ARO when considering identified Variance Requests. I have a number of Planning Commission Minutes that well confirm this statement. This is a big problem.

I now need to address the Law Director Mr. Brian Fox’s verbal support of Mr. Moeller’s “interpretation” that Swing Line Grill is a “Restaurant” in accordance with the Ohio Revised Code Sect. 4301.01. While ORC 4301.01(B)(12) does define a “Restaurant” for the express purpose (4301.05) of defining the limitations of executive or administrative duties or powers of the Liquor Control Commission which reads: “Sections 4301.03, 4301.04, and 4301.041 of the ORC do not derogate from prejudice any other power expressly or impliedly granted to the Liquor Control Commission by Chapters 4301. and 4303. of the Revised Code, but except as expressly provided in Sections 4301.03, 4301.04 and 4301.41 of the Revised Code, the Commission shall not exercise executive duties or powers.”

The Madeira Zoning Code Section 150.24 reads; “Nightclubs, Saloons, Cocktail Lounges and other operations which serve alcoholic beverages.” These words are not difficult to understand unless you want them to be difficult to understand. These words have a defined purpose in the Zoning Code and absolutely have a legal right to exist in the Code. There is no need whatsoever to “interpret” these words differently than what they clearly say. These words, contrary to Mr. Fox’s suggested reference to the ORC, have a perfectly legal right to exist and to be respected accordingly. Mr. Fox’s comment and directive in support of Mr. Moeller’s “interpretation” are clearly incorrect. And one more thing Mr. Fox, the next time you want to do a Deposition on me, please give me proper legal notice and have a court recorder present.

So, considering the fact that the Planning Commission Approved the Swing Line Grill Final Plan with a number of “Conditions”, none of which spelled out the inaccuracy of the Abercrombie “Final Site Layout Plan” or the Planning Commission Aug. 15, 2016 Approved identical plan prepared by Swing Line Grill’s Architect, I believe I can safely conclude, contrary to Mr. Moeller’s comment, that Railroad Avenue can now be reduced to a one-way roadway with a traffic use width of approximately 15.5 feet by the City and Mr. Powers executing the “Commitments” contained in Resolution #17-16 dated April 25, 2016.

As my letter to you from Robert McCabe Co., Inc. , DBA McCabe Do-It Center dated October 17, 2016 specified that appropriate legal action would be taken if the City takes any action to dispense of any portion of existing Railroad Avenue Right-Of-Way prior to the City legally correcting their previous illegal “Taking”, it is clear that the Oct. 17, 2016 “Approval Action” of the Planning Commission has opened the gate for the Robert McCabe Co., Inc. to proceed with an appropriate legal action as necessary.

October 21, 2016

Page 5 of 5

To: Mr. Thomas Moeller, Madeira City Council, and, Madeira Planning Commission
From: James R. Tepe

It is also obvious to me that any City of Madeira Taxpayer now has the right to file a Taxpayer's Lawsuit against the City for allowing or causing the Planning Commission to Approve a project in the Main Street Core District that violates Article VII .3, Chapter 154 of the Madeira City Charter which specifically states:

"The Planning Commission shall not grant a Variance in any case in which the deviation from the existing zoning ordinance is so substantial that it is the equivalent of a Change in the Zoning District."

THIS HAS OCCURRED.

Further the Charter Reads:

"When any such Appeal or Variance is filed, the Commission shall hold a Public Hearing on EACH Appeal and Variance---" THIS HAS NOT OCCURRED.

Thank you for your attention. I am also sorry this has turned into such a mess.

Again, Justice Requires Being Held Responsible For Your Actions.

Sincerely

James R. Tepe