

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF MADEIRA, : Case No. A-18-02415
 :
 Plaintiff, : Judge Shanahan
 :
 v. : DEFENDANT’S REPLY MEMORANDUM
 : IN SUPPORT OF MOTION FOR
 PHILIP DOUGLAS OPPENHEIMER, : JUDGMENT ON THE PLEADINGS OR,
 : ALTERNATIVELY, FOR SUMMARY
 Defendant. : JUDGMENT BASED UPON THE
 : COMMENCEMENT OF THIS ACTION
 : WITHOUT LEGAL AUTHORITY
 :

Defendant DOUG OPPENHEIMER, by and through undersigned counsel, hereby tenders the following reply in support of the *Motion for Judgment on the Pleadings or, alternatively, Motion for Summary Judgment* relating to this action being filed and commenced on May 11, 2018, without the authorization of the Madeira City Council and, therefore, said filing being *ultra vires*.

As stated in the *Motion*, in its prior ruling on a similarly-filed motion, the Court did not explicitly conclude that the City Manager had the legal authority to authorize the filing of this lawsuit on behalf of the municipal corporation but, rather, simply suggested such authority may exist. Now, and to preserve the issue, this *Motion* now puts squarely before the Court whether, under Ohio law and the Madeira City Charter, a legal action may be commenced by and in the name of the municipal corporation upon the direction and authorization of the City Manager, as opposed to the Madeira City Council.

In the *Memorandum in Opposition*, the CITY OF MADEIRA repeatedly couches the issue as whether “this lawsuit was authorized by the City of Madeira” or, by referencing the post-hoc declaration passed by the Madeira City Council, that “the City did, indeed, direct the Law Director” to file the case against Mr. OPPENHEIMER. Repeatedly invoking that “the City” authorized the

lawsuit avoids the issue. Like all corporations, a municipal corporation can only act through its agents and the issue is what agent of the CITY OF MADEIRA actually authorized this lawsuit and whether such authorization was valid under state law and the Madeira City Charter, or was it *ultra vires*.¹

In the *Amended Complaint*, the CITY OF MADEIRA establishes that it was the City Manager (but not the Madeira City Council) who authorized the filing of the lawsuit. While previously claiming generalized language in the City Charter authorized such action and authority, the CITY OF MADEIRA failed in the *Memorandum in Opposition* to even address that “[t]he rule

¹ Not once in that post-hoc motion did the Madeira City Council declare that “the Madeira City Council” authorized the filing of the lawsuit but instead repeatedly references that “the City” provided the authorization. The avoidance of declaring that the Madeira City Council actually authorized the filing of this lawsuit is deliberate for one of two alternative reasons, both of which are fatal to the filing and prosecution of this case.

One potential reason for declaring “the City” (and not “the Madeira City Council”) authorized the lawsuit is that the Madeira City Council, in fact, never authorized the lawsuit. As raised in the *Motion* and unaddressed by the CITY OF MADEIRA in the *Memorandum in Opposition*, “a public board, commission or other deliberative body speaks through its minutes or its written record of resolutions, directives, and actions.” *Swafford v. Norwood Bd. of Ed.*, 14 Ohio App.3d 346, 348, 471 N.E.2d 509 (Ohio App. 1st Dist. 1984), and, as there are no minutes or resolutions directing the filing of this action, such authorization was never given prior to the filing.

The other potential reason for not unequivocally stating that “the Madeira City Council” authorized the filing of this lawsuit before it was filed is, not that such authorization wasn’t given, but that the authorization was actually given in and as part of the executive session held on April 23, 2018, or through a series of round-robin telephone calls where a decision was made outside the confines of a meeting. Following that executive session, the Madeira City Council did pass Proclamation No. 18-01, wherein the Madeira City Council (i) simply declared its intention; and (ii) that intention was limited to exploring the possibility of filing of a civil action against Mr. OPPENHEIMER. At that stage, no lawsuit had been publicly authorized by the Madeira City Council (and there was no subsequent public meeting of the Council before the lawsuit was filed). But if the Madeira City Council authorized the Law Director, in the executive session (or outside any meeting), to go beyond simply exploring the possibility of filing of a civil action to include actually authorizing the filing of this lawsuit, then the taking of that additional step and action in an executive session or outside a meeting would constitute a violation of the Open Meetings Act, R.C. 121.22, and, as a result, such authorization would be invalid. *See* R.C. 121.22(H)(“[a] resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body”).

of charter supremacy applies only where the conflict appears by the express terms of the charter and not by mere inference.” See *Motion, at 4* (quoting *State ex rel. Bardo v. City of Lyndhurst*, 37 Ohio St.3d 106, 109, 524 N.E.2d 447 (1988)). And from the failure of the CITY OF MADEIRA to acknowledge, let alone address, this legal standard for when the supremacy of a city charter applies (which even if the Charter exclusively applies, it does not extend to include the *carte blanche* authority to authorize the filing of lawsuits on behalf of the municipal corporation), the CITY OF MADEIRA compounds its avoidance of the law, including, specifically, R.C. 715.03 (“the legislative authority of such municipal corporations may provide by ordinance or resolution for the exercise and enforcement of such powers” within R.C. 715.01, including the power to sue) and R.C. 733.53 (“[t]he city director of law, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute”).

The CITY OF MADEIRA has not refuted that, consistent with state law and the Madeira City Charter, the City Manager did not have the legal authority to authorize the filing and commencement of this action. In this case, as the governing body of the CITY OF MADEIRA, *i.e.*, the Madeira City Council, alone has that authority and it did not take official action to authorize the commencement and filing this lawsuit. Accordingly, Mr. OPPENHEIMER is entitled to judgment as a matter of law, either on the pleadings alone or summary judgment.

Respectfully submitted,
/s/ Curt C. Hartman
Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
Cincinnati, OH 45230
(513) 379-2923
hartmanlawfirm@fuse.net

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon counsel for Plaintiff, Brian Fox (*bfox@graydon.law*) and Steve Goodin (*sgoodin@gradon.law*), via e-mail on the 8th day of October 2020.

/s/ Curt C. Hartman