

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
 PHILIP DOUGLAS OPPENHEIMER, : MOTION TO DISMISS BASED UPON
 : THE FILING OF THE COMPLAINT
 Defendant. : WITHOUT LEGAL AUTHORITY
 : ----
 : ORAL ARGUMENT:
 : July 2, 2019, 11:00 a.m.

Defendant PHILIP DOUGLAS OPPENHEIMER, by and through undersigned counsel, tenders the following *Reply Memorandum in Support of the Motion to Dismiss Based Upon the Filing of the Complaint Without Legal Authority*. Instead of simply identifying who authorized the filing of this lawsuit on behalf of the municipal corporation and establishing the legal authority for that person to do so, the CITY OF MADEIRA posits theoretical propositions on the legal authority of various individuals who it contends might have legal authority to authorize the filing of this particular lawsuit, but never identifies which of those individuals actually authorized the filing of this particular action. At the outset and before proceeding forward, the CITY OF MADEIRA should identify forthwith the specific and particular individual who authorized the filing of this action on behalf of the CITY OF MADEIRA.

Nonetheless, at the end of the day, through all the self-righteous bluster and irrelevant innuendo offered in the *Response to Defendant’s Motion to Dismiss*, one clear and critical fact is clearly established – namely, that the Madeira City Council itself did not authorize the filing or commencement of this action on behalf of the CITY OF MADEIRA because, according to the argument posited, “no Council approval was necessary for the initiation of this lawsuit”. *See*

Response to Defendant's Motion to Dismiss, at 7. That fact alone requires dismissal of this action as its filing was *ultra vires*.

REPLY MEMORANDUM IN SUPPORT

The *sine qua non* issue before the Court is succinctly presented, *viz.*, whether, to exercise the power of the municipal corporation and to bring a lawsuit in the name of the municipal corporation pursuant to R.C. 2323.52, approval and authorization was required by the city council or by the person who actually authorized the filing of this action. In the *Response to Defendant's Motion to Dismiss*, the CITY OF MADEIRA posits two alternative individuals who it claims might have the legal authority to authorize the filing of a lawsuit on behalf of the CITY OF MADEIRA *qua* as a municipal corporation (though it does not indicate who *actually authorized* the filing of this particular lawsuit). The two individuals argued in the *Response to Defendant's Motion to Dismiss* as to who may have authority to authorize the filing of this particular lawsuit on behalf of a municipal corporation (though, again, not identifying which one actually did authorize it) are: (i) the Law Director; and (ii) the City Manager. But neither of those two individuals has the legal authority to authorize the filing of this particular lawsuit on behalf of the municipal corporation. And with the Madeira City Council itself concededly not authorizing the filing of this lawsuit (though that is the body that could have authorized this lawsuit on behalf of the municipal corporation), this case must be dismissed as its filing was *ultra vires*.¹

¹ Again, counsel for the CITY OF MADEIRA should be required to state unequivocally the specific individual who authorized and directed the filing of this lawsuit on behalf of the CITY OF MADEIRA *qua* a municipal corporation. In making the argument that R.C. 2323.52(B) empowered the law director to file the lawsuit on behalf of the municipal corporation, the CITY OF MADEIRA implies or suggests that its legal counsel alone made the decision to file the lawsuit.

The Law Director's Authority. With the Madeira City Council not authorizing the filing of this particular action, the CITY OF MADEIRA first argues that there exists the legal authority for the city law director to file this lawsuit on behalf of and in the name of the CITY OF MADEIRA through language in R.C. 2323.52. *Response to Defendant's Motion to Dismiss, at 3.* But in so doing, the CITY OF MADEIRA conflates and confuses the granting of statutory standing or statutory authority to bring such an action as a party versus the authority to act on behalf of a municipal corporation. R.C. 2323.52(B) concerns the former; but the *Motion to Dismiss* is directed to the latter.

The case *sub judice* was filed, *i.e.*, commenced, by the CITY OF MADERIA. It is the municipal corporation, not the law director, that is the named party and which seeks relief. *See* Ohio R. Civ. P. 10(A) (“[i]n the complaint the title of the action shall include the names and addresses of all the parties”); *Complaint* ¶3 (“the City seeks to have Mr. Oppenheimer declared a vexatious litigator”).

R.C. § 2323.52(B) simply provides statutory authority for who may file such a vexatious-litigator action but as a litigant, *i.e.*, who is a proper party-plaintiff to such an action:

A person, the office of the attorney general, or...city director of law...or similar chief legal officer of a municipal corporation who has defended against habitual and persistent vexatious conduct...may commence a civil action....

But then it argues the City Manager has the legal authority, suggesting that the direction for the filing of this lawsuit was given by the City Manager.

Yet, through this academic exercise, no definitive statement or representation by the CITY OF MADEIRA as to who actually authorized the filing of this action. Of course, there is a third possibility that the CITY OF MADEIRA does not even argue. – that the Madeira City Council did, in fact, authorize the filing of this lawsuit. If that were the case, then the challenge raised by the *Motion to Dismiss* would no longer have merit. But then, the CITY OF MADEIRA must acknowledge that it would be inviting another issue, *i.e.*, a clear violation of the Open Meetings Act.

It is the parties or litigants who actually commence civil actions, not the attorney representing such parties or litigants in such action. And it is who may bring an action, *i.e.*, be the plaintiff, that R.C. § 2323.52(B) identifies and enables. While a city law director is identified as granted statutory standing to bring a vexatious-litigator action, the named and identified party in the case *sub judice* is the CITY OF MADEIRA, not the city law director.

In comparison, in *Herron v. Bramel*, 2018-Ohio-1029 (7th Dist.), the Columbiana County Prosecuting Attorney personally brought the action in his own right, not purportedly on behalf of any client (as was done in the case *sub judice*). As the Seventh District characterized it, “as the Columbiana County Prosecuting Attorney, appellee is the proper party to bring a vexatious litigator claim against appellants pursuant to R.C. 2323.52(B).” *Id.* ¶18.² And in similar cases when “the office of the attorney general, or...city director of law...or similar chief legal officer of a municipal corporation” have commenced actions under R.C. § 2323.52, those legal counsel are themselves the party-plaintiff. *See, e.g., DeWine v. Morgan*, 2017-Ohio-5600 (10th Dist.)(Ohio Attorney General DeWine bringing R.C. § 2323.52 action as party-plaintiff); *Ohio Attorney General v. Brock*, 2015-Ohio-4173 (4th Dist.); *Gains v. Harman*, 148 Ohio App.3d 357, 773 N.E.2d 583, 2002-Ohio-2793 (7th Dist.)(“plaintiff, who is the current Mahoning County

² Consider, e.g., R.C. 2950.034 address the remedy if a sexually-oriented offender attempts to establish a residence within 1,000 of a school. R.C. 2950.034(B) provides that “the prosecuting attorney, village solicitor, city or township director of law, similar chief legal officer of a municipal corporation or township, or official designated as a prosecutor in a municipal corporation...has a cause of action for injunctive relief against the person.” This provision similar to R.C. 2323.52(B) provides the prosecuting attorney, city law director, *et al.*, statutory authority to bring the action in his or her own name, *i.e.*, he or she is the party-plaintiff, not simply to serve as legal counsel on behalf of another party. *See, e.g., State ex rel. O'Brien v. Heimlich*, 2009-Ohio-1550 (10th Dist.)(action brought by and in the name of Franklin County Prosecutor Ron O'Brien).

Prosecuting Attorney, filed a complaint seeking to have Harman...declared a vexatious litigator under R.C. 2323.52”).

Instead, the case *sub judice* was purportedly commenced by a “person” – the CITY OF MADEIRA who is the named party-plaintiff. See R.C. § 1.59(C)(“[a]s used in any statute...‘Person’ includes...[a] corporation”). And while R.C. § 2323.52(B) clearly allows such a “person” to bring such an action, the question still remains whether the person that actually brought the action did, in fact, authorize the filing of the lawsuit. Stated otherwise, did the corporate entity that is CITY OF MADEIRA *qua* a municipal corporation actually authorized the bringing of this particular action in the name of and on behalf of the corporation. R.C. § 2323.52(B) does not empower an attorney to bring a lawsuit on behalf of a client without legal authority being granted by that client. Thus, the argument attempting to impart authority on the Law Director pursuant to R.C. § 2323.52(B) is without merit.

The City Manager’s Authority. Next, the CITY OF MADEIRA claims, based upon generalized language in the Madeira City Charter, that the City Manager may have authorized the bringing of this lawsuit (though, again, no evidence is offered to actually establish that the City Manager expressly authorized the filing of this particular lawsuit on behalf of and in the name of the CITY OF MADEIRA). Instead, all that the CITY OF MADEIRA offers on this point is the academic exercise of contending the City Manager, and not the Madeira City Council, has the legal authority to authorize and approve the filing of this lawsuit on behalf of the municipal corporation. *Response to Defendant’s Motion to Dismiss, at 3-6.* But reliance upon the Madeira City Charter does not empower the City Manager to authorize and direct the filing of this particular action by and in the name of the municipal corporation, *i.e.*, the CITY OF MADEIRA.

Attempting to claim the City Manager has the authority to authorize the filing of this particular lawsuit (though, again, offering no evidence that the City Manager did, in fact, authorize the filing of this lawsuit), the CITY OF MADEIRA initially quotes from Article II, Section 2 of the City Charter, through does so selectively. In full context, the pertinent language in Article II, Section 2 provides:

The Manager shall be responsible to Council for the proper administration of all the affairs of the municipality and the enforcement of all its laws and ordinances,...and to that end he shall have exclusive authority to make all appointments, suspensions, and removals of employees in the departments and offices under his control....

This provision does not grant the City Manager authority to authorize the present lawsuit pursuant to R.C. § 2323.52. Instead, it is simply a general assignment of being responsible to the Madeira City Council for the administration of the municipal affairs and the enforcement of the laws and ordinances, and, to that end, he is given authority to appoint, suspend, *etc.*, employees.

Instead, focus and appreciation must be given that the City Manager is the executive of the City. *Madeira City Charter, Article II, Section 1*. Thus, his explicit authority only flows from ordinances and resolutions passed by the legislative authority, *i.e.*, the Madeira City Council. And, as the CITY OF MADEIRA has conceded, the Madeira City Council has not authorized the filing of this lawsuit through the passage of any ordinance or resolution. Therefore, there was no ordinance or resolution for the City Manager to actually enforce.

The lack of any ordinance or resolution by the Madeira City Council makes the present situation distinguishable from the situation in *Village of Marysville v. Boerger*, 20 Ohio App.2d 61, 251 N.E.2d 628 (3d Dist. 1969), the primary case upon which the CITY OF MADEIRA relies for supposedly giving sole and exclusive authority to the City Manager to authorize this particular lawsuit. The issue before the court in *Marysville* was whether the city manager had the authority

to enforce the already-enacted zoning ordinance without authorization by the city council to bring a particular injunctive action. Because the Marysville Village Charter explicitly declared the city manager had “the power and duty to:…[s]ee that all municipal and state laws are enforced,” *id.* at 63 (quoting Marysville Village Charter, Section 4.02), the Third District concluded that the city manager had the authority to “enforce duly enacted ordinances of the village”, and that included the already-enacted zoning ordinance.³ In fact, the Third District found the distinction between enforcement of an already-existing ordinance versus the bringing of a special legal proceeding significant. *Id.* at 62 (“[h]ere we are dealing with the enforcement of a zoning ordinance and not with a special appellate action”).

In the case *sub judice*, there is no ordinance already passed by the Madeira City Council that the City Manager is simply seeking to enforce (such as a zoning ordinance); instead, this is a special legal proceeding for which no ordinance or resolution has explicitly authorized the City Manager to bring on behalf of the CITY OF MADEIRA. That is the significant difference and distinction with the case in *Marysville*, *viz.*, there is no already-existing ordinance for which the City Manager (or Law Director) is simply enforcing.⁴

³ The Madeira City Charter does not contain a comparable provision that explicitly imposes upon the City Manager the “power and duty” to “see that all municipal and state laws are enforced.” Instead, Article II, Section 2 of the Madeira City Charter simply declares the City Manager is “responsible” to the Madeira City Council “for the proper administration of all the affairs of the municipality and the enforcement of all its laws and ordinances.” But even if this language in the Madeira City Charter can be equated to granting the City Manager the “power and duty” to enforce ordinances and state law, there is no ordinance to be enforced by which this particular lawsuit is brought.

⁴ In a final effort to justify the lack of authority being granted for the municipal corporation to bring this particular action, the CITY OF MADEIRA makes a generalized policy argument premised upon what it characterizes as “common sense” and that one cannot expect a city council to meet endlessly to authorize the bringing of particular legal actions. *Response to Defendant’s Motion to Dismiss*, at 7.

In making such a contention – which is not based upon any law, including the law relating to the authority of corporations – the CITY OF MADEIRA offers a red herring, contending that “[i]f Oppenheimer’s contention was correct, then Cincinnati City Council’s meetings should take hours as it painstakingly approves ordinances for the thousands of collection and building code enforcement actions it undertakes each year.” *Response to Defendant’s Motion to Dismiss*, at 7.

But had the CITY OF MADEIRA and its legal counsel actually reviewed the Cincinnati Municipal Code, they would have discovered that, by already-enacted ordinances, the Cincinnati City Council expressly authorized the Cincinnati City Solicitor to bring collection matters, building code enforcement actions, *etc.* See *Cincinnati Municipal Code*, Administrative Code, Art. IX, Sec 13 (“[w]henver any person is indebted to the city in any manner..., the city treasurer shall demand and receive the same. When any claim is not collectible by other means the treasurer shall report the same to the city solicitor to be collected by suit or other appropriate action”). And with respect to enforcement of the building code violations (as well as other code or ordinance), the Cincinnati City Council has explicitly and expressly authorized the bringing of such action:

Whenever an officer charged with the enforcement of the Cincinnati Municipal Code is satisfied that a provision that officer is charged to enforce, or a law in force in the city applicable to the same subject matter, has been violated or is about to be violated, or that an order or direction made in pursuance of the enforcement of this Code has not been complied with, or is being disregarded, and whenever that officer is satisfied that civil proceedings are necessary for the enforcement of the Cincinnati Municipal Code or laws, to restrain or correct the violations thereof, that officer may apply to the city solicitor, who is authorized to institute civil proceedings. Civil proceedings may be brought in the name of the city, and may include claims for injunction, mandatory relief, restraining orders, damages, the appointment of a receiver, and such other relief as may be allowed in law or equity. Institution of civil proceedings does not exclude criminal proceedings as may be authorized by the Cincinnati Municipal Code or charging a person with a civil offense as authorized by this Title.

Cincinnati Municipal Code § 1501-27 (emphasis added). The Madeira City Council has not adopted any comparable ordinance by which the Law Director or the City Manager had the authority to bring this particular action against Mr. OPPENHEIMER. And there are numerous other provisions of the Cincinnati Municipal Code whereby the city solicitor is expressly authorized to bring suit. So the CITY OF MADEIRA has offered an illusory argument and comparison to the City of Cincinnati.

Finally, the fact that the Cincinnati City Council has expressly granted authority for the bringing of civil action in the name of the city further refutes the basic contention of the CITY OF MADEIRA that “no Council approval was necessary for the initiation of this lawsuit”. See *Response*, at 7. If no council approval is necessary for the bringing of an action in the name of and on behalf of a municipal corporation, then there was no need for the Cincinnati City Council to even adopt Cincinnati Municipal Code § 1501-27.

At the end of day, without an ordinance or resolution passed by the Madeira City Council, the City Manager is not free to authorize the filing of a special legal proceeding, such as this particular action pursuant to R.C. § 2323.52. As the executive of the CITY OF MADEIRA, his authority must have a basis in law, *i.e.*, city ordinances. Thus, the argument attempting to impart authority on the City Manager to be the individual who authorized the filing of the lawsuit on behalf of and in the name of the CITY OF MADEIRA is without merit.

As the governing body of the CITY OF MADEIRA, *i.e.*, the Madeira City Council, has not authorized the filing of this lawsuit, the filing thereof is without legal authority, *i.e.*, it is *ultra vires*. And absent such express and explicit authority having been given to either the Law Director or the City Manager, this action must be dismissed as its filing was *ultra vires*.

Respectfully submitted,

/s/ Curt C. Hartman
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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 4th day of June 2019.

/s/ Curt C. Hartman