

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

|                                |   |                                      |
|--------------------------------|---|--------------------------------------|
| <b>CAROL DONOVAN, et al.</b>   | : | <b>CASE NO. 21 CV 094117</b>         |
|                                | : |                                      |
| <b>Plaintiffs</b>              | : | <b>JUDGE TEPE</b>                    |
|                                | : |                                      |
| <b>v.</b>                      | : |                                      |
|                                | : | <b>DEFENDANTS' MOTION TO DISMISS</b> |
| <b>CITY OF LEBANON, et al.</b> | : | <b>PURSUANT TO CIV. R. 12(B)(6)</b>  |
|                                | : |                                      |
| <b>Defendants.</b>             | : |                                      |
|                                | : |                                      |

Defendants City of Lebanon and Mark Yurick hereby move to dismiss pursuant to Civ. R. 12(b)(6). As developed in the following Memorandum in Support, Plaintiffs' personal grievance with the decision of the Lebanon City Council on the control and supervision of municipal property and the regulations concerning meetings of the City Council, and the personal impact such a decision has on their attendance or participation at meetings of the City Council, does not give right to a valid taxpayer action or a valid basis for declaratory judgment.

Respectfully Submitted,

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## MEMORANDUM IN SUPPORT

Simply stated, the gravamen of this case involves Plaintiffs' disagreement with the decision of the Lebanon City Council by which individuals possessing a valid concealed carry license may exercise the right granted by that license while attending meetings of the City Council. Claiming that "[t]his case concerns Plaintiffs' and the public's ability to safely access their city government" (Complaint ¶5), Plaintiffs maintain that the recent action of the City Council to allow individuals with valid concealed carry licenses to carry concealed weapons while attending council meetings "chills Plaintiffs' engagement in the democratic process" because the action of the City Council "creates an environment in which Plaintiffs cannot feel safe." Complaint ¶ 6. Thus, Plaintiffs have improperly sought the intervention of this Court to second guess the decision of the Lebanon City Council on the control and supervision of municipal property and the regulations concerning meetings of the City Council.

### **I. Statement of Facts**

On March 10, 2020, the Lebanon City Council enacted Ordinance No. 2020-022, a copy of which is attached as Exhibit 1 to the Complaint. Pursuant to Ohio Revised Code § 2923.126(B)(7) Ordinance No. 2020-022 permits licensed individuals to carry concealed weapons in the City Building located at 50 South Broadway, Lebanon, Ohio 45036 during times when the Lebanon Municipal Court is not in operation. Ordinance No. 2020-022, in relevant part, reads:

**NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Lebanon, Ohio:**

**SECTION 1. That Section 508.13 of the Lebanon Code of Codified Ordinances, attached hereto as Exhibit A and incorporated herein as if fully set forth, permitting licensed individuals to carry concealed weapons in the City Building located at 50 South Broadway, Lebanon, Ohio 45036, during times when the Lebanon, Ohio Municipal Court is not in operation is hereby adopted pursuant**

**to Section 3.02 of the Charter of the City of Lebanon, Ohio and section 2923.126(B)(7) of the Ohio Revised Code.**

Ordinance No. 2020-022, Section 1 (Complaint, Exhibit 1). As provided, Ordinance No. 2020-022 enacted Section 508.13 of the Lebanon Code of Codified Ordinances, which reads:

**§ 508.13 CONCEALED HANDGUN POSSESSION ON CITY OWNED PROPERTY/BUILDINGS.**

**Pursuant to Ohio Revised Code section 2923.126, a licensee under Ohio Revised Code section 2923.125 or section 2923.1213 is authorized to carry a concealed handgun in the City of Lebanon, Ohio City Building located at 50 South Broadway, Lebanon, Ohio, except during the operation of any function of the Lebanon Municipal Court.**

Lebanon Code of Codified Ordinances § 508.13 (Complaint, Exhibit 1).

On March 10, 2020, Lebanon City Council also enacted Ordinance No. 2020-023, which rescinded City Council Rule 15, which had prohibited bringing weapons or items resembling weapons into Council Chambers. Complaint, Exhibit 2. While Plaintiffs mention Ordinance No. 2020-023 in their Complaint, they do not make any claims with respect to the validity or invalidity of the ordinance. All of Plaintiffs' claims, including their alleged taxpayer action and their request for declaratory judgment, relate solely to the Ordinance No. 2020-022. Complaint, ¶¶ 63 - 80.

On January 23, 2021, attorney William J. Dunning sent a letter on behalf of his clients – who are the Plaintiffs in this matter – to Defendant City Attorney Mark Yurick claiming that the City abused its corporate powers by enacting Ordinance No. 2020-022 and asking Mr. Yurick to seek an injunction pursuant to Ohio Revised Code § 733.56 restraining the application of Ordinance No. 2020-022. Complaint, Exhibit 3, p. 1. The City responded through counsel with a letter to Mr. Dunning stating that the enactment and enforcement of Ordinance No. 2020-022 is

within the power and authority of the City and does not rise to the level of a corporate abuse of power, and that the City, therefore, declines to seek the requested injunction. Complaint, Exhibit 4, p. 1. Plaintiffs responded by filing the Complaint, which fails to state a claim upon which relief can be granted.

## **II. Law and Argument**

A Civ. R. 12(B)(6) motion tests the sufficiency of the complaint. *Darby v. Cincinnati*, 2014-Ohio-2426, ¶ 5 (1st Dist. 2014). A complaint must be dismissed under Civ. R. 12(B)(6) when it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192-93, 532 N.E.2d 753 (1988); *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. In reviewing the complaint, all factual allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of the nonmoving party. *Mitchell*, 40 Ohio St.3d at 192. The court should not rely on evidence outside of the pleadings, but it may consider materials that are referred to or incorporated into the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992 Ohio 73, 605 N.E.2d 378 (1992).

### **a. Plaintiffs' taxpayer claim for injunctive relief under R.C. 733.59 should be dismissed.**

In Count One, Plaintiffs purport to bring a taxpayer claim pursuant to R.C. 733.56 *et seq.* Specifically, they maintain that Ordinance No. 2020-022 constitutes an abuse of corporate powers for which injunctive relief should issue.

**1. Plaintiffs fail to bring the putative taxpayer action by and on behalf of the municipal corporation.**

“A taxpayer suit is a unique type of ‘derivative action, created by statute, that is brought on behalf of the municipality to ensure that its officers comply with the law, do not misapply funds, or do not abuse the municipality’s corporate powers.’” *State ex rel. Doran v. Preble Cty. Bd. of Comm’rs*, 995 N.E.2d 239, 2013-Ohio-3579 ¶16 (12th Dist.) (quoting *Cincinnati ex rel. Ritter v. Cincinnati Reds, LLC*, 150 Ohio App.3d 728, 782 N.E.2d 1225, 2002-Ohio-7078 ¶20 (1st Dist.)). Thus, “the city is the real party in interest in a taxpayer lawsuit.” *Laituri v. Nero*, 138 Ohio App.3d 348, 351, 741 N.E.2d 228, 2001-Ohio-230 ¶ (11th Dist.); accord *Ritter*, 150 Ohio App.3d 728, 782 N.E.2d 1225, 2002-Ohio-7078 ¶21.

Pursuant to Ohio R. Civ. P. 17(A), “[e]very action shall be prosecuted in the name of the real party in interest.” Having failed to prosecute their putative taxpayer action in relation to the municipal corporation as the real party in interest – and a reasonable time has been allowed to correct such error – dismissal is warranted. See *State ex rel. Hostetter v. Hunt*, 56 Ohio App. 120, 10 N.E.2d 155 (1937) (with respect to county statutory action, “the action contemplated by [R.C. 309.13] is required to be instituted in the name of the state”).

**2. Plaintiffs improperly seek to vindicate their own personal or private motive, not a public right and, thus, lack standing to pursue the taxpayer action.**

Taxpayer actions, involving an abuse of corporate powers, are carefully restricted by court decisions.” *City of Columbus ex rel. Willits v. Cremean*, 27 Ohio App.2d 137, 149, 273 N.E.2d 324 (10th Dist. 1971). “[T]axpayers cannot contest official acts ‘merely upon the ground that they are unauthorized and invalid.’” *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Comm’rs*, 132 Ohio St.3d 47, 969 N.E.2d 224, 2012-Ohio-1861 ¶16 (quoting *Pierce v. Hagans*, 79 Ohio St. 9, 22, 86 N.E. 519 (1908)); accord *Neuendorff v. Gibbons*, 2018-Ohio-2980 ¶ 10(6th

Dist.). For a taxpayer to maintain an action under R.C. 733.59, the “aim must be to enforce a public right, regardless of any personal or private motive or advantage.” *State ex rel. Caspar v. Dayton*, 53 Ohio St.3d 16, 20, 558 N.E.2d 49 (1990). And “the taxpayer should have unselfish motives.” *Willits v. Cremean*, 27 Ohio App.2d at 149. Thus, “when the taxpayer’s aim is merely for his own benefit, no public right exists, and a taxpayer action pursuant to R.C. 733.59 cannot be maintained.” *Cleveland ex rel. O’Malley v. White*, 148 Ohio App.3d 564, 774 N.E.2d 337, 2002-Ohio-3633 ¶46.

As alleged extensively in the *Complaint*, Plaintiffs are seeking to vindicate and remedy their own personal rights, interests, concerns, and objections vis-à-vis Ordinance No. 2020-022 and, in particular, as they relate to their attendance at future meetings of the Lebanon City Council:

- Describing the Lebanon City Council as the “center of their community”, *Complaint* ¶1;
- Plaintiffs “share a history of attending City Council meetings and a desire to participate in the democratic process freely, without fear or intimidation”, *Complaint* ¶4; *accord Complaint* ¶10; *Complaint* ¶45; *Complaint* ¶¶51-52; *Complaint* ¶56;
- “[t]his case concerns” the “ability to safely access” meetings of the Lebanon City Council, including “observ[ing] [the] government at work and to be heard on issues before the City Council”, *Complaint* ¶5;
- Ordinance No. 2020-022 “creates an environment in which Plaintiffs cannot feel safe” and “chills Plaintiffs’ engagement in the democratic process”, *Complaint* ¶6;
- Plaintiffs’ interest is in having “safe access to Lebanon’s government, including through attendance at City Council meetings and work sessions”, *Complaint* ¶14;
- “The Ordinance affects Plaintiffs’ access to City Council meetings and work sessions and chills their engagement in the democratic process”, *Complaint* ¶46;
- “The potential presence of concealed firearms [during meetings of City Council] heighten [Plaintiff] Donovan’s risk of physical harm and burdens her with an unreasonable level of fear and concern about potential harm to herself or others”, *Complaint* ¶48;
- Plaintiff Donovan “believes that the presence of concealed firearms in the [City Building] invites catastrophe”, *Complaint* ¶50;
- “In light of the Ordinance,... [Plaintiff] Iannelli has decided that he can no longer attend City Council meetings. The presence of concealed firearms at City Council meetings

burdens Iannelli with prohibitive fear and stress, and increases his risk of physical harm”, *Complaint ¶53*;

- [Plaintiff] Iannelli has “experienced significant distress and anxiety associated with the presence of firearms”, *Complaint ¶54*;
- “So long as the possession of concealed firearms is permitted at City Council meetings and work sessions, [Plaintiff] Iannelli will no longer attend or participate in City Council proceedings”, *Complaint ¶55*;
- “The Ordinance has affected [Plaintiff] Handley’s attendance at and participation in City Council meetings and work sessions. Specifically, she has experienced fear, anxiety, and discomfort while attending City Council proceedings”, *Complaint ¶57*;
- Plaintiff Handley “decided not to speak at a recent City Council meeting...due, in part, to her fear that other attendees at the meeting were carrying concealed guns”, *Complaint ¶58*;
- Plaintiff Handley “fears the serious physical harm that she or others could suffer due to the presence of firearms at City Council meetings.... Handley experiences anxiety caused by her knowledge that the likely presence of firearms increase the risk of a dangerous escalation”, *Complaint ¶58*.

Clearly, by their own repeated and extensive admissions in the *Complaint*, this action is not being brought to vindicate a public interest but, instead, is an effort to address and remedy the personal fears, stresses, or anxieties Plaintiffs claim to experience knowing that properly licensed individuals may be carrying concealed weapons at meeting of City Council and the impact thereof of their attendance or participation at such meetings. Thus, Plaintiffs have improperly brought such a challenge as a taxpayer lawsuit pursuant to R.C. 733.56 *et seq.* “[A]llowing constant judicial intervention into government affairs for matters that do not involve a clear public right would not also benefit the public.” *Teamsters*, 132 Ohio St.3d 47, 969 N.E.2d 224, 2012-Ohio-1861 ¶17. Accordingly, Plaintiffs have not brought a claim under the municipal taxpayer-lawsuit provisions upon which relief may be granted.

**3. On the merits, Plaintiffs have not sufficiently alleged a taxpayer claim upon which relief may be granted.**

Even on the merits of the statutory taxpayer action, Plaintiffs have failed to state a claim upon which relief may be granted. Plaintiffs must establish, in order to prevail, that the City “engaged in an unlawful exercise of its powers” or “assumed powers not conferred.” *Porter v. Oberlin*, 1 Ohio St. 2d 143, 146, 205 N.E.2d 363 (1965). The crux of Plaintiffs’ putative taxpayer claim is that Ordinance No. 2020-022 conflicts with Ohio Revised Code Sections §§ 2923.123, 2923.126(B)(3), and 2923.126(B)(7). *See* Complaint, ¶¶ 63 – 74 and prayer for relief (b). Thus, the legal premise for the claim is that “City Council exceeded Lebanon’s Home Rule authority in passing the Ordinance”, *Complaint* ¶71, and, therefore, assumed powers not conferred. But even assuming *arguendo* all factual allegations (not legal conclusion) in the Complaint as true and drawing all reasonable inferences therefrom in favor of Plaintiffs, Ordinance No. 2020-022 does not conflict with the Ohio Revised Code, and enactment and enforcement of the Ordinance is well within the City’s home rule authority.

The Home Rule Amendment to the Ohio Constitution “confers a high measure of sovereignty upon municipalities,” *City of Cleveland v. City of Shaker Heights*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987), “to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Ohio Const., art. XVII, sec. 3; *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 81 Ohio St. 3d 599, 602, 693 N.E.2d 212 (1998). “The power of local self-government and that of the general police power are constitutional grants of authority equivalent in dignity. A city may not regulate activities outside its borders, and *the state may not restrict the exercise of the powers of self-government within a city.*” *Canton v. Whitman*, 44 Ohio St.2d 62, 66, 337

N.E.2d 766 (1975) (emphasis added). “It is of the essence of home rule and of self-government that the sovereign body that has that power, whether described as a commission, council, assembly or otherwise, has the inherent power to carry on its duties according to its own rules. Were it otherwise, home rule and self-government would become a fiction, and the purpose of the constitutional amendment would be denied.” *City Comm’n of Piqua v. Piqua Daily Call*, 64 Ohio App.2d 222, 225, 412 N.E.2d 1331 (2d Dist. 1979). Thus, “[t]he courts are sensitive to the home rule authority of municipalities because a disregard of that authority would be an effective nullification of the constitutional right.” *Payphone Ass’n of Ohio v. City of Cleveland*, 146 Ohio App. 3d 319, 328, 766 N.E.2d 167, 2001 Ohio App. LEXIS 4095 (8th Dist. 2001).

Nonetheless, courts “have used a three-part test to evaluate conflicts under the Home Rule Amendment.” *Cleveland v. State*, 128 Ohio St.3d 135, 942 N.E.2d 370, 2010-Ohio-6318 ¶10. “A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.” *City of Canton v. State*, 95 Ohio St. 3d 149, 766 N.E.2d 963, 2002-Ohio-2005 ¶9; *accord Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, 896 N.E.2d 967, 2008-Ohio-4605 ¶24. Plaintiff cannot establish or satisfy this test to invalidate Ordinance No. 2020-022.

**i. Ordinance No. 2020-022 does not conflict with state statute.**

“In determining whether an ordinance is in ‘conflict’ with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” *City of Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 859 N.E.2d 514, 2006-Ohio-6422 (quoting *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus ¶2); *see also State v. Burnett*, 93 Ohio St.3d 419, 755 N.E.2d 857, 2001 Ohio 1581; *Middleburg Hts. v. Ohio Bd. of Bldg. Standards*, 65 Ohio St.3d 510, 512, 605 N.E.2d 66, 1992-Ohio-11. “In other words, ‘[n]o real conflict can exist

unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa.” *Baskin*, 112 Ohio St. 3d at 283, quoting *Sokol*, 108 Ohio St. at 268.

In determining whether a conflict exists, courts have a general duty, whenever possible, to harmonize local ordinances with state law. *City of Tiffin v. McEwen*, 130 Ohio App.3d 527, 531, 720 N.E.2d 587 (3d Dist. 1998); *Payphone Assn. of Ohio v. Cleveland*, 146 Ohio App. 3d 319, 328, 766 N.E.2d 167 (8th Dist. 2001); *N. Ohio Patrolman Benevolent Assn. v. Parma*, 61 Ohio St.2d 375, 377, 402 N.E.2d 519 (1980). And any doubts regarding the validity of a legislative enactment should be resolved in favor of the enactment. *State v. Gill*, 63 Ohio St. 3d 53, 55, 584 N.E.2d 1200 (1992); *City of Tiffin*, 130 Ohio App.3d at 531.

Plaintiffs contend that certain provisions of state law impermissibly conflict with Ordinance No. 2020-022 so as to invalidate the latter. First, Plaintiffs rely upon R.C. 2923.123 (A) and (B), which read:

**(A) No person shall knowingly convey or attempt to convey a deadly weapon or dangerous ordnance into a courthouse or into another building or structure in which a courtroom is located.**

**(B) No person shall knowingly possess or have under the person's control a deadly weapon or dangerous ordnance in a courthouse or in another building or structure in which a courtroom is located.**

Next, Plaintiffs rely upon state law addressing the duties of persons possessing a concealed handgun license in R.C. 2923.126:

**(B) A valid concealed handgun license does not authorize the licensee to carry a concealed handgun in any manner prohibited under division (B) of section 2923.12 of the Revised Code or in any manner prohibited under section 2923.16 of the Revised Code. A valid license does not authorize the licensee to carry a concealed handgun into any of the following places:**

**(3) A courthouse or another building or structure in which a courtroom is located if the licensee's carrying the concealed handgun is in violation of section 2923.123 of the Revised Code;**

**(7) Any building that is a government facility of this state or a political subdivision of this state and that is not a building that is used primarily as a shelter, restroom, parking facility for motor vehicles, or rest facility and is not a courthouse or other building or structure in which a courtroom is located that is subject to division (B)(3) of this section, unless the governing body with authority over the building has enacted a statute, ordinance, or policy that permits a licensee to carry a concealed handgun into the building;**

According to Plaintiffs, “read together [these statutes] prohibit the carrying and possession of firearms within courthouses and other buildings containing courtrooms” and “such prohibition applies even to individuals who are otherwise licensed to carry concealed handguns throughout the state of Ohio.” Complaint ¶ 27. Plaintiffs’ challenge to Ordinance No. 2020-022 rests solely upon their contention that the Ordinance permits the carrying of a concealed handgun into a building that contains a courtroom. Complaint ¶¶ 28-37.<sup>1</sup> Such a claim is without merit as the Ordinance does not allow the carrying or possession of any firearm – concealed or not – in any building that contains a courtroom.

This case raises the question how temporally a courtroom constitutes a courtroom when the venue in which court is held also is a multipurpose room utilized at times when court is not in session for other governmental functions. As Plaintiffs admit, a room within the City Building serves multiple purposes, sometimes functioning as the municipal courtroom while, at other times, being the venue where the Lebanon City Council conducts its meetings. *Complaint* ¶¶ 28-30. Inevitably, other committees or groups may also utilize this same space.

The Revised Code, including R.C. Chapter 2923, does not define or include a definition of a “courtroom.” But R.C. 1901.36 does impose the requirement on municipalities to provide various accommodations for municipal court, including “suitable accommodations for the

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<sup>1</sup> Plaintiffs make no claim that the City Building is a “courthouse.” They claim only that the City Building contains a “courtroom.” *See generally* Complaint ¶¶ 28-37.

municipal court and its officers....suitable accommodations for a law library, complete sets of reports of the supreme and inferior courts and such other law books and publications as are deemed necessary by the presiding judge, and shall provide for each courtroom, a copy of the Revised Code.....[and] any other employees that are necessary.” Thus, “Municipal Courts remain dependent to a reasonable extent upon the legislative authority of the municipality in which they sit.” *State ex rel. Cleveland Municipal Court v. Cleveland City Council*, 34 Ohio St.2d 120, 127, 296 N.E.2d 544 (1973). And, in the first instance, the nature, scope or limitations on the accommodations provided for a municipal court are the prerogative of the legislative authority of the municipality. In fact, in addressing R.C. 1901.36, the Ohio Supreme Court recognized the discretion afforded to the legislative authority: “[i]t is only in regard to the law library that sole discretion is left to the ‘presiding judge.’ The remaining clauses of R.C. 1901.36 are geared to the discretion of the ‘legislative authority’.” *Id.* Thus, the Lebanon City Council, in providing a multipurpose room as a courtroom for the municipal court when it is in session, still retains the discretion to treat and consider the venue differently at other times.

And in another case, the Ohio Supreme Court implicitly recognized that the use of a multipurpose room as a “courtroom” does not preclude other uses or designations of such venue when court is not in session. In *State ex rel. Musser v. City of Massillon*, 12 Ohio St. 3d 42, 45-46, 465 N.E.2d 400 (1984), the judges of a municipal court sought a writ of mandamus to compel the municipality to allow the use of council chambers as accommodations for the court’s referee. Recognizing that R.C. 1901.36 grants municipalities, in the first instance, the authority to provide and define the accommodation for a municipal court, the Court granted the writ because council chambers were adjacent to existing courtrooms and the Rules of Superintendence required referees have court and office facilities similar to those offered a judge. Implicit in the Court’s decision

and written opinion is the concept that the council chambers will constitute a “courtroom” when court is being held by the referee, but at other times will remain council chambers. *Id*; *see also State ex rel. Law Office of the Pub. Defender v. Rosencrans*, 2005-Ohio-6681 (2d Dist.) (mayor’s court conducted in council chambers).

Furthermore, the fact that a multipurpose room – such as is at issue in this case – is considered a “courtroom” only when court is in session is consistent with other provisions of the Revised Code. R.C. 1901.028 allows for a municipal court to be held in a temporary location – even outside its jurisdiction – in certain circumstances. Clearly, when court is in session in such a temporary location, the room in which it is held must be considered a “courtroom” for purposes of interpreting other sections of the Ohio Revised Code. For example, R.C. 2945.49 addresses when a child victim is required to testify at trial and provides for a child’s deposition to serve as such testimony and be televised into or recorded and played in “the courtroom.” The temporary location of a court pursuant to R.C. 1901.028 must be considered a “courtroom” for purposes of R.C. 2945.49. But, logically, when the court is not in session at its temporary location, that temporary location would no longer be a “courtroom.”

The fact that a multipurpose room is only considered a “courtroom” when court is in session is also consistent with the well-accepted definition of a “court.” As explained by the Ohio Supreme Court:

**A court is an incorporeal, political being, composed of one or more judges, who sit at fixed times and places, attended by proper officers, pursuant to lawful authority, for the administration of justice. It is only when a court is in session thus regularly constituted that it may lawfully perform its fixed and permanent functions...**

*State ex rel. Hawke v. Le Blond*, 108 Ohio St. 126, 133, 140 N.E. 510 (1923). Consistent with this definition, a court exists only when it is in session. *A fortiori*, a multipurpose room that is used for court only part of the time constitutes a “courtroom” only when court is in session.

Finally, the interpretation that a multipurpose room is considered a “courtroom” only when court is in session is consistent with the manifest legislative intent of the R.C. Chapter 2923 provisions regarding courtrooms at issue in this matter. Courts are convened to resolve disputes, administer justice, and interpret law. In doing so courts encounter parties that are hostile to each other, the court, the attorneys, witnesses and others. And courts hold the future of those in the courtroom in their hands in both civil and criminal proceedings. The fact that parties in a court proceeding can become agitated and even dangerous is well known and evidenced by the heightened security in courts. The legislature acknowledged these facts and the increased risk of violence in such circumstances when they enacted the Revised Code provisions disallowing deadly weapons (including handguns) in courts.

When a court that convenes in a multipurpose room is not in session, that manifest legislative intent no longer applies to that multipurpose room. As admitted by Plaintiffs, when court is not in session in Lebanon’s City Building, the room in which court is held is used for other purposes including as city council chambers for city council meetings and other city council business. The Ohio General Assembly has not placed any restrictions on local governments allowing carrying, possession, or concealed carry of handguns (or other deadly weapons) in city council chambers or during city council meetings. R.C. 2923.126(B)(7). R.C. 2923.126 creates a right to concealed carry subject to specific exceptions. *Ohioans for Concealed Carry*, 120 Ohio

St. 3d 96, 105, 896 N.E.2d 967, 2008-Ohio-4605 ¶ 53. These exceptions do not prohibit doing so into a city council chamber or during meetings of a city council.<sup>2</sup>

In fact, Plaintiffs do not claim that any use of the City Building falls within any of these exceptions, except for the alleged “courtroom” in the City Building. For the reasons explained above, a “courtroom” exists in the City Building only when the Lebanon Municipal Court is in session. Ordinance No. 2020-022 specifically provides that “... a licensee under Ohio Revised Code section 2923.125 or section 2923.1213 is authorized to carry a concealed handgun in the City of Lebanon, Ohio City Building... *except during the operation of any function of the Lebanon Municipal Court.*” Lebanon Code of Codified Ordinances § 508.13 (Complaint, Exhibit 1). Accordingly, Ordinance No. 2020-022 does not allow the carrying or possession of any firearm – concealed or not – in any building that contains a courtroom. Accordingly, the Ordinance does not directly conflict with state law and Plaintiffs have failed to state a claim upon which relief may be granted.

**ii. Ordinance No. 2020-022 is a proper exercise of local self-government.**

Because Ordinance No. 2020-022 does not conflict with state law, it is a valid exercise of the City’s home rule sovereignty. Even if this Court were to find, however, that Ordinance No. 2020-022 does conflict with a state statute, it is still a valid exercise of the City’s home rule

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<sup>2</sup> Much of Plaintiffs’ Complaint is irrelevant to their claims, because it addresses how the Plaintiffs feel about concealed carry being allowed in the City of Lebanon’s city council chambers and during city council meetings. See Complaint ¶¶ 40 – 59. Plaintiffs do not claim, nor would they have any legal basis to do so, that the City of Lebanon cannot allow for concealed carry in city council chambers or during city council meetings or business. Plaintiffs’ claims rest solely on their unsupported allegation that Ordinance No. 2020-022 conflicts with state law regarding carrying, possession, and concealed carry of deadly weapons in buildings that contain a courtroom. The allegations in their complaint regarding city council meetings and chambers are wholly irrelevant to the legal issues in this matter.

authority because it constitutes a matter of local self-governance, rather than an exercise of local police power.

As stated above, one of the required elements in establishing that a local ordinance exceeds a municipality's home rule authority is that the ordinance at issue constitutes an exercise of police power rather than an exercise of local self-governance. *Ohioans for Concealed Carry, Inc.*, 120 Ohio St. 3d at 99. "If the ordinance is one relating solely to matters of self-government, 'the [home rule] analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.'" *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008 Ohio 92, 880 N.E.2d 906, P 11, quoting *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 20, 539 N.E.2d 103 (1989). "An ordinance created under the power of local self-government must relate 'solely to the government and administration of the internal affairs of the municipality.'" *Id.*, quoting *Beachwood v. Cuyahoga Cty. Bd of Elections* (1958), 167 Ohio St. 369, 5 O.O.2d 6, 148 N.E.2d 921

Defendants acknowledge that in *Ohioans for Concealed Carry, Inc. v. City of Clyde*, the Ohio Supreme Court determined that the City of Clyde deadly weapon ordinance at issue was an exercise of the City's police power, rather than an exercise of local self-governance. The Court acknowledged, however, that this was the first case in which the Court had "spoken directly on the subject of firearm regulations as an exercise of police power in the home rule context." *Ohioans for Concealed Carry, Inc.*, 120 Ohio St. 3d at 101. Because the ordinance at issue in *Ohioans for Concealed Carry, Inc.* is distinguishable from and of a completely opposite nature to Ordinance No. 2020-022, the reasoning applied by the Court to determine that the City of Clyde ordinance was an exercise of police power does not apply to Ordinance No. 2020-22.

The ordinance at issue in *Ohioans for Concealed Carry, Inc.* prohibited the carrying and possession of deadly weapons in any city park, and provided that a violation of the ordinance was a first-degree misdemeanor. *Id.* at 98. Ordinance No. 2020-022 at issue in this matter is not aimed at, nor does it impose, a restriction on the carrying or possession of a firearm. Complaint, Exhibit 1. In fact, Ordinance No. 2020-022 does the opposite. It expands properly licensed citizens' rights to carry concealed weapons to the City Building. *Id.*

In determining that the City of Clyde ordinance was an exercise of police power in the home rule context, the Court relied on appellate court decisions. And, the Court relied on the fact that the City of Clyde ordinance “imposes a penalty just as the ordinances presented in *Marich, Baskin, Mendenhall, and Ohio Assn. of Private Detective Agencies*,” (which are cases where the ordinances at issue were considered exercises of police power). *Id.* at 101 – 102.

The ordinances at issue in the appellate court decisions upon which the Court relied in *Ohioans for Concealed Carry, Inc.* were aimed at restricting the carrying and/or possession of firearms to protect citizens from the alleged potential dangers of firearms and/or certain aspects of firearms or other deadly weapons. See *Ohioans for Concealed Carry, Inc.*, 120 Ohio St. 3d at 101 – 102; *Cincinnati v. Baskin*, 158 Ohio App. 3d 539, 2004 Ohio 5055, P8, 817 N.E.2d 433 (ordinance at issue prohibited the possession of certain semiautomatic firearms); *Cincinnati v. Langan* (1994), 94 Ohio App.3d 22, 30, 640 N.E.2d 200 (ordinance at issue prohibited the possession of semiautomatic firearms and detachable magazines of certain capacities); *Toledo v. Beatty*, 169 Ohio App.3d 502, 2006 Ohio 4638, 863 N.E.2d 1051, P 45 (ordinance at issue prohibited the carrying of a firearm in city parks).<sup>3</sup> As explained above, Ordinance No. 2020-

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<sup>3</sup> The Court in *Ohioans for Concealed Carry, Inc.* noted that the appellate court decisions upon which it relied were consistent with its decision in *Klein v. Leis* (2003), 99 Ohio St.3d 537, 2003

022 at issue here does the opposite. Rather than imposing more restrictions, it expands properly licensed citizens ability to carry concealed handguns to the City Building.

Further, Ordinance No. 2020-022 does not impose any penalty. Complaint, Exhibit 1. The inclusion of a penalty in the ordinance at issue in *Ohioans for Concealed Carry, Inc.* was a key element in the Court’s determination that the ordinance was an exercise of police power. *Ohioans for Concealed Carry*, 120 Ohio St. 3d at 102.

For these reasons, the Court’s reasoning for determining that the City of Clyde ordinance was an exercise of police power is wholly inapplicable to Ordinance No. 2020-022 at issue in this case. This case presents an issue of first impression regarding whether a local ordinance that expands the ability of citizens to possess and carry firearms – rather than restricting it – is an exercise of local self-governance or of police power. The facts in this case support the conclusion that, as a matter of law, Ordinance No. 2020-022 is an act of self-governance. By its terms, it was enacted to “provide clear and consistent rules for the administration of Council.”<sup>4</sup>

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Ohio 4779, 795 N.E.2d 633, P 13. *Klein* did not address the question of home rule. It addressed the constitutionality of ORC §§ 2923.12, 2923.16(B) and (C), which prohibited the carrying of concealed weapons. *Klein*, just like the appellate court cases that relied on it, is distinguishable because the state statutes at issue imposed restrictions on the carrying of firearms. As explained above, Ordinance No. 2020-022 does the opposite.

<sup>4</sup> While Ordinance No. 2020-022 also provides that it is “for the preservation of the public peace, health, safety, morals and welfare of the City of Lebanon,” that language is not dispositive of whether the ordinance is an exercise of self-governance or police power. In considering similar language in the City of Clyde ordinance at issue in *Ohioans for Concealed Carry, Inc.*, the Court noted that “a municipality’s description or classification of its enactments is not dispositive.” *Ohioans for Concealed Carry*, 120 Ohio St. 3d at 102. The Court found that the language in the City of Clyde ordinance supported the Court’s determination that the ordinance was an exercise of police power. As described above, however, the facts and authority upon which the Court made that determination are distinguishable, and in fact the opposite, of Ordinance No. 2020-022 in this case. And the Court’s reasoning for that determination does not apply in this case.

Ordinance No. 2020-022, Section 2 (Complaint, Exhibit 1). As such, it is aimed at the “administration of the internal affairs of the municipality” and constitutes an exercise of local self-governance.

Because Ordinance No. 2020-022 is an exercise of local self-governance, it is a valid and enforceable exercise of the City’s home rule authority and must stand even if it were to conflict with a general law of the State – which as explained above, it does not. Further, Plaintiffs’ claim that Ordinance No. 2020-022 exceeds the City’s home rule authority fails for the separate and independent reason that the Ordinance does not conflict, as Plaintiffs claim, with Ohio Revised Code § 2923.123, § 2923.126(B)(3), or § 2923.126(B)(7).<sup>5</sup>

Plaintiffs cannot establish a claim for taxpayer injunctive relief under Ohio Revised Code § 733.59, because their claim that the City abused its corporate authority by exceeding its home rule authority in enacting the Ordinance No. 2020-022 fails as a matter of law.

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<sup>5</sup> Defendants posit that Plaintiffs’ claim that Ordinance No. 2020-022 also fails because the statutes Plaintiffs claims it conflicts with are not general laws. The trial court in *Ohioans for Concealed Carry, Inc.* relied on *Toledo v. Beatty*, 169 Ohio App.3d 502 to determine that ORC § 2923.126 is not a general law, and that the City of Clyde ordinance therefore did not violate Clyde’s home rule authority. Between the trial court’s decision, however, and the appellate court’s decision, the Ohio General Assembly enacted ORC § 9.68. The appellate court relied on the enactment of ORC § 9.68 to distinguish *Beatty*, overrule the trial court and hold that ORC § 2923.126 is a general law and that “[b]ecause R.C. 9.68(A) precluded any law other than state or federal law from infringing on the right to carry arms, the law preempted Clyde Ordinance 2004-41.” The case was then appealed to the Ohio Supreme Court. According to the Ohio Supreme Court’s opinion, “[s]imply put, the General Assembly, by enacting R.C. § 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so.” This could be interpreted as merely ensuring that local governments do not attempt to impose more restrictions on the carrying and possession of handguns and as not having any impact on local ordinances, such as the one at issue, that do not attempt to impose such additional restrictions. Accordingly, the appellate court may have been too quick to rely on ORC § 9.68 as a basis for determining that ORC § 2923.126 is a general law. Defendants posit that it is not a general law, and that this is a third, and independent, reason that Plaintiffs cannot establish that Ordinance No. 2020-022 exceeds the City’s home rule authority.

**b. Plaintiffs' claim for declaratory judgment should be dismissed**

Count Two of Plaintiffs' Complaint seeks a declaration that that Ordinance No. 2020-022 conflicts with Ohio Revised Code §§ 2923.123, 2923.126(B)(3), and 2923.126(B)(7) and is therefore invalid and can have no force or effect. Complaint, ¶¶ 75-80.

**1. Plaintiffs lack standing to bring their declaratory judgment claim**

Plaintiffs lack standing to bring their declaratory judgment claim because they do not allege that their "rights, status, or other legal relations" have been impaired by Ordinance No. 2020-022, as is required by R.C. 2721.03.

To maintain an action for declaratory judgment, a party must show that a real controversy exists between the parties, which is justiciable in character, and that speedy relief is necessary to the preservation of rights, which may otherwise be impaired or lost. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97, 296 N.E.2d 261; *Indiana Ins. Co. v. Forsmark*, 160 Ohio App.3d 277, 2005 Ohio 1635, 826 N.E.2d 915. "[A] declaratory judgment action lies when a party challenges a statute as it specifically applies to him or her." *Kuhar v. Medina County Bd. of Elections*, 2006-Ohio-5427, \*P13, 2006 Ohio App. LEXIS 5412 citing *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12, 16, 526 N.E.2d 1350; *State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 745 N.E.2d 494. "Courts only have the power to resolve present disputes and controversies, but do not have the authority to issue advisory opinions to prevent future disputes." *Kuhar*, 2006-Ohio-5427, \*P14. The controversy must be a real or actual controversy. See *Burger Brewing Co.*, at 97.

Plaintiffs do not allege any right or any justiciable real or present controversy or dispute that is relevant to their request for declaratory judgment. Their request for declaratory judgment is based on their allegation that Ordinance 2020-022 conflicts with state law provisions disallowing firearms in buildings containing a courtroom. Yet, Plaintiffs make no allegations regarding their rights or any present controversies or disputes related to the concealed carry of weapons in the City Building when court is in session or in any way related to court. Their allegations relate solely to the how they feel about concealed carry being allowed in city council meetings.

Allegations regarding city council meetings are irrelevant to the reason they claim they seek declaratory judgment. It is clear that Plaintiffs are merely asking this Court for an advisory opinion with respect to how Ordinance 2020-022 interacts with state statutes regarding carrying firearms into building containing courtrooms. It is well established under Ohio law that courts do not have the authority to issue such advisory opinions, and plaintiffs who attempt to bring such claims do not have standing to do so.

## **2. On the merits, Plaintiffs fail to state a claim for declaratory judgment**

For the reasons explained above, even taking all of Plaintiffs' factual allegations in the Complaint as true and drawing all reasonable inferences in favor of Plaintiffs, as a matter of law, Ordinance No. 2020-022 does not conflict with Ohio Revised Code § 2923.123, § 2923.126(B)(3), or § 2923.126(B)(7). Plaintiffs request for a declaration that it does, therefore, should be dismissed.

And, as explained above, even assuming that this Court were to find that Ordinance No. 2020-022 does conflict with one or more of those state statutes – which it does not – it is still valid and enforceable because it is an exercise of the City's self-governance. As such it is a valid and enforceable exercise of the City's home rule authority.

### III. Conclusion

Based on the foregoing, Plaintiffs' Complaint should be dismissed in its entirety with prejudice.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the foregoing was served this 3<sup>rd</sup> day of May 2021, via email upon the following:

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