

COURT OF COMMON PLEAS  
WARREN COUNTY, OHIO

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JAMES L. SPAETH  
CLERK OF COURTS

CAROL DONOVAN, et al.	:	CASE NO. 21 CV 094117
	:	
Plaintiffs	:	JUDGE TEPE
	:	
v.	:	
	:	DEFENDANTS' REPLY IN SUPPORT
CITY OF LEBANON, et al.	:	OF THEIR MOTION TO DISMISS
	:	PURSUANT TO CIV. R. 12(B)(6)
Defendants.	:	
	:	

In their Opposition to Defendants' Motion to Dismiss the Complaint ("Plaintiffs' Response") Plaintiffs admit that preventing concealed carry in Lebanon City Council meetings to quell their own personal fears and concerns is "at the heart of the Complaint." Plaintiffs' Response, p. 19. Plaintiffs describe the alleged "controversy" in this matter as follows:

The Ordinance...is currently interfering with Plaintiffs' abilities to attend and participate in City Council meetings. That is, Plaintiffs are already facing a dilemma over whether to refrain from participating in City Council meetings or face the increased risk of physical harm and armed intimidation, along with the attendant fear and anxiety, posed by concealed firearms. As a result, two Plaintiffs have already stopped attending the meetings, and the third has curtailed her participation.

Plaintiffs' Response, p. 18 (internal citation omitted). This description is consistent with Plaintiffs' Complaint which spends *at least 27 paragraphs* describing Lebanon City Council meetings and Plaintiffs' personal positions, concerns, and fears related to allowing conceal carry of handguns into city council meetings, and which *does not mention even a single concern* about the impact of concealed carry related to court proceedings. Complaint ¶¶ 1-6, 10, 14, 40-46, 48, 50-59. 74.

It is undisputed, however, that there is no prohibition on local governments allowing the concealed carry of handguns in city council meetings or during city council business. As Plaintiffs admit in their response, "Licenses may carry a concealed handgun 'anywhere in this state,' subject to certain enumerated exceptions. R.C. § 2923.126(A)." Plaintiffs' Response, p. 2. Plaintiffs do

not claim – nor could they – that city council meetings or business are included in any of those “certain enumerated exceptions.” The “controversy” that Plaintiffs claim exists, therefore, does not give rise to a valid taxpayer action nor is it a valid basis for declaratory judgment.

Further, to try to remedy the defects in their Complaint and in the fundamental “controversy” they present to this Court, Plaintiffs rely on mischaracterizations of Defendants’ arguments and speculation about possible facts that were neither presented in the Complaint nor that can be drawn from any reasonable inference of facts alleged in the Complaint.

### **I. Law and Argument**

“In deciding whether a complaint should be dismissed pursuant to Civ.R. 12(B)(6), the court's review is *limited to the four corners of the complaint along with any documents properly attached* to or incorporated within the complaint.” *Demeraski v. Bailey*, 2015-Ohio-2162, \*P12, 35 N.E.3d 913, 2015 Ohio App. LEXIS 2261 (8<sup>th</sup> Dist. 2015) (emphasis added); see also *Loveland Education Asso. v. Loveland City School Dist. Bd. of Education*, 58 Ohio St. 2d 31, 32, 387 N.E.2d 1374 (1979). The court accepts as true all the material factual allegations of the complaint and construes all reasonable inferences to be drawn from those facts in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192, 532 N.E.2d 753, 1988 Ohio LEXIS 450 (1988); *BAC Home Loans Servicing, LP v. Kolenich*, 194 Ohio App. 3d 777, 786, 2011-Ohio-3345, 958 N.E.2d 194, 2011 Ohio App. LEXIS 2836 (12<sup>th</sup> Dist. 2011).

#### **a. Plaintiffs’ purported taxpayer action should be dismissed.**

Plaintiffs’ purported taxpayer action in their Count One should be dismissed for three independent reasons: (1) Plaintiffs failed to bring the action in the name of the real party in interest, the City of Lebanon; (2) Plaintiffs do not seek to vindicate a public right and, thus, lack standing to pursue the taxpayer action; and (3) the purported taxpayer action fails on its merits, because Ordinance 2020-022 is well within the home rule authority of Defendant the City of Lebanon.

**1. Plaintiffs fail to bring the putative taxpayer action in the name of the real party in interest, the City of Lebanon.**

Plaintiffs' Complaint must be dismissed because Plaintiffs failed to bring it in the name of the real party in interest as required under Civ.R. 17(A), which reads "[e]very action shall be prosecuted in the name of the real party in interest." Plaintiffs mischaracterize the authority presented by Defendants on this issue. Plaintiffs erroneously claim that Defendants rely "primarily on a decision that interprets a *different* taxpayer statute that, unlike R.C. 733.59, requires a taxpayer to "institute [a] civil action *in the name of the state*." Plaintiffs' Response, p. 5.

Defendants, in fact, rely on *City of Cincinnati ex rel. Ritter v. Cincinnati Reds*, interpreting R.C. § 733.59, the same taxpayer statute under which Plaintiffs bring their taxpayer claim. Defendants' Motion, p. 5; Plaintiffs' Complaint ¶¶ 63-74; *City of Cincinnati ex rel. Ritter v. Cincinnati Reds*, 150 Ohio App. 3d 728, 734, 782 N.E.2d 1225 (1<sup>st</sup> Dist. 2002). In *Ritter*, the Court held that the municipality, the City of Cincinnati, "was the real party in interest." *Ritter* at 738.<sup>1</sup>

Given that the municipality is the real party in interest in taxpayer actions under R.C. § 733.59, in accordance with Civ.R. 17(A), such actions must be brought in the name of the municipality – in this case the City of Lebanon. Having failed to do so – and a reasonable time has been allowed to correct such error – dismissal is warranted. See Civ.R. 17(A).

Plaintiffs present no authority to the contrary. Although Plaintiffs cite *Bower v. Village of Mount Sterling*, 12th Dist. Madison No. CA99-10-025, 2000 Ohio App. LEXIS 1807 (12<sup>th</sup> Dist. 2000) and *Mack v. City of Toledo*, 6th Dist. Lucas No. L-19-1010, 2019-Ohio-5427 (6<sup>th</sup> Dist. 2019), neither case addresses the "real party in interest" or Civ.R. 17(A). Plaintiffs rely on these

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<sup>1</sup> Defendants also rely on *Laituri v. Nero* interpreting taxpayer statute R.C. § 5705.45 which, like R.C. § 733.59, provides that "the taxpayer may institute suit in his own name in behalf of the subdivision." In *Laituri*, the Court ruled that "the city is the real party in interest in a taxpayer lawsuit." Defendants' Motion, p. 5; *Laituri v. Nero*, 138 Ohio App.3d 348, 351, 741 N.E.2d 228, 2001-Ohio-230 (11th Dist. 2001).

cases merely because they are captioned in the name of an individual and proceeded that way. There is no indication in either case that the issue of the “real party in interest” was ever raised.

**2. Plaintiffs do not seek to vindicate a public right and, thus, lack standing to pursue the taxpayer action.**

For a taxpayer to have standing, his "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). As explained above, Plaintiffs have admitted that their own fears, concerns, and anxieties are at the heart of this action, and they have defined the “controversy” in this matter in terms of their desire to prevent concealed carrying of handguns in Lebanon City Council Meetings because of how it impacts them personally. Plaintiffs’ Response, pp. 18-19. And, the vast majority of factual allegations in the Complaint – at least 27 paragraphs – focus on Plaintiffs’ personal interests with respect to Lebanon City Council meetings.

In response to Defendants’ Motion, Plaintiffs now claim that their Complaint is aimed at addressing the public’s interest in uniform gun laws and in the right to access their government. Plaintiffs’ Response, pp. 5-8. Plaintiffs’ cursory mention in the Complaint, however, of these alleged public interests does not support standing to bring Plaintiffs’ purported taxpayer action.<sup>2</sup>

With respect to any alleged public interest in uniform gun laws, the Complaint actually alleges that Ordinance No. 2020-022 undermines the public interest “by conflicting with Ohio state law, which prohibits the concealed carry of handguns at all times within government buildings, like the City Building, that contain courtrooms.” Complaint, ¶ 7-8. “[T]axpayers cannot contest official acts ‘merely upon the ground that they are unauthorized and invalid.’” *State ex rel.*

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<sup>2</sup> Further, with their new presentation of wholly unsupported facts about Court operations, Plaintiffs seem to be making a veiled attempt to argue the Ordinance is void for vagueness. They did not, however, make this allegation in the Complaint, and, given that they do not claim to want to bring a handgun into the Lebanon City Building, would not have standing to do so.

*Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Comm'rs*, 132 Ohio St.3d 47, ¶16, 969 N.E.2d 224 (2012) (quoting *Pierce v. Hagans*, 79 Ohio St. 9, 22, 86 N.E. 519 (1908)).

The second “public interest” Plaintiffs claim they aim to address in this matter - the public’s right to access city council meetings – also fails to establish standing. It is merely an afterthought mentioned in two small phrases of the Complaint, compared to the at least 27 paragraphs that focus on Plaintiffs’ personal interest. Plaintiff’s Response, ¶¶ 5, 74. Further, it is not a public interest that can be addressed by Plaintiffs’ purported taxpayer action, because it is undisputed that there is no prohibition on local governments allowing concealed carry of guns in city council meetings.

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

Plaintiffs’ claim that “City Council exceeded Lebanon’s Home Rule authority in passing the Ordinance” and, therefore, assumed powers not conferred is without merit. Complaint ¶ 71, The parties agree that under the relevant home rule analysis, “[a] state statute takes precedence over a local ordinance only 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, ¶9, 766 N.E.2d 963 (2002) (emphasis added); *accord Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, ¶24, 896 N.E.2d 967 (2008). Even assuming *arguendo* all factual allegations in the Complaint as true and drawing all reasonable inferences therefrom in favor of Plaintiffs, Plaintiffs cannot establish or satisfy this test to invalidate Ordinance No. 2020-022.

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

The parties agree that “[i]n 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, 283, 859 N.E.2d 514

(2006) (quoting *Struthers v. Sokol*, 108 Ohio St. 263 (1923) (syllabus ¶2). Plaintiffs' challenge to Ordinance No. 2020-022 rests solely upon their contention that it permits the carrying of concealed handguns into a building containing a "courtroom" in conflict with R.C §§ 2923.123, 2923.126(B)(3), and 2923.126(B)(7). Complaint ¶¶ 28-37, 63-74. This claim is without merit.

Defendants presented significant legal authority that a "courtroom" exists in the Lebanon City Building only when the Lebanon Municipal Court is in operation. Defendants' Motion, pp. 9-15. Plaintiffs ask the Court to ignore this authority and claim that the Court must apply the ordinary meaning of the word "courtroom."<sup>3</sup> Plaintiffs' Response, p. 10. In defining this ordinary meaning for the Court, Plaintiffs rely on [www.lexico.com](http://www.lexico.com) which defines a "courtroom" as "[t]he place or room in which a court of law meets," and [www.merriam-webster.com](http://www.merriam-webster.com) which defines a "courtroom" as "a room in which a court of law is held." *Id.*, p. 10, n. 7.

Both of these definitions, however, are consistent with the legal authority presented by Defendants that the multipurpose room in which Lebanon Municipal Court meets is a "courtroom" only when court is in operation. Both definitions turn on the concept of court meeting or being held. Plaintiffs readily admit that the multipurpose room in which Lebanon Municipal Court sometimes operates is also City Council chambers where council holds their meetings and conducts other meetings and business. Complaint, ¶ 30. In fact, the use of the room for City Council purposes is at the core of Plaintiffs' definition of the "controversy" in this case. Clearly, at the time that the room is being used as City Council chambers it is not a room in which court is meeting or being held. Accordingly, at such time – even under the Lexico and Merriam-Webster

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<sup>3</sup> Plaintiffs base this argument on their claim that the statutes at issue are unambiguous with respect to the definition of "courtroom." Defendants disagree that "courtroom" is unambiguous in the statutes at issue. This matter is evidence of such ambiguity. Nonetheless, as explained herein, even the definitions of "courtroom" posited by Plaintiffs support a finding that the multipurpose room at issue herein is not a "courtroom" when it is being used as a city council chambers or for other purposes.

definitions presented by Plaintiffs – the room constitutes City Council chambers and not a courtroom.

"As a further aide in determining the meaning of an undefined [statutory] term, the maxim of *noscitur a sociis* — it is known from its associates — directs [a court] to look to accompanying words to deduce the undefined word's meaning." *Inland Prods. v. City of Columbus*, 193 Ohio App. 3d 740, 751, 954 N.E.2d 141, 2011 Ohio App. LEXIS 1745 (10th Dist. 2011) quoting *Ltd., Inc. v. Commr. of Internal Revenue* (C.A.6, 2002), 286 F.3d 324, 332 (6<sup>th</sup> Dist. 2002); *Bungard v. Dep't of Job & Family Servs.*, 2007-Ohio-6280, ¶12, 2007 Ohio App. LEXIS 5511 (10<sup>th</sup> Dist. 2007). That maxim follows from the premise that "the coupling of words denotes an intention that they should be understood in the same general sense." *Inland Prods.* at 751, quoting *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 453, 639 N.E.2d 105 (1994), quoting 2A Sutherland Statutory Construction (5 Ed.Singer Rev.1992) 183, Section 47.16.

In addition to prohibiting the concealed carrying of handguns into a building in which a “courtroom” is located, R.C. § 2923.126 also prohibits the concealed carrying of handguns into a “school safety zone.” R.C. § 2923.126(B)(2). A “school safety zone” is defined by statute to include schools, school buildings, and school premises “*whether or not any instruction, extracurricular activities, or training provided by the school is being conducted...at the time.*” R.C. §§ 2923.126(B)(2), 2923.122, 2901.01, and 2925.01 (quoting § 2925.01).

The General Assembly specifically provided, in the context of Ohio’s handgun laws, that schools, school buildings, and school premises always constitute a school safety zone even when no school activities are taking place. In the same context of Ohio’s gun laws – R.C. Chapter 2923 – the General Assembly chose not to similarly define a courtroom as being a courtroom even when court is not in operation. Under the statutory construction maxim of *noscitur a sociis*, the General

Assembly clearly did not intend for a physical location that is sometimes used as a “courtroom” to always constitute a “courtroom” even when that that physical location is being used for other purposes.

Based on the above and the authority presented in Defendants’ Motion, Ordinance No. 2020-022 does not conflict with the state statutes at issue, because it is drafted to prohibit the possession and concealed carry of handguns in the Lebanon Municipal Building “during the operation of any function of the Lebanon Municipal Court.” Ordinance No. 2020-022, attached to the Complaint as Exhibit 1, p. 2. Accordingly, the Ordinance does not allow the carrying or possession of any firearm – concealed or not – in any building that contains a courtroom.

Additionally, Plaintiffs’ new factual allegations regarding the alleged various types and hours of operation of Lebanon Municipal Court are unpersuasive and not proper for consideration by this Court on a Civ.R. 12(B)(6) motion. Plaintiffs make *no factual allegations* about the operation of Lebanon Municipal Court in their Complaint. Because these new allegations were not included in the four corners of the Complaint and cannot be drawn from any reasonable inferences from the factual allegations in the Complaint, they cannot be considered by this Court with respect to Defendants’ Motion. And even if they were considered, they would not change the fact that as a matter of law, the Ordinance No. 2020-022 does not conflict with the statutes at issue.

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

As explained in detail in Defendants’ Motion, if this Court were to find that Ordinance No. 2020-022 does conflict with a state statute – which it does not – it is still a valid exercise of Lebanon’s home rule authority because it constitutes a matter of local self-governance.

Plaintiffs mischaracterize the position and the authority presented by Defendants on this issue. Plaintiffs’ Response, p. 16. Plaintiffs would have this Court believe that Defendants rely



only on the lack of a penalty provision in Ordinance 2020-022 to distinguish the Court's decision regarding police power in *Ohioans for Concealed Carry, Inc. v. City of Clyde* from this matter. *Id.* On the contrary, Defendants provided an analysis distinguishing every deadly weapon case on which the Court relied in *Clyde* and providing authority for why the Court's analysis in *Clyde* regarding police power is not applicable in this matter, as well as why Ordinance 2020-022 is an exercise of local self-governance, rather than police power. Defendants' Motion, pp. 17-19.

Further, Plaintiffs' attempt to counter the authority presented by Defendants specific to the distinction between permissive weapons ordinances and restrictive weapons ordinances by citing *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92 (2008) fails. Plaintiffs' Response, p. 16. *Marich* addresses a traffic ordinance, not a weapons ordinance, and is completely irrelevant to an analysis of permissive verses restrictive weapons ordinances. Plaintiffs have presented no relevant authority countering Defendants' reasoning for distinguishing *Clyde* or for the factual and legal authority presented by Defendants that Ordinance 2020-022 constitutes a matter of self-governance.

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

Plaintiffs lack standing to bring their declaratory judgment claim – found in Count Two of the Complaint – because their Complaint does not present a justiciable controversy. Defendants' Motion, p. 20. “[A] justiciable controversy exists for purposes of a declaratory-judgment action when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Waldman v. Pitcher*, 2016-Ohio-5909, 70 N.E.3d 1025 (1<sup>st</sup> Dist. 2016), citing *Burger Brewing Co. v. Liquor Control Com., Dep't of Liquor Control*, 34 Ohio St. 2d 93, 97, 296 N.E.2d 261 (1973).

Plaintiffs define their alleged justiciable controversy as their “dilemma over whether to refrain from participating in City Council meetings or face the increased risk of physical harm and armed intimidation, along with the attendant fear and anxiety, posed by concealed firearms,” Plaintiffs’ Response, p. 18.

In admitting that this is the real “controversy” Plaintiffs attempt to address, they effectively admit they have no justiciable claim. It is undisputed that there is no prohibition on local governments allowing concealed carry of handguns into city council meetings. Even if this Court were to declare Ordinance 2020-022 invalid, it would not resolve what Plaintiffs define as the real controversy. City Council could merely choose to meet and allow concealed carry in a building where Lebanon Municipal Court is never held, and the same controversy would still exist. Accordingly, the declaratory relief requested cannot resolve the alleged real “controversy.”

Plaintiffs are asking this Court merely for an advisory opinion on how Ordinance 2020-022 interacts with the state statutes at issue. Accordingly, Plaintiffs lack standing to bring their purported declaratory judgment claim. *Calvary Indus. v. Coral Chem. Co.*, 2019-Ohio-1288, 2019 Ohio App. LEXIS 1384 (12<sup>th</sup> Dist. 2019) (“The Declaratory Judgment Act does not authorize a court to render an advisory opinion”).

Further, even if this Court were to find that Plaintiffs have standing to bring their purported declaratory judgment claim, such claim would fail on the merits for the reasons explained in Defendants’ Motion. Defendants’ Motion, p. 20.

## **II. Conclusion**

Based on the reasons addressed above, as well as those asserted in Defendants’ Motion, Plaintiffs’ Complaint should be dismissed in its entirety with prejudice.

Respectfully Submitted,

/s/ Rebecca Simpson Heimlich

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the foregoing was served this 23rd day of June 2021, via email upon the following:

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