

**IN THE COURT OF COMMON PLEAS  
STATE OF OHIO, COUNTY OF WARREN  
GENERAL DIVISION**

<b>CAROL DONOVAN, et al,</b>	:	<b>CASE NO. 21-CV-094117</b>
	:	
<b>Plaintiff,</b>	:	<b>JUDGE TIMOTHY N. TEPE</b>
	:	
<b>v.</b>	:	<b><u>DECISION DENYING</u></b>
	:	<b><u>DEFENDANTS’ MOTION</u></b>
<b>CITY OF LEBANON, et al.</b>	:	<b><u>TO DISMISS</u></b>
	:	
<b>Defendant.</b>	:	

Pending before the Court is Defendants’, City of Lebanon (“Lebanon”) and Mark Yurick (“Mr. Yurick”)(collectively referred to as “Defendants”) motion to dismiss Plaintiffs’ Complaint pursuant to Ohio Civ. R. 12(B)(6) For the following reasons, this motion is hereby denied.

**Factual and Procedural Background**

This case arises from a tax-payer lawsuit pertaining to the enactment of Ordinance No. 2020-0222. More specifically, the City of Lebanon enacted Ordinance No. 2020-0222 in March of 2020, which authorized individuals with state-issued concealed carry license to carry handguns within the Lebanon City Building during City Council meetings, as well as other specified periods. This Ordinance prohibits the carrying of firearms during the operation of “any function of the Lebanon Municipal Court”.

The Plaintiffs in this case are Carol Donovan, David Iannelli, and Brooke Handley, who are all residents of Lebanon, Ohio. As articulated in Plaintiffs’ Complaint, after the enactment of

Ordinance No. 2020-0222, the Plaintiffs sent a letter to Defendant, Mr. Yurick, who is the Lebanon City Attorney, and requested that the City Attorney's office seek an injunction "requiring the city to comply with Ohio law and return to its prohibition on the possession of firearms within the City Building." Comp. at 61. On March 2, 2021, the City of Lebanon responded by letter and stated that it declined to seek injunctive relief. Subsequently, the Plaintiffs filed the above-captioned case. In response to the above-captioned case, Defendants filed their Motion to Dismiss.

**Standard of Review for Civ. R. 12(B)(6)**

A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. *Klan v. Med. Radiologists, Inc.*, 12th Dist. Warren No. CA2014-01-007, 2014-Ohio-2344, ¶ 12. "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Tankersley v. Ohio Fair Plan Underwriting Assn.*, 12th Dist. Clermont No. CA2018-01-003, 2018-Ohio-4386, ¶ 20. For a trial court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond a reasonable doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Stewart v. Solutions Comm. Counseling and Recovery Cen. Inc.*, 2021-Ohio-2635, 12th Dist. (2021), citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶ 14; see also, *Marchetti v. Balankenburg*, 2011-Ohio-2212 (12th Dist.) The court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Id.*, citing *Klan* at ¶ 12.

The Rules of Civil Procedure set out a low standard for pleading for a complaint to survive a motion to dismiss. Generally, such a motion will be granted only where the party opposing the motion can prove no set of facts in support of his claim that would entitle him to relief. *O'Brien v. University Community Tenant's Union*, 42 Ohio St.2d 242, 244, 327 N.E.2d 753 (1975). The allegations of the complaint are taken to be true, and every reasonable inference is made in the nonmoving party's favor. *Id.* Moreover, a complaint is not to be dismissed merely because plaintiff's legal theory is unsupported by the allegations, rather, the complaint can be dismissed only if the court finds that the

allegations do not entitle the plaintiff to relief under any possible theory. *Fahnbulleh v. Strahan*, 73 Ohio St.2d 666, 667, 653 N.E.2d 1186 (1995). The court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Ward v. Graue*, 12th Dist. Clermont No. CA2011-04-032, 2012-Ohio-760, ¶ 10.

### Analysis

#### 1. PLAINTIFFS PROPERLY BROUGHT THE PUTATIVE TAXPAYER ACTION BY AND ON BEHALF OF THE MUNICIPAL CORPORATION

First, Defendants argue that Plaintiffs' complaint should be dismissed due to the Plaintiffs failing 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. Prebel Cty. Bd. Of Comm'rs*, 995 N.E.2d 239, 2013-Ohio-3579 (12<sup>th</sup> Dist.), quoting *Cincinnati ex rel. Ritter v. Cincinnati Reds, LLC*, 150 Ohio App.3d 728, 782 N.E.2d 1224, 2002-Ohio-7087 (1st Dist.).

Pursuant to Ohio R. Civ. P. 17(A), "[e]very action shall be prosecuted in the name of the real party in interest." R.C. 733.59 provides that a municipal taxpayer "**may institute suit in his own name**, on behalf of the municipal corporation" in order to restrain the municipalities' abuse of corporate power. R.C. 733.59 (emphasis added). Further, appellate districts have held that a plaintiff filing a taxpayer action in his or her own name is proper. See *Bower v. Village of Mount Sterling*, 12<sup>th</sup> Dist. Madison No. CA99-10-025, 2000 Ohio App. LEXIS 1807 (Apr. 24, 2000); *Mack v. City of Toledo*, 6<sup>th</sup> Dist. Lucas No. L-19-1010, 2019-Ohio-5427.

In the case at bar, Plaintiffs filed the putative taxpayer action in their own names "in their capacity as taxpayers and on behalf of the municipal corporation of Lebanon." Compl. at 73. Therefore, the Court finds that Plaintiffs have properly brought this taxpayer claim in accordance with R.C. 733.59.

**2. PLAINTIFFS PROPERLY SEEK TO VINDICATE A PUBLIC RIGHT AND THUS, HAVE STANDING TO PURSUE THE TAXPAYER ACTION.**

Next, Defendants argue that Plaintiffs' complaint should be dismissed due to Plaintiffs improperly seeking to vindicate their own personal or private motive and not a public right, and thus, lack standing to pursue the taxpayer action.

A taxpayer action is properly brought only when the right under review in the action is one benefitting the public. *Ohioans for Concealed Carry, Inc. v. City of Columbus*, 2020-Ohio-6724, Ohio St. 3d (2020). "Taxpayers cannot contest official acts 'merely upon the ground 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, quoting *Pierce v. Hagens*, 79 Ohio St. 9, 22, 86 N.E. 510 (1908). 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). 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.

Courts have held that plaintiffs' personal interest in a case does not necessarily diminish their aim to enforce the public's interest. See *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.2d 315, 323, 631 N.E.2d 1048 (1994)(affirming taxpayer's standing to challenge removal of political ally from public office "notwithstanding [plaintiff's] motives may not have been purely philanthropic"); *State ex rel. White v. Cleveland*, 34 Ohio St.2d 37, 295 N.E.2d 665 (1973)(held that taxpayers, who had been denied access to certain city records, sought to enforce the public's right to inspect the records"; *State ex rel. Fischer v. Cleveland*, 109 Ohio St. 3d 33, 2006-Ohio-1827 (held that a taxpayer challenge by a firefighter and firefighters' association to Cleveland's mandate that firefighters produce their tax returns to demonstrate residency was properly sought to enforce the public rights,

even thought it was brought by an individual firefighter who had a private motive to pursue the case as he objected to a request for his tax return).

In the case at bar, the Plaintiffs are challenging the Ordinance 2020-0222. In addressing the aforementioned ordinance, the Court will be required to review R.C. 2923.126(A), which provides that a licensed handgun owner “may carry a concealed handgun anywhere in this state,” except as provided in R.C. 2923.126(B) and (C). Furthermore, R.C. 2923.126(C)(1) and (C)(3) allow private employers and landowners to prohibit gun possession on their property as they deem fit. Thus, the law provides a right for license holders to carry concealed handguns anywhere in the state subject to several express exceptions that apply universally throughout the state, and further subject to the directives of private employers and property owners, who are authorized to prohibit handguns. R.C. 2923.126 prescribes a rule of conduct for any citizen seeking to carry a concealed handgun. The right to keep and bear arms is a fundamental individual right, but any citizen seeking to exercise this right must comply with the requirements set out in R.C. 2923.126.

In the case at hand, Defendants argue that Plaintiffs are seeking to vindicate and remedy their own person rights, interests, concerns, and objections vis-à-vis Ordinance No. 2020-022. In support of its position, Defendants point to fourteen (14) paragraphs of the Complaint, which it contends shows and articulates Plaintiff’s own repeated and extensive admission that this action is not being brought to vindicate a public interest but instead is an effort to address and remedy their own personal fears and anxieties.

In response, Plaintiffs argue that they are seeking to enforce the public’s interest in clear, uniform and administrable rules regarding where and when licensed individuals can carry concealed handguns. Next, Plaintiffs aver that they are seeking to enforce the public’s interest in safe access to their government and safe engagement in their democratic process.

There is no question that the Ordinance at issue affects the Plaintiff’s personal interest. However, likewise, there is no question that the Ordinance also affects the public interest as it controls when and where licensed individuals can carry concealed firearms. Thus, the Court finds that the

Plaintiffs are seeking to vindicate a public right, even though Plaintiffs may have some individual motives for filing the Complaint. Therefore, the Court finds that Plaintiff has standing to file the above-captioned lawsuit as they seek to advance the rights of the public.

**3. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED A TAXPAYER CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

"A motion to dismiss for failure to state a claim upon which relief can be granted \* \* \* tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). A motion made pursuant to Civ.R. 12(B)(6) only determines whether the pleader's allegations set forth an actionable claim. *Ward v. Graue*, 12th Dist. No. CA2011-04-032, 2012-Ohio-760, ¶ 9

The Rules of Civil Procedure set out a low standard for pleading for a complaint to survive a motion to dismiss. Generally, such a motion will be granted only where the party opposing the motion can prove no set of facts in support of his claim that would entitle him to relief. *O'Brien v. University Community Tenant's Union*, 42 Ohio St.2d 242, 244, 327 N.E.2d 753 (1975). The allegations of the complaint are taken to be true, and every reasonable inference is made in the nonmoving party's favor. *Id.*

"In order for a complaint to be dismissed under Civ.R. 12(B)(6) \* \* \* it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Cincinnati v. Berretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5. "In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988).

The court being sufficiently advised and presuming all factual allegations in the complaint are true and making all reasonable inferences in favor of the non-moving party finds that the Plaintiffs

have stated a claim, which if proven, may entitle them to relief. Thus, the Court finds that Defendants' motion to dismiss is not well taken.

**4. PLAINTIFFS HAVE STANDING TO BRING THEIR DECLARATORY JUDGMENT CLAIM AND PLAINTIFFS HAVE ADEQUATELY STATED A CLAIM FOR DECLARATORY JUDGMENT**

It is well established that prior to a courts consideration of the merits of a legal claim, "the person or entity seeking relief must establish standing to sue." *Ohio Pyro, Inc v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27.

The essential elements for declaratory relief are (1) a real controversy between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties. *Gauthier v. Gauthier*, 2019-Ohio-4208 (12th Dist. 2019), see also, *Burchwell v. Warren Cty.*, 12th Dist. Warren No. CA2013-09-079, 2014-Ohio-1892, ¶ 9. For purposes of a declaratory judgment action, a "justiciable issue" requires the existence of a legal interest or right, and a "controversy" exists where there is a genuine dispute between parties with adverse legal interests. *Wurdlow v. Turvy*, 10th Dist. Franklin No. 12AP-25, 2012-Ohio-4378, ¶ 13.

Ohio courts have determined that there are only two bases for dismissing a declaratory judgment claim: "(1) no real controversy or justiciable issue exists between the parties; or (2) the declaratory judgment will not terminate the uncertainty or controversy. *Burchwell v. Warren County*, 12<sup>th</sup> Dist. Warren No. CA2013-09-079, 2014-Ohio-1892. See also, *Weyandt v. Davis*, 112 Ohio App.3d 717, 721, 679 N.E.2d 1191 (9th Dist. 1196).

First, the court finds that there is a real controversy or justiciable issue between the parties. "A real, justiciable controversy is a 'genuine dispute between parties having adverse legal interest of sufficient immediacy and reality to warrant the issue of declaratory judgment.'" *Chojnacki v. Mohr*, 2018-Ohio-1167, 110 N.E.3d 689 (9th dist.), quoting *Kuhar v. Medina Cnty, Bd. Of Elections*, 9<sup>th</sup> Dist. Medina No. 06CA0076-M, 2006-Ohio-5427. Put another way, a real justiciable controversy is

one that presents a danger or dilemma to the plaintiffs and that is not based on the happening of hypothetical future events. Waldman v. Pitcher, 2016-Ohio-5909, 70 N.E.3d 1025 (1st Dist.).

Here, the Court finds that there is a genuine dispute as to the legal validity of the Ordinance. Further, it is not disputed by either party that Plaintiffs and Defendants interest in this dispute are adverse. Further, the Ordinance has taken effect and is currently in place. Thus, the controversy is immediate and real. The Court finds that Plaintiffs' have standing to bring a declaratory judgment claim and that they have adequately stated a declaratory judgment claim for which relief can be granted.

**Conclusion**

For the foregoing reasons, the Court hereby denies Defendants, Lebanon, and Mr. Yurick's motion to dismiss. This matter shall be scheduled for a case management conference.

**IT IS SO ORDERED.**



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**JUDGE TIMOTHY N. TEPE**  
**Warren County Common Pleas Court**

c: All parties of record