

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PHILIP D. OPPENHEIMER
7209 JULER AVENUE
CINCINNATI, OHIO 45243,
A TAXPAYER OF THE CITY OF
MADEIRA, OHIO

:
:
:

CASE NO.:
JUDGE

AND

:

MADEIRA HISTORICAL SOCIETY, INC.
AN OHIO CORPORATION
C/O PHILIP D. OPPENHEIMER, PRES.
7209 JULER AVENUE
CINCINNATI, OHIO 45243

:
:
:
:

PLAINTIFFS

:

VS.

:

CITY OF MADEIRA
A MUNICIPAL CORPORATION;
RICHARD STAUBACH, MAYOR,
AND THOMAS MOELLER, CITY MANAGER
7141 MIAMI AVENUE
MADEIRA, OHIO 45243

:
:
:
:
:

COMPLAINT

AND

:

CLEO J. HOSBROOK
6940 STIEGLER LANE
CINCINNATI, OHIO 45243

:
:
:

DEFENDANTS

COUNT I

1. At all times material the plaintiff, Philip D. Oppenheimer, hereinafter referred to as Oppenheimer, was, and still is, a citizen and taxpayer of the City of Madeira, Ohio.
2. Oppenheimer files herewith, a bond as security for costs as required by §733.59, of the Ohio Revised Code.
3. Oppenheimer, on September 15, 1993 filed a written request on Robert P. Malloy, solicitor/director of law City of Madeira of Ohio, in accordance with §733.59 of the Ohio Revised Code, to bring

an action relating to the matters alleged in this complaint, but he has failed to comply with such request and to bring the action. A copy of the written request is attached as Exhibit "A".

4. Plaintiff is informed and believes that the City of Madeira, hereinafter referred to as "City", intends to raze the structure commonly referred to as the Hosbrook House, which is located on the property described in the attached Exhibit "B", hereinafter referred to as "the property".

5. The action alleged in paragraph 4, above, is illegal in that it is in contravention of Madeira Ordinance 90-42, passed May 21, 1990, which requires the City to consider the historical aspects of maintaining and improving the property as a condition of ownership of the property. To the best of my knowledge Ordinance 90-24 has not been repealed. A copy of Ordinance 90-24 is attached as Exhibit "C".

COUNT II

6. Oppenheimer, incorporates by reference the allegations contained in paragraphs 1 through 6 above as if fully rewritten herein.

7. On April 9, 1990 defendant Cleo J. Hosbrook executed and delivered to City a general warranty deed transferring the property to City. The deed is recorded at book 5289 page 917 in the Hamilton County, Ohio Recorder's office.

8. Both defendants intended the property transferred to be maintained and improved by City as a condition of ownership, hereinafter referred to as the "covenant".

9. By reason of the absence of the covenant requiring the City to improve and maintain the property, the deed does not express the

intent of the parties to the deed.

10. The mistake in failing to include the covenant was mutual.

11. The failure of the parties to include the covenant was discovered upon the passage of time.

12. Oppenheimer has demanded both defendants to make a correction in the mistake and both defendants have failed or refused to do so.

WHEREFORE, Oppenheimer demands judgment:

First, that the City of Madeira, Ohio and Thomas Moeller, City Manager of the City of Madeira, Ohio, be restrained from contracting with any party to raze the Hosbrook House in contravention the ordinances, laws, obligations and contracts of Madeira, Ohio;

Second, that the City of Madeira, Ohio be compelled to fulfill the obligations undertaken in Ordinance 90-24;

Third, for an order reforming the deed between the defendants to correctly reflect the intent of the parties at the time of the transfer;

Fourth, for reasonable attorney fees and costs of this action; and

Fifth, for such other legal and equitable relief to which the plaintiff, Oppenheimer, is entitled.

COUNT III

12. Plaintiff, Madeira Historical Society, Inc., hereinafter referred to as "Society," incorporates by reference the allegations contained in paragraphs 1 through 12 above as if fully rewritten herein.

13. Society, is an Ohio Corporation formed, for among other purposes, to bring about the acquisition, preservation or

restoration of historic buildings in the City of Madeira, Ohio.

14. Society, is a tenant of City and has been since on or about June 1989. Society stores various items of historical significance in the Hosbrook House.

15. Society's rights as a tenant, the historic Hosbrook House and various items of historic significance will be irreparable injured if the City is permitted to raze the Hosbrook House.

16. The damages which Society will sustain cannot fully be compensated for by money, and Society has no adequate remedy at law.

WHEREFORE, Society demands judgment:

First, restraining and enjoining City perpetually and during the continuance of this action from razing the Hosbrook House; and
Second, for an order reforming the deed between the defendants to correctly reflect the intent of the parties at the time of the transfer.

George M. Parker (004664)
Trial Attorney for Plaintiffs
400 TechneCenter Drive
Suite 410
Milford, Ohio 45150
(513) 831-3373

State of Ohio)
) SS:
County of Hamilton)

Philip D. Oppenheimer, being duly sworn, deposes and says that he resides at 7209 Juler Avenue, Cincinnati, Ohio 45243 (Madeira), that he is the plaintiff and is the President of the Madeira Historical Society, Inc. and that he has read the foregoing complaint and knows the contents and that they are true of his own knowledge except as to the matters stated to be alleged on information and belief, and as to those matters he believes them to be true.

Philip D. Oppenheimer

Sworn to before me and subscribed to in my presence this _____
day of _____, 1993, by the Philip D. Oppenheimer, _____

Notary Public

INSTRUCTIONS TO THE CLERK

Please cause a copy of the foregoing to be served upon the
defendants at the addresses listed above.

George M. Parker (004664)
Trial Attorney for Plaintiffs

civil\oppenhei\com

September 15, 1993

7209 Juler Avenue
Cincinnati, Ohio 45243

Mr. Robert P. Malloy, Esq.
Wood & Lamping
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202-2409

Re: City of Madeira and the Hosbrook property

Dear Mr. Malloy:

This letter is being written to you in your capacity as solicitor/director of law of the City of Madeira. I am writing to request that you make an application to the Court of Common Pleas of Hamilton County, Ohio requesting the court to restrain the City of Madeira from executing a contract in contravention of Madeira Ordinance 90-42. Upon information and belief, it is my understanding that the City of Madeira is intending to raze the Hosbrook House which was given to the city and which the city accepted under the condition that it would maintain and improve the property.

In addition to seeking an injunction prohibiting the City of Madeira from entering into an agreement to raze the Hosbrook House, I also ask you to request Cleo J. Hosbrook to reform the deed in which she donated her property to the city of Madeira and for this reformed deed to be delivered to you by the time stated below. Ms. Hosbrook signed the deed on or about April 9th of 1990, (the property referred to as the Hosbrook House). In that regard, I am asking you, along with the applications stated above, to file suit demanding the reformation of the deed given by Ms. Hosbrook so that the original intent of the parties is expressed on the reformed deed.

It would be an abuse of the corporate power for the current council of the City of Madeira to contract to raze the Hosbrook House when the clear intent of the parties to the gift of the Hosbrook property was for the property to be maintained and improved by the City of Madeira.

Unless you file the application prior to 9:00 a.m. on September 16, 1993, I will file the appropriate application in my own name on behalf of the City of Madeira.

I look forward to your anticipated timely response and assistance.

Sincerely,

Mr. Doug Oppenheimer

ORDINANCE 90- 42

ACCEPTING REAL ESTATE LOCATED ON THE EAST SIDE OF MIAMI AVENUE

WHEREAS, The City of Madeira has been offered certain real estate described in Section 1 below as a gift to the City, and;

WHEREAS, The City is undertaking certain historical preservation of the area;

NOW, THEREFORE, BE IT ORDAINED that:

Section 1: The City of Madeira does hereby accept the following property:

Situate in Moore and Hosbrook's Subdivision in section 6, Town 4, Fractional Range 2, Miami Purchase, and bounded as follows, to-wit: Beginning at a point in the center of Miami (formerly Moore) Avenue one hundred and forty-six and three-fourths (146.75) feet south of the center of Laurel Avenue; thence east two hundred and seventy-four and one-half (274.50) feet, more or less, to the east line of Lot No. 9; thence south on the east line of Lot 9 and Lot 18 sixty (60) feet to a point; thence westwardly parallel with Laurel Avenue two hundred and seventy-four and one-half (274.50) feet to the center line of Miami Avenue; thence north in the center line of Miami Avenue sixty (60) feet to the place of beginning, being parts of Lots No. 9 and 18 of Madeira as laid out by Moore and Hosbrook, a plat of which is recorded in Plat Book 3, Page 231, Hamilton County Records, subject to all legal highways.

Subject to any and all easements and restrictions of record.

Being the same property conveyed to the Donor-Grantor herein by instruments recorded in Deed Book 2036, Page 597, and in Deed Book 2534, Page 365, of the Hamilton County, Ohio, records.

Section 2. In acceptance of the property, the City will consider the historical aspects of maintaining and improving said property in that regard.

Section 3. This Ordinance shall take effect at the earliest date allowed by law.

Passed this 21st day of May, 1990.

Charles F. Weisbrod
Mayor Charles Weisbrod

Attest:

Dorinda J. Soens
Clerk of Council

21:14A:4/jiw

Ordinance 90-42 was passed by the following roll call vote:
Ayes
R. Stanbach
R. Siebert
D. Inwall
C. Peniel
M. Morgan
R. Eggers
Nays
C. Weisbrod

62
276E

8th Ser. 62/276E, Parcel No. 525-2-57 and 58, cons.

GENERAL WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That CLEO J. HOSBROOK, unmarried, herein called the "Donor-Grantor", in consideration of her affection for the community known as the "City of Madeira," does hereby give, grant and convey to the CITY OF MADEIRA, a municipal corporation under the laws of Ohio, its successors and assigns, herein called the "Donee-Grantee," whose address is 7141 Miami Avenue, Madeira, Ohio 45243, all of the Donor-Grantor's interest in the following described real estate:

525-2-57-58
525-2-57-58

Situate in Moore and Hosbrook's Subdivision in Section 6, Town 4, Fractional Range 2, Miami Purchase, and bounded as follows, to-wit: Beginning at a point in the center of Miami (formerly Moore) Avenue one hundred and forty-six and three-fourths (146.75) feet south of the center of Laurel Avenue; thence east two hundred and seventy-four and one-half (274.50) feet, more or less, to the east line of Lot No. 9; thence south on the east line of Lot 9 and Lot 18 sixty (60) feet to a point; thence westwardly parallel with Laurel Avenue two hundred and seventy-four and one-half (274.50) feet to the center line of Miami Avenue; thence north in the center line of Miami Avenue sixty (60) feet to the place of beginning, being parts of Lots No. 9 and 18 of Madeira as laid out by Moore and Hosbrook, a plat of which is recorded in Plat Book 3, Page 231, Hamilton County Records, subject to all legal highways.

Subject to any and all easements and restrictions of record.

Being the same property conveyed to the Donor-Grantor herein by instruments recorded in Deed Book 2036, Page 597, and in Deed Book 2534, Page 365, of the Hamilton County, Ohio, Records.

Together with all the Estate, Title and Interest of the said Donor-Grantor, either in Law or Equity, of, in and to said premises; together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; TO HAVE AND TO HOLD the same to the only proper use of the said Donee-Grantee, its successors and assigns.

And the Donor-Grantor, for herself and for her heirs, successors and assigns, executors and administrators, does hereby COVENANT with the said Donee-Grantee, its successors and assigns, that she is the true and lawful owner of the said premises and has full power to convey the same and that the title so conveyed is CLEAR, FREE AND UNENCUMBERED; AND FURTHER, That she DOES WARRANT AND WILL DEFEND the same against all claim or claims, of all persons whomsoever; except the taxes and assessments due and payable in June, 1990, and thereafter which the Donee-Grantee herein agrees to pay.

IN WITNESS WHEREOF, the said CLEO J. HOSBROOK, unmarried, has hereunto set her hand this 9th day of April, 1990, in the presence of Lord one thousand nine hundred and ninety (1990).

HAMILTON COUNTY RECORDERS OFFICE
IN THE FRONT DESK OUT
DOC # 90-44118 TYPE DEED
FILED: 05/23/90 @ 02:54:04PM @ 10.00
OFF REC: 5289 0917 F W2 264

Signed and acknowledged in the presence of:

Helen Mansfield
Engel Mansfield

Cleo J. Hosbrook
CLEO J. HOSBROOK

STATE OF OHIO, COUNTY OF HAMILTON, SS: The foregoing instrument was acknowledged before me this 9th day of April, 1990, by CLEO J. HOSBROOK, unmarried.

John W. Hudson
JOHN W. HUDSON
NOTARY PUBLIC IN AND FOR SAID
COUNTY AND STATE

This instrument was prepared by Wood & Lamping.

JOHN W. HUDSON, Attorney at Law
Notary Public, State of Ohio
My commission has no expiration date
Section 147.08 R.C.

Complies with Sec. 570.212 R.C. Conveyances
is exempt from the under Sec. 570.51 (F) 2.

MICHAEL J. MALONEY
HAMILTON COUNTY, OHIO

1.00
#15289 PAGE 917

RECOR TRANS

WOOD & LAMPING
ATTORNEYS AND COUNSELLORS AT LAW
2600 CINCINNATI COMMONS CENTER
600 VINE STREET

CINCINNATI, OHIO 45202-2409
TELEPHONE (513) 852-6000
TELECOPIER (513) 852-6007

WRITER'S DIRECT DIAL NUMBER

(513) 852-6043

September 17, 1993

ROBERT F. BECKMAN
KENNETH J. SCHNEIDER
WILLIAM H. EGGER, JR.
HAROLD G. KORBEE
ALBERT H. NEUMAN
DAVID A. CALDWELL
STEPHEN COHEN
ERIC G. HOLZAPFEL
PAUL W. BEANINGCA
ROBERT F. MALLOY
JEFFREY M. HOLLMAN
STANTON H. VOLLMAN
WILLIAM R. ELLIS***
THOMAS C. KORBEE

MARK S. BECKMAN
JAN M. FRANKEL
GARY J. DAVIS
JAMES B. HARRISON*
JANE A. MCTAGGART**
GERALD G. BALMEN
HENRY E. MENNINGER, JR.
JOHN H. FLESSA
THOMAS M. WOESKENBERG
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AMY L. TOLNITCH***
MARTIN J. RENWORTHY*
BERALDINE M. JOHNSON
WILLIAM C. PRICE

COUNSEL

JOHN WOOD
HARRY M. HOFFHEIMER
ROBERT O. LEMING

FRANCO LAMPINO, JR.

*ALSO ADMITTED IN KENTUCKY
**ALSO ADMITTED IN MINNESOTA
***ALSO ADMITTED IN NEW YORK
****ALSO ADMITTED IN PENNSYLVANIA

George M. Parker
400 Technecenter Drive
Suite 410
Milford, Ohio 45150

Re: Madeira - Hosbrook House

Dear Mr. Parker:

Since my original response to Mr. Doug Oppenheimer's letter of September 15, 1993 regarding the above matter, I have been notified that you are representing Mr. Oppenheimer and therefore my supplemental response is directed to you. As indicated in this earlier letter, I was researching and reviewing the issues relevant to the City's authority to dismantle the Hosbrook House.

Preliminary to presenting the issues found thus far, it is appropriate to advise you that it has been confirmed that the cost of the demolition of the Hosbrook House would exceed the \$5,000.00 figure and therefore it is mandatory under the Charter of the City of Madeira for the bid process to occur. Inasmuch as additional work still needs to be done to prepare specifications for the bids, it is clear that the City Council will not be in a position to consider accepting bids at this next Council meeting, Monday night. Therefore, the urgency in your filing an immediate legal action appears lessened. Of course, that final decision is yours.

In my evaluation of these issues, it is clear that we are dealing with several areas of the law that require recognition of certain formalities as well as the application of unique facets of the law. Both real estate and municipal law require written documentation and little weight is given to unwritten intent or action by those who are not authorized with the authority to act. Another aspect is also involved in your threatened litigation. That is the separation of powers and the reservation of reasonable discretion to a legislative branch of the government.

WOOD & LAMPING

George M. Parker
 September 17, 1993
 Page 2

Using the foregoing to distill the relevant facts, the following elements appear relevant. As part of her estate plan Cleo Hosbrook made a gift to the City of Madeira of certain real estate known as the Hosbrook House. Her attorney prepared the deed to the City of Madeira which contained no restrictions nor any reversionary clause. Title was conveyed free, clear and unencumbered. The City did provide an appraisal of the property to the attorney of Ms. Hosbrook for purposes of her estate plan. The City accepted the conveyance by Ordinance which contained the following: "In acceptance of the property, the City will consider the historical aspects of maintaining and improving said property in that regard."

No where in those documents, the deed and the Ordinance, is this property reserved to any particular historical purpose. Obviously, the grantor was in the unique position of explicitly setting forth in the deed any restrictions that were intended to run with the land. None were included. One must consider the possibility that if such a restriction were to be placed in the deed, it would reduce the appraised value of the property significantly and may have therefore negatively impacted the tax strategies being employed on behalf of Ms. Hosbrook. But the fact remains that no restrictions were placed in the deed and it would appear that the Doctrine of Merger would limit discussion of restrictions to those actually set forth in the deed.

Even if there had been restrictions included in the deed, the case law in the State of Ohio has held that a municipal corporation is not bound by any restrictive covenants in such deed that may have been imposed upon the land by a predecessor in title even though it is a covenant running with the land so long as the land is devoted to public use. Therefore, should the City determine that such property is best suited for park purposes or a parking lot or any other public use, which uses may be inconsistent with the maintenance and improvement of the house, the City may elect to do so. Doan v. Cleveland Shortline Railway, 92 Ohio St. 461. In addition, the City always has the inherent right to dispose the property which it determines is no longer needed for municipal purposes. Such a decision is a distinctively legislative one in which a great deal of discretion is vested with the City Council. In considering Ordinance 90-42, it is clear that the City has only adopted the concept that the historical aspects would be considered when making decisions regarding maintenance or improvement of the property. However, this must only be considered one factor in addition to other elements normally considered by a City Council in reaching a decision. Nothing in Ordinance 90-42 obligates the City to preserve the building for historical purposes if other factors, consistent with the public health, safety and welfare of the

WOOD & LAMPING

George M. Parker
September 17, 1993
Page 3

community, provide reasons to do otherwise. Similarly, nothing in the Ordinance restricts the City's right to transfer the property.

Presently, the City Council has directed the City Manager to prepare specifications and obtain bids for the demolition of the Hosbrook House. No Ordinance has been presented to Council authorizing a contract be entered into for that purpose. In fact, the City Manager has authority to secure such bids with or without the direction of Council. Furthermore, based on the above discussions, it would be premature and futile for me to seek to obtain an injunction against legislative debate and Council's mere consideration of such a matter. The only proper time to evaluate whether injunctive action is appropriate is after the City Council has adopted an Ordinance or Resolution which can then be reviewed to determine its reasonableness and validity.

If the City Council were to consider adopting legislation to remove the structure in question, the legislation would be reviewed by the Solicitor for the following:

1. Did Council consider whether the building was needed for municipal purposes? If Council determines that it is not needed for municipal purposes then that "threshold issue is resolved.
2. Were the proper public bidding requirements followed with respect to advertisement, selection, etc.? As I indicated to you in our phone conversation, there is absolutely no reason to believe that the City of Madeira would not adhere rigorously to its bidding requirements. Mr. Moeller has informed me that he has confirmed that such a demolition of the Hosbrook House would be in excess of \$5,000.00 and that there will be a need for detailed specifications because of the asbestos located in the house. Therefore, as of the writing of this letter, it is impossible for Council to be ready to consider any bid for the demolition of the Hosbrook House by its Monday Council Meeting.
3. Did Council consider any historical aspects of the building in reaching a decision to remove it? However, Council is obligated to consider other factors also. These factors would include costs, safety, aesthetics, other uses (e.g. a park or parking lot) and any other factors that may be relevant to the health, safety and welfare of the community. No single factor would be dispositive. A great deal of latitude must be given to the legislative discretion inherent in this kind.

WOOD & LAMPING

George M. Parker
September 17, 1993
Page 3

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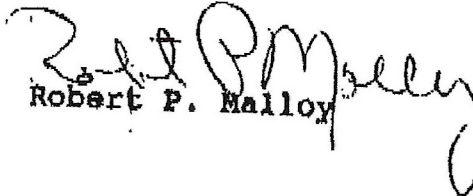
George M. Parker
September 17, 1993
Page 4

If such legislation conforms to the above criteria and no other impediments exist, then it would be irresponsible for me or anyone to initiate legal action to enjoin the execution of the contract. You have raised an additional issue that is separate and apart from the City's authority to undertake the demolition of the Hosbrook House. That is the fact that the Historical Society is storing certain property within the Hosbrook House. Obviously, the City will not act irresponsibly with respect to that property but that is a separate issue from the City's ultimate authority to remove the Hosbrook House.

With respect to your demand that I, as City Solicitor, seek reaffirmation of the deed so that it includes a restriction for the preservation of the structure on the property, I am without authority to do so under both of the statutes of the State of Ohio and the Charter of the City of Madeira unless I am directed to do so by the City Council. Furthermore, as discussed above, even if such restrictions were contained in the deed it would not preclude the City from using the property for some other type of public purpose. Furthermore, such a restriction might have a serious negative impact with respect to tax planning previously utilized by Ms. Hosbrook.

Finally, You and you client, Doug Oppenheimer, appeared at my office yesterday and requested an opportunity to speak with me. As a result of that meeting I am conveying to Council by a copy of this letter, your request that a moratorium on the demolition of the Hosbrook House for some 60 days be adopted by City Council. If so adopted, you have indicated that you would not proceed on the legal action which you are otherwise prepared to take. The purpose of the moratorium would be to permit all interested parties to explore the issues together. As I stated to you at the meeting, I leave the burden to you to explain to Council while you believe such a moratorium would be productive and effective. However, we are in agreement that such a moratorium might defer and could avoid legal fees associated with the commencement of litigation which you otherwise intend to take on this matter. I expect that Council will address this matter on Monday evening.

Very truly yours,


Robert P. Malloy

RPM:jik
cc: Tom Moeller
Council Members