Case No. 2024-1687

Supreme Court of the State of Ohio

CITY OF CINCINNATI *ex rel.* MARK MILLER,

Relator-Appellant,

v.

CITY OF CINCINNATI, *et al.*,

Respondents-Appellees,

and

OVER-THE-RHINE COMMUNITY HOUSING,

Intervening Respondent-Appellee.

City of Cincinnati ex rel. Miller v. City of Cincinnati, et al.
Hamilton County Court of Appeals, First Appellate District
Case No. C-23-0683

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Citations

Municipal Charter / Local Ordinances

Dictionaries

I. STATEMENT OF FACTS

Under the City of Cincinnati's zoning regulations, the real property located at 2000 Dunlap Street is within in the UM (Urban Mix) zoning district and also within the Over-the-Rhine Historic Overlay District. *Planning Commission Staff Report, at 1 (T.d.39, at 54)*. Consistent with such zoning, 14 units in a congregated-housing facility would be permitted on the *Property* and a minimum 10-foot setback would be required for the rear yard. *Planning Commission Staff Report, at 2 (T.d.39, at 55)*.

The owner of the *Property*, *i.e.,* Over-the-Rhine Community Housing, sought from the Cincinnati Historic Conservation Board variances from the zoning requirements in order to increase the density on the *Property* so as to allow for 44 units versus the permitted 14 units, as well as to eliminate in its entirety the required rear-yard setback. *Historic Conservation Board Decision dated September 27, 2022, at 1-2 (T.d.39, at 43-44)*. The Historic Conservation Board is the quasi-judicial administrative body empowered to grant variances to zoning requirements for properties located in, *inter alia*, the Over-the-Rhine Historic Overlay District. *See Cincinnati Municipal Code 1439-09*. After receiving testimonial and other evidence over the course of three public quasi-judicial hearings on the requested variances, the Historic Conservation Board granted the variance with respect to the rear-yard setback but denied the requested variance with respect to density standards. *Historic Conservation Board Decision dated September 27, 2022, at 10 (T.d.39, at 48).*

Notwithstanding the denial of the one requested variance by the Historic Conservation Board, the Cincinnati City Council subsequently adopted a *Notwithstanding Ordinance* wherein the Council itself granted a "variance" for the zoning regulations for 2000 Dunlap Street. *Ordinance No. 346-2022.* Specifically, the City Council "authorize[d] the construction of the

Project [at 2000 Dunlap Street]…notwithstanding the September 27, 2022 decision of the Historic Conservation Board…[and] notwithstanding the density and setback regulations contained in [the *Zoning Code*]….” *Ordinance No. 346-2022, Section 5.* Also within the *Notwithstanding Ordinance*, the City Council expressly declared that the *Ordinance* “does not provide a variance from any other laws of the City of Cincinnati, and the Property shall remain subject to all other provisions of the Cincinnati Municipal Code, the UM, ‘Urban Mix,’ zoning district, and the Over-the-Rhine Historic District.” *Ordinance No. 346-2022, Section 6.*[1]

When the *Notwithstanding Ordinance* was coming before the Cincinnati City Council and pursuant to R.C. § 733.59, Mark Miller, a taxpayer in the City of Cincinnati, tendered through legal counsel, a written *Taxpayer Demand Letter* to the Cincinnati City Solicitor, requesting that she make application to a court of competent jurisdiction for an order of injunction to restrain the abuse of corporate powers arising from the City Council assuming for itself the non-legislative power to grant variances to existing building and zoning regulations, and, in particular, the prospective granting of such a variance with respect to zoning regulations for the real property at 2000 Dunlap Street. *Verified Complaint (T.d.2) ¶63 & Exhibit F.* In response, the City Solicitor transmitted a *Response Letter* wherein she expressly refused to commence any legal action challenging the authority of the City Council to grant variances to the *Zoning Code*, including, in

[1] “A variance is intended to permit amelioration of strict compliance of the zoning ordinance in individual cases.… [V]ariances are not authorized to change zoning schemes or to correct errors of judgment in zoning laws. The authority to permit a variance does not include the authority to alter the character and use of a zoning district.” *Consolidated Management, Inc. v. Cleveland*, 6 Ohio St. 3d 238, 240, 452 N.E.2d 1287 (1983)(emphasis added). Thus, both before and following the action of the Cincinnati City Council in granting a variance through adoption of the *Notwithstanding Ordinance,* the *Property* was always located in the UM (Urban Mix) zoning district and the requirements in the *Zoning Code* for the UM (Urban Mix) zoning district were not changed by the *Notwithstanding Ordinance*.

particular, a variance related to the real property at 2000 Dunlap Street. *Verified Complaint (T.d.2) ¶65 & Exhibit G.*

Upon the refusal of the Cincinnati City Solicitor to bring any action to challenge the granting of variances by the Cincinnati City Council *qua* a legislative body, in general, and the *Notwithstanding Ordinance* as it related to the *Property*, in particular, Mr. Miller commenced, pursuant to R.C. § 733.59, a statutory municipal taxpayer lawsuit on behalf of and in the name of the City of Cincinnati premised upon an abuse of the corporate powers by the Cincinnati City Council and its members. Mr. Miller posted an initial deposit which the trial court specifically determined was sufficient security for the proceedings. *Order Establishing Amount of Security for Costs of Proceeding Pursuant to R.C. § 733.59* (*T.d. 18*).

On cross-motions for summary judgment, the trial court entered an *Order Granting Respondents' Motions for Summary Judgment and Denying Relator's Motion for Summary Judgment (T.d.46)* wherein the trial court made explicit affirmative adjudications and declarations concerning the power and authority of the Cincinnati City Council under the City Charter as it concerns granting variances, including expressly decreeing the validity of *Ordinance No. 0346-2022*. On appeal, the First District "vacate[d] the trial court's judgment and remand[ed] the cause to the trial court with instructions to dismiss Miller's complaint for lack of standing." *Cincinnati ex rel. Miller v. Cincinnati*, 2024-Ohio-4805 ¶28 (1st Dist.).

A timely appeal was taken to this Court from the final judgment of the First District and this Court accepted the appeal for review on issues relating to the standing of a municipal taxpayer to bring a statutory municipal taxpayer lawsuit pursuant to R.C. § 733.59. *04/01/2025 Case Announcements*, 2025-Ohio-1090.

II. ARGUMENT

The First District committed reversible error in concluding that, notwithstanding his status as a municipal taxpayer who undisputedly satisfied of all the conditions precedent expressly set forth in R.C. § 733.59, Mr. Miller still lacked standing to pursue a statutory municipal taxpayer lawsuit because, according to the First District, Mr. Miller was not vindicating the public interest or a providing a public benefit in challenging, as an abuse of corporate powers, the assumption of powers by the Cincinnati City Council not conferred on it by the *Cincinnati City Charter*.[2] *Cincinnati ex rel. Miller v. Cincinnati*, 2024-Ohio-4805 ¶2 (1st Dist.)("[h]e has not shown that he is seeking to vindicate a public interest and therefore does not have standing to bring a taxpayer action under R.C. 733.59"). The judgment of the First District must be reversed as: (i) the plain and unambiguous language of the statutory municipal taxpayer lawsuit provisions, R.C. 733.56 *et seq.*, do not impose a requirement that the taxpayer must be vindicating the public interest or providing a public benefit; or, if such an extra-statutory requirement is nonetheless required, then

[2] Article II, Section 1 of the *Cincinnati City Charter* grants only "legislative powers" to the Cincinnati City Council. Pursuant to Article IV, Section 1 of the *City Charter*, the administrative and executive powers are vested, not in the City Council, but in the Cincinnati City Manager. Contending that the granting of variances is an administrative or executive function, and that, in granting variances and in adopting the *Notwithstanding Ordinance*, the City Council exercised and is threatening to exercise a power not conferred upon it by the *City Charter*, Mr. Miller brought the underlying statutory municipal taxpayer lawsuit so as to prevent the City Council from exercising a power not granted to it by the City's constitution, *i.e.*, the *Cincinnati City Charter*. See *Cleveland ex rel. Neelon v. Locher*, 25 Ohio St. 2d 49, 51, 266 N.E.2d 831 (1971)(a "municipal charter is basically the constitution of the municipality").

"A sound distinction exists in law between the act of zoning, or rezoning, and the act of granting or refusing a variance. The former constitutes a legislative act …. The latter constitutes an administrative or quasi-judicial act…." *State ex rel. Humble Oil & Refining Co. v. Marion*, 4 Ohio App. 2d 178, 180-81, 211 N.E.2d 667 (3d Dist. 1965). Thus, the underlying contention is that the adoption of the *Notwithstanding Ordinance*, in particular, and the general practice of the Cincinnati City Council in granting variances from the *Zoning Code* are the exercise of non-legislative powers which the *Cincinnati City Charter* does not grant to the City Council or its members.

(ii) the General Assembly, as the final arbiter of public policy, made the policy determination that the type of actions it expressly provided for in R.C. §§ 733.56 - 733.58 satisfy *ipso facto* any requirement to vindicate the public interest or to provide a public benefit; and/or (iii) in the particulars of this case, Mr. Miller is vindicating the public interest and/or providing a public benefit as this action directly seeks to restrain the abuse of corporate powers by the Cincinnati City Council and its members assuming and exercising a power not granted to them by the people of the City of Cincinnati in the *City Charter*.

> *PROPOSITION OF LAW NO. 1*: **Under the statutory municipal taxpayer-lawsuit provisions, a taxpayer may file an action on "behalf of a municipal corporation," R.C. § 733.59, if the government fails to pursue a lawsuit after a written request from the taxpayer. In such cases, the standing requirement is satisfied because the municipal corporation is the actual party in interest and the General Assembly has explicitly given the taxpayer authority to sue on the government's behalf.**

1. Overview of the statutory municipal taxpayer lawsuit provisions.

R.C. § 733.56 authorizes a village solicitor or city law director to seek:

> [an] injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption.

Similarly, a solicitor or law director may also bring: (i) a claim for specific performance "[w]hen an obligation or contract made on behalf of a municipal corporation, granting a right or easement or creating a public duty, is being evaded or violated," R.C. § 733.57, or (ii) a claim in mandamus when "an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance," R.C. § 733.58.

If a solicitor or law director fails to act pursuant to R.C. § 733.56, R.C. § 733.57, or R.C. § 733.58, then the General Assembly expressly empowered a municipal taxpayer, pursuant to R.C.

§ 733.59, to bring on behalf of the municipal corporation an action for such an injunction, specific performance, or mandamus. In such a situation, "the taxpayer[] stand[s] in the shoes of [the] municipal corporation." *City of Shaker Heights ex rel. Friends of Horseshoe Lake, Inc. v. City of Shaker Heights*, 2024-Ohio-3007 ¶23 (8th Dist.).

In expressly empowering a taxpayer to bring such action on behalf of the municipal corporation, the General Assembly set forth in R.C. § 733.59 certain conditions precedent that had to be met in order for the municipal taxpayer to do so:

> If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

And it was premised upon R.C. § 733.59 by which Mr. Miller commenced the present action on behalf of the City of Cincinnati in an effort to restrain the abuse of corporate powers by the Cincinnati City Council and its members.

2. As the determination of statutory standing is a matter of statutory interpretation, upon meeting the conditions precedent within R.C. § 733.59, a municipal taxpayer then has standing to bring on behalf of the municipality corporation a statutory municipal taxpayer lawsuit.

"It is well established that prior to an Ohio court's considering the merits of a legal claim, 'the person or entity seeking relief must establish standing to sue.'" *Ohioans for Concealed Carry, Inc v. City of Columbus*, 164 Ohio St. 3d 291, 172 N.E.3d 935, 2020-Ohio-6724 ¶12 (quoting *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St.3d 375, 875 N.E.2d 550, 2007-Ohio-5024 ¶27). "Whether a party has established standing to bring an action before the court is a question of law, which [this Court] review[s] *de novo*." *Moore v. City of Middletown*, 133 Ohio St. 3d 55, 975 N.E.2d 977, 2012-Ohio-3897 ¶20; *accord State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 130 Ohio St. 3d 30, 955 N.E.2d 935. 2011-Ohio-4612 ¶27 ("[s]tanding is a question of law, so we review the issue *de novo*").

However, "[s]tanding does not flow from the common-law 'personal stake' doctrine alone…. [S]tanding may also be conferred by a specific statutory grant of authority." *Middletown v. Ferguson*, 25 Ohio St. 3d 71, 75, 495 N.E.2d 380 (1986); *accord ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 13 N.E.3d 1101, 2014-Ohio-2382 ¶17 ("[i]n addition to standing authorized by common law, standing may also be conferred by statute"); *City of Wooster v. Enviro-Tank Clean, Inc.*, 2015-Ohio-1876 ¶12 (9th Dist.)("[s]tanding can be based on general common law principles or can be founded on a grant of authority from a statute"). And "[c]ommon-law standing principles do not apply when standing is authorized by statute." *Cool v. Frenchko*, 200 N.E.3d 562, 2022-Ohio-3747 ¶29 (10th Dist.). In this case, the standing of Mr. Miller to bring the present action on behalf of the City of Cincinnati does not arise from the common law but, instead, is premised upon the statutory authority explicitly granted to him *qua* a municipal taxpayer under R.C. § 733.59.

The question of standing to bring a statutory municipal taxpayer lawsuit under R.C. § 733.56 *et seq.* is simply a matter of statutory interpretation. *See Ohio Valley Associated Builders & Contrs. v. Indus. Power Sys.*. 190 Ohio App. 3d 273, 941 N.E.2d 849, 2010-Ohio-4930 ¶21 (6th Dist.)("the Ohio Supreme Court has resolved issues of standing in prevailing-wage cases exclusively as matters of statutory interpretation").

> "Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged … a "personal stake in the outcome of the controversy" [citation omitted] …. *Where, however, … [a legislative authority] has … provided by statute for judicial review …, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff*."

Middletown, 25 Ohio St. 3d. at 75-76 (emphasis added; alterations in original and quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-732 (1972)).

"Statutory interpretation requires [a court] to look at the plain language of the relevant statutes and no further." *State v. Fork*, 174 Ohio St. 3d 224, 235 N.E.3d 451, 2024-Ohio-1016 ¶33. "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Ed.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463, 1996-Ohio-291. "It is the responsibility of courts to enforce the literal language of a statute whenever possible." *Cablevision of the Midwest v. Gross*, 70 Ohio St. 3d 541, 544, 639 N.E.2d 1154 (1994). This is so because "[a] court's role is to interpret, not legislate." *Id*. Accordingly, "[c]ourts do not have the authority to ignore the plain and unambiguous language in a statute in the guise of statutory interpretation." *State v. Krutz*, 28 Ohio St. 3d 36, 38, 502 N.E.2d 210 (1986).

"Words used in a statute must be taken in their usual, normal or customary meaning." *Morgan v. Ohio Adult Parole Auth*., 68 Ohio St. 3d 344, 347, 626 N.E.2d 939, 1994-Ohio-380. And, in so doing, courts may not make "additions nor deletions from words chosen by the General Assembly." *Hulsmeyer v. Hospice of Southwest Ohio, Inc*., 142 Ohio St. 3d 236, 29 N.E.3d 903, 2014-Ohio-5511 ¶23. Consideration of the plain and unambiguous language of R.C. § 733.59 confirms that the General Assembly conferred statutory standing upon a municipal taxpayer who satisfies the conditions precedent therein, including, in the present case, Mr. Miller.

Additionally, and specifically with respect to the statutory municipal taxpayer lawsuit provisions, *i.e.*, R.C. § 733.56 *et seq*., this Court has expressly acknowledged such provisions as "being remedial in nature" and, thus "should be construed liberally." *Parks v. Cleveland Ry. Co*., 124 Ohio St. 79, 177 N.E. 28 (1931); *accord Brauer v. Cleveland*, 119 Ohio App. 159, 163, 191

N.E.2d 847 (8th Dist. 1963)(syllabus ¶1)(R.C. §§ 733.56 to 733.59 "are remedial in character and must be liberally construed and the broadest interpretation possible given to the language therein"), *rev'd on other grds.*, 7 Ohio St. 2d 94 (1966). Stated otherwise, this Court must give "the broadest interpretation possible to protect the rights of taxpayers from unauthorized acts on the part of municipalities." *New Richmond v. Greene*, 2004-Ohio-3540 ¶26 (12th Dist.).

The language of R.C. § 733.59 is clear and unambiguous as to the conditions precedent which must be met before a municipal taxpayer has standing to pursue a claim thereunder:

(i) The municipal taxpayer made a written request upon the solicitor or law director to make application to a court of competent jurisdiction for an injunction, specific performance and/or mandamus as provided for in R.C. § 733.56, R.C. § 733.57, or R.C. § 733.58; and,

(ii) the solicitor or law director fails to bring such an application.[3]

The plain language of R.C. § 733.59 requires nothing further before "the taxpayer may institute suit in his own name, on behalf of the municipal corporation."[4] And there is no dispute that Mr. Miller satisfied all such requirements in this case. *Cincinnati ex rel. Miller v. Cincinnati*, 2024-Ohio-4805 ¶20 ("[t]he parties do not dispute that Miller pays taxes to the City of Cincinnati [or] that the city solicitor rejected Miller's demand letter").

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[3] "When such 'written request' has been made, the solicitor must either refuse to bring the action, or 'fail' to bring it within a reasonable time after such request has been made, before the right to bring it accrues to the taxpayer." *Nunnold v. Toledo*, 52 Ohio App. 172, 174-75, 3 N.E.2d 550 (6th Dist. 1935).

[4] While R.C. § 733.59 also provides that "[n]o such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding," this condition does not go to the standing of the municipal taxpayer to bring such an action but, instead, goes to the jurisdiction of a court to entertain the action. *State ex rel. Citizens for a Better Portsmouth v. Snydor*, 61 Ohio St.3d 49, 54, 572 N.E.2d 649 (1991). Additionally, this Court has "rejected the argument that security must be provided at the time the suit is initially filed." *State ex rel. Committee for Charter Amendment Petition v. City of Maple Heights*, 140 Ohio St. 3d 334, 18 N.E.3d 426, 2014-Ohio-4097 ¶26.

In light of the plain language of R.C. § 733.59 and the explicit conditions precedent therein which a municipal taxpayer must satisfied in order to bring an action thereunder, this Court recently acknowledged that;

> a taxpayer may file an action on 'behalf of a municipal corporation,' R.C. § 733.59, … if the government fails to pursue a lawsuit after a written request from the taxpayer. In such cases, the standing requirement is satisfied because the municipal corporation … is the actual party in interest and the General Assembly has explicitly given the taxpayer authority to sue on the government's behalf.

State ex rel. Martens v. Findlay Muni. Court, __ Ohio St.3d __, __ N.E.3d __, 2024-Ohio-5667 ¶24. That legal proposition applies unequivocally to the present case and is consistent with the 150-year plus history of the statutory municipal taxpayer lawsuit provisions.

Having satisfied the conditions precedent set forth under the plain language of R.C. § 733.59, Mr. Miller has been afforded statutory standing as established by the General Assembly in order to bring the lawsuit herein "on behalf of" the City of Cincinnati. Accordingly, and for that reason alone, the decision of the First District must be reversed.

3. As statutory municipal taxpayer lawsuits are derivative actions brought on behalf of the municipal corporation, the municipal taxpayer brings the action simply because the municipal corporation has failed to exercise its own right to sue.

Independent of the application of the plain language of R.C. § 733.59, the nature of taxpayer lawsuits themselves further support the standing of Mr. Miller to bring the present action "on behalf of" the City of Cincinnati. In *Cincinnati ex rel. Ritter v. Cincinnati Reds, LLC*, 150 Ohio App.3d 728, 2002-Ohio- 7078 (1st Dist.), the First District succinctly described a statutory municipal taxpayer lawsuit as:

> a 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.

Id. ¶20. And this Court similarly equated such lawsuits as being:

> analogous to the equitable doctrine that, where the officers or directors of a corporation will not discharge their duty, the corporation is ordinarily the proper party to redress the wrong. If on the other hand, the directors are parties to the wrong, or will not bring the action, or both, the shareholders of the corporation may institute suit.

State ex rel. Nimon v. Village of Springdale, 6 Ohio St.2d 1, 5, 215 N.E.2d 592 (1966). Thus, statutory municipal taxpayer lawsuits, such as the present one, are not the claims of or brought on behalf of a specific individual or taxpayer but, instead, are, by their very nature, brought on behalf of the municipal corporation itself. In fact, R.C. § 733.59 expressly provides that such lawsuits are brought "on behalf of the municipal corporation."

In *Appleton v. Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988), the Wisconsin Supreme Court aptly described the nature of such lawsuits and the claim being brought by the municipal taxpayer as simply be a derivative action:

> a taxpayer brings a derivative action when the taxpayer brings the suit on behalf of a municipal entity and the effect of the lawsuit on the taxpayer is "neither special, immediate nor direct …." The basis of the derivative action is that the municipality has been injured and has the primary right to proceed but has refused to bring the action. The individual brings the action because the municipality fails to exercise its own right to sue.

Id. at 876 (quoting *State ex rel. Skogstad v. Anderson*, 130 Wis. 227, 230, 109 N.W. 98 (1906)). Accordingly, "[w]hen a taxpayer brings an action on behalf of the municipality, that is, a derivative action, the taxpayer's rights in the suit are coextensive with those of the municipality." *Id.*

In appreciation of the foregoing principles, "Ohio courts have held that the relevant municipal corporation is the party with the legitimate interest in a taxpayer action." *City of Cleveland ex rel. Wade v. City of Cleveland*, 18 F. Supp. 3d 897, 902 (N.D. Ohio 2014). And, thus, in statutory municipal taxpayer lawsuits, "the City is the real party in interest, attempting to enforce its rights." *Id.* at 901; *accord Lake S. & M. S. R. Co. v. Elyria*, 69 Ohio St. 414, 422-23, 69 N.E. 738 (1904)("[w]hile the suit was instituted with the title of 'Frank M. Stevens, as city solicitor of the city of Elyria, and as a taxpayer,' *it was so instituted on behalf of the city of Elyria as the real party in interest*"); *Ritter*, 2002-Ohio-7078 ¶21 (in municipal taxpayer lawsuit, "Cincinnati was the real party in interest"); *Laituri v. Nero*, 138 Ohio App. 3d 348, 351, 741 N.E.2d 228 (11th Dist. 2000)("the city is the real party in interest in a taxpayer lawsuit"); *see also see also Ritter*, 2002-Ohio-7078 ¶20 (1st Dist.) ("[t]he taxpayer's rights or claims are no greater than the rights or interests of the municipality").

Accordingly, because municipal taxpayer lawsuits are derivative actions, a municipal taxpayer filing an action pursuant to R.C. § 733.59 "is, in effect, the legislature's designated agent of the city and a representative of the public and virtually in the shoes of the solicitor," and, therefore, "is entitled to the same prerogatives as the solicitor." *Schulman v. Heights*, 94 Ohio L. Abs. 19, 20, 196 N.E.2d 102 (8th Dist. 1964). Yet, no court has ever required a solicitor or law director bringing an action pursuant to R.C. §§ 733.56 - 733.58 (or the predecessors thereof) to demonstrate the vindication of the public interest or providing a public benefit. Accordingly, if a solicitor or law director is not required to demonstrate the vindication of the public interest or providing a public benefit (or is always presumed to be doing so when bringing an action pursuant to R.C. §§ 733.56 – 733.58), then the municipal taxpayer is entitled to the same prerogative. Conversely, though, if the vindication of a public interest or providing a public benefit is a *sine qua non* before a municipal taxpayer may bring an action under R.C. § 733.59, then that same standard must also apply to all actions by a solicitor or law director not only under R.C. §§ 733.56 - 733.58 or but also under any other provision of law whereby a solicitor or law director is authorized to bring suit on behalf of a municipal corporation.

Thus, in light of the municipal corporation, and not the taxpayer, being the real party in interest in statutory municipal taxpayer lawsuits, the focus should not be on the individual taxpayer bringing the action. "[T]he charter of the city is in effect a constitution for the city, subject to be amended or repealed by the people themselves, in whom is vested the sovereign power of the municipality." *State ex rel. Baird v. Schroy,* 29 Ohio L. Abs. 519, 521 (9th Dist. 1938). When any public body or agent of the municipal corporation (including the city council itself) violates or exceeds the powers granted to them under a city charter, the people and municipal corporation have clearly suffered a harm as such assumption of power not granted constitutes an abuse of the corporate power and, pursuant to R.C. § 733.59, any taxpayer in the municipal corporation has the right to bring a derivative action to seek redress in the courts "on behalf of the municipal corporation" for such abuse of the corporate power less such abuse continue unabated and *ad infinitum*, free from any judicial review or accountability.

4. Longstanding, historical precedent of this Court further supports the proposition that, upon satisfying the conditions precedent within R.C. § 733.59, a municipal taxpayer has standing to bring on behalf of the municipality corporation a statutory municipal taxpayer lawsuit.

Beyond the plain and unambiguous language of R.C. § 733.59 or consideration of the nature of statutory municipal taxpayer lawsuits, historical precedent of this Court further supports that, upon satisfying the conditions precedent in R.C. § 733.59, a municipal taxpayer has standing to bring a statutory municipal taxpayer lawsuit on behalf of the municipal corporation in order to, *inter alia*, restrain an abuse of corporate powers.

In 1860, the General Assembly enacted, in language very similar to that which is codified today at R.C. § 733.56 *et seq.*, the first statute that provided for municipal taxpayer lawsuits for cities of the first class having a population exceeding eighty thousand inhabitants. *See* 57 *Ohio*

Laws 16, section 13 (1860). Only 9 years later, the General Assembly enacted comprehensive legislation for municipal corporations which included similar statutory provisions for municipal taxpayer lawsuits with respect to all municipal corporations with similar language as that currently codified at R.C. § 733.56 *et seq*. *See* 66 *Ohio Laws* 149, sections 159-161 (1869). And since that time, the language empowering municipal taxpayers to bring statutory taxpayer lawsuits on behalf of the municipal corporation has not changed substantively.[5] And precedents of this Court for most of the 150-plus years such provisions have been on the books have repeatedly confirmed that, upon satisfying the conditions precedent set forth in R.C. § 733.59, a municipal taxpayer has standing to bring such an action on behalf of the corporation.

In ***Elyria Gas & Water Co. v. Elyria***, 57 Ohio St. 374, 49 N.E. 335 (1898), this Court considered the use of the statutory municipal taxpayer lawsuit provisions in a lawsuit which sought "to enjoin the issue and sale of bonds of the city for the purpose of raising a fund with which to build water-works." *Id.* at 375. After the city solicitor refused a request to bring an action, *id.* at 375-76, a municipal taxpayer filed suit asserting, *inter alia*, the approval by the municipal council

[5] Since the initial adoption of the statutory municipal taxpayer provisions, subsequent amendments to such provisions were simply minor or grammatical. *See* 67 *Ohio Laws* 68, 72 (1870); 75 *Ohio Laws* 161, 218-219 (1878). In 1880, with the codification of all legislative enactments into the Revised Statutes, the statutory municipal taxpayer lawsuit provisions were initially codified at **R.S. §§ 1777 to 1778 (1880-1910)**. Subsequent amendments to the Revised Statutes were also minor or grammatical. *See* 81 *Ohio Laws* 188, 188-89 (1884); 87 *Ohio Laws* 122, 122-23 (1890); 95 *Ohio Laws* 316, 316-17 (1898); 96 *Ohio Laws* 20, 65-66 (1902); 99 *Ohio Laws* 458, 458-59 (1908). In 1910, with the adoption of the General Code, the statutory municipal taxpayer lawsuit provisions were then codified at **G.C. §§ 4311 to 4316 (1910-1953)**, and subsequent amendments were, as before, minor or grammatical. *See* 101 *Ohio Laws* 216, 216-17 (1910). Finally, with the adoption of the Revised Code in 1953, the statutory municipal taxpayer lawsuit provisions were then codified, as presently codified, at **R.C. §§ 733.56 to 733.61 (1953-present)**, and, as before, amendments thereto were minor or grammatical. *See* 129 *Ohio Laws* 1817, 1819-20 (1961); 137 *Ohio Laws* 2091, 2105-06 (1977). Thus, the statutory municipal taxpayer lawsuit provisions have been unchanged substantively since enacted over 150 years ago and, accordingly, historical cases brought thereunder have been premised upon the same legal standards as are presently codified at R.C. § 733.56 *et seq.*

of the issuance and sale of such bonds were illegal and constituted an abuse of corporate powers. Concluding that the underlying proceedings of the council were "unauthorized by reason of the failure of the council to act within its powers, and in compliance with the statute regulating such proceedings," this Court concluded that "the proposed use of the fund so to be raised would be illegal, and, therefore, a misapplication of it, as well as an abuse of corporate power." *Id.* 384. Accordingly, this Court granted judgment in favor of the municipal taxpayer. *Id.*

Within *Elyria Gas*, this Court directly addressed the standing of the municipal taxpayer to bring the statutory municipal taxpayer lawsuit premised upon a claim that the municipal council failed to act within its powers, *i.e.*, the same assertion made by Mr. Miller. With respect to the standing of the municipal taxpayer, this Court declared:

> It is claimed, however, that the plaintiff cannot maintain the action….
>
> The proceedings of the council of the city of Elyria … being unauthorized by reason of the failure of the council to act within its powers, … [t]o constitute such an abuse, it is not necessary that there be an intentional or willful disregard by the council of its duties; an omission to properly perform them, may be sufficient. And the abuse of corporate powers within the purview of the statute, includes an unauthorized or unlawful exercise of the powers possessed by the corporation, as well as the assumption of powers not conferred. *We have not considered the question whether the plaintiff, as a taxpayer, independent of the statute, might not maintain the action, for we think it was authorized by the statute to bring the suit, and is entitled to the injunction prayed for*.

Id. at 383-84 (emphasis added). Thus, this Court in *Elyria Gas* appreciated that the issue was whether the statute (not the common law) authorized the municipal taxpayer to bring this action. And as the municipal taxpayer made the requisite demand upon the city solicitor to bring the action challenging, *inter alia*, the abuse of corporate powers, upon the refusal of the solicitor to bring such an action, the taxpayer had standing to proceed; no further requirements, extra-statutory or otherwise, were required.

Similarly, in ***Butler v. Karb***, 96 Ohio St. 472, 117 N.E. 953 (1917), this Court entertained a statutory municipal taxpayer lawsuit wherein the taxpayer successfully challenged as an abuse of corporate powers the rates being charged for the municipality's electric utility services, as the municipal officials failed "to have or use any system or schedule of rates for such service, and arbitrarily fixing the rate in each case" so that "prices and rates for said [electric] current have been at no time uniform, or substantially so, under like conditions, situations and circumstances, but have been widely different and varying." *Id.* at 485. Acknowledging that, "such discrimination [in the rates charged] constitutes an abuse of power there can be no question," *id.*, this Court confirmed the taxpayer's standing:

> it is urged that the plaintiff is not a proper party to make such complaint, and that it not appearing that he suffers any injury by reason of the wrongful practices charged, he cannot maintain the action. We think that contention is unsound.... If upon the request of a taxpayer the city solicitor refuses to institute the action, the taxpayer may do so by virtue of the provisions of Section 4314, General Code. He then represents the public just as would the solicitor had he exercised the power conferred upon him and brought the suit.

Id. at 485-86.

Then, in ***Parks v. Cleveland Ry. Co***., 124 Ohio St. 79, 177 N.E. 28 (1931), the standing of a municipal taxpayer was again challenged and addressed in a lawsuit challenging the failure of a municipality to approve, reject, or object to an arbitration decision regarding the rates to be charged by a municipality-granted public utility. In rejecting the contention that the statutory municipal taxpayer provisions were "merely declaratory of the common law," this Court recognized that "the language of the section is broad enough to include any matters which involve an alleged abuse of corporate powers or the execution or performance of any contract, whether or not it involves a misappropriation or misapplication of funds of the corporation." *Id.* at 85. Thus, "the legislative intent is not to be narrowed to the mere matter of waste or unlawful diversion, but that the statute was intended to cover the execution or performance of ultra vires contracts by municipal officers, and to prevent usurpation by public bodies or agents of powers not granted, the exercise of which may imperil the public interest," *id.* at 86, and, thus, the taxpayer therein had standing to pursue such an action authorized by the statute. And not only did this Court uphold the standing of the taxpayer to bring the claim therein but, also, recognized that the statutory municipal taxpayer lawsuit provisions were remedial nature so as to be liberally construed to promote and advance the object and purposes of the law. *Id.*; *see* R.C. § 1.11 ("[r]emedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice").

In ***State ex rel. Scott v. Masterson***, 173 Ohio St. 402, 183 N.E.2d 376 (1962), municipal taxpayers commenced a statutory municipal taxpayer lawsuit in mandamus to compel compliance with the municipal charter to effectuate the redistricting of districts for city council elections. After the taxpayers' request to the law director to institute such an action was denied, the taxpayers commenced the mandamus action. In directly addressing the question of the taxpayers' standing to bring such an action, this Court concluded that "relators as taxpayers and electors have sufficient interest in the execution of the laws to maintain [the] action." *Id.* at 404.

And again, in ***Porter v. Oberlin****,* 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965), this Court concluded that a taxpayer had standing to bring a statutory municipal taxpayer lawsuit to seek a declaration that the fair housing ordinance of the City of Oberlin was unconstitutional and for an injunction restraining its enforcement. *Id.* at 145 ("we will first consider whether plaintiff has a right to maintain this action"). After summarizing the statutory municipal taxpayer provisions, this Court readily concluded that, in light of, *inter alia,* the alleged abuse of corporate powers, the "plaintiff has a right to maintain this action" so as to seek both injunctive relief and a declaratory judgment on behalf of the municipal corporation. *Id.* at 146.

Then, in ***Brauer v. Cleveland***, 7 Ohio St. 2d 94, 218 N.E.2d 599 (1966), a statutory municipal taxpayer lawsuit was properly brought and proceeded to trial even though "the rights protected were private rights as opposed to public rights. The action filed was primarily for the benefit of the plaintiff's own interests." *Id.* at 96. When the plaintiff-taxpayer successfully obtained judgment upon a claim of abuse of discretion by municipal officials, this Court concluded that the lack of a public benefit precluded an award attorney fees pursuant to R.C. § 731.66. In other words, the existence *vel non* of vindicating the public interest or providing a public benefit did not go to the standing of the taxpayer to bring the lawsuit but, instead, simply went to whether attorney fees should be awarded to the successful taxpayer at the end of the case. And, numerous cases of this Court have reiterated such timing of when the public benefit of a statutory municipal taxpayer lawsuit comes into play. *See, e.g., Billington v. Cotner*, 37 Ohio St.2d 17, 305 N.E.2d 805 (1974) (syllabus ¶l)("a prerequisite to the allowance of attorney fees in a taxpayer's action is the bestowal of a benefit upon the public through the efforts of the taxpayer"); *State ex rel. Committee for Charter Amendment Petition v. Avon*, 81 Ohio St.3d 590, 693 N.E.2d 205 (1998)(in an municipal statutory taxpayer lawsuit, "[a]n award [of attorney fees] requires a public benefit"); *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 58, 641 N.E.2d 1075 (1994)("[t]he allowance of attorney fees in a taxpayer action requires a resultant public benefit").

Thus, the lengthy history of statutory taxpayer actions provides that the existence of a public interest/public benefit goes to the discretion of a court in awarding attorney fees at the end of the case pursuant to R.C. § 733.61, not a *sine qua non* for the standing of the taxpayer at the outset of the case. If a public interest/public benefit is a *sine qua non* for bringing a statutory taxpayer action in the first instance, then, *a fortiori*, it would be a non-issue by the time the case had progressed to trial or to post-trial proceedings concerning an award of attorney fees. And caselaw of this Court clearly considers the public interest/public benefit at the end of a case when the issue is whether attorney fees should be awarded to a taxpayer who successfully brought a statutory municipal taxpayer lawsuit, not at the outset of the case in a standing analysis.

In ***Elyria Gas***, ***Butler***, ***Parks, Scott***, and ***Porter***, upon the solicitor or law director rejecting a demand from a municipal taxpayer to make application to a court of competent jurisdiction for an injunction, specific performance, or mandamus premised on the specific grounds set for in R.C. §§ 733.56 - 733.58 (or the prior codifications thereof), respectively, the municipal taxpayers satisfied all the conditions precedent of the statutory municipal taxpayer lawsuit provisions and, accordingly, had standing to pursue such claims. No requirement outside of the plain language of the statute, now codified at R.C. § 733.59, was required before the municipal taxpayer could properly bring the actions therein, as this Court recently reiterated in *Martens.* The holdings in *Elyria Gas*, *Butler*, *Parks, Scott,* and *Porter* were consistent with the plain language of the statutory municipal taxpayer lawsuit provisions which has been substantially the same since first enacted in 1860, and such decisions are still good law. And, as such, the holdings in these cases directly support the standing of Mr. Miller to bring the claims herein arising from the abuse of corporate powers by the Cincinnati City Council and its members.

5. The imposition of an extra-statutory requirement in order for a municipal taxpayer to have statutory standing to pursue an action under R.C. § 733.59 not only lacks any statutory basis, but has been undertaken with no substantive analysis.

In this case, the First District imposed an extra-statutory requirement before the standing requirement could be satisfied, *i.e.*, that the court determines or concludes that the taxpayer is also seeking to vindicate the public interest or to provide a public benefit. *See City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805 ¶2 ("[h]e has not shown that he is seeking to vindicate a public interest and therefore does not have standing to bring a taxpayer action under R.C. § 733.59"). But, as noted above, the imposition of such an extra-statutory requirement upon a taxpayer seeking to proceed under R.C. § 733.59 has no basis in the plain and unambiguous language of the statute itself nor in historical precedent of this Court spanning the 150 years in which the municipal statutory taxpayer-lawsuit provisions have been on the books. *See Martens*, 2024-Ohio-5667 ¶24 ("the standing requirement is satisfied because the municipal corporation ... is the actual party in interest and the General Assembly has explicitly given the taxpayer authority to sue on the government's behalf. Ohio has recognized such actions for over 150 years").

While the decision of the First District echoes language drawn from other appellate courts and this Court that impose the extra-statutory requirement that, to maintain standing, the court must also determine at the outset of a case that the taxpayer is seeking to vindicate the public interest or provide a public benefit, such a requirement lacks any basis in the plain and unambiguous text of R.C. § 733.59, as well as not being supported by the holdings of this Court in *Elyria Gas*, *Butler*, *Parks*, *Scott,* or *Porter*. Instead, such an extra-statutory requirement has been a recent phenomenon in the 150-plus year history of the statutory municipal taxpayer provisions. And the imposition of this extra-statutory requirement has been undertaken with no statutory analysis nor any acknowledgment that the statutory municipal taxpayer lawsuit provisions are remedial in nature which must be liberally construed to protect against unauthorized acts on the part of municipal bodies or municipal officials.

It appears that genesis of this extra-statutory requirement derived from language within this Court's opinion in *State ex rel. Nimon v. Village of Springdale*, 6 Ohio St.2d 1, 215 N.E.2d

592 (1966). In the *Nimon*, the issue concerned the relators' right to maintain a statutory municipal taxpayer lawsuit premised upon their asserted status as "electors," but not as "taxpayers". In holding the relators were also taxpayers, this Court explained that "[a]s *resident freeholders and electors*, they are necessarily taxpayers…. An 'elector' necessarily is a domiciliary and it would be an extreme situation wherein such person might not in fact pay any tax, directly or indirectly, to the political subdivision of his domicile." *Id.* at 6. This Court continued, declaring that "the sounder view is that the word, 'taxpayer,' is to be construed generally, not literally. It includes, in fact, freeholders and tenants, both resident and nonresident, citizens and electors. It also includes a nonresident and nonfreeholder municipal income taxpayer." *Id.* Thus, in such an explanation, this Court appropriately construed the statute, including the concept of taxpayer, liberally. But nowhere in the opinion itself did the Court even raise, address or consider that statutory municipal taxpayer lawsuits are limited only to taxpayers seeking to vindicate the public interest or to provide a public benefit. However, in the syllabus from *Nimon*, the Court described the concept of "taxpayer" as used in R.C. § 733.59 as "includ[ing] any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the benefit of the public, and any such person is subject to the conditions imposed by that section, unless waived." *Id.* (syllabus ¶2).

Yet, from the language in *Nimon* indicating broadly what is within (but not exclusively within) the ambit of who is a taxpayer, subsequent decisions of this Court and certain appellate courts latched onto the phrase "for the benefit of the public" so as to narrowly constrain the statutory municipal taxpayer lawsuit provisions contrary to the plain and unambiguous language of the statute, as well as in direct conflict to the holdings of this Court in *Elyria Gas*, *Butler*, *Parks, Scott,* and *Porter.* The imposition of such an extra-statutory requirement was undertaken with no substantive analysis, with no appreciation that the statutory language does not impose such a requirement and without considering historic precedent of this Court. *See State ex rel. White v. Cleveland*, 34 Ohio St. 2d 37, 40, 295 N.E.2d 665 (1973)(directly quoting and relying upon language from the syllabus in *Nimon*, concluding that mandamus action for production of public records could "properly [be] categorized as a 'taxpayer's action'" because relators, "regardless of any private or personal benefit, have enforced a right of action on behalf of and for the benefit of the general public" to compel duty to provide request public records); *State ex rel. Caspar v. Dayton*, 53 Ohio St. 3d 16, 20, 558 N.E.2d 49 (1990)("*White* establishes that to maintain such an action under R.C. § 733.59, the taxpayer's aim must be to enforce a public right"); *State ex rel. Fisher v. City of Cleveland*, 109 Ohio St. 3d 33, 845 N.E.2d 500, 2006-Ohio-1827 ¶12 ("[a]s established in *White* and discussed in *Caspar*, 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'" (quoting *Caspar*, 53 Ohio St.3d at 20)); *Ohioans for Concealed Carry*, 164 Ohio St. 3d 291, 172 N.E.3d 935, 2020-Ohio-6724 ¶26 ("[o]ur decision in *Fisher* addressed only the specific standing argument that had been presented in that case; namely, whether relators had asserted a matter that concerned a public right or benefit"); *see also State ex rel. Teamsters Local Union No. 436 v. Bd. of County Comm'rs*, 132 Ohio St. 3d 47, 969 N.E.2d 224, 2012-Ohio-1861 (in a county taxpayer lawsuit, "[i]n addition to the satisfaction of the foregoing formal requirement [contained with the statutory language], the taxpayer must also demonstrate that the remedy sought will benefit the public in order to have standing" (citing to *White*, 34 Ohio St.2d 37) and "when a remedy being pursued is one that is merely for the individual taxpayer's benefit, the taxpayer cannot claim that he is vindicating a public right, and he will not have standing to pursue a taxpayer action" (citing to *Caspar*, 53 Ohio St.3d at 20)). Thus, this Court's recent pronouncements concerning the extra-statutory requirement that a taxpayer must also be vindicating the public interest or providing a public benefit arises solely from *White* which contained little to no legal analysis.[6]

But in unduly constraining the expansive definition of "taxpayer" in *Nimon* (which simply indicated what was "included" therein), the conclusory statement in *White* and its progeny disregarded (let alone failed to apply) the plain and unambiguous language of R.C. § 733.59 (including the ordinary meaning of "taxpayer").[7] Additionally, such decisions did not appreciate or treat R.C. § 733.56 *et seq.* as remedial legislation so as to afford the broadest protection against unauthorized acts on the part of public bodies or agents of municipal corporations Furthermore,

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[6] Because *White* and its progeny failed to engage in any substantive discussion concerning what actually rises to the level of being within the vindication of the public interest or the providing of a public benefit, the resulting decisions from courts on the issue have been nothing more than arbitrary and *ad hoc* pronouncements on a case-by-case basis with no overriding principles or standards guiding such a determination. As aptly stated recently by the Twelfth District, "[c]ase law is not particularly clear on what constitutes a 'public right' for the purposes of taxpayer standing under R.C. 733.59." *Donovan v. Lebanon*, 2024-Ohio-6059 ¶23 (12th Dist.). Thus, when this extra-statutory requirement is imposed, the consistency and predictability inherent is the law is completely lacking.

[7] Because R.C. § 733.59 does not define "taxpayer", this Court must afford the term its plain, everyday meaning, looking to how the word is ordinarily used, as opposed to imposing a definition that imposes a condition precedent not found in R.C. § 733.59. *See State ex rel. Bratenahl v. Village of Bratenahl*, 157 Ohio St. 3d 309, 136 N.E.3d 447, 2019-Ohio-3233 ¶12 ("[b]cause the act does not define 'open' or 'open meeting,' we afford the terms their plain, everyday meanings, looking to how such words are ordinarily used"); *see* R.C. § 1.42 (undefined terms in a statute are to be given their plain, common, and ordinary meaning). "[T]o determine the common, everyday meaning of a word, [this Court] [has] consistently used dictionary definitions." *State v. Wells*, 91 Ohio St.3d 32, 34, 740 N.E.2d 1097, 2001-Ohio-3; *accord Gabbard v. Madison Local Sch. Dist. Bd. of Ed.*, 165 Ohio St. 3d 390, 179 N.E.3d 1169, 2021-Ohio-2067 ¶120 (DeWine, J., dissenting)("courts often rely on dictionaries to pinpoint the ordinary meaning of undefined terms"). And across various dictionaries, the term "taxpayer" is consistently recognized to simply and self-evidently mean "one that pays or is liable to pay a tax". *Webster's Third New Int'l Dictionary*, at 2345 (2002); *see Random House Webster's Dictionary of American English*, at 763 (1997)(taxpayer: "one who pays a tax or taxes or is subject to taxation"); *Oxford Dictionary of American English*, at 714 (2005)(taxpayer: "a person who pays taxes").

such decisions did not appreciate that the nature of municipal taxpayer lawsuits as being derivative actions brought "on behalf of" the municipal corporation. Nor did these decisions consider or even address the long-standing precedent and holdings of this Court in *Elyria Gas*, *Butler*, *Parks, Scott,* or *Porter*, which repeatedly held that, upon compliance with the express requirements of the statutory municipal taxpayer lawsuit provisions, a taxpayer had standing to pursue a claim asserting, *inter alia*, an abuse of corporate powers. Thus, any effort to impose an extra-statutory requirement before the standing requirement could be satisfied under R.C. § 733.59 should be rejected and, instead, the Court reaffirmed the clear statutory language and the standards therein, as well as the precedent and holdings of this Court in *Elyria Gas*, *Butler*, *Parks, Scott,* or *Porter*.

6. Conclusion: reversal and remand are warranted.

In light of any or all of the foregoing, this Court should reverse the judgment of the First District and hold that the standard by which a municipal taxpayer has statutory standing to bring an action under R.C. § 733.59 is upon satisfaction of the conditions precedent set forth in R.C. § 733.59, *i.e.*, upon a municipal taxpayer's written demand for the solicitor or law director to make an application to a court of competent jurisdiction as provided for in R.C. §§ 733.56 - 733.58, the solicitor or law director fails to make such an application. As Mr. Miller indisputably satisfied these conditions precedents, the Court should thus conclude that he has standing to bring this action and, accordingly, REVERSE the judgment of the First District and REMAND for further proceedings.

<u>PROPOSITION OF LAW NO. 2</u>: **To the extent the vindication of the public interest or providing a public benefit is required before a taxpayer has standing to proceed under the statutory municipal taxpayer lawsuit provisions, when a city council has allegedly assumed and exercised a power not grant to it under the city charter, a taxpayer has standing to challenge such action under the statutory municipal taxpayer lawsuit provisions as the effort to restrain such abuse of corporate power by the city council vindicates the public interest and/or provides a public benefit.**

Even if, notwithstanding plain language of R.C. § 733.59 or the decisions of this Court in *Elyria Gas*, *Butler*, *Parks*, *Scott,* or *Porter*, this Court still imposes upon a municipal taxpayer, as a requirement of standing, the extra-statutory requirement of vindicating the public interest or providing a public benefit, when such a taxpayer bring a claim to prevent the usurpation by public bodies or agents of powers not granted, the assertion of such a claim itself constitutes the advancement of a public interest or a public benefit. There are two reasons for such a conclusion: (i) in setting forth specific types of actions in R.C. §§ 733.56 - 733.58 which serve as the bases for statutory municipal taxpayer lawsuits, the General Assembly made the final policy determination that those type of actions, by their nature, vindicate the public interest or provide a public benefit; and (ii) when any governmental body or agents exercise a power not granted to them, it vindicates the public interest or provides a public benefit for a taxpayer to seek to restrain such abuse of power, including in the specific context of this case involving a governmental body exercising powers not granted to it under the constitution of that government, *i.e*, in this case, the *Cincinnati City Charter*.

1. **As the final arbiter of public policy, the General Assembly determined that the nature of actions provided for in R.C. §§ 733.56 - 733.58 already vindicates the public interest and/or provides a public benefit.**

The question of when and under what circumstances a municipal taxpayer may bring a statutory municipal taxpayer lawsuit is, ultimately, a policy decision to be made by the General

Assembly, not the courts. In enacting the statutory municipal taxpayer lawsuit provisions, the General Assembly has expressly made the policy determination of what type of actions by municipal authorities may be challenged by a taxpayer. If, a municipal taxpayer must also be vindicating the public interest or providing a public benefit before bringing such a lawsuit, then the policy decision by the General Assembly as to the various type of claims that may give rise to such lawsuits *ipse facto* defines the type of actions which satisfy any requirement to vindicate the public interest or to provide a public benefit.

In enacting R.C. § 733.56, the General Assembly identified only certain type of actions by municipal officials which could give rise to a statutory municipal taxpayer lawsuit, *i.e.*, "the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption"; similarly, R.C. § 733.57 allows for a claim for specific performance but only "[w]hen an obligation or contract made on behalf of a municipal corporation, granting a right or easement or creating a public duty, is being evaded or violated"; and R.C. § 733.58 allows for mandamus if and only if "an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance." While such language may arguably be very broad, not narrowly confined, this Court's "paramount concern is to ascertain and give effect to the intention of the General Assembly," *State ex rel. Bohlen v. Halliday*, 164 Ohio St. 3d 121, 172 N.E.3d 114, 2021-Ohio-194 ¶16 (quoting *State v. Vanzandt*, 142 Ohio St.3d 223, 28 N.E.3d 1267, 2015-Ohio-236 ¶7, and "[t]he intent of the General Assembly must be determined primarily from the language of the statute itself." *State ex rel. Repeal the Lorain Cty. Permissive Sales Tax Comm. v. Lorain Cty. Bd. of Elec.*, 151 Ohio St. 3d 247, 87 N.E.3d 1234, 2017-Ohio-7648 ¶14.

"[I]t is not the court's role to create law based on public policy…. This court may not use any policy preferences it may have to override valid legislative enactments." *Friedenberg v. Friedenberg*, 161 Ohio St. 3d 98, 161 N.E.3d 546, 2020-Ohio-3345 ¶18; *accord State ex rel. Tritt v. State Emp. Relations Bd.*, 97 Ohio St.3d 280, 779 N.E.2d 226, 2002-Ohio-6437 ¶17 ("[b]ecause the General Assembly is the final arbiter of public policy, judicial policy preferences may not be used to override valid legislative enactments"); *Painter v. Graley*, 70 Ohio St. 3d 377, 385, 639 N.E.2d 51 (1994)("[w]here the General Assembly has spoken, and in so speaking violated no constitutional provision, the courts of this state must not contravene the legislature's expression of public policy"). In fact, a court's "role in reviewing a statute is not to express agreement or disagreement with the public policy that led to its enactment." *Antoon v. Cleveland Clinic Found.*, 148 Ohio St. 3d 483, 71 N.E.3d 974, 2016-Ohio-7432 ¶33.

As the General Assembly has, by the plain language of R.C. §§ 733.56 - 733.58, set forth certain type of actions by which a taxpayer may bring a statutory municipal taxpayer lawsuit under R.C. § 733.59, the General Assembly has made the ultimate policy determination of what type of claims by taxpayer vindicates the public interest or provides a public benefit so as to afford the taxpayer standing to pursue such an action (assuming *arguendo* such an extra-statutory requirement is even required). Accordingly, when a taxpayer brings an action under R.C. § 733.59 and asserts a claim premised one or more of the type of actions identified in R.C. §§ 733.56 - 733.58, the taxpayer is vindicating the public interest or providing a public benefit so as to have standing to pursue such action on behalf of the municipal corporation; the province of the courts is limited to confirming the claim falls within the ambit of R.C. §§ 733.56 - 733.58 and no *ad hoc* and subjective determination by a court is required to decree whether the public interest or a public benefit is being advanced.

2. When any governmental body or agents exercise or attempt to exercise a power not granted to them, any effort to restrain such body or agent to exercising only those powers granted to them vindicates the public interest or provides a public benefit.

In the specifics of this case, Mr. Miller is unequivocally bringing an action seeking to vindicate the public interest or to provide a public benefit as the claims asserted on behalf of the City of Cincinnati directly maintain that the Cincinnati City Council and its members abused the corporate powers by exercising and threatening to exercise powers not granted to them under the *Cincinnati City Charter*. *See Elyria Gas*, 57 Ohio St. 374, 49 N.E. 335 (syllabus ¶6)("[t]he abuse of corporate powers, within the purview of [the statutory municipal taxpayer lawsuit provisions], includes … the assumption of power not conferred"); *Parks*, 124 Ohio St. at 86 (statutory municipal taxpayer lawsuit provisions intended "to prevent usurpation by public bodies or agents of powers not granted"). Nothing could be more in the public interest or providing a public benefit than ensuring a government, through the actions of public bodies or agents, operates within the confines of the powers granted to it by the people.

Article II, Section 1 of the *Cincinnati City Charter* grants only "legislative powers" to the Cincinnati City Council. Pursuant to Article IV, Section 1 of the *City Charter*, the administrative and executive powers are vested, not in the City Council, but in the Cincinnati City Manager. Contending that the granting of variances is an administrative or executive function, and, in granting such variances and in adopting the *Notwithstanding Ordinance*, the City Council assumed and exercised a non-legislative power not granted to it by the *City Charter*, Mr. Miller commenced this statutory municipal taxpayer lawsuit so as to restrain the City Council and its members to exercising only those powers the people of the City of Cincinnati granted to them by the constitution of the City, *i.e.*, the *City Charter*. *See State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elec.*, 148 Ohio St.3d 176, 69 N.E.3d 696, 2016-Ohio-5919 ¶¶13-14 (because "significant portions of [a] proposed ordinance attempt[ed] to govern the execution of existing law rather than enact new law," the ordinance was not legislative, but administrative).

"[W]hat is a city charter but a city constitution…. [I]t only distributes that power to the different agencies of government, and in that distribution may place such limitation, but not enlargement, upon that power, as the people of the municipality may see fit in such charter or constitution." *Perrysburg v. Ridgway*, 108 Ohio St. 245, 253, 140 N.E. 595 (1923); *accord Cleveland ex rel. Neelon v. Locher*, 25 Ohio St. 2d 49, 51, 266 N.E.2d 831 (1971)("[t]he municipal charter is basically the constitution of the municipality"). As "one of [the] functions [of a municipal charter] is the distribution of powers and the establishing of a framework within which substantive powers may be exercised," *State ex rel. Holloway v. Personnel Appeals Bd.*, 2010-Ohio-4754 ¶7 (2d Dist.), to seek to constrain a municipal body or official to exercising power consistent with a municipal charter (as Mr. Miller has done herein) most certainly should be determined to be vindicating the public interest and/or providing a public benefit. As this Court aptly cautioned, "[i]f the members of a legislative body can ignore, with impunity, the mandates of a constitution or a city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely." *Neelon*, 25 Ohio St.2d at 52. Advancing public faith in constitution government – even at the municipal level – clearly vindicates the public interest and/or provides public benefit. If this Court should conclude that the vindication of the public interest or providing a public benefit is required before a taxpayer even has standing to proceed under the statutory municipal taxpayer lawsuit provisions, this Court should readily conclude and hold that a municipal taxpayer meets that standard when the taxpayer brings a lawsuit that seeks to restrain a municipal body or officials from exercising powers not granted, both as a general proposition and in the particulars of the claims brought by Mr. Miller, and, accordingly, such taxpayer (including Mr. Miller) has standing to bring such an action provided the specific conditions precedent in R.C. § 733.59 are met.

III. CONCLUSION

This Court has appropriately declined to "find or enforce jurisdictional barriers not clearly statutorily or constitutionally mandated." *Nucorp, Inc. v. Montgomery Cty. Bd. of Revision*, 64 Ohio St.2d 20, 22, 412 N.E.2d 947 (1980). The premise for such a proposition includes an appreciation that "[t]o incorporate common law standing principles where the legislature has specifically authorized a party to bring suit is simply inappropriate." *Ohio Valley Associated Builders & Contrs.*, 2010-Ohio-4930 ¶13.

Based upon the foregoing – the plain language of R.C. § 733.59, the nature of statutory municipal taxpayer lawsuits, and historical precedents of this Court – this Court should conclude and hold that, in light of having satisfied the conditions precedent in R.C. §733.59, Mr. Miller has standing to pursue this statutory municipal taxpayer lawsuit on behalf of the City of Cincinnati. Alternatively, even if vindication of the public interest or providing a public benefit is required before a municipal taxpayer has standing to bring a statutory municipal taxpayer lawsuit, this Court should conclude and hold that the General Assembly set forth the type of claims in R.C. §§ 733.56 – 733.58 which *ipso facto* vindicate the public interest and/or provide public benefit; and that the type of claims brought herein, *i.e.*, seeking to restrain a municipal body and officials from exercising powers not granted by the municipal charter, vindicate the public interest and/or provide a public benefit, so that Mr. Miller has standing to bring the claims herein. For any or all of the foregoing, the judgment of the First District should be REVERSED and the case REMANDED for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served via email on the 9th day of June 2025, upon the following counsel of record:

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APPENDIX

Judgment Entry, Hamilton County Court of Appeals,
First Appellate District, Case No. C-23-0683 (October 4, 2024)

Opinion, *City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805
Hamilton County Court of Appeals, First Appellate District,
Case No. C-23-0683 (October 4, 2024)

Entry Denying Application for Reconsideration, Hamilton County Court of Appeals,
First Appellate District, Case No. C-23-0683 (December 4, 2024)

Statutory Municipal Taxpayer Lawsuit Provisions (R.C. §§ 733.56 – 733.61)

City of Cincinnati Ordinance No. 346-2022 / *Notwithstanding Ordinance*