IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

DAVID ESRATI	**:**	**Case No. 2018 CV 00593**
Plaintiff,	**:**	**Judge Richard Skelton**
v.	**:**	
DAYTON CITY COMMISSION, ET AL.	**:**	
Defendants.	**:**	

BRIEF OF THE BOARD OF EDUCATION FOR DAYTON PUBLIC SCHOOLS AND MOHAMED AL-HAMDANI RE: APPLICATION OF RULE 65 AND AUTHORITY OF THE COURT

I. INTRODUCTION

On February 7, 2018, this Court requested written briefs on two legal issues: (1) Whether the procedures set forth in Rule 65 of the Ohio Rules of Civil Procedure apply to injunctions sought under R.C. §121.22; and (2) whether the injunctive remedy set forth in that statute gives the Court authority to disband the Dayton School Facilities Task Force. The Dayton Public Schools Board of Education and Mohamed Al-Hamdani submit the following response to those two questions along with the supporting legal analysis.

First, the procedures required by Rule 65 apply in the context of an action brought pursuant to R.C. 121.22(I), because those procedures will not alter the basic purpose underlying the statutory remedy. Second, the open meetings law allows the Court "to compel the members of [a] public body to comply with its provisions." R.C. 121.22(I)(1). Those "provisions" require resolutions, rules, or formal actions by a public body to be adopted only at a meeting open to the public. Nothing in the statute constrains the ability of a public school district superintendent to

S&W

Subashi
& Wildermuth

The Greene Town Center
50 Chestnut Street
Suite 230
Dayton, Ohio 45440

phone: 937-427-8800
fax: 937-427-8816

create a task force to study a situation, gather information, and provide input. This Court does not have authority under R.C. 121.22(I) to disband the task force.

II. CIVIL RULE 65 GENERALLY PRESCRIBES THE PROCEDURE TO BE FOLLOWED IN THIS MATTER.

Civil Rule 65 sets forth the procedural requirements necessary in an injunction proceeding. The question from this Court was whether those requirements apply where injunctive relief is expressly afforded by statute. Civil Rule 1(A) provides: "These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in division (C) of this rule." Ohio Civ.R. 1(A). As applicable to the current litigation, Civ.R. 1(C) limits the reach of the Civil Rules only where a special statutory proceeding has rendered them "clearly inapplicable." Ohio Civ. R. 1(C). Otherwise, "that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules." *Id*.

In 1971, Civil Rule 1(C) was amended to permit a broad application of the Civil Rules to special statutory proceedings. According to the 1971 Staff Notes for Civil Rule 1, "the Civil Rules [are] applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules." And, the Ohio Supreme Court has stated that, "[t]he civil rules should be held to be clearly inapplicable only when their use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action." *State, ex rel. Millington, v. Weir*, 60 Ohio App. 2d 348, 349 (1978). Rule 1 should be considered "a rule of inclusion rather than exclusion." *Price v. Westinghouse Elec. Corp*., 70 Ohio St.2d 131, 132 (1982). Determinations as to whether the rules and statutory processes are incompatible must be made on a "case-by-case basis, depending on the statute involved." *Ramsdell v. Ohio Civ. Rights Comm.*, 56 Ohio St. 3d 24, 27 (1990).

S&W

Subashi
& Wildermuth

The Greene Town Center
50 Chestnut Street
Suite 230
Dayton, Ohio 45440

phone: 937-427-8800
fax: 937-427-8816

In this instance, Section 121.22 provides for a remedy, in the form of injunctive relief, that was not available at common law and, thus, is a special statutory proceeding under Civil Rule 1(C). The only question, then, is whether the application of the procedures set forth in Civil Rule 65 for seeking injunctive relief will alter the basic statutory purpose for which injunctive relief was provided for in 121.22. To demonstrate a violation of R.C. 121.22, a complainant must show that, "*** a resolution, rule or formal action of some kind ***" was adopted by a public body at a meeting which was not open to the public. *Holeski v. Lawrence*, 85 Ohio App.3d 824, 829, 621 N.E.2d 802 (1993).

If a party is able to prove a violation of the open meetings law, the Court shall enjoin the public body from engaging in the prohibited action. Thus, the basic statutory purpose for 121.22(I) is to create a remedy for parties who believe the open meetings law has been violated. Generally, application of the procedures set forth in Civil Rule 65 and the other Rules of Civil Procedure do not alter that basic statutory purpose.

Indeed, the statute appears to recognize that consideration of injunctive relief under the statute falls to a certain extent within the equity jurisdiction of Civil Rule 65 when it states, "Irreparable harm and prejudice to the party that sought the injunction shall be conclusively and irrebuttably presumed upon proof of a violation or threatened violation of this section." R.C. 121.22(I)(3). Irreparable harm is a classic element necessary for equitable relief under Civil Rule 65. The statute only "slightly" modifies Rule 65 to provide when such irreparable harm will be deemed to have occurred. *State, ex rel. Hardin Cty. Pub. Co. v. Hardin Mem'l Hosp.*, 2002-Ohio-5586 (incorporating the trial court's finding that the statute only "slightly" modifies Civil Rule 65). Because Civil Rule 65 does not alter the purpose underlying R.C. 121.22(I), its procedures should be found to apply.

S&W

Subashi
& Wildermuth

The Greene Town Center
50 Chestnut Street
Suite 230
Dayton, Ohio 45440

phone: 937-427-8800
fax: 937-427-8816

III. THE COURT'S AUTHORITY IS LIMITED TO ENJOINING VIOLATIONS OF R.C. 121.22.

The next question is whether the trial court has the authority, under R.C. 121.22, to disband the School Facilities Task Force. It does not. As explained below, the scope of an injunction is specifically limited.

First, however, it is appropriate to examine the discretion available to a board of education and the superintendent it appoints. A board is statutorily authorized to operate a public school district. Section 3313.17 explains that authority in the broadest possible terms:

> The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

The entirety of Chapter 33 of the Revised Code sets forth the extensive rights, obligations, and responsibilities of school boards and their employees. For example, a board of education is authorized, indeed instructed, to appoint a superintendent who "shall be the executive officer for the board" and "shall perform such other duties as the board determines." R.C. 3319.01.

In this instance, the Board instructed the Superintendent to study the District's facilities and provide a recommendation.[1] The Superintendent, in turn, created a diverse task force to gather and study information and seek community input. Ohio courts have recognized that information-gathering and fact-finding (even when undertaken by the public body itself) are essential functions of any board, and that the gathering of facts and information for ministerial purposes does not constitute a violation of the open meetings act. See *Holeski* at 829; *Cincinnati Enquirer*, 192 Ohio App. 3d 566, 2011 Ohio 703 at ¶ 12, 14, 949 N.E.2d 1032; *Steingass Mechanical Contracting, Inc. v. Warrensville Hts. Bd. of Edn.*, 151 Ohio App.3d 321, 2003-

[1] The Board, of course, would remain the decision-maker.

S&W

Subashi
& Wildermuth

The Greene Town Center
50 Chestnut Street
Suite 230
Dayton, Ohio 45440

phone: 937-427-8800
fax: 937-427-8816

Ohio-28. This situation is even one step further removed, as it was the Superintendent's task force (i.e. not a "public body" under R.C. 121.22(B)(1)) that was gathering information.

The injunctive relief provided for in R.C. 121.22(I) is specifically designed to address past or threatened violations of the open meetings law. While the Court may be able to enjoin a public body (e.g. the Board) from violating that law, the statute offers no authority to disband a task force created by a public body's executive officer. Even if the task force were a public body (which it is not), the Court could do no more than "issue an injunction to compel the members of the public body to comply with its provisions." R.C. 121.22(I)(1). In other words, if the task force were a public body, the Court could enjoin it to comply with subsection (F) (i.e. the notice provisions) and subsection (C) (i.e. the "[a]ll meetings of a public body are declared to be public meetings" provision).

The Court does have the authority to invalidate a resolution passed by the Board in violation of the open meetings law, but that authority is strictly limited. As one court explained:

> This court has oft recognized that unambiguous statutory language must not be abridged or enlarged, regardless of policy implications. More fundamentally, any authority from whatever source which empowers the judiciary to nullify legislative or administrative actions must be carefully guarded. "One branch of the Government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Consequently, a violation of the "open meeting" requirement imposed by R.C. 121.22(C) is a prerequisite to invalidation of a resolution, rule, or other formal action in accordance with R.C. 121.22(H).

Barbeck v. Twinsburg Twp., 73 Ohio App. 3d 587, 595 (1992)(citations omitted). In other words, a decision to invalidate a public body's action must not be taken lightly and must be strictly limited in accordance with the statute. Moreover, the Board did not create the task force, the Superintendent did. There simply is no board action to invalidate.

S&W

Subashi
& Wildermuth

The Greene Town Center
50 Chestnut Street
Suite 230
Dayton, Ohio 45440

phone: 937-427-8800
fax: 937-427-8816

Respectfully submitted,

/s/ Brian L. Wildermuth
Brian L. Wildermuth (0066303)
bwildermuth@swohiolaw.com
SUBASHI & WILDERMUTH
The Greene Town Center
50 Chestnut Street, Suite 230
Dayton, OH 45440
(937) 427-8800
(937) 427-8816 (fax)
Attorney for Defendants Dayton Board of Education and Mohamed Al-Hamdani

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the Court's authorized electronic filing system, which will send notification of such filing to the following:

David Esrati
esrati@thenextwave.biz
13 Bonner Street
Dayton, OH 45410
Pro Se Plaintiff

John C. Musto (0071512)
john.musto@cityofdayton.org
Assistant City Attorney
Barbara J. Doseck (0079159)
barbara.doseck@daytonohio.gov
Law Director
City of Dayton
101 West Third Street
P.O. Box 22
Dayton, OH 45401
Attorneys for Dayton City Commission and Jeffrey J. Mims, Jr.

/s/ Brian L. Wildermuth
Brian L. Wildermuth (0066303)

S&W
Subashi
& Wildermuth
The Greene Town Center
50 Chestnut Street
Suite 230
Dayton, Ohio 45440
phone: 937-427-8800
fax: 937-427-8816