№ 2019-0811

IN THE SUPREME COURT OF OHIO

DAVID ESRATI

Plaintiff-Appellant,

v.

DAYTON CITY COMMISION, ET AL.

Defendants-Appellees.

APPEAL FROM THE COURT OF APPEALS,
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY, OHIO
Case № CA28062

APPELLEES' JOINT MEMORANDUM IN OPPOSITION TO JURISDICTION

Brian L. Wildermuth (0066303)
bwildermuth@swjohiolaw.com
Zachary J. Cloutier (0097160)
zcloutier@swjohiolaw.com
SUBASHI, WILDERMUTH & JUSTICE
The Greene Town Center
50 Chestnut Street, Suite 230
Dayton, Ohio 45440-1385
Telephone: (937) 427-8800
Facsimile: (937) 427-8816
Counsel for Defendants-Appellees
Dayton City School District
Board of Education and
Mohamed Al-Hamdani

David Esrati, Pro Se
100 Bonner Street
Dayton, Ohio
Appellant

John C. Musto (0071512)
John.musto@daytonohio.gov
Martin W. Gehres (0096711)
Martin.gehres@daytonohio.gov
City of Dayton Law Department
101 W. Third Street
P.O. Box 22
Dayton, Ohio 45401
Counsel for Defendants-Appellees
Dayton City Commission and
Commissioner Jeffrey J. Mims Jr.

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I. EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

This case does not involve an issue of public or great general interest. Instead, it presents nothing more than the application of well-settled law concerning the Open Meetings Act ("OMA"), R.C. 121.22. Applying this law, both the trial and appeals courts concluded that, based on the undisputed facts in the record, Appellees did not conduct "deliberations" and, therefore, did not violate the OMA, as a matter of law.

While the issue presented by this case is certainly important to the parties included in this litigation and, indeed, has become a personal crusade for Appellant, it lacks any further reaching interest to the citizens of Ohio. Despite Appellant's efforts to now recharacterize it, the primary issue presented by this case is whether a February 2018 school facilities bus tour involved "deliberations," as contemplated by the OMA. The larger issue of governmental transparency is an issue to be directed toward the General Assembly, which enacted the OMA using language that requires "deliberations" to establish a violation.

A clarification of the law, as it pertains to the meaning of "deliberations," is also unnecessary. Ohio appellate courts have clearly and unanimously instructed that the term requires more than information-gathering, investigation, or fact-finding. This is so because the plain meaning of deliberations is a thorough discussion, careful weighing, and cautious consideration of the relevant factors to arrive at a proper decision. It does not include activities like question-and-answer sessions between public body members and community members.

Given the lack of general interest, and the well-settled law on the subject-matter involved, this Court should decline to exercise its jurisdictional authority over this appeal.

II. STATEMENT OF THE CASE AND FACTS

As early as September 2016, Dayton Public Schools observed an "enrollment problem." In response, it initiated enrollment studies and began discussing the need to move teachers and students. In November 2017, the Dayton Public School District Board of Education ("Board") appointed Dr. Elizabeth Lolli as acting superintendent of Dayton Public Schools. Dr. Lolli had 40 years of experience in education, serving in various teaching and administrative roles.

In December 2017, the Board instructed Dr. Lolli to study, in particular, facility issues and provide a recommendation on the topic. To that end, Dr. Lolli sought out business people "who could offer a different viewpoint" and, ultimately, assembled the School Facilities Task Force ("Task Force") as an information-gathering tool. The Task Force included three members of the Board: Mohamed Al-Hamdani, Dr. William Harris, and Dr. Robert Walker. The four other Board members did not participate.

The Task Force held its first meeting on January 24, 2018. At the meeting, the Task Force members discussed the purpose of "right-sizing" the district, Dayton Public Schools' position for growth in enrollment, its guiding principles, prioritization criteria, and district reports. Appellant attended and video-recorded the January 24, 2018 meeting.

On the morning of February 6, 2018, the Task Force members boarded a school bus at Dayton Public Schools' administrative headquarters for a tour of several facilities operated by Dayton Public Schools. Media personnel, Task Force members, and school administrative personnel were on the bus. The three Board members who were also Task Force members were in attendance. Between headquarters and arriving at the tour's first stop, Valerie Elementary School, Al-Hamdani asked to exit the bus. When the bus arrived at Valerie Elementary School,

Appellant was waiting in the portico with a video camera and recorded the group as they entered Valarie Elementary School.

By that point, Appellant had moved the trial court for a temporary restraining order and preliminary injunction. As the Task Force was completing its tour of Valerie Elementary School, Dr. Lolli received notification that the trial court had requested that the tour be halted. She immediately stopped the tour. The trial court later denied Appellant's motion as moot.

On March 8, 2018, Appellant moved for an expedited hearing and requested an enjoinment of any further discussions concerning the issue of school closings. One week later, the trial court held an evidentiary hearing on Appellant's request. At the hearing, Appellant conceded that his sole claim concerned the February 6, 2018 bus tour. Further, Appellant admitted that he had no idea what transpired among the Task Force members who attended the bus tour. On March 19, 2018, the trial court issued an order denying Appellant's request for injunctive relief. The trial court found that Appellant did not meet his burden to show the Task Force conducted "deliberative discussion" during the February 6, 2018 bus tour, thus concluding that he failed to demonstrate an OMA violation.

In early June 2018, Appellees moved the trial court for summary judgment and dismissal of Appellant's complaint with prejudice. In their supporting memorandum, Appellees explained, among other things, that they were entitled to judgment as a matter of law because (1) the Task Force was not a public body as defined by the OMA and (2) it did not conduct deliberations during the February 6, 2018 bus tour.

The trial court agreed that the Task Force did not conduct deliberations during the February 6, 2018 bus tour and, accordingly, granted summary judgment in Appellees' favor. Specifically, the trial court found that "there [was] no evidence that any deliberation occurred

during the bus tour or any discussion of the prospective closing of school buildings." The trial court noted that Appellant did not present any evidence in supplement to the preliminary injunction hearing transcript and that Appellant "advised the [trial court] that he would stand on his response to the defense motions."

On appeal, the Second District Court of Appeals upheld the trial court's ruling. It similarly concluded that, based on the undisputed evidence in the record, the Task Force did not engage in any deliberations during the February 2018 bus tour. It later denied Appellant's motion for reconsideration. Appellant now seeks review by this Court.

III. ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

A. First Proposition of Law

Appellant's first proposition of law is an apparent criticism of the OMA as a general matter. He complains that the OMA "shouldn't require a law degree to enforce." (Memorandum in Support of Jurisdiction of Plaintiff-Appellant David Esrati ("Appellant's Memorandum"), 6.) Yet, it is well-established that Ohio courts cannot indulge in advisory opinions and, as dictated by the separation of powers doctrine, cannot compel the General Assembly to amend or repeal a statute. Regardless of whether Appellant's criticism has merit, it fails to present an appropriate question for this Court to review.

This Court has long instructed that it will not indulge in advisory opinions. *See Egan v. National Distillers & Chemical Corp.*, 25 Ohio St. 3d 176, 178, 495 N.E.2d 904 (1986), syllabus; *Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St. 2d 401, 406, 433 N.E.2d 923 (1982). Further, the General Assembly is vested with the legislative power of this state, and it may enact any law that does not conflict with the Ohio and United States Constitutions. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶

36; *City of Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358, ¶ 2. The separation of powers doctrine prevents the judiciary from asserting control over "the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control." *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633, 716 N.E.2d 704 (1999). "A court can no more prohibit the General Assembly from enacting a law than it can compel the legislature to enact, amend, or repeal a statute—'the judicial function does not begin until after the legislative process is completed.'" *City of Toledo* at ¶ 27, citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 1999-Ohio-123, 715 N.E.2d 1062 (1999); *see also State ex rel. Slemmer v. Brown*, 34 Ohio App.2d 27, 28, 295 N.E.2d 434 (10th Dist.1973) ("The judiciary has no right or power to command the General Assembly to adopt joint resolutions.").

Appellant's first proposition of law fails to present a basis for any relief in this matter. Instead, it is merely a criticism that the OMA is overly complicated and difficult for a non-lawyer to understand. It does not assert a constitutional challenge or some other reasonable grounds to reverse the decisions below. Further, though Appellant may prefer it, this Court does not have authority to amend the OMA. *See City of Toledo* at ¶ 27. Appellant must direct his criticism toward the General Assembly. Accordingly, Appellant's first proposition of law lacks merit, and this Court should decline to exercise its jurisdictional authority.

B. Second Proposition of Law

In his second proposition of law, Appellant claims that "[t]he words information session, had they been meant to be an exception of the plain language, well documented rules of [R.C.] 121.22, would appear in the [Revised Code] relating to governmental meetings." (Appellant's Memorandum, 7.) He also decries that "the average citizen should have full access to the law,

without having to be versed in court cases where exceptions were somehow granted to allow this kind of meeting." (Appellant's Memorandum, 7-8.)

Appellant's second proposition of law fails for two reasons. First, Appellant never raised this argument in the proceedings below and, therefore, waived it. Second, even if it is a proper question for review, Appellant confuses the analysis. And, it is well-settled that "deliberations," which are necessary to establish an OMA violation, involve more than information-gathering, investigation, or fact-finding.

1. Appellant waived this argument by failing to raise it during the proceedings below.

It is well-established procedure that a party seeking to appeal a particular issue must preserve the issue by appropriately raising it in the proceedings below. *Patton v. Ditmyer*, 4th Dist. Athens Nos. 05CA12, 05CA21, 05CA22, 2006-Ohio-7107, ¶ 52, citing *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 220, 574 N.W.2d 457 (1991), *overruled on other grounds by Collins v. Sotka*, 81 Ohio St.3d 506, 1998 Ohio 331, 692 N.E.2d 581 (1998). In the context of a motion for summary judgment, "'[d]espite the fact that appellate courts review summary judgment decisions *de novo*, "[t]he parties are not given a second chance to raise arguments that they should have raised below."'" *Litva v. Richmond*, 172 Ohio App.3d 349, 2007-Ohio-3499, 874 N.E.2d 1243, ¶ 18 (7th Dist.), quoting *Aubin v. Metzger*, 3d Dist. Allen No. 1-03-08, 2003-Ohio-5130, ¶ 10, quoting *Smith v. Capriolo*, 9th Dist. Summit No. 19993, 2001 Ohio App. LEXIS 1668 (Apr. 11, 2001).

For the first time, Appellant asserts that "deliberations," as used in the OMA, covers information-gathering sessions. He never made this claim at any point during the proceedings below—whether it be in his response to Appellees' motions for summary judgment or his court

of appeals briefing. In turn, he waived this issue for the purposes of this appeal and is barred from now asserting it.

2. It is well-settled law that "deliberations," as contemplated by the OMA, involve more than information-gathering, investigation, or fact-finding.

When interpreting a statute, a court must first look at its language to determine legislative intent. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). To discern legislative intent, a court considers the statutory language, reading the words and phrases in context, according to rules of grammar and common usage. *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, ¶ 12, 990 N.E.2d 568, citing R.C. 1.42 (additional citations omitted). "The court may not delete or insert words, but must give effect to the words the General Assembly has chosen." *Id.*, citing *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 39-40, 2001 Ohio 236, 741 N.E.2d 121 (2001). "Statutes that are plain and unambiguous must be applied as written without further interpretation." *Lake Hosp. Sys. v. Ohio Ins. Guar. Assn.*, 69 Ohio St. 3d 521, 524, 634 N.E.2d 611 (1994). If a legislative definition is available, a court construes the words of the statute accordingly. R.C. 1.42.

Appellant questions the trial and appeals courts' interpretation of "deliberations." He seems to contend that, because the OMA fails to expressly state that an "information session" is an exception to the public access requirement, the courts erred in construing it as one. This argument confuses the issue though. Rather than finding some implicit or unstated exception, the courts below actually determined the type of activities that qualify as "deliberations" and thus require public access.

The OMA, codified as R.C. 121.22, imposes open meeting requirements on public bodies. *Paridon v. Trumbull County Children's Services Board*, 11th Dist. Trumbull No. 2012-T-

0035, 2013-Ohio-881, ¶ 16. In particular, the OMA requires that public bodies "take official action and * * * conduct all deliberations upon official business only in open meetings * * *." R.C. 121.22(A). Thus, for the OMA to apply, a plaintiff has the burden to show that a public body held a "meeting" in which it conducted "deliberations" concerning "public business." R.C. 121.22(B)(2); *accord Berner v. Woods*, 9th Dist. Lorain No. 07CA009132, 2007-Ohio-6207, ¶ 17; *Holeski v. Lawrence*, 85 Ohio App.3d 824, 829-30, 621 N.E.2d 802 (11th Dist. 1993).

Interpreting R.C. 121.22, Ohio appellate courts have unanimously held that "deliberations" involve more than information-gathering, investigation, or fact-finding. *State ex rel. Huth v. Vill. of Bolivar*, 5th Dist. Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-4560, ¶ 39; *State ex rel. Ames v. Portage Cty. Bd. of Comm'rs*, 11th Dist. Portage No. 2017-P-0093, 2018-Ohio-2888, ¶ 23; *Brenneman Bros. v. Allen County Comm'rs*, 3d Dist. Allen No. 1-14-15, 2016-Ohio-148, ¶ 23; *State ex rel. Chrisman v. Clearcreek Twp.*, 12th Dist. Warren No. CA2012-08-076, 2013-Ohio-2396, ¶ 12; *Radtke v. Chester Twp.*, 11th Dist. Geauga No. 2014-G3222, ¶ 25; *Berner* at ¶ 17; *Piekutowski v. South Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 161 Ohio App. 3d 372, 2005-Ohio-2868, ¶ 14 (4th Dist.); *Vos v. Vill. of Washingtonville*, 7th Dist. Columbiana No. 03-CO-20, 2004-Ohio-1388, ¶ 26; *Steingass Mech. V. Warrensville Heights Bd. of Educ.*, 151 Ohio App. 3d 321, 2003-Ohio-28, ¶ 49 (8th Dist.).

The Ninth District Court of Appeals examination of the meaning of "deliberations," as it is used in R.C. 121.22, is particularly insightful here. Acknowledging that the intent of the OMA is to require governmental bodies to deliberate public issues in public, the *Berner* court explained that Webster's Third New International Dictionary (1961) 596, defines "deliberation" as "the act of weighing and examining the reasons for and against a choice or measure" or "a discussion and consideration by a number of persons of the reasons for and against a measure." *Id.* at ¶ 15.

Relying on the plain meaning, the *Berner* court concluded that "'deliberations' involves more than information-gathering, investigation, or fact-finding." *Id.* The court clarified that activities, such as question-and-answer sessions between public body members and community members, do not qualify as deliberations. *Id.*

Appellant has not offered any basis to support that the trial and appeals courts' decisions should be disrupted. Both courts reviewed the evidence submitted for consideration and concluded that Appellees were entitled to summary judgment in their favor. In doing so, both courts applied the plain meaning of the OMA. As to Appellant's second proposition of law, the Court should decline to exercise its jurisdictional authority.

C. Third Proposition of Law

Appellant's final proposition of law is seemingly indistinguishable from his second proposition of law. Appellant asserts that, "[t]o remove the rights of the public to observe, for any reason at all, should have a sound and unquestionable justification that provides some sort of supported logic." (Appellant's Memorandum, 8.) He then states that "[t]his is why [R.C.] 121.22 clearly stipulates exclusions." (Appellant's Memorandum, 8.)

Although information-gathering and fact-finding sessions are not expressly provided by R.C. 121.22, Ohio courts have long recognized that they "are essential functions of any board, and that the gathering of facts and information for ministerial purposes does *not* constitute a violation of the [OMA]." (Emphasis added.) *Holeski* at 829. Courts have concluded this because "public bodies must 'deliberate' over public business" for the OMA to apply. *See* Id. at 829. And, as discussed above, Ohio courts have relied on the plain meaning of the statute to determine that public bodies may conduct information-gathering in a non-public setting. *See Holeski* at 831;

Theile v. Harris (1986), 1986 WL 6514, 6 (finding that a public body's private discussions with its legal counsel were not a violation of the Open Meetings Act).

Like his others, Appellant's third proposition of law fails to present a basis for any relief. An express exception for information-gathering and fact-finding sessions is unnecessary. It is implicit in the plain meaning of the OMA. *See Holeski* at 831. Contrary to Appellant's position, the OMA requires only that a public body deliberate and take official actions in public; it does not require every aspect of a public body's existence to be accessible to the public. As to Appellant's third proposition of law, this Court should decline to exercise its jurisdictional authority.

IV. CONCLUSION

For the foregoing reasons, Appellees urge this Court to decline to exercise its jurisdictional authority over this appeal.

Respectfully submitted,

Brian L. Wildermuth (0066303)
bwildermuth@swohiolaw.com
Zachary J. Cloutier (0097160)
zcloutier@swohiolaw.com
SUBASHI & WILDERMUTH
The Greene Town Center
50 Chestnut Street, Suite 230
Dayton, Ohio 45440-1385
Telephone: (937) 427-8800
Facsimile: (937) 427-8816
Counsel for Defendants-Appellees
Dayton City School District
Board of Education and
Mohamed Al-Hamdani

By Email Authority ZJC

John C. Musto (0071512)
John.musto@daytonohio.gov
Martin W. Gehres (0096711)
Martin.gehres@daytonohio.gov
City of Dayton Law Department
101 W. Third Street
P.O. Box 22
Dayton, Ohio 45401
Counsel for Defendants-Appellees
Dayton City Commission and
Commissioner Jeffrey J. Mims Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by ordinary mail this 17 day of July 2019, upon:

David Esrati, Pro Se
100 Bonner Street
Dayton, Ohio
Appellant

(0097160) FOR
Brian L. Wildermuth (0066303)