

Case No. 2023-1059

**Supreme Court
of the State of Ohio**

LOOK AHEAD AMERICA,

and

MERRY LYNNE RINI,

Plaintiffs-Appellants,

v.

STARK COUNTY BOARD OF ELECTIONS, *et al.*,

Defendants-Appellees.

Look Ahead America, et al. v. Stark County Board of Elections, et al.,
Stark County Court of Appeals, Fifth Appellate District
Case No. 2022-CA-00152

APPELLANTS' MERIT BRIEF

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Democracies die behind closed doors.... When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.

– *Detroit Free Press v. Ashcroft*,
303 F.3d 681, 683 (6th Cir. 2002)

I. STATEMENT OF FACTS

At a meeting held on December 9, 2020, the STARK COUNTY BOARD OF ELECTIONS considered, *inter alia*, whether to transmit to the Stark County Board of County Commissioners a recommendation for the purchase of new voting equipment. *Trial Court Docket, Trial Transcript (T.d.108), Exhibit 24*. In advance of that meeting and based upon proposals that had already been submitted by prospective vendors, staff for the BOARD recommended in favor of adopting the proposal tendered by Dominion Voting Systems. *Trial Court Docket, Trial Transcript (T.d.108), at 50:11-52:13 & Exhibit 23*.

During the course of the meeting on December 9, 2020, the members of the BOARD met in executive session wherein the motion to hold the executive session declared the purpose thereof was “to discuss the purchase of property for public purposes” even though the proposals from potential vendors were already a matter of public record. *Trial Court Docket, Trial Transcript (T.d.108), Exhibit 5*. Immediately upon exiting that executive session, the BOARD formally adopted the use of voting equipment from Dominion consistent with the staff recommendation, though, within the motion (and with no public discussion or explanation), the

BOARD also included an additional scanner above and beyond that recommended by staff.¹
Trial Court Docket, Trial Transcript (T.d.108), Exhibit 5.

Following the action of the BOARD in voting to recommend Dominion equipment, that decision was then transmitted to the Board of County Commissioners. *Trial Court Docket, Trial Transcript (T.d.108), at 112:9-112:21.* However, a dispute over this selection ensued between the BOARD and the County Commissioners. *See State ex rel. Stark Cty. Bd. of Elec. v. Stark Cty. Bd. of Comm'rs*, 165 Ohio St. 3d 201, 177 N.E.3d 232, 2021-Ohio-1783 ¶5 (“[s]oon after the December 9 meeting, it became apparent that the elections board and the commissioners disagreed about the significance of the board’s vote”); *see generally Trial Court Docket, Trial Transcript (T.d.108), Exhibit 32 ¶¶42-54.*

At the next meeting of the BOARD, *i.e.*, on January 6, 2021, the members convened in executive session again for the stated purpose “to discuss the purchase of property for public purposes”, even though the BOARD’s official action concerning the adoption of the voting equipment already occurred at the meeting of December 9, 2020. *Trial Transcript, Exhibit 7.* Immediately upon exiting this 36-minute executive session, the chairman of the BOARD made the following public statement, setting forth certain *faits accomplis* on behalf of the BOARD:

We’re back on the record from an executive session regarding property for public purposes, and we’ve *discussed and revisited our decision* with respect to Dominion Voting Systems. We’ve *considered the claims* that have been made against them, which we’ve *determined to be false* in 99.9% of the claims. And we

¹ The trial court precluded and the Fifth District affirmed, as irrelevant, any inquiry or cross-examination concerning, *inter alia*: (i) when the staff recommendation was actually presented to the BOARD; (ii) whether the staff recommendation was ever presented or discussed during a public session of a meeting; and (iii) when the BOARD actually considered, discussed, or decided to add one additional scanner above and beyond that recommended by staff. *Trial Court Docket, Trial Transcript (T.d.108), at 53:23 – 54:5 & 55:6-55:12.*

stand by our decision for the adoption of the Dominion Voting System; to be in touch with the county commissioners.

Trial Court Docket, Trial Transcript (T.d.108), Exhibits 8 & 35 (emphases added); *see also Trial Court Docket, Trial Transcript (T.d.108), Exhibit 7*. Yet, a review of the minutes and the audio recording from that meeting, *see Trial Court Docket, Trial Transcript (T.d.108), Exhibits 7, 8 & 35*, confirm that there was no public discussion or debate by the Board Members on any of these topics nor any public motion, vote, or consensus on the actual determinations made by the BOARD as announced by the chairman; instead, the chairman simply announced that the BOARD had already made these specific determinations and decisions as *faits accomplis*.²

At the next regular meeting of the BOARD on February 9, 2021, the members met in yet another executive session for the same declared purpose, *i.e.*, “to discuss the purchase of property for public purposes”. *Trial Court Docket, Trial Transcript (T.d.108), Exhibit 11*. Again, immediately upon exiting this executive session, there was no public discussion or debate amongst the Board Members nor any motion relating to the purchase of property; instead, the chairman of the BOARD made yet another public pronouncement of *faits accomplis*, this time that “[t]he Board is directing staff to contact the County Commissioners for a firm date as to

² The trial court precluded and the Fifth District affirmed, as irrelevant, any inquiry or cross-examination concerning whether any of the subjects of this public declaration by the chairman were actually discussed or, decided in executive session, including, *inter alia*: (i) the BOARD “revisiting” its decision to adopt Dominion voting equipment; (ii) the definitive decision to “stand by” its prior adoption of Dominion voting equipment; (iii) the BOARD’S “reconsideration” of the claims against Dominion; and (iv) the “determination” by the BOARD that “99.9% of the claims” against Dominion were false. *Trial Court Docket, Trial Transcript (T.d.108), at 140:24-142:9, 143:12-143:23, 145:14-145:21 & 152:10-156:25*.

when they are going to make their decision on the Board’s request. And, to review legal options going forward.” *Trial Court Docket, Trial Transcript (T.d.108), Exhibits 11, 12 & 36.*³

Then, for the fourth time, the BOARD met in another executive session during a meeting held on March 15, 2021, premised, again, on the declared “purpose of discussing the purchase of property for public purposes.” *Trial Court Docket, Trial Transcript (T.d.108), Exhibit 15.* Similar to what occurred at the prior meetings, immediately upon exiting this executive session, the chairman of the BOARD made a public declaration of yet another *fait accompli*, this time declaring that the BOARD was not inclined to revisit the previous decision to recommend to the County Commissioners the purchase of voting equipment from Dominion. *Trial Court Docket, Trial Transcript (T.d.108), Exhibits 15, 16 & 37.*⁴

On May 18, 2021, Appellants LOOK AHEAD AMERICA and MERRY LYNN RINI (a resident of Stark County) commenced this action in the Stark County Common Pleas Court, alleging several violations or threatened violations of the Open Meetings Act (the “OMA”) arising from the four meetings held in executive sessions held by the STARK COUNTY BOARD OF ELECTIONS between December 9, 2020, and March 15, 2021. *Trial Court Docket, Complaint (T.d.1).* The gravamen of the claims was that the members of the BOARD OF ELECTIONS had violated or threatened to violate the Open Meetings Act because the four executive sessions at issue were not conducted or limited to a permissible purpose under R.C.

³ As before, the trial court precluded and the Fifth District affirmed, as irrelevant, any inquiry or cross-examination on such matters, specifically, any line of inquiry concerning this public declaration by the chairman concerning direction the BOARD was issuing. *Trial Court Docket, Trial Transcript (T.d.108), at 159:17-159:22.*

⁴ The trial court expressly precluded and the Fifth District affirmed, as irrelevant, any inquiry or cross-examination on concerning the decision by the BOARD to not revisit its prior decision. *Trial Court Docket, Trial Transcript (T.d.108), at 161:5-161:25.*

121.22(G)(2); stated otherwise, the claims herein maintain that the executive sessions simply concerned “the purchase of property for public purposes” though they were not limited to considering the “premature disclosure of information [that] would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.”

In advance of and at trial, the trial court made clear its legal construction of R.C. 121.22(G)(2), *i.e.*, the limiting provision therein did not apply to executive sessions concerning the purpose of property. Initially, during discovery, the trial court issued an *Order Granting Protective Order*, wherein the Court concluded, though without any briefing on the issue by the parties, that the limitation of executive sessions under R.C. 121.22(G)(2) to situations when the “premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest” only applies when a public body is considering “the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code”, and that such limitation is not applicable when the public body is considering “the purchase of property for public purposes” or “the sale of property at competitive bidding.” *Trial Court Docket, Order Granting Protective Order (T.d.91)*.

Then, on the eve the bench trial, the trial court issued a *Pretrial Order Regarding Scope of Executive Sessions Under R.C. 121.22(G)(2)* wherein it, once again, reiterated its construction of R.C. 121.22(G)(2):

The Court disagrees with Plaintiffs’ interpretation of [R.C. 121.22(G)(2)] and declines to view the “if clause” as a mandatory prerequisite for executive sessions “to consider the purpose of property for public purposes.”....

... [T]his Court also previously applied the rule of the last antecedent as an additional, alternative basis for its decision, and concluded that Plaintiff's interpretation of the statutory language was inconsistent with settled rules of construction....

...
[T]he Court modifies its previous ruling [in the *Order Granting Protective Order*] and concludes that the "if clause" most likely intends to refer to the sale of property at competitive bidding and to the sale of obsolete property under R.C. 505.10. However, the Court reaffirms its previous decision that the "if clause" was not intended to apply as a mandatory prerequisite to executive sessions to consider the purchase of property.

...
[T]he Court rejects Plaintiffs' position and stands by its previous decision regarding the interpretation of Ohio Rev. C. 121.22(G)(2).

Trial Court Docket, Pretrial Order Regarding Scope of Executive Sessions Under R.C. 121.22(G)(2) (T.d.99), at 3, 5, 8, & 13.

After limiting the presentation of evidence consistent with its construction of R.C. 121.22(G)(2) and at the conclusion of the plaintiffs' case-in-chief, the trial court dismissed the case pursuant to Ohio R. Civ. P. 41(B)(2). In so doing, the trial court again based it upon:

... Plaintiffs claim the statute authorizes executive sessions to consider the purchase of property for public purposes only "if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest".... In a pretrial ruling, the Court rejected this argument and found evidence relating to such considerations was irrelevant.

Trial Court Docket, Judgment for Defendants (T.d.104), at 5. Accordingly, and ultimately, the trial court dismissed the case.

On appeal, the Fifth District affirmed the judgment of the trial court. In addressing the scope of permissible executive sessions under R.C. 121.22(G)(2), the Fifth District did not even acknowledge, let alone attempt to apply, specific caselaw concerning the construction or interpretation of the OMA as it relates to the executive sessions. Instead, the Fifth District

summarily declared “the ordinary meaning [of R.C. 121.22(G)(2)] is clear: a public body can enter executive session to discuss the purchase of property without additional qualification.” *Look Ahead America v. Stark Cty. Bd. of Elec.*, 2023-Ohio-2494 ¶22. And, then, to offer itself solace in its summary conclusion which was bereft of any substantive legal analysis, the Fifth District declared that “[a]n examination of how this would work in practice further supports [its] conclusion,” *id.*, though then, in a *non sequitur*, it offered a scenario wherein the premature disclosure of information would actually give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. *Id.* ¶23.⁵

A timely appeal was taken to this Court from the judgment of the Fifth District. This Court accepted jurisdiction on the proposition of law set forth and addressed below. 11/07/2023 *Case Announcements*, 2023-Ohio-3952.

⁵ What the Fifth District failed to consider or put to its test of how its interpretation would work in practice was a specific scenario that Appellants offered in order to demonstrate the absurdity that results from the construction which the Fifth District just adopted. In their appellate brief to the Fifth District, Appellants posited that the interpretation of R.C. 121.22(G)(2) which the trial court applied (and which the Fifth District ultimately adopted) “does not advance the purpose of the OMA; instead, it promotes the conducting of public business behind closed doors.” *Court of Appeals Docket, Appellants’ Brief*, at 18. To demonstrate this, Appellants offered the simple proposition that, under such a construction, “if a public body is considering the simple act of purchasing a copier (or even a single pencil) from the local office supply store, the trial court would allow members of the public body to convene in executive session to discuss such a simple and uneventful purchase, even though no public interest is being served, advanced, or protected by allowing such private consideration of public business.” *Court of Appeals Docket, Appellants’ Brief*, at 18 n.12. When this scenario is applied to the Fifth District methodology of examining how its construction of R.C. 121.22(G)(2) “would work in practice”, the result does not support the Fifth District’s construction but, instead, demonstrates the absurdity of such a construction.

II. ARGUMENT

PROPOSITION OF LAW: Under R.C. 121.22(G)(2), members of a public body may meet in an executive session to consider “the purchase of property for a public purpose” but, then, only to consider information the premature disclosure of which would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.

The Fifth District committed reversible error in its construction of the OMA by upholding the trial court’s legal conclusion that executive sessions held by public bodies for the purpose of considering the purchase of property for public purposes are not subject to any further limitation, including the limitation expressly stated in R.C. 121.22(G)(2), *i.e.*, if “the premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.”⁶ See *Look Ahead America v. Stark Cty. Bd. of Elec.*, 2023-Ohio-2494 ¶22 (5th Dist.) (“a public body can enter executive session to discuss the purchase of property without additional qualification”).

The trial court construed the foregoing limitation so as to rule, as a matter of law, that the express statutory limitation does not apply to executive sessions convened under the rubric of “the purchase of property for a public purpose”. *Trial Court Docket, Pretrial Order Regarding Scope of Executive Sessions Under R.C. 121.22(G)(2) (T.d.99)*, at 3 (“[t]he Court disagrees with Plaintiffs’ interpretation of the statute and declines to view the ‘if clause’ as a mandatory prerequisite for executive sessions ‘to consider the purchase of property for public purposes’”); *Trial Court Docket, Judgment for Defendants (T.d.104)*, at 5-7.⁷ Premised upon its erroneous

⁶ Though not exclusively, this was the heart of the entire case brought by Appellants.

⁷ Even under its construction of the OMA, the trial court took contradictory and conflicting positions as to whether the limitation applied only to the last of the three matters, *i.e.*, the sale or other disposition of property under R.C. 505.10, or whether it also applied to the second matter,

construction of the OMA, the trial court proceeded to conduct the bench trial, limiting inquiry only to whether the BOARD MEMBERS “properly convened executive sessions” (which was not even the basis of Appellants’ claims); Appellants, thus, were precluded by the trial court from developing any evidence that there was no information the premature disclosure of which would afford an unfair competitive or bargaining advantage to a person whose personal, private interest was adverse to the general public interest.

In this Court’s *de novo* review of such legal conclusion, it must proceed with a full appreciation that “[a] court’s ‘paramount concern’ when construing a statute is the statute’s legislative intent and courts should avoid adopting a construction of a statute that would result in circumventing the evident purpose of the enactment.” *State ex rel. Young v. Bd. of Ed.*, 2013-Ohio-1111 ¶23 (12th Dist.). In this appeal, three interrelated considerations demonstrate the reversible error of the trial court and the Fifth District in their construction of R.C. 121.22(G)(2): (i) rules of statutory construction, specifically, both the last-antecedent canon and the series-qualifier canon; (ii) the legislative history of R.C. 121.22(G)(2); and (iii) binding precedent from this Court on interpreting the OMA. The ultimate conclusion that this Court should readily reach is that executive sessions conducted under R.C. 121.22(G)(2) – to consider the purchase of property, the sale of property, or the sale or disposition of property under R.C. 505.10 – are all

i.e., the sale of property at competitive bidding. *Compare Trial Court Docket, Order Granting Protective Order (T.d.91), at 11-13* (concluding the restrictive phrase in R.C. 121.22(G)(2) applies only to executive sessions considering “the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code”) *with Trial Court Docket, Pretrial Order Regarding Scope of Executive Sessions Under R.C. 121.22(G)(2) (T.d.99), at 8* (“the Court modifies its previous ruling and concludes the ‘if clause’ most likely intends to refer to the sale of property at competitive bidding and to the sale of obsolete property under R.C. 505.10”).

limited those situations only when the public body is considering information the premature disclosure of which would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.

For ease of the ensuing argument in the context of this case, the language of R.C. 121.22(G)(2) can readily be converted to a simplified mathematical proposition such that, pursuant to that division of the OMA, the members of a public body may conduct a meeting in executive sessions to consider “A, B, or C, if X”.⁸ And, in this simplified form, the question before this Court thus becomes whether, as a matter of law, X limits solely C or does X limit A, B, and C; the answer is clearly the latter.

A. Rules of Statutory Construction.

Initially, the trial court wrongfully concluded that X applied to C but not to A or B based upon what it characterized as the rule of the last antecedent. *Trial Court Docket, Order Granting Protective Order (T.d.91), at 11*. Subsequently, the trial court modified its earlier conclusion while but still erring, concluding that X “most likely” applies to both B and C, but still definitively not to A. *Trial Court Docket, Pretrial Order Regarding Scope of Executive Sessions Under R.C. 121.22(G)(2) (T.d.99), at 8*. Regardless, both constructions by the trial court were in

⁸ Naturally, using the format that an executive session under R.C. 121.22(G)(2) may be conducted to consider “A, B, or C, if X”, the following correspondence exists:

A = “the purchase of property for public purposes”.

B = “the sale of property at competitive bidding”

C = “the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code”

X = “the premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest”

error and, in turn, the Fifth District erred in affirming such a construction. This legal error resulted in Appellants being precluded from making any inquiry through cross-examination or otherwise to challenging the specific discussions occurring or actual decisions made in the executive sessions at issue and, specifically, whether the executive sessions truly involved consideration of information the premature disclosure of which would afford a competitive advantage to a private party whose interests were adverse to the public interest.⁹ In turn, the Fifth District disavowed any need to even consider rules or canons of statutory construction when determining the requirements of R.C. 121.22(G)(2). *See Look Ahead America v. Stark Cty. Bd. of Elec.*, 2023-Ohio-2494 ¶26 (5th Dist.).

“Where a statute is found to be subject to various interpretations..., a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at the legislative intent.” *Meeks v. Papadopoulos*, 62 Ohio St. 2d 187, 190, 404 N.E.2d 159 (1980). The construction of R.C. 121.22(G)(2) of the Fifth District is directly contrary to the construction afforded to the same provision by a federal court. *See University Estates, Inc. v. City of Athens, Ohio*, 2011 WL 796789, 2011 U.S. Dist. LEXIS 19262, at *5 (S.D. Ohio Feb. 25, 2011) (“Ohio Revised Code § 121.22(G)(2) provides that a [public body] can go into executive session to

⁹ At one time the trial court overruled an objection and allowed the director of the BOARD to declare that, “in his opinion”, the members of the BOARD considered in an executive session information the premature disclosure of which would give an unfair competitive or bargaining advance to a person whose personal private interest was adverse to the general public interest. *Trial Court Docket, Trial Transcript (T.d.108)*, at 82:4-83:23. Yet, just as quickly as it allowed that door to be open, the trial court immediately slammed shut any further inquiry or challenge to that opinion, including prohibiting the simple inquiry “What information?”, *Trial Court Docket, Trial Transcript (T.d.108)*, at 82:24-85:13, or even a simple confirmation that the information that need to be discussed in the executive session did not include the price of the equipment. *Trial Court Docket, Trial Transcript (T.d.108)*, at 85:15-85:19.

consider the purchase of property for public purposes ‘if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest’”). Furthermore, even the trial court offered different and varying constructions of R.C. 121.22(G)(2), *see* note 7, *supra*, ultimately arriving at a construction it declared only to be “most likely” though, in so doing, implicitly recognizing alternative viable constructions. Thus, it should be beyond cavil that the scope of R.C. 121.22(G)(2) is subject to at least two reasonable interpretations and, accordingly, rules of statutory construction must be applied in order to ascertain legislative intent. And two principles of statutory construction – the last-antecedent canon and the series-qualifier canon – directly repudiate and conflict with the construction the Fifth District ultimately afforded to R.C. 121.22(G)(2).

Last-Antecedent Canon. Under the last-antecedent canon, “referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.” *Averback v. Montrose Ford, Inc.*, 120 N.E.3d 125, 2019-Ohio-373 ¶19 (9th Dist.).¹⁰ While, in the present case, such a proposition might appear initially to limit *X* only to *C*, there is an additional aspect to the rule that clearly establishes a contrary conclusion. Specifically, “[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.” Singer & Singer, SUTHERLAND ON STATUTES & STATUTORY CONSTRUCTION § 47:33, at

¹⁰ While couched as a “canon”, the U.S. Supreme Court has recognized that the last antecedent canon only involves a “grammatical rule” that is “not an absolute and can assuredly be overcome by other indicia of meaning.” *Paroline v. United States*, 572 U.S. 434, 447 (2014). Additionally, “[t]he rule of the last antecedent is context dependent.” *Facebook, Inc. v. Duguid*, 592 U.S. ___, 141 S.Ct. 1163, 1170 (2021).

369 (7th ed. 2020)(emphasis added)); *Wohl v. Swinney*, 118 Ohio St. 3d 277, 888 N.E.2d 1062, 2008-Ohio-2334 ¶35 (Pfeifer, J., dissenting)(“[a] corollary to [the] [last antecedent] rule is that ‘the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one’” (quoting *In re Sehome Park Care Ctr., Inc.*, 127 Wash.2d 774, 781-782, 903 P.2d 443 (1995))). And this principle was just recently reiterated by a unanimous U.S. Supreme Court. See *Facebook, Inc. v. Duguid*, 592 U.S. ___, 141 S.Ct. 1163, 1170 (2021)(“[a]s several leading treatises explain, ‘[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one’” (quoting William M. Eskridge Jr., *Interpreting Law: A Primer On How To Read Statutes and The Constitution* 67-68 (2016))).

Applying all aspects of the last-antecedent rule (including the provision that addresses the impact of a comma between the antecedents and the qualifying or limiting phrase), the error of the Fifth District’s construction becomes evident. The Fifth District’s conclusion that *X* does not apply to *A* would be correct if R.C. 121.22(G)(2) actually read “*A, B, or C if X*”. See *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 999 n.2 (9th Cir. 2017)(“[u]nder the last-antecedent rule, the series ‘*A or B with respect to C*’ contains two items: (1) ‘*A*’ and (2) ‘*B with respect to C*’”). But with the inclusion of a comma between the antecedents and the limiting phrase, *i.e.*, “*A, B, or C, if X*”, the last-antecedent canon compels the conclusion that *X* applies to all of the antecedents, *i.e.*, *A, B, and C*. As succinctly recognized and summarized by the Sixth Circuit:

Under the last-antecedent rule of construction, therefore, the series “*A or B with respect to C*” contains two items: (1) “*A*” and (2) “*B with respect to C.*” On the

other hand, under the rule of grammar the series “A or B, with respect to C” contains these two items: (1) “A with respect to C” and (2) “B with respect to C.”

Stepnowski v. C.I.R., 456 F.3d 320, 324 n.7 (6th Cir. 2006).

Thus, R.C. 121.22(G)(2) must be read that *X* applies and limits all three antecedents, *i.e.*, *A*, *B*, and *C*. Such a construction is further supported and reinforced by court precedent specifically mandating that “the exceptions in R.C. 121.22(G) are to be strictly construed” in favor of openness and transparency *E.g.*, *State ex rel. Ames v. Portage Cty. Bd. of Comm’rs*, 132 N.E.3d 729, 2019-Ohio-3730 ¶50 (11th Dist.). The Fifth District erred in its construction of R.C. 121.22(G)(2) which liberally allows executive sessions and which runs directly contrary to the principles of openness and transparency at the heart of the OMA.

Series-Qualifier Canon. While the foregoing should be determinative that, with respect to R.C. 121.22(G)(2), *X* applies to *A*, *B*, and *C*, another principle of statutory construction further supports such a reading – the series-qualifier canon. The series-qualifier canon of statutory construction “provides that a modifier at the beginning or end of a series of terms modifies all the terms.” *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012). “[T]he series-qualifier canon generally reflects the most natural reading of a sentence.” *Duguid*, 592 U.S. at ___, 141 S.Ct. at 1174 (Alito, J., concurring).

Recently, a unanimous U.S. Supreme Court reiterated that the series-qualifier canon constitutes a “conventional rule[] of grammar” that dictates that, “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,’ a modifier at the end of the list ‘normally applies to the entire series.’” *Duguid*, 592 U.S. at ___, 141 S.Ct. at 1169 (quoting A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147

(2012)); see *Gabbard v. Madison Local Sch. Dist. Bd. of Ed.*, 165 Ohio St. 3d 390, 179 N.E.3d 1169, 2021-Ohio-2067 ¶88 (DeWine, J., dissenting). Stated otherwise, the series-qualifier canon provides that “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Paroline v. United States*, 572 U.S. 434, 447 (2014)(brackets omitted)(quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).

Taken together or separately, the last-antecedent canon and the series-qualifier canon both support a construction that all executive sessions under R.C. 121.22(G)(2) are limited to matters “if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” Thus, the trial court and the Fifth District committed reversible error in their construction of R.C. 121.22(G)(2).

B. Legislative History of R.C. 121.22(G)(2)

In addition to canons of statutory construction establishing the reversible error of the trial court, when consideration is also given to the legislative history of the OMA – and R.C. 121.22(G)(2), in particular – it becomes all the more readily apparent that the General Assembly did not intend that *X* apply only to *C* but that it must also apply to both *A* and *B*.

The current version of R.C. 121.22(G)(2) was the result of an amendment to the OMA adopted in 2016. See *H.B. 413, 131st Ohio General Assembly*.¹¹ Prior to the amendment,

¹¹ Available from the Ohio Secretary of State at <https://publicfiles.ohiosos.gov/free/publications/SessionLaws/131/131-HB-413.pdf>.

though, R.C. 121.22(G)(2) allowed for a public body to conduct an executive session for only two purposes:

To consider the purchase of property for public purposes, or for the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.

Converted to the mathematical proposition, this division of the OMA prior to 2016 allowed for an executive session to consider “*A*, or *B*, if *X*”. Thus, prior to the 2016 amendment, *X* had to apply to *A*, or *B*, or both (but not to *C* as *C* did not even exist).

However, the 2016 amendment inserted the phrase “the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code” such that R.C. 121.22(G)(2) now reads *A*, *B*, or *C*, if *X*. Thus, even if *arguendo* *X* only applied to *B* prior to 2016, there is no indication or suggestion that the 2016 amendment was designed or intended to completely negate or nullify the application of *X* to *B*.

With R.C. 121.22(G)(2) now (after 2016) reading “*A*, *B*, or *C*, if *X*”, then, at a minimum, *X* has to apply to both *B* and *C*. To limit *X* to only *B* and *C*, however, would be contrary to any canon of statutory construction; the only logical and rational conclusion resulting therefrom is that, prior to 2016, *X* applied to both *A* and *B*, and with the addition of *C* in 2016, *X* now applies to *A*, *B*, and *C*. Any other reading ignores the legislative history of R.C. 121.22(G)(2), as well as canons of statutory construction. Accordingly, there is further support establishing that the trial court and the Fifth District committed reversible error in their construction of R.C. 121.22(G)(2).

C. Precedent on OMA Interpretation.

Finally, precedent from this Court further confirms that the proper construction of R.C. 121.22(G)(2) leads to the conclusion that *X* applies to *A*, *B*, and *C*, as such a reading is consistent with the fundamental purpose of the OMA. The OMA “exists to shed light on deliberations of public bodies [and] cannot be interpreted in a manner which would result in the public being left in the dark.” *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St. 3d 540, 544, 668 N.E.2d 903, 1996-Ohio-372 (emphasis added). And “[g]iven the General Assembly’s exhortation that the Open Meetings Act ‘shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings,’ R.C. 121.22(A), [courts] must be wary of any attempt to avoid the transparency that the public deserves.” *White v. King*, 147 Ohio St. 3d 74, 60 N.E.3d 1234, 2016-Ohio-2770 ¶36 (Lanzinger, J., dissenting)(emphasis added). Yet, while this Court has appropriately interpreted the OMA in a manner such that actions of public officials do not “subvert[] the purpose of the [OMA],” *id.* ¶18, the Fifth District’s construction of R.C. 121.22(G)(2) ignores all of such principles.

Furthermore, in *State ex rel. More Bratenahl v. Bratenahl*, 157 Ohio St.3d 309, 136 N.E.3d 447, 2019-Ohio-3233, this Court unanimously concluded that, based upon “the full text of [the OMA], its structure, and the legislative purpose as derived from the text of the act,” a “broader reading” in favor of openness “must carry the day”. *Id.* ¶14. As noted above, “when the text of a statute makes its purpose clear, and [courts] must choose between two permissible readings of the statutory text, an interpretation that advances the purpose of the statute is to be preferred over one that would thwart that purpose.” *Id.* ¶15. And the clear purpose of the OMA is “to require that public business be conducted in a manner that is accessible to the public.” *Id.*

Similarly, in this case, the Fifth District’s construction of R.C. 121.22(G)(2) does not advance the purpose of the OMA consistent with *More Bratenahl* but, instead, promotes the contrary, *i.e.*, public bodies conducting of public business behind closed doors.¹² Thus, as there are *arguendo* two permissible readings of R.C. 121.22(G)(2), the trial court and the Fifth District committed reversible error in choosing a reading that undermines the purposes of the OMA.

III. CONCLUSION

“A fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government’s work and decisions.” *Kish v. City of Akron*, 109 Ohio St. 3d 162, 846 N.E.2d 811, 2006-Ohio-1244 ¶15. Thus, “open government serves the public interest and our democratic system.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 848 N.E.2d 472, 2006-Ohio-1825 ¶20; *accord Gabbard v. Madison Local Sch. Dist. Bd. of Ed.*, 153 N.E.3d 47, 2020-Ohio-1180 ¶30 (“transparency and accountability are fundamental public interests”).

¹² Under the Fifth District’s construction of R.C. 121.22(G)(2), a public body can now meet in an executive session to consider the potential purchase of any property, with no constraints whatsoever. For example, if a public body is considering the simple act of purchasing a copier (or even a single pencil) from the local office supply store, the Fifth District would allow members of the public body to convene in executive session to discuss such a simple and uneventful purchase, even though no public interest is being served, advanced, or protected by allowing such private consideration of public business. Such a construction directly subverts and undermines openness and transparency. But even on more controversial purchases of property (and the expenditure of taxpayer dollars thereon), the public interest still supports the requirement that consideration and discussions thereon be open to the public, unless and only unless the public disclosure of information would result in an unfair competitive or bargaining advantage in favor of a person whose personal, private interest is adverse to the general public interest. Appellants’ position advances the purposes and intent of the OMA; the Fifth District’s construction does not.

Running directly contrary to the fundamental public interest of open and transparent government is the ability of public bodies to meet and consider public business behind closed doors, *i.e.*, in executive sessions. While certain, though limited, governmental interests may justify such conduct in private, the OMA strictly limits such secrecy. But, when a court construes the OMA broadly in favor of the conduct of public business behind closed doors and then precludes any substantive inquiry or challenge to the legality of such conduct, the fundamental public interests of openness and transparency are directly undermined and eroded; that is what happened in this case.

Based on any or all of the foregoing legal principles developed above, the Fifth District committed reversible error in its construction of R.C. 121.22(G)(2). Under R.C. 121.22(G)(2), a public body can convene in an executive session to consider “the purchase of property for public purposes” but if and only if to consider information such that the premature disclosure of that information in public would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. As the trial court and the Fifth District erred in their statutory construction of R.C. 121.22(G)(2), the *Judgment* of the Fifth District must be reversed and the matter remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the above has been served by electronic mail on the following counsel of record on the 16th day of January 2024:

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/s/ Curt C. Hartman

APPENDIX

Appellate Court Docket, Judgment Entry

Fifth Appellate District, Case No. 2022-CA-00152 (July 19, 2023)

Appx001

Appellate Court Docket, Opinion (T.d.13)

Look Ahead America v. Stark Cty. Bd. of Elec., 2023-Ohio-2494

Fifth Appellate District, Case No. 2022-CA-00152 (July 19, 2023)

Appx002 – Appx021

Trial Court Docket, Judgment Entry (T.d. 104)

Stark County Court of Common Pleas, Case No. 2021-CV-702 (Oct. 20, 2022)

Appx022 – Appx039

Trial Court Docket, Order Granting Protective Order (T.d.91)

Stark County Court of Common Pleas, Case No. 2021-CV-702 (June 14, 2022)

Appx040 – Appx058

Trial Court Docket, Pretrial Order Regarding Scope of Executive Sessions Under R.C. 121.22(G)(2) (T.d.99)

Stark County Court of Common Pleas, Case No. 2021-CV-702 (Aug. 4, 2022)

Appx059 – Appx073

Excerpts of Open Meetings Act, R.C. 121.22

Appx074 – Appx075

3304517249 Fifth District 23

CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

2023 JUL 19 PM 1:51

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LOOK AHEAD AMERICA, ET AL.

Plaintiffs-Appellants

-vs-

STARK COUNTY BOARD OF
ELECTIONS, ET AL.

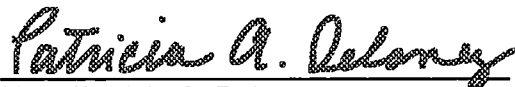
Defendants-Appellees

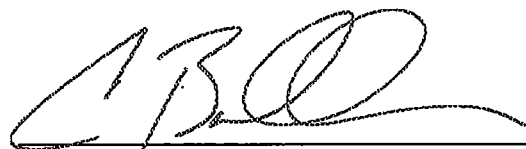
JUDGMENT ENTRY

CASE NO. 2022-CA-00152

For the reasons stated in our accompanying Memorandum-Opinion, the judgment
of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellants.


Hon. Andrew J. King


Hon. Patricia A. Delaney


Hon. Craig R. Baldwin

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LYNN M. TOLSON
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

2023 JUL 19 PM 1:50

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LOOK AHEAD AMERICA, ET AL.

Plaintiffs-Appellants

-vs-

STARK COUNTY BOARD OF
ELECTIONS, ET AL.

Defendants-Appellees

JUDGES:

Hon. Patricia A. Delaney, P.J.

Hon. Craig R. Baldwin, J.

Hon. Andrew J. King, J.

Case No. 2022-CA-00152

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 2021-CV-00702

Heath

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

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P

Appx002

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Stark County, Case No. 2022-CA-00152

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King, J.

{¶ 1} Plaintiffs-Appellants, Look Ahead America and Merry Lynne Rini, appeal the October 20, 2022 judgment of the Court of Common Pleas of Stark County, Ohio, entering judgment for Defendants-Appellees, Stark County Board of Elections and each of the individual board members, and dismissing the complaint. We affirm the trial court.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On May 18, 2021, appellants filed a complaint against Stark County Board of Elections and each individual board member alleging violations of the Open Meetings Act (hereinafter "OMA"). The meetings pertained to the purchase of new voting equipment from Dominion Voting Systems. Appellants complained about four meetings held in executive session: December 9, 2020, and January 6, February 9, and March 15, 2021. On March 26, 2021, appellees approved a motion to use Dominion as the vendor for the voting equipment and to request the Stark County Board of County Commissioners to purchase the property. Appellants claimed appellees failed to indicate the executive sessions were necessary because the "premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest." They also claimed public statements made by the chairman indicated certain discussions and determinations made in executive session should have been made in a public session. Appellants sought in part a declaration that appellees' decision to purchase the Dominion voting equipment was invalid.

{¶ 3} On May 27, 2021, appellants filed an amended complaint adding Stark County Board of Commissioners and Dominion Voting Systems as defendants. On June 29, and July 2, 2021, respectively, Commissioners and Dominion filed Civ.R. 12(B)

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motions to dismiss. By judgment entry filed August 20, 2021, the trial court granted the motions, finding the complaint failed to state a claim upon which relief can be granted and dismissed the amended complaint against Commissioners and Dominion. The amended complaint proceeded as to appellees.

{¶ 4} On August 4, 2022, the trial court issued a lengthy pretrial order regarding the scope of executive sessions under R.C. 121.22(G)(2) and the interpretation of the statute. The trial court found the conditional language of the statute ("if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest") did not apply to purchases of property for public purposes. The trial court found the dispute centered on whether appellees "properly convened executive sessions '[t]o consider the purchase of property for public purposes' under R.C. 121.22(G)(2)." August 4, 2022 Pretrial Order at 14. The trial court concluded appellants were not "permitted to undertake a 'full and unlimited inquiry' into all matters discussed during the executive sessions. Such evidence is irrelevant to any claim pending in this case as it would not tend to prove or disprove any fact that is of consequence to the determination of the action." *Id.* at 15.

{¶ 5} A bench trial commenced on August 8, 2022. The trial court limited appellants' inquiry consistent with the pretrial order. At the conclusion of appellants' case, appellees moved for a directed verdict. The trial court treated the motion as an involuntary dismissal under Civ.R. 41(B)(2) and granted the motion, journalizing its decision in a judgment filed October 20, 2022. The trial court found appellees "entered into the four executive sessions for a permissible and valid purpose (the purchase of property for public purposes), and that each of the executive sessions was consistent with that purpose and related specifically to the topic that was announced in the motion which

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authorized the executive session." October 20, 2022 Judgment at 14. The trial court dismissed the complaint.

{¶ 6} Appellants filed an appeal with the following assignments of error:

I

{¶ 7} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ENTERING *JUDGMENT FOR DEFENDANTS* WHEREBY, PURSUANT TO CIV.R.41(B)(2), IT DISMISSED THE *COMPLAINT*." (EMPHASIS SIC.)

II

{¶ 8} "THROUGHOUT THE COURSE OF TRIAL, THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH THE EXCLUSION OF RELEVANT EVIDENCE AND PROHIBITING CROSS-EXAMINATION THEREON, WHEN SUCH EXCLUSION WAS PREMISED UPON AN ERRONEOUS CONSTRUCTION OF THE OPEN MEETINGS ACT THAT CONCLUDED A PUBLIC BODY MAY LEGALLY CONDUCT MEETINGS IN EXECUTIVE SESSIONS UNDER R.C. 121.22(G)(2) FOR THE "PURCHASE OF PROPERTY FOR A PUBLIC PURPOSE" EVEN WHEN THE PURCHASE OF SUCH PROPERTY WOULD BE UNDERTAKEN BY A COMPLETELY DIFFERENT PUBLIC BODY."

III

{¶ 9} "PURSUANT TO A *PRETRIAL ORDER* AND THROUGHOUT THE COURSE OF TRIAL, THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH THE EXCLUSION OF RELEVANT EVIDENCE AND PROHIBITING CROSS-EXAMINATION THEREON, WHEN SUCH EXCLUSION WAS PREMISED UPON AN ERRONEOUS CONSTRUCTION OF THE OPEN MEETINGS ACT THAT CONCLUDED A PUBLIC BODY MAY LEGALLY CONDUCT MEETINGS IN EXECUTIVE SESSIONS

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UNDER R.C. 122(G)(2) FOR THE "PURCHASE OF PROPERTY FOR A PUBLIC PURPOSE" WITHOUT THE ADDITIONAL STATUTORY LIMITATION THAT SUCH EXECUTIVE SESSIONS ARE LIMITED TO INSTANCES WHEN THE "PREMATURE DISCLOSURE OF INFORMATION WOULD GIVE AN UNFAIR COMPETITIVE OR BARGAINING ADVANTAGE TO A PERSON WHOSE PERSONAL, PRIVATE INTEREST IS ADVERSE TO THE GENERAL PUBLIC INTEREST." (EMPHASIS SIC.)

IV

{¶ 10} "PURSUANT TO A *PRETRIAL ORDER* AND THROUGHOUT THE COURSE OF THE BENCH TRIAL, THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH THE EXCLUSION OF RELEVANT EVIDENCE AND PROHIBITING CROSS-EXAMINATION THEREON, WHEN SUCH EXCLUSION WAS PREMISED UPON AN ERRONEOUS MISTAKE OF LAW THAT DECREED AS IRRELEVANT EVIDENCE GOING TO THE SPECIFIC DISCUSSIONS OR ACTUAL DECISIONS MADE IN EXECUTIVE SESSIONS HELD DURING THE COURSE OF MEETINGS OF A PUBLIC BODY WHEN THE CLAIMS BROUGHT UNDER THE OPEN MEETINGS ACT CHALLENGED THE LEGALITY OF THE SPECIFIC DISCUSSIONS AND THE ACTUAL DECISIONS MADE IN THE EXECUTIVE SESSIONS." (EMPHASIS SIC.)

V

{¶ 11} "PURSUANT TO A *PRETRIAL ORDER* AND THROUGHOUT THE COURSE OF THE BENCH TRIAL, THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH THE EXCLUSION OF RELEVANT EVIDENCE AND PROHIBITING CROSS-EXAMINATION THEREON, WHEN SUCH EXCLUSION WAS PREMISED UPON AN ERRONEOUS MISTAKE OF LAW THAT DECREED EVIDENCE GOING TO THE SPECIFIC DISCUSSIONS OR ACTUAL DECISIONS MADE IN EXECUTIVE

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SESSIONS HELD DURING THE COURSE OF MEETINGS OF A PUBLIC BODY WERE PROTECTED AS CONFIDENTIAL OR PRIVILEGED INFORMATION." (EMPHASIS SIC.)

VI

{¶ 12} "PURSUANT TO A *PRETRIAL ORDER* AND THROUGHOUT THE COURSE OF THE BENCH TRIAL, THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH THE EXCLUSION OF RELEVANT EVIDENCE AND PROHIBITING CROSS-EXAMINATION THEREON, SAID ERROR CONSTITUTING CUMULATIVE ERROR." (EMPHASIS SIC.)

{¶ 13} For ease of analysis, we will address the assignments of error out of order. We note, as appellees do in their brief at 2, appellants' brief "contains an outline of arguments completely unmoored from the assignments of error." We will address appellants' arguments under the closest corresponding assignment of error.

II

{¶ 14} In their second assignment of error, appellants claim the trial court erred in finding appellees could enter into executive session to discuss the purchase of property for a public purpose even though a different public body (Stark County Commissioners) would be purchasing the property. We disagree.

{¶ 15} The fact that the Stark County Commissioners is the contracting authority does not affect appellees' right to enter into executive session because action by appellees is necessary to effectuate the purchase.

{¶ 16} R.C. 122.22(G)(2) does not limit executive sessions to the purchase of property only when that public body is the statutory contracting authority. Here, R.C. 3506.03 contemplates, among other processes, that a board of elections makes a

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recommendation to the board of commissioners regarding the purchase of voting equipment. That recommendation or similar board of elections action is a statutory prerequisite for the board of commissioners to purchase the voting equipment. The statute also makes clear that the board of commissioners has no discretion to deviate from the equipment recommended or approved by the board of elections. In such cases where the General Assembly delegates portions of the authority to purchase property among different public bodies, each has the authority to enter into executive session to the extent necessary to further the purchase.

{¶ 17} Assignment of Error II is denied.

III

{¶ 18} In their third assignment of error, appellants claim the trial court erred in its interpretation of R.C. 121.22(G)(2). We disagree.

{¶ 19} R.C. 121.22 governs open meetings. Subsection (A) states: "This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." Subsection (G)(2) states in pertinent part:

(G) Except as provided in divisions (G)(8) and (J) of this section, the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

(2) To consider the purchase of property for public purposes, the sale of property at competitive bidding, or the sale or other disposition of

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Stark County, Case No. 2022-CA-00152

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unneded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.

{¶ 20} Appellants argue the property purchasing clause of subsection (G)(2) should be read as follows: "To consider the purchase of property for public purposes * * * if the premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest." (Emphasis added.) Appellees contend the property purchasing clause of subsection (G)(2) stands alone, without requiring the conditional clause to apply. We agree with appellees.

{¶ 21} When interpreting a statute, a trial court examines the ordinary meaning of the words or phrases at issue and, whenever possible, interprets the statute according to that meaning. *Lingle v. State*, 164 Ohio St.3d 340, 2020-Ohio-6788, 172 N.E.3d 977, ¶ 15. In situations where the statute proves to be vague or ambiguous, sometimes reading the entire statute applies the appropriate context for the questioned passage. *K Mart Corporation v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988). In other instances, a trial court must instead turn to the appropriate canons of statutory construction to appropriately construe the statute.

{¶ 22} We find when reading subsection (G)(2), the ordinary meaning is clear: a public body can enter executive session to discuss the purchase of property without additional qualification. An examination of how this would work in practice further supports this conclusion.

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{¶ 23} When a public body is seeking to purchase property, it usually does so with the intent to get the best value for the public. A public discussion about the offer, negotiation strategy, and material terms would likely reveal those critical details to a potential seller. In turn, it is reasonable to assume most sellers would pursue maximum profit with that information.

{¶ 24} In contrast, when a public entity is selling property, that property is usually no longer fit for public use. Unlike a business, a public entity does not buy property in the hopes of future profit; thus, its intent when selling can be broadly defined as recovering what monetary value, if any, the property has left at the end of its public service. And a public body often disposes of property through competitive bidding, which can maximize the monetary return on the property's residual value. It follows then that executive session will normally not be needed when selling property using public bidding.

{¶ 25} Yet, there are some situations, such as where a piece of property no longer fit for public use has appreciated in value, that a public discussion about its sale could undermine the value the public could stand to receive by its sale. In such a case, the General Assembly has provided an exception, in the form of the conditional clause, for public bodies to discuss that matter in executive session.

{¶ 26} Appellants disagree that the statute is capable of being applied without resorting to statutory construction. Even if we were to agree with this, appellants would still not prevail. One of the methods provided by the General Assembly is to resolve the issue by looking to the legislative history. R.C. 1.49. Here, before the statute was amended in 2016, it read as follows: "To consider the purchase of property for public purposes, or for the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose

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personal, private interest is adverse to the general public interest." This version makes it even more clear that the legislature did not intend for the conditional clause to apply to purchases.

{¶ 27} Upon review, we find the trial court did not err in its interpretation of R.C. 121.22(G)(2) regarding the conditional clause.

{¶ 28} Assignment of Error III is denied.

IV, V

{¶ 29} In their fourth and fifth assignments of error, appellants claim the trial court erred in excluding relevant evidence and prohibiting cross-examination. We disagree.

{¶ 30} The recent Supreme Court case of *State ex rel. Hicks v. Clermont County Board of Commissioners*, 2022-Ohio-4237, --- N.E.3d ---, controls much of the issues here.¹ In *Hicks*, the board of commissioners entered into executive session on multiple occasions after giving a "laundry list" of reasons for doing so "rather than identifying the specific issues it intended to discuss in executive session." *Id.* at ¶ 2. The case proceeded through discovery, but neither side could establish what happened in those executive sessions, including the commissioners, who testified they could not remember the details. *Id.* at ¶ 3. Under the framework established by the Twelfth District, this resulted in the commissioners losing at summary judgment because the burden had flipped to the commissioners to demonstrate a valid reason for entering into executive session. *Id.* at ¶ 4.

¹The trial court and the parties did not have the benefit of the *Hicks* decision during trial, but were well aware of the pending appeal in the Supreme Court. In fact, the trial court discussed the case in its October 20, 2022 judgment at 13-14.

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{¶ 31} The Supreme Court rejected the burden-shifting framework created by the Twelfth District. The court re-affirmed that the plaintiff maintained the burden of proof. *Id.* at ¶ 11 ("the statutory provision authorizing citizens to sue public bodies for violations of the OMA clearly places the burden of proof, or at least the burden of persuasion, on the plaintiff"). Moreover, the *Hicks* court held that evidence of the commissioners entering into executive session after properly passing a motion is treated as facial compliance with the open meetings act, thus not permitting the burden to shift to the public body. *Id.* at ¶ 14.

{¶ 32} Relevant to this matter, the Supreme Court touched on the evidentiary burden a plaintiff faces in the absence of the burden-shifting framework. *Id.* ¶ 18. The court stated that through discovery, the plaintiff will have access to the same evidence as the public body. *Id.* The court also keenly noted that if a public body complied with the requirements of R.C. 121.22, there may not be any evidence of what occurred in the executive session beyond the recorded meeting minutes. *Id.*

{¶ 33} The Supreme Court then went on apply the "presumption of regularity" to public officers and the OMA. *Id.* at ¶ 21. This means unless there is evidence to the contrary, courts should presume the public body acted lawfully. *Id.* In light of this presumption, the court held, "the burden of production remains on the plaintiff to overcome the presumption and prove that a violation occurred." *Id.* The court went on to reject the proposition that a public body is required to discuss every matter included in its motion to enter executive session. *Id.* at ¶ 34-35, 37.

{¶ 34} Although *Hicks* did not directly deal with how a trial court should manage discovery and the admission of evidence in an OMA case, its holding provides ample guidance in this regard.

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{¶ 35} Here, aside from the legal argument regarding the interpretation of subsection (G)(2), there is no dispute the meeting was properly noticed and the minutes showed facial compliance with the OMA.² In such a case, the presumption of regularity attaches and the plaintiff maintains the burden of persuasion and the burden of production. As noted in *Hicks*, due to the secrecy of executive session and the probable lack of publicly available records, if there is evidence of a violation, it is probably known only to the defendants. *Id.* ¶ 18.

{¶ 36} Because of this asymmetry of knowledge, appellants argue in essence that OMA plaintiffs ought to be entitled to robust discovery followed by broad cross-examination of witnesses with the generous admission of evidence. We disagree.

{¶ 37} Importantly, the OMA does not change the fact that most of the trial court's evidentiary decisions are reviewed only for an abuse of discretion. "It is well settled that a trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice." *Stark County Park District v. Dickerhoof*, 2018-Ohio-4319, 122 N.E.3d 608, ¶ 50 (5th Dist). In addition, there is a very real possibility, as acknowledged in *Hicks*, that there is no evidence to produce to a plaintiff.

{¶ 38} Here, before the trial court, was an OMA claim with stipulated compliance to which the presumption of regularity attached and plaintiffs without evidence in its

²In fact, the parties stipulated "with respect to each of the four executive sessions at issue, Defendants complied with the procedural formalities of Section (G), through a proper motion and roll call vote, and that Defendants stated a proper statutory basis for entering executive session by referencing purchase of property for public purposes under (G)(2)." October 20, 2022 Judgment at 4; T. at 21-22.

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possession sufficient to overcome that presumption. Moreover, even after discovery, there was the possibility that there still would not be sufficient evidence for plaintiffs to meet their burden. The trial court attempted to balance these various competing interests of the parties by limiting the admission of evidence and cross-examination. We do not find the trial court abused its discretion.

{¶ 39} Appellants claim discussions and/or decisions were held and/or made during the executive sessions that were outside the scope of the stated purpose for the sessions. They argue the trial court limited their ability to cross-examine the witnesses regarding discussions held during the executive sessions which was a particularly egregious error.

{¶ 40} Appellees' director, Jeffrey A. Matthews, and appellees' chairman, Samuel J. Ferruccio, Jr., were called to testify on cross-examination by appellants. On redirect, appellees asked Mr. Matthews: "With respect to any of the executive sessions that Mr. Hartman asked you about, was there anything discussed in any of those sessions aside from the purchase of public property?" *Id.* at 131. Mr. Matthews responded in the negative. *Id.* At no time was Mr. Ferruccio questioned as to whether anything other than the purchase of property for public purposes was discussed during the executive sessions. Yet appellants sought to question Mr. Ferruccio on public statements he made after an executive session. Given the presumption of regularity, there was no foundation to challenge Mr. Ferruccio on his public comments.

{¶ 41} Appellants did not ask either witness the general question about whether anything other than the purchase of property for public purposes was discussed during the executive sessions because they were well aware of the trial court's position:

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THE COURT: But that's what's at issue here is whether or not the members violated the spirit of the statute with respect to the executive session and whether or not they discussed anything beyond the scope of property for a public purpose, and it's a real simple question: Did you discuss anything beyond the scope of purchase of property for a public purpose, and we can move on. Because if they didn't, then we're done.

T. at 67; *see also* T. at 96-97.

{¶ 42} Instead, appellants' inquiries were described by the trial court as an attempt to "get in through the back door by asking specific questions and I'm not going to allow that to occur." T. at 49.

{¶ 43} Appellants assert cross-examination is "the greatest legal engine ever invented for the discovery of truth." Appellants' Brief at 21, citing *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930 (1970). That may be so, but given the presumption of regularity here and the absence of other evidence showing a violation, we cannot say the trial court abused its discretion in limiting cross-examination. Further, the trial court's decision was consistent with *Hicks*. Appellants had the opportunity to test the facial validity of the meeting minutes with limited cross-examination. But the witnesses' answers strengthened—rather than weakened—appellees' claim of compliance. It remained very speculative that further cross-examination would have led to a different outcome.

{¶ 44} Appellants also argue the trial court erred in limiting their cross-examination because the trial court was misguided that discussions in executive session are

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confidential. Appellees maintain having complete access to all executive session material could have a chilling effect on future discussions. We agree generally that public bodies have some interest in protecting some of the details of the discussions that occur during lawful executive sessions. But this case does not require us to go any further than that. Here, appellees sought and received a protective order under Civ.R. 26(C) pertaining to the scope of depositions. In the June 14, 2022 protective order at 18, the trial court ordered the following:

To this end, Plaintiffs may inquire generally as to the *nature of topics discussed at the executive sessions in question*, specifically to determine whether the topics discussed related to "the purchase of property for a public purpose." Plaintiffs may not inquire into the substance or specific details of any information presented or any conversations that took place during those executive sessions. Inquiry beyond the Court's prescribed parameters is neither relevant nor necessary for Plaintiffs to prove their case, and no compelling justification exists to override the confidentiality generally protecting such discussions.

{¶ 45} The trial court found this approach afforded appellants "the opportunity to explore what is potentially relevant to their claims without permitting an unlimited fishing expedition into confidential matters wholly irrelevant to the case." *Id.* Appellants chose not to conduct depositions.

{¶ 46} Prior to trial, appellees filed a motion in limine to confine "the scope of evidence at trial to the parameters imposed in the previously issued protective order."

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Defendants' Motion in Limine filed July 11, 2022. The trial court issued a pretrial order standing "by its previous rulings concerning the permissible scope of inquiry in this matter." August 4, 2022 Pretrial Order at 13. The trial court stated appellants were not "permitted to undertake a 'full and unlimited inquiry' into all matters discussed during the executive sessions. Such evidence is irrelevant to any claim pending in this case as it would not tend to prove or disprove any fact that is of consequence to the determination of the action." *Id.* at 15. The trial court was consistent with this ruling throughout the trial. T. at 47, 49, 56-57.

{¶ 47} A review of the transcript indicates a witness never testified to discussing a topic that was not covered under subsection (G)(2). In fact, appellants never asked that general question. Instead, they attempted to inquire about specific discussions during the executive sessions which the trial court was very clear about in its orders. The trial court's rulings were based on relevance, not confidentiality.

{¶ 48} In reviewing appellants' objected to inquiries throughout the trial, we find the trial court did not abuse its discretion in finding them to be irrelevant as to whether improper topics were discussed during the executive sessions. We find the trial court's orders fairly balanced the concerns of the Supreme Court set forth in *Hicks*. The Supreme Court expressed a need to balance the presumption of regularity and the distinct possibility there would be a lack of evidence in existence to rebut that presumption against a plaintiff's lawful opportunity to satisfy both its burden of proof and burden of production.

{¶ 49} Assignments of Error IV and V are denied.

VI

{¶ 50} In their sixth assignment of error, appellants claim cumulative error. We disagree.

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{¶ 51} In *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, the Supreme Court of Ohio recognized the doctrine of cumulative error. However, where we have found the trial court did not err, cumulative error is inapplicable. *State v. Carter*, 5th Dist. Stark No. 2002CA00125, 2003-Ohio-1313, ¶ 37.

{¶ 52} We have found no error in appellants' preceding assignments of error; therefore, the doctrine of cumulative error is inapplicable.

{¶ 53} Assignment of Error VI is denied.

I

{¶ 54} In their first assignment of error, appellants claim the trial court erred in granting judgment to appellees and dismissing the complaint. We disagree.

{¶ 55} The trial court dismissed the complaint pursuant to Civ.R. 41 (B)(2) which states in pertinent part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

{¶ 56} In ruling pursuant to Civ.R. 41(B)(2), a trial court "is not required to construe the evidence in favor of the non-moving party, but rather may weigh the evidence and render judgment." *Canter v. Wolfe*, 5th Dist. Fairfield No. 15 CA 64, 2016-Ohio-5300, ¶

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18, citing *Levine v. Beckman*, 48 Ohio App.3d 24, 27, 548 N.E.2d 267 (10th Dist.1988).

A trial court may order a dismissal "if it finds that the plaintiff's evidence is not persuasive or credible enough to satisfy [the] burden of proof." *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶ 9 (10th Dist.). A trial court's ruling on a Civ.R. 41(B)(2) motion can be reversed on appeal if it is erroneous as a matter of law or against the manifest weight of the evidence. *Canter* at ¶ 19.

{¶ 57} In its October 20, 2022 judgment dismissing the complaint, the trial court determined the following at 9-10:

Based upon the testimony of the witnesses who appeared at trial (Jeff Matthews, BOE director; and Sam Ferruccio, BOE chairman, along with the numerous exhibits introduced (including the minutes from the various meetings, the transcripts, the audio recordings, communications from and between members of the BOE, and numerous other items), and based on the Court's assessment of the witnesses' demeanor and credibility, the Court finds that Plaintiffs failed to prove the (G)(2) exception was either invalid or inapplicable. The overwhelming evidence demonstrated to the Court's satisfaction that with respect to all four of the executive sessions at issue, the topic that was intended to be discussed, and the topic that was in fact discussed, was the purchase of property for public use, specifically, the purchase of voting equipment for the County. When specifically asked if anything other than that topic was discussed at any of the relevant executive sessions, the witnesses testified that nothing other than that was discussed. The Court finds this testimony not only

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credible, but also consistent with the minutes and recordings that were introduced into evidence.

{¶ 58} We do not find the trial court's decision to be erroneous as a matter of law or against the manifest weight of the evidence. Appellants' arguments in support of this assignment of error have been reviewed above and have been denied.

{¶ 59} As stated by the Supreme Court in *Hicks*, 2022-Ohio-4237, --- N.E.3d ---, ¶ 22: "Under the presumption of regularity, absent evidence to the contrary, courts should presume that a public body in executive session discussed the topics stated in its motion to enter executive session and did not discuss any matters not stated in the motion. * * * It is the plaintiff's burden to prove otherwise." Appellants did not present any evidence showing that appellees discussed any improper topics during any of the executive sessions; they did not meet their burden.

{¶ 60} Upon review, we find the trial court did not err in dismissing the complaint.

{¶ 61} Assignment of Error I is denied.

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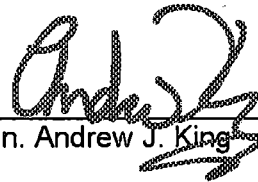
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{¶ 62} The judgment of the Court of Common Pleas of Stark County, Ohio is
hereby affirmed.

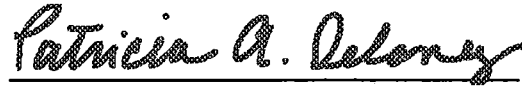
By King, J.

Delaney, P.J. and

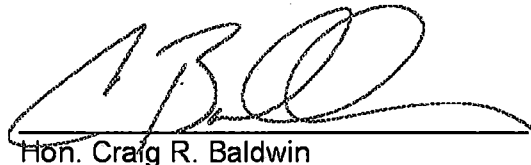
Baldwin, J. concur.



Hon. Andrew J. King



Hon. Patricia A. Delaney



Hon. Craig R. Baldwin

AJK/db

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

LYNN M. TODARO
CLERK OF COURTS
STARK COUNTY, OHIO

2022 OCT 20 PM 4:11

LOOK AHEAD AMERICA, et al.,

Case No. 2021CV00702

Plaintiffs

JUDGE HEATH

vs.

JUDGMENT FOR
DEFENDANTS

STARK COUNTY BOARD OF
ELECTIONS, et al.,

Defendants.

This matter came before the Court for a bench trial on August 8, 2022. Upon consideration of all of the evidence, the Court hereby enters judgment in favor of Defendants and orders that Plaintiffs' claims shall be dismissed, for the reasons more fully set forth herein.

Preliminary Matters

(a) Plaintiffs' Claims

This case involves a claim by Plaintiffs Look Ahead America ("Look Ahead") — a Washington, D.C. nonprofit¹—and Merry Lynne Rini ("Rini") — a Stark County resident—against the Stark County Board of Elections ("BOE") as well as the BOE's

¹ Look Ahead America, a non-profit corporation organized in Washington, D.C., alleges that it is "dedicated to empowering everyday Americans by protecting the voting process." (Complaint, ¶ 1.) On February 3, 2021, Look Ahead America issued a press release urging the public, and particularly Ohioans, to "warn the Board of Elections of Stark County, Ohio not to move ahead" with the purchase of Dominion voting equipment." (Dominion's Reply Brief in Support of Motion to Dismiss, pp. 6-7.) On March 31, 2021, the Commissioners notified the BOE that they would not be taking any action to purchase the Dominion equipment selected by the BOE. On April 2, 2021, the BOE filed a mandamus action in the Ohio Supreme Court in *State ex rel. Stark Cty. Bd. of Elections v. Stark Cty. Bd. of Commrs.*, 165 Ohio St.3d 201, 2021-Ohio-1783. On May 18, 2021, Plaintiffs filed this action. On May 24, 2021, the Supreme Court granted the writ. The BOE asserts that the within action is a "fairly transparent attempt to exploit the OMA to achieve [Plaintiff's] goal of prohibiting Stark County from acquiring Dominion voting equipment..."

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individual board members, in connection with the BOE's decision to purchase voting equipment from Dominion Voting Systems, Inc.² Plaintiffs allege that the BOE violated Ohio's Open Meeting Act by conducting executive sessions on December 9, 2020; January 6, 2021; February 9, 2021; and March 15, 2021 that did not comply with R.C. 121.22(G)(2).

As Plaintiffs' claims arise wholly out of the statutory provisions set forth in R.C. 121.22, those provisions exclusively govern the remedy or remedies available. "Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." R.C. 121.22(I)(1). "If the court of common pleas issues an injunction pursuant to division (I)(1)..., the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction..." R.C. 121.22(I)(2). As authorized by these sections, Plaintiffs seek a civil forfeiture award for alleged past violations and general injunctive relief ordering Defendants to comply with the Act going forward. (Plaintiffs' First Amended Complaint, pp. 21-22, ¶s a-c, h.)³

² On December 9, 2020, the BOE, in a unanimous and bipartisan decision, voted to purchase Dominion Voting Systems equipment and request funding from the Commissioners for the purchase. On March 26, 2021, the bipartisan board unanimously passed another motion, expressly adopting Dominion's voting system for use in the county and demanding that the Commissioners take all steps necessary to immediately acquire and fund the purchase.

³ In paragraph g. of their prayer, Plaintiffs also seek an injunction directing the BOE members to "publicly declare, reveal, and document all discussions improperly held in executive session", but no such remedy is provided by the statute, even if a violation were found.

(b) Limited scope of inquiry into matters discussed during executive sessions

Pursuant to section (H) of the statute, Plaintiffs also initially sought a declaration invalidating the vote to acquire Dominion voting equipment. Section (H) authorizes the invalidating of a public body's resolution or decision where such resolution or formal action "resulted from deliberations" that took place in an unauthorized executive session. However, this Court has previously determined that a Section (H) claim was rendered moot by virtue of the Ohio Supreme Court's writ issued in *State ex rel. Stark Cty. Bd. Of Elections v. Stark Cty. Bd. Of Commissioners*, 2021-Ohio-1783. Since the Court cannot invalidate the BOE's vote to purchase Dominion machines, and since that is the only "formal action" or resolution at issue, a section (H) violation has no viability in the instant case and therefore, it is irrelevant what "deliberations" regarding voting machines may or may not have taken place during the four executive sessions at issue.⁴ Moreover, where the evidence proves that there were no "unauthorized" or illegal executive sessions, Plaintiffs would not be entitled to invalidate any of the BOE's resolutions.

In order to prove their case, Plaintiffs were permitted to introduce evidence that the BOE's asserted justification for entering executive session was "invalid or inapplicable." To this end, Plaintiffs were permitted to inquire generally as to the nature of topics discussed at the executive sessions in question, to determine whether the topics discussed

⁴ "Relevant evidence" means evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable..." Evid. R. 401. It is within the sound discretion of the court to determine what evidence is relevant. *State v. Sherrell*, 5th Dist. Tuscarawas No. 94AP050034, 1995 WL 497590, *5, citing *Columbus v. Taylor* (1988), 39 Ohio St.3d 162. Deliberations that took place during an illegal executive session are only relevant if a plaintiff seeks to invalidate a formal action that was allegedly taken as a result of such deliberations.

related to “the purchase of property for a public purpose,” but more specific inquiry was neither relevant nor necessary for Plaintiffs to prove their case.

(c) Stipulations regarding the four executive sessions at issue

It was stipulated at trial that the BOE entered into four executive sessions, on December 9, 2020; January 6, 2021; February 9, 2021; and March 15, 2021; and that the public was excluded from these executive sessions. Only the first of these sessions (December 9) resulted in any formal action, vote, or resolution of the Board (to “acquire the Dominion Voting Systems equipment” and to “notify the Commissioners of the selection and request funding from them for the purchase”).

R.C. 121.22(G) prescribes the circumstances under which public bodies may enter into executive session and the procedures for doing so. This Section states that the public body may hold an executive session “only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of” one of the matters prescribed in subsections (G)(1) through (G)(8). It was stipulated at trial that with respect to each of the four executive sessions at issue, Defendants complied with the procedural formalities of Section (G), through a proper motion and roll call vote, and that Defendants stated a proper statutory basis for entering executive session by referencing purchase of property for public purposes under (G)(2).

(d) The Court's interpretation of the "premature disclosure" clause

The crux of the dispute at trial was whether the BOE's executive sessions satisfied the specific requirements of R.C. 121.22(G)(2), which permits executive sessions "[t]o consider the purchase of property for public purposes, the sale of property at competitive bidding, or the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest."

With regard to each of the executive sessions at issue here, the BOE stated it was entering into executive session "to consider the purchase of property for public purposes". Plaintiffs assert two arguments to challenge this stated purpose. The first argument is that Plaintiffs believed that within the executive sessions, discussions took place that went beyond this statutorily permitted purpose. This issue will be discussed in greater detail by this Court, *infra*.

The second argument is that Plaintiffs claim the statute authorizes executive session to consider the purchase of property for public purposes only "if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest" (hereinafter referred to as the "premature disclosure" clause). Plaintiffs contend that unless the BOE can substantiate that this conditional clause was fulfilled in connection with each executive session, each session was illegal. In a pretrial ruling, the Court rejected this argument and found evidence relating to such considerations was irrelevant.

The Ohio Administrative Law Handbook and Agency Directory published by the Ohio State Bar Association Administrative Law Committee provides the following explanation of how subsection G(2) is to be interpreted and applied by public bodies:

Purchase or sale of public property. A public body may move into executive session to consider the purchase of property for public purposes. It may also move into executive session to discuss the sale of property by competitive bid “if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.”

Oh. Admin. Law, Public Records and Open Meeting, § 8:22, *When executive sessions may be held* (2021-2022 ed.). Thus, practice guides issued by the Ohio State Bar Association Administrative Law Committee make it clear that public bodies may move into executive session to consider the purchase of property for public purposes, with no other conditions or criteria required. Similarly, the Ohio Sunshine Laws 2022 Manual published by the Ohio Attorney General’s Office (which is tasked with providing Sunshine Laws training to Ohio’s public officials) has made it clear that the “premature disclosure” clause does not apply to the purchase of property. With regard to section (G)(2), the Manual states as follows:

2. Purchase or sale of property

A public body may adjourn into executive session to consider the purchase of property of any sort – real, personal, tangible, or intangible. A public body may also adjourn into executive session to consider the sale of real or personal property by competitive bid, or the sale or disposition of unneeded, obsolete, or unfit property under R.C. 505.10, if disclosure of the information would result in a competitive advantage to the person whose personal, private interest is adverse to the general public interest.

Thus, the Ohio Attorney General, who is entrusted with the training of public officials in the area of compliance with the Open Meetings Act pursuant to R.C. 109.43, has made it

clear that the “premature disclosure” clause applies only when the sale of property by competitive bid, or the sale of obsolete property pursuant to R.C. 505.10, is being considered.

Finally, the Fifth District Court of Appeals has also found that merely stating “to discuss sale or purchase of property (according to ORC Section 121.22G-2)” is *legally sufficient* to “satisf[y] the statutory requirements for entering an executive session.” *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. Fairfield No. 12-CA-8, 2013-Ohio-2295, ¶¶ 18-19 (granting summary judgment to the Board with respect to alleged Sunshine Law violations). In that case, the Fifth District Court of Appeals considered whether a violation of the Open Meetings Act could be established with respect to two separate executive sessions of the Board of Trustees which took place on April 7, 2019, and April 21, 2010. The minutes for each of those meetings stated, “Mr. Meyers made a motion to go into Executive Session...to discuss sale or purchase of property (according to ORC Section 121.22 G-2)”. The Fifth District observed that the minutes contained “both a statutory reason for entering into executive session as well as a roll call vote as required by R.C. 121.22(G)(1).” *Id.* at ¶ 18. The Court granted summary judgment to the Board with respect to these two executive sessions, finding “...Respondent’s citation to an appropriate subsection on the foregoing dates coupled with a description of the topic to be discussed in the executive session satisfies the statutory requirements for entering an executive session.” In fact, no court has interpreted subsection G(2) of the statute to mean that a public body may go into executive session to consider purchasing property for public purposes *only if* that body also finds that “premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse

to the general public interest.” In other words, no court has held that if a public body fails to demonstrate findings consistent with the “premature disclosure” clause, its executive session is illegal and its subsequent actions are invalidated, and a plain reading of the statute does not support such a conclusion.

Burden of proof and evidence at trial

In this case, the dispute is whether Defendants properly convened executive sessions “[t]o consider the purchase of property for public purposes” under R.C. 121.22 (G)(2). “[T]he party asserting a violation of [the OMA] has the ultimate burden to prove [the OMA] was violated (or was threatened to be violated) by a public body.” *State ex rel. Huth v. Village of Bolivar*, 5th Dist. Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-3460, ¶ 27. “[T]he party asserting a violation of OMA has the burden of persuasion by a preponderance of the evidence.” *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 12th Dist. No. CA2011-05-045, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 24, citing *State ex rel. Hardin Cty. Publishing Co. v. Hardin Mem. Hosp.*, 3rd Dist. No. 6-02-04, 2002 WL 31323400, *3 (Oct. 18, 2002) (the person asserting a violation of OMA bears the burden of proving the violation occurred by a preponderance of the evidence); *Barnes v. Sandy Twp. Bd. of Trustees*, 5th Dist. No. CA-8377, 1991 WL 122343 (June 25, 1991); *State ex rel. Ames v. Portage Cnty. Bd. of Commrs.*, 11th Dist. No. 2019-P-0015, 2019-Ohio-3729, 144 N.E.3d 1010, ¶ 69; *Brenneman Bros. v. Allen Cty. Commrs.*, 3rd Dist. Allen No. 1-14-15, 2015-Ohio-148, ¶ 39.

The appropriate procedure for evaluating the burden of proof is set forth in *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 12th Dist. No. CA2011-05-045, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 25. In that case, the court explained:

...[I]n an action brought under R.C. 121.22, the plaintiff or relator initially carries his or her burden by showing that a meeting of the majority of the members of a public body occurred and that the general public was excluded from that meeting. Once the plaintiff or relator demonstrates the above, the burden then shifts to the public body to produce or go forward with evidence that the challenged meeting fell under one of the exceptions of R.C. 121.22(G). After the public body comes forward with such evidence, the burden then shifts to the plaintiff or relator to come forward with evidence that the exception claimed by the public body is not applicable or valid. If the plaintiff or relator cannot show that the exception is inapplicable or invalid, he has failed to prove the public body violated OMA, that is, he has failed to meet his burden of proof. If, on the other hand, the plaintiff or relator can show that the exception is not applicable or not valid, he has met his burden of proof.

Hardin, 2012-Ohio-2569 at ¶ 25; *State, ex rel. Richardson v. City of Milford*, 2017 WL 733464, at *8 (Ohio Com.Pl.).

In this case, it is beyond dispute that Plaintiffs met their initial burden, and Defendants met their responsive burden by showing that each of the four executive sessions at issue was entered into “[t]o consider the purchase of property for public purposes” under R.C. 121.22 (G)(2). Indeed, these two matters were stipulated by the parties at trial. Thus, the burden then shifted back to Plaintiffs to come forward with evidence to prove that the (G)(2) exception was invalid or inapplicable. It was therefore incumbent upon Plaintiffs to produce evidence at trial to persuade the Court that the (G)(2) exception claimed by Defendants either did not apply, or was invalid.

Based upon the testimony of the witnesses who appeared at trial (Jeff Matthews, BOE director; and Sam Ferruccio, BOE chairman), along with the numerous exhibits

introduced (including the minutes from the various meetings, the transcripts, the audio recordings, communications from and between members of the BOE, and numerous other items), and based on the Court's assessment of the witnesses' demeanor and credibility, the Court finds that Plaintiffs failed to prove the (G)(2) exception was either invalid or inapplicable. The overwhelming evidence demonstrated to the Court's satisfaction that with respect to all four of the executive sessions at issue, the topic that was intended to be discussed, and the topic that was in fact discussed, was the purchase of property for public use, specifically, the purchase of voting equipment for the County. When specifically asked if anything other than that topic was discussed at any of the relevant executive sessions, the witnesses testified that nothing other than that was discussed. The Court finds this testimony not only credible, but also consistent with the minutes and recordings that were introduced into evidence.

Plaintiffs argued at trial that the BOE members reached improper "decisions" within the executive sessions because at times it appeared that some sort of consensus existed when the BOE returned to open session, but the Court finds nothing sinister, suspicious, or improper from any of the minutes, transcripts, testimony, or recordings. Moreover, the Open Meetings Act does not prohibit a public body from engaging in discussions during authorized executive sessions simply because those discussions might reveal some sort of accord or unity of thought among the members on an issue. The Act only prevents the public body from taking formal action in executive session. *State ex rel. Huth v. Village of Bolivar*, 5th Dist. Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-3460, ¶ 40; R.C. 121.22(H) ("a *resolution, rule, or formal action* of any kind is invalid unless adopted in an open meeting of the public body"). There is no evidence persuasive to this

Court, nor frankly even an inference to be made, that any improper or “illegal” discussions took place during any of the executive sessions or that any “resolutions” or “formal actions of any kind” were made within the executive sessions themselves. The purpose of the Open Meetings Act is to “prevent public bodies from engaging in secret deliberations with no accountability to the public.” *State ex rel. Ames v. Portage Cnty. Bd. of Commrs.*, 11th Dist. No. 2021-P-0067, 2022-Ohio-105, 183 N.E.3d 633, ¶ 7, citing *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032, ¶ 9 (1st Dist.). Based upon the extensive public statements in the meeting minutes and transcripts and recordings, the Court is convinced beyond doubt that the Board of Elections engaged in no “secret deliberations” and fulfilled its obligation of “accountability to the public.”

Plaintiffs suggest that one or more of the executive sessions were illegal because they appeared to relate to the County Commissioners’ refusal to move forward with the purchase of the voting equipment in accordance with the BOE’s previous directive. Plaintiffs contend that “a dispute with another public body” is not a permissible executive session topic listed in R.C. 121.22(G). Plaintiffs argue that the BOE “obviously” discussed during executive session what steps they might be able to take in order to get the Commissioners to comply and move forward with the purchase of the equipment. Even if such an inference is made, the Court finds it does not prove any violation of (G)(2), because such discussion still clearly relates to the purchase of property for a public purpose, and specifically, to the purchase of the voting machines. Moreover, the mere fact that a discussion regarding a permissible executive session topic may necessarily touch upon some related topic which is not expressly listed as a permissible topic, does not render the executive session illegal. See, e.g., *State ex rel. Huth v. Village of Bolivar*, 5th Dist.

Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-3460, ¶ 46 (finding no OMA violation even though the Council's permissible executive session discussion regarding pending litigation may have also included some discussion regarding the litigation's impact upon zoning changes – an impermissible topic).

Plaintiffs also argued, for the first time on the day of trial, that because the BOE does not actually purchase the equipment with its own funds but has to, by statute, direct the Commissioners to make the purchase based upon the BOE's recommendations, this fact somehow removes the entire discussion from the sphere of "purchase of property for public purposes". The Court disagrees. The statute does not limit the (G)(2) exception in such a manner, and public bodies are frequently required to make decisions regarding purchases even though another entity (such as a board of commissioners) will be the entity that ultimately provides the funds or writes the check. Pursuant to R.C. 3501.11, the Board of Elections has the mandatory duty to "provide for the *purchase*, preservation, and maintenance of booths, ballot boxes, books, maps, flags, blanks, cards of instructions, and other forms, papers, and equipment used in registration, nomination, and elections..." (Emphasis added.) *State ex rel. Stark Cnty. Bd. of Elections v. Stark Cnty. Bd. of Commrs.*, 165 Ohio St.3d 201, 2021-Ohio-1783. The prescribed procedure for the "purchase" of such equipment is set forth in R.C. 3506.02 and 3506.03, which states that once the BOE "adopts" or "recommends" the equipment, the "board of county commissioners shall acquire the equipment ... by purchasing in whole or in part such equipment...". *Id.* Thus, the acquisition and purchase of voting equipment is by statute both the right and the obligation of the Board of Elections, even though the funds are statutorily designated to come from the Commissioners. The Court finds, therefore, that whenever the BOE entered

into executive session for the purpose of discussing the adoption, recommendation, acquisition, and ultimate purchase of voting equipment for Stark County, the Board was in fact discussing “the purchase of property for public purposes”. Plaintiffs’ proposed reading of the statute is pedantic and unpersuasive. In short, none of the evidence, and none of Plaintiffs’ arguments, persuade the Court that Defendants’ invocation of the (G)(2) exception to go into executive session on any of the dates at issue was inapplicable, invalid, illegal, or in any way improper.

The Court is aware of the case of *State ex rel. Hicks v. Clermont Cnty. Bd. of Commrs.*, 12th Dist. No. CA2020-06-032, 2021-Ohio-998, 171 N.E.3d 358, ¶¶ 30-32, *appeal allowed sub nom. State ex rel. Hicks v. Clermont Cty. Bd. of Commrs.*, 163 Ohio St.3d 1504, 2021-Ohio-2401, 170 N.E.3d 894, ¶¶ 30-32, currently being considered by the Ohio Supreme Court. Specifically, the Supreme Court is considering the public body’s obligations to produce evidence within the burden shifting scheme referenced above. In *Hicks*, the court of appeals imposed “dual aspects” of compliance in requiring the public body to produce evidence not only that the entity “went into executive session for a legally permissible purpose”, but also that “the discussions during the executive session complied with R.C. 121.22(G) and were consistent with the motion authorizing the executive session.”⁵ Many amici have criticized this holding as impermissibly shifting the burden to

⁵ This Court believes that the burden shifting in *Hicks* is legally incorrect and flies in the face of long-standing principles regarding the burden of proof, particularly in cases where, as here, injunctive relief is sought. “It is well established that the party seeking injunctive relief has the burden of proof. *Union Twp. Bd. of Trustees v. Jordan*, 12th Dist. Clermont No. CA2021-01-003, 2021-Ohio-3871, ¶ 18, citing *State ex rel. Hardin v. Clermont Cty. Bd. Of Elections*, 12th Dist. Clermont Nos. CA2011-05-045 and CA2011-06-047, 2012-Ohio-2569, ¶ 22; *State ex rel. Sigall v. Aetna Cleaning Contrs. of Cleveland, Inc.*, 45 Ohio St.2d 308, 315 (1976). Further, the right to an injunction must be established by the strength of plaintiff’s own case rather than by any weakness of that of its adversary. *Jordan, supra*.

the public body instead of requiring the complaining party to carry its traditional burden, and at this time it is unclear how the Supreme Court will rule. Nevertheless, the outcome of *Hicks* will not have a material impact on the Court's decision here. Regardless of who has the burden, the Court finds, based upon all of the evidence in this case and the Court's assessment of the credibility of the witnesses who testified, that the BOE entered into the four executive sessions for a permissible and valid purpose (the purchase of property for public purposes), and that each of the executive sessions was consistent with that purpose and related specifically to the topic that was announced in the motion which authorized the executive session. Thus, even under *Hicks*, the Court finds no violation. The Court finds the issues have been proven in favor of Defendants in this case.⁶

Disposition of case

At the conclusion of Plaintiffs' evidence at trial, Defendants made a motion for a directed verdict. Both sides presented argument and the Court took the matter under advisement.

The Court recognizes that "in cases involving a bench trial, the rule governing directed verdicts is not applicable." *Canter v. Wolfe*, 5th Dist. No. 15 CA 64, 2016-Ohio-

⁶ During the course of the trial, and in response to the Court's rulings on relevance, Plaintiffs made numerous proffers regarding topics Plaintiffs believe were discussed during the various executive sessions. Plaintiffs contend that their proffered evidence would establish that during the various executive sessions, the BOE went beyond the parameters of discussing "purchase of property for public purposes" and engaged in discussions regarding the voting equipment proposed by ESS, a competitor of Dominion; the highly politicized and ultimately debunked allegations of voting fraud asserted against Dominion; the addition of a scanner to the list of voting equipment to be acquired; the optimal timing of the acquisition of the voting equipment; the Commissioners' refusal to move forward with the purchase of the equipment despite the BOE's directive; and options for responding to that refusal in order to ensure that the desired equipment was purchased. The Court finds that, even if all of these matters were established by evidence in the record, none of these would establish a violation of the Open Meetings Act. The Court finds that all of these topics would relate to the (G)(2) category of "purchase of property for public purposes", as they all specifically relate to the purchase of the Dominion equipment which was adopted by the BOE in accordance with its statutory obligations under R.C. 3501.11(C).

5300, 69 N.E.3d 1061, ¶¶ 18-19, citing, e.g., *Williams v. Williams*, 5th Dist. Morrow No. 2010-CA-0006, 2011-Ohio-1200, 2011 WL 915750, ¶ 13. Instead, “[i]n a bench trial, a defendant seeking a favorable disposition after the close of the plaintiff’s case must move to dismiss under the rule governing involuntary dismissal in non-jury actions.” *Id.* Therefore, the Court will treat Defendants’ motion for directed verdict as a motion for involuntary dismissal under Civ. R. 41(B)(2). *Canter v. Wolfe*, 5th Dist. No. 15 CA 64, 2016-Ohio-5300, 69 N.E.3d 1061, ¶¶ 18-19; *Hayes v. Carrigan*, 1st Dist. No. C-160554, 2017-Ohio-5867, 94 N.E.3d 1091, ¶ 21. Civ.R. 41(B)(2) provides in relevant part as follows: “After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff’s evidence, the defendant * * * may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.”

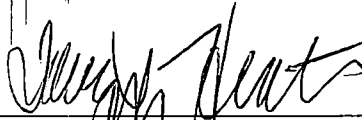
Unlike a motion for directed verdict, in which the court must construe the evidence in favor of the nonmoving party and make no determination regarding the weight of the evidence or the credibility of the witnesses, a motion to dismiss under Civ.R. 41(B)(2) allows the court to determine the facts, weigh the evidence, resolve any conflicts therein, and assess credibility. *Jarupan v. Hanna*, 10th Dist. No. 06AP-1069, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶¶ 8- 9; *Canter, supra*. A trial court’s ruling on a Civ.R. 41(B)(2) motion will be set aside on appeal only if it is erroneous as a matter of law or against the manifest weight of the evidence. *Canter* at ¶ 19, citing *Mohn v. Ashland Cty. Chief Med. Examiner*, 2015-Ohio-1985, 34 N.E.3d 137, 145, ¶ 29, citing *Ogan v. Ogan*, 122 Ohio App.3d 580, 702 N.E.2d 472 (12th Dist.1997). A reviewing court, in addressing

a civil manifest weight challenge, must determine whether the finder of fact, in resolving conflicts in the evidence, clearly lost his or her way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Criss v. Young Star Academy, LLC*, 5th Dist. Ashland No. 21-COA-005, 2021-Ohio-3009, ¶ 71, citing *Hunter v. Green*, Coshocton App. No. 12-CA-2, 2012-Ohio-5801, 2012 WL 6094172, ¶ 25. As part of the manifest-weight standard, a reviewing court must presume that the trial court's findings of fact are correct. *Criss, supra*, citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80, 10 OBR 408, 461 N.E.2d 1273(1984). “The trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial.” *Burton v. Dutiel*, 5th Dist. No. 14-CA-00024, 2015-Ohio-4134, 43 N.E.3d 874, ¶ 86, quoting *Malone v. Courtyard by Marriott Ltd. P'ship*, 74 Ohio St.3d 440, 659 N.E.2d 1242 (1996). Further, the trier of fact is in the best position to view the witnesses and their demeanor in making a determination of the credibility of the testimony. *Burton, supra*, citing *DeMoss v. Smailes*, 5th Dist. Coshocton No. 2009CA00015, 2010-Ohio-1910, 2010 WL 1732827. The trier of fact is free to believe all, part, or none of a witness' testimony. *Id.*

For all of the reasons set forth in this Entry, and based upon the Court's findings of fact, weighing of the evidence, and assessment of the witnesses' credibility, together with the Court's conclusions regarding the applicable law, the Court hereby finds that Plaintiff has shown no right to relief. Accordingly, the Court hereby enters JUDGMENT in favor of Defendants as to all of Plaintiffs' claims herein, and Plaintiffs' Complaint is hereby DISMISSED.

Costs to Plaintiffs.

IT IS SO ORDERED.

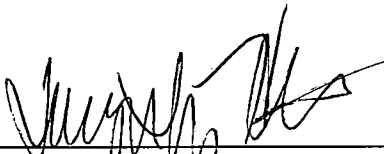


JUDGE TARYN L. HEATH

**NOTICE TO CLERK:
FINAL APPEALABLE ORDER**

IT IS HEREBY ORDERED that this Judgment Entry and notice thereof shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.

Pursuant to Civ.R. 54(B), there is no just reason for delay.



JUDGE TARYN L. HEATH

CC (via email): Atty. Finney/Atty. Hartman
 Atty. Lysenko/Atty. Dawson

**STARK COUNTY CLERK OF COURTS
NOTICE OF JUDGMENT**

2021CV00702

LOOK AHEAD AMERICA ET AL VS STARK COUNTY BOARD OF ELECTIONS ET AL

INDIVIDUALS LISTED BELOW WERE NOTIFIED THAT AN ENTRY WHICH MAY BE A FINAL APPEALABLE ORDER HAS BEEN FILED WITH THE CLERK OF THE COMMON PLEAS COURT ON Oct 20 2022.

Name	Address
CURT C HARTMAN	7394 RIDGEPOINT DR SUITE 8 CINCINNATI, OH 45230
LISA NEMES	110 CENTRAL PLAZA SUITE 510 CANTON, OH 44702
CHRISTOPHER P FINNEY	4270 IVY POINTE BLVD SUITE 225 CINCINNATI, OH 45245
DEBORAH A. DAWSON	110 CENTRAL PLAZA SOUTH SUITE 510 CANTON, OH 44702
JORDAN A TREECE	2228 HAYES AVE SUITE A FREMONT, OH 43420
JOSEPH F ALBRECHTA	2228 HAYES AVE SUITE A FREMONT, OH 43420
JOHN A COBLE	2228 HAYES AVE SUITE A FREMONT, OH 43420
JOHN LYSENKO	110 CENTRAL PLAZ SOUTH SUITE 510 CANTON, OH 44702
CHRISTOPHER E LIEBOLD	2228 HAYES AVE SUITE A FREMONT, OH 43420

LYNN M. TOVARO
CLERK OF COURTS
STARK COUNTY, OHIO
JUN 14 AM 11:01

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

LOOK AHEAD AMERICA, et al.,

Plaintiffs

vs.

STARK COUNTY BOARD OF
ELECTIONS, et al.,

Defendants.

Case No. 2021CV00702

JUDGE HEATH

JUDGMENT ENTRY
GRANTING PROTECTIVE
ORDER

This matter is before the Court on the Motion for Protective Order filed by Defendants Stark County Board of Elections, Samuel J. Ferruccio, Jr., Frank C. Braden, Kody V. Gonzalez, and William S. Cline, on March 8, 2022. Considering Defendants' motion and Plaintiffs' memorandum in opposition, the Court finds Defendants' motion well taken and the same is hereby GRANTED, as follows.

This case involves a claim by Plaintiffs Look Ahead America ("Look Ahead") — a Washington, D.C. nonprofit¹—and Merry Lynne Rini ("Rini") — a Stark County resident—against the Stark County Board of Elections ("BOE") as well as the BOE's

¹ Look Ahead America, an organization founded by the former Director of Data and Strategy for the Trump campaign, has as one of its publicly stated missions to "enfranchise" "disaffected and disenfranchised rural and blue-collar patriotic Americans" by, among other things, "ensuring voter integrity". On February 3, 2021, Look Ahead America issued a "public call to action", urging the public, and particularly Ohioans, to contact the Stark County Commissioners and urge them not to purchase Dominion voting equipment. On March 31, 2021, the Commissioners notified the BOE that they would not be taking any action to purchase the Dominion equipment. On April 2, 2021, the BOE filed a mandamus action in the Ohio Supreme Court in *State ex rel. Stark Cty. Bd. of Elections v. Stark Cty. Bd. of Commrs.*, 165 Ohio St.3d 201, 2021-Ohio-1783. On May 18, 2021, Plaintiffs filed this action. On May 24, 2021, the Supreme Court granted the writ.

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individual board members, in connection with the BOE's approval to purchase voting equipment from Dominion Voting Systems, Inc. Plaintiffs allege that the BOE violated Ohio's Open Meeting Act by conducting executive sessions on December 9, 2020; January 6, 2021; February 9, 2021; and March 15, 2021 that did not comply with Ohio's R.C. 121.22(G)(2). Plaintiffs seek a declaration that the Open Meetings Act was violated; an injunction compelling the BOE and its board members to comply with the Open Meetings Act; and a declaration that any action taken by the BOE as a result of the allegedly improper executive sessions was invalid. Plaintiffs also seek an injunction prohibiting the BOE from taking any further actions to implement its action on December 9, 2020, when it first approved the purchase of voting equipment from Dominion Voting Systems, Inc. In their First Amended Complaint, Plaintiffs additionally assert that a vote occurring during a special meeting of the BOE on March 26, 2021 should also be declared invalid because it resulted from discussions or deliberations occurring during previous executive sessions, and therefore also violated the Open Meetings Act.

The present dispute relates to Plaintiffs' request to take the depositions of the individual BOE Defendants regarding matters discussed in executive sessions on December 9, 2020; January 6, 2021; February 9, 2021; and March 15, 2021. Specifically, Plaintiffs claim they are entitled to explore the following matters "freely and without limitation":

- (i) the presentation of and discussions concerning the Staff Recommendation (per the indication of what occurred at the meeting of December 9, 2020);
- (ii) the decision to "add one additional scanner to the equipment recommendation that was received" (per the motion and vote of what was adopted at the meeting of December 9, 2020);

(iii) the various allegations concerning Dominion Voting equipment of which the COUNTY DEFENDANTS were “fully cognizant” and any assessment thereon, together with the “examin[ation] at length” undertaken by the COUNTY DEFENDANTS concerning information related thereto (per the minutes of the meeting of December 9, 2020, and public comments thereat);

(iv) the publicly pronounced conclusion that “this Dominion system is entirely credible; it is not vulnerable” (per the minutes of the meeting of December 9, 2020, and public comments thereat);

(v) that there is “no basis in fact” for what some “have been reading in some parts of the press and the internet” (per the minutes of the meeting of December 9, 2020, and public comments thereat);

(vi) the Board’s express “consideration] [of] these allegations” (per the minutes of the meeting of December 9, 2020, and public comments thereat);

(vii) the “discussion] and revisit[ation] [of] the decision to purchase Dominion Voting Systems” (per the minutes of the meeting of January 6, 2021, and public comments thereat);

(viii) the Board’s “consider[ation][of the] claims made against Dominion” (per the minutes of the meeting of January 6, 2021, and public comments thereat);

(ix) the Board’s “determination[that the claims made against Dominion] were false” (or, as specifically stated by Member FERRUCCIO, “determined to be false in 99.9% of the claims [against Dominion]” (per the minutes of the meeting of January 6, 2021, and public comments thereat);

(x) the decision of the Board to “stand[] by their decision for the adoption of the Dominion Voting Equipment” (per the minutes of the meeting of January 6, 2021, and public comments thereat);

(xi) the decision to direct staff “to contact the County Commissioners to obtain a firm date as to when they will make a decision” on the purchase of Dominion Voting equipment (per the minutes of the meeting of February 9, 2021, and public comments thereat); and

(xii) the decision to not “revisit the Board’s previous recommendation and decision” concerning the selection of Dominion Voting equipment” (per the minutes of the meeting of March 15, 2021, and public comments thereat).

In a footnote, Plaintiffs state that this substantial list is not complete. In fact, Plaintiffs also suggest they should be permitted to depose the BOE members regarding the “ongoing dispute with the Board of County Commissioners.”

The BOE Defendants submit that they have already provided Plaintiffs with all relevant and discoverable information, including the audio recordings, minutes from each meeting, the agendas and meeting packets, and accompanying documents. They also assert that the executive sessions were entered into using the prescribed statutory procedure and for a statutorily-permitted reason, and that matters discussed therein are protected as confidential.

In order to evaluate these competing positions, the Court must first assess the nature of Plaintiffs’ claims to determine the appropriate scope of discovery.

Plaintiffs assert that Defendants violated the Open Meetings Act specifically by holding executive sessions without proper statutory authorization. As Plaintiffs’ claims arise wholly out of the statutory provisions set forth in R.C. 121.22, those provisions exclusively govern the remedy or remedies available. “Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.” R.C. 121.22(I)(1). “If the court of common pleas issues an injunction pursuant to division (I)(1)..., the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction...” R.C. 121.22(I)(2). As authorized by these sections, Plaintiffs seek a civil forfeiture award for alleged past violations and general injunctive relief ordering Defendants to comply with

the Act going forward. (Plaintiffs' First Amended Complaint, pp. 21-22, ¶s a-c, h.)²

Section (H) of the statute states that a "resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section." Pursuant to this section, Plaintiffs seek a declaration invalidating the actions that were allegedly taken by Defendants as a result of the allegedly improper executive sessions – specifically, the vote to acquire Dominion voting equipment. (Plaintiffs' First Amended Complaint, pp. 21-22, ¶s d-f.)

Out of the two types of claims and/or remedies sought by Plaintiffs (a prospective injunction directing compliance with the Act with a civil forfeiture of \$500.00; and a declaration that the public body's actions be retroactively invalidated), only the first type is still viable in this case, and that fact must be considered by this Court in fashioning an appropriate discovery order. The second claim (a section (H) claim seeking to invalidate the actions of the BOE specifically in connection with the vote to purchase the Dominion voting equipment) is no longer viable for reasons already set forth by this Court in its Judgment Entry of August 20, 2021, and as more fully explained below.

² In paragraph g. of their prayer, Plaintiffs also seek an injunction directing the BOE members to "publicly declare, reveal, and document all discussions improperly held in executive session", but no such remedy is provided by the statute, even if a violation were found. In fact, R.C. 102.03 would arguably prohibit any member of the BOE from disclosing any confidential information acquired in the course of executive sessions, since "the information discussed may be considered confidential under R.C. 102.03(B) because: the majority of a quorum of the public body voted that the executive session is necessary; the Open Meetings Act affords a privacy status to executive session discussions; and the Open Meetings Act strictly limits the types of approved government business permitted to be discussed in executive session." OH Eth. Op. 2020-02.

Plaintiffs' quest to invalidate the BOE's action directing the Commissioners to purchase Dominion voting equipment is based entirely on Section (H) of the statute. That section authorizes the invalidating of a public body's resolution or decision where such resolution or formal action "resulted from deliberations" that took place in an unauthorized executive session. Plaintiffs allege that the BOE voted to purchase Dominion equipment as the result of deliberations that took place in unauthorized executive sessions, and they rely upon this theory as a basis for deposing the BOE members regarding all discussions that took place during the executive sessions at issue. However, it has already been determined that it was the March 26, 2021 vote — made in a meeting which was entirely open and had no executive session — which imposed upon the Commissioners a legal duty to acquire the Dominion voting machines. *State ex rel. Stark Cty. Bd. Of Elections v. Stark Cty. Bd. Of Commissioners*, 2021-Ohio-1783, at 10. Because the BOE's vote on March 26, 2021 was held in an open meeting with no executive session, and because that vote was the basis for the Ohio Supreme Court's writ of mandamus cited above, this Court has already made it clear that Plaintiffs cannot prevail in their mission to *invalidate* the purchase of the Dominion voting equipment. Thus, Plaintiffs cannot obtain any injunctive relief against the BOE in connection with the March 26, 2021 vote, not only because no executive session occurred in connection with that specific meeting, but also because the Ohio Supreme Court has already ratified and enforced the BOE's action on that date.³

Therefore, to the extent Plaintiffs' claim for relief seeks to utilize section (H) to

³ Plaintiffs have suggested that the BOE's vote of March 26, 2021 must be considered invalid because there were allegedly Open Meeting Act violations during previous meetings on the same topic. No authority has been presented to support this theory, and indeed this Court has already rejected such an argument. As this Court held on page 10 of its previous Entry, "The purpose of the Open Meetings Act is to assure accountability, not to foreclose a public body from future decision-making due to an alleged past violation." See, e.g., *Board of Educ. School Dist. Number 67 v Sikorski* (1991, 1st Dist) 214 Ill App 3d 945, 158 Ill Dec 623, 574 NE2d 736, app withdrawn 143 Ill 2d 636.

“invalidate” or “undo” the BOE’s decision to acquire Dominion voting equipment, or to prohibit the BOE from taking any further action in connection with that issue, such claim is moot. Even if the Court were to find violations in connection with previous meetings and specifically invalidate the December 9, 2020 vote, the March 26, 2021 vote would still remain undisturbed, and the purchase by the Commissioners would still be a *fait accompli*, so the practical effect of such an exercise would be nil. Therefore, to the extent Plaintiffs seek an injunction to invalidate the decision to purchase, implement, and use the Dominion voting machines, that claim for injunctive relief is moot. *Thompson v. DeWine*, 7 F.4th 521, 523–24; *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013) (noting that a case is moot when the court cannot “grant any effectual relief”); *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir.1986), citing *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 514, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911) (“Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief.”).

Because Plaintiffs’ claim to invalidate the BOE’s vote to purchase Dominion voting equipment is moot in this case by virtue of the Ohio Supreme Court’s decision in the mandamus action, any depositions designed to delve into the BOE members’ *reasoning* behind such decision is beyond the scope of relevant evidence in this case. In other words, because Plaintiffs have no viable claim for invalidating “any resolution, rule, or formal action” by the BOE as a claim for relief under subsection (H) of the statute, inquiries into “executive session deliberations” allegedly resulting in the BOE’s formal action are irrelevant. This encompasses virtually all of the areas of inquiry set forth on pages 11 and 12 of Defendants’ memorandum in opposition. Since the Court cannot and will not

invalidate the BOE's vote to purchase Dominion machines, and since that is the only "formal action" or resolution at issue, a section (H) violation has no viability in the instant case and therefore, it is irrelevant what "deliberations" may or may not have taken place during the four executive sessions at issue.⁴

On the other hand, Plaintiffs are still permitted to conduct discovery to develop evidence that could prove their claim in this case that Defendants violated the Open Meetings Act by holding executive sessions without proper statutory authorization. Specifically, Plaintiffs are entitled to discover whether or not Defendants complied with section (G) of the statute, which states the public body may hold an executive session "only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of" one of the matters prescribed in subsections (G)(1) through (G)(8). In this case, the dispute is whether Defendants properly convened executive sessions "[t]o consider the purchase of property for public purposes" under R.C. 121.22 (G)(2).

R.C. 121.22(G) prescribes the circumstances under which public bodies may enter into executive session and the procedures for doing so. The relevant subsection here is R.C. 121.22(G)(2), which permits executive sessions "[t]o consider the purchase of property for public purposes..." The full text of this subsection reads, "To consider the purchase of

⁴ Civ. R. 26 permits discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending action." "Relevant evidence" means evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable..." Civ. R. 26; Evid. R. 401. "With relevancy as the threshold, Courts have broad discretion to determine the scope of discovery." *Hilton-Rorar v. State & Fed. Communications, Inc.*, N.D. Ohio No. 5:09-CV-01004, 2010 WL 518031, *1, citing *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir.1998). Where matters are deemed outside the scope of relevant and discoverable information, the Court need not determine whether a privilege exists to prevent such discovery.

property for public purposes, the sale of property at competitive bidding, or the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” With regard to each of the executive sessions at issue here, the BOE stated it was entering into executive session “to consider the purchase of property for public purposes”. Plaintiffs contend that this stated purpose is inadequate under the statute. Plaintiffs argue that the statute authorizes executive session to consider the purchase of property for public purposes only if “premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” Plaintiffs contend that unless the BOE can substantiate that this conditional clause was fulfilled in connection with each executive session, each session was illegal. Plaintiffs then use this argument to justify their efforts to depose each of the BOE members “without limitation” as to all matters discussed in executive session.

The Court disagrees with Plaintiffs’ interpretation of the statute and finds this argument legally insufficient to justify piercing the armor of confidentiality with which executive sessions are cloaked.

In the first place, no court addressing this provision has required such a detailed explanation nor required a public body to disclose such minutiae in order to determine whether section G(2) was complied with. In fact, courts have routinely found that merely stating “purchasing property for public purposes” (or similar language) is sufficient to comply with the executive session requirements of G(2). See, *Univ. Estates, Inc. v. City of*

Athens, Ohio, S.D.Ohio No. 2:09-CV-758, 2011 WL 796789, *2 (holding the phrase “Real Estate Acquisition” was legally sufficient notice, observing that “nowhere in Ohio Revised Code § 121.22 or in case law interpreting that statute is there an express requirement that council not only set forth the reason for an executive session using the magic words of the applicable statutory provision involved, but also state the condition precedent [to avoid premature disclosure] serving as justification for the closed proceeding.”)

Second, no court has interpreted subsection G(2) of the statute to mean that a public body may go into executive session to consider purchasing property for public purposes *only if* that body also finds that “premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” No court has held that if a public body fails to make such findings, its executive session is illegal, its subsequent actions are invalidated, and its members shall be compelled to testify regarding any and all matters discussed during such executive session. Plaintiffs have submitted no legal authority for this position.

Finally, the Court finds Plaintiff’s interpretation of the statutory language is inconsistent with well-settled rules of construction. R.C. 121.22(G)(2) permits executive sessions “[t]o consider the purchase of property for public purposes, the sale of property at competitive bidding, or the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” In considering this sentence in its entirety, the most reasonable construction is that the final clause (“*if premature disclosure of information would give an unfair competitive or bargaining*

advantage to a person whose personal, private interest is adverse to the general public interest") applies only to the last phrase appearing immediately before it, namely "the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code." This rule of statutory construction, known as the "rule of the last antecedent", provides that when a series of terms or phrases is followed by a limiting clause, that limiting clause "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 577 U.S. 347, 351, 136 S.Ct. 958, 962–63, 194 L.Ed.2d 48, citing *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003); see also Black's Law Dictionary 1532–1533 (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing"). Although the rule can, in certain circumstances, be "overcome by other indicia of meaning"⁵, the Court finds no "other indicia of meaning" here.

In section G(2), the last antecedent is "the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code." R.C. 505.10 deals with the sale of obsolete property such as motor vehicles, road machinery, equipment, and tools. R.C. 505.10 sets forth a detailed procedure to be followed regarding the public sale of such property, including public auctions, internet auctions, bid solicitation, newspaper publication, public advertisement of the auction, publicly posted lists of all such obsolete property, and publicly reported donations to nonprofit organizations. Clearly, the gist of R.C. 505.10 is to permit and regulate public

⁵ *Barnhart*, 540 U.S., at 26, 124 S.Ct. 376.

sales of obsolete property, and the statute makes it clear that all aspects of such transaction are to be public and transparent. It would make sense, then, given the statute's emphasis on transparency, that if a public body wanted to discuss such a matter in executive session, it would be permitted to do so only if it determined that premature disclosure of information pertaining to the sale could give some person --with interests adverse to the general public-- an unfair advantage in the public bidding process. Otherwise, if no such risk is identified, such matters should not be discussed in executive session because R.C. 505.10 indicates they are to be handled publicly and transparently in all regards. The Court's interpretation of R.C. 121.22(G)(2) therefore makes logical sense when all parts of that section are considered and read together as a whole.

This Court's construction of the statute is supported by published legal guidelines as well. The Ohio Administrative Law Handbook and Agency Directory published by the Ohio State Bar Association Administrative Law Committee provides the following explanation of how subsection G(2) is to be interpreted and applied by public bodies:

Purchase or sale of public property. A public body may move into executive session to consider the purchase of property for public purposes. It may also move into executive session to discuss the sale of property by competitive bid "if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest."

Oh. Admin. Law, Public Records and Open Meeting, § 8:22, When executive sessions may be held (2021-2022 ed.). Thus, practice guides issued by the Ohio State Bar Association Administrative Law Committee make it clear that public bodies may move into executive session to consider the purchase of property for public purposes, with no other conditions or criteria required. The "premature disclosure" clause is not applicable to the general category of "considering the purchase of property for public purposes." The Fifth District

Court of Appeals has likewise found that merely stating “to discuss sale or purchase of property (according to ORC Section 121.22G-2)” is legally sufficient to “satisf[y] the statutory requirements for entering an executive session.” *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. Fairfield No. 12-CA-8, 2013-Ohio-2295, ¶¶ 18-19 (granting summary judgment to the Board with respect to alleged Sunshine Law violations).

Therefore, because Plaintiffs’ reliance upon the limiting clause (“if premature disclosure of information would give an unfair competitive or bargaining advantage...”) is misplaced, Plaintiffs’ primary argument regarding the supposed illegality of the BOE’s executive sessions is without merit. Plaintiffs are not entitled to explore in depositions whether such “unfair competitive advantages” were weighed and whether “premature disclosure” risks were considered. The BOE had no obligation to undertake such analysis under the statute and such inquiries are beyond the scope of relevant evidence here.

For the foregoing reasons, the Court finds that Plaintiffs are not entitled to depose the BOE members regarding (1) the basis for, or any substantive discussions regarding, their decision to vote to purchase Dominion voting equipment; or (2) the BOE’s assessment of risks relating to “premature disclosure of information” and “unfair competitive advantages,” as such areas are wholly outside the scope of relevant discovery. However, this does not mean that Plaintiffs are precluded from taking the BOE members’ depositions entirely.

The Court recognizes that:

...in an action brought under R.C. 121.22, the plaintiff or relator initially carries his or her burden by showing that a meeting of the majority of the members of a public body occurred and that the general public was excluded from that meeting. Once the plaintiff or relator demonstrates the above, the burden then shifts to the public body to produce or go forward with evidence that the challenged meeting fell under one of the exceptions in of R.C.

121.22(G). After the public body comes forward with such evidence, the burden then shifts to the plaintiff or relator to come forward with evidence that the exception claimed by the public body is not applicable or valid.

State, ex rel. Richardson v. City of Milford, 2017 WL 733464, at *8 (Ohio Com.Pl.) In this case, Plaintiffs have met their initial burden, and Defendants have met their responsive burden by showing that each of the four executive sessions at issue was entered into “[t]o consider the purchase of property for public purposes” under R.C. 121.22 (G)(2).⁶ Thus, the burden has now shifted back to Plaintiffs to come forward with evidence that the (G)(2) exception is invalid or inapplicable. In order to develop such evidence, Plaintiffs are entitled to conduct discovery, within certain limitations. Indeed, Defendants acknowledge that depositions should be permitted; however, they object to the sort of unfettered inquiry sought by Plaintiffs.

In order to fashion an appropriate discovery order, the Court must balance Defendants’ right and duty to keep confidential information confidential, against Plaintiffs’ right to discover facts that could prove their claims.

Defendants assert that the confidentiality of executive session discussions is implicitly recognized in R.C. 121.22 and R.C. 102.03(B). They also point out that R.C. 121.22(C) eliminates a board’s obligation to record minutes of executive sessions , further underscoring the legislature’s recognition of the confidential nature of such sessions. The question of whether a privilege exists to protect disclosure of matters discussed during

⁶ The minutes on each of these dates contain both a statutorily sanctioned reason for entering into executive session as well as a roll call vote as required by R.C. 121.22.

executive session of a public body has been answered inconsistently by state and federal courts in Ohio.

In *University Estates, Inc. v. City of Athens, Ohio*, S.D. Ohio No. 2:09-cv-758, 2011 WL 796789 (Feb. 25, 2011), the United States District Court, Southern District of Ohio, ruled that the contents of executive sessions that were properly entered into by the city council, should remain confidential. In so finding, the court explained that R.C. 102.03(B) and R.C. 121.22(G)(2) were the core of the privilege. *University Estates, Inc.*, *supra*, at *2 (“Matters discussed in a properly convened executive session are confidential. Because city council properly went into executive session, the contents of those sessions remain confidential.”) Similarly, the Sixth Circuit Court of Appeals has ruled that there is an absolute executive session privilege in Ohio, “which makes confidential any communications that occur during the executive sessions of political subdivisions.” *Humphries v. Chicarelli*, 554 Fed.Appx. 401 (6th Cir. 2014) (citing to R.C. 102.03(B) and R.C. 121.22(G) in finding that “the privilege applies because the City Council was properly in executive session, and its members and members-elect were entitled to proceed in that way under Ohio law.”)

On the other hand, the United States District Court, Northern District of Ohio, in apparent defiance of the Sixth Circuit decision, addressed the executive session privilege in *Kamenski v. Wellington Exempted Village Schools*, N.D. Ohio No. 1:14-cv-01589, 2016 WL 1732872 (May 2, 2016) and declined to grant a protective order on the basis of the claimed privilege. The court in *Kamenski* concluded that the defendants “have not shown that O.R.C. § 102.03(B) in conjunction with O.R.C. § 121.22(G), which is part of the Ohio

Open Meetings Act and/or Ohio Sunshine Law, establish, without exception, the existence of a privilege that protects any and all discussions occurring in executive session.”

Ohio state courts provide even less guidance on the issue. The earliest appellate court decision on the existence of an executive session privilege is *Springfield Local School District Board of Education v. Ohio Association of Public School Employees, Local 530*, 106 Ohio App.3d 855, 667 N.E.2d 458 (9th Dist. 1995). In *Springfield*, a union counterclaimed against a board of education, claiming that the board violated R.C. 121.22 because the board made a resolution concerning labor during an illegal executive session. The Ninth District Court of Appeals declined to recognize an “absolute privilege” for executive session discussions and instead ordered an *in camera* review of contested matters in order to “balance the public's interest in confidentiality against the need for discovery in the efficient administration of justice.” *Id.* at 870, citing *Henneman v. Toledo* (1988), 35 Ohio St.3d 241, 245–246, 520 N.E.2d 207, 211–212. More recently in *State ex rel. Hicks v. Clermont Cnty. Bd. of Commrs.*, 12th Dist. No. CA2020-06-032, 2021-Ohio-998, 171 N.E.3d 358, ¶ 37, *appeal allowed sub nom.* 163 Ohio St.3d 1504, 2021-Ohio-2401, 170 N.E.3d 894, ¶ 42, the court noted that by eliminating the detailed minutes requirement, “the General Assembly has afforded public bodies with a means to maintain the confidentiality of executive session discussions while generally memorializing that their discussions complied with OMA.” Recognizing the need to protect executive session discussions from unfettered disclosure, the court noted that where there are “legitimate concerns over confidentiality of executive session discussions in the midst of defending OMA claims, protective orders are commonly used by litigants to preserve the confidentiality of sensitive matters.” *Id.*

Common Pleas courts in the state have had the opportunity to address the question of “executive session privilege” and have, likewise, reached inconsistent decisions. This Court finds the analysis of the *Clermont County Court of Common Pleas in State, ex rel. Richardson v. City of Milford*, 2017 WL 733464, at *8 (Ohio Com.Pl.) both thorough and helpful. In that case, the court recognized that public bodies “do have an interest in keeping confidential those matters discussed while in executive session concerning ... the purchase of public property for a public purpose. Allowing [Plaintiff] complete access to these conversations may have a chilling effect on the ability of the [public body] to engage in meaningful discussion of these topics at future meetings.” On the other hand, the court acknowledged that conversations that occurred during the executive sessions were “central to the [plaintiff’s] claims that the [defendants] violated the Ohio Meetings Act.” *Id.* In *Richardson*, the court noted that the plaintiff already had access to evidence regarding the discussions that took place at the various meetings, in addition to the minutes from various meetings showing how and why the defendants had entered into executive sessions. Similarly, in the instant case, Plaintiffs already have the audio recordings, the meeting minutes, the agendas and meeting packets, and the accompanying documents such as staff recommendations, with respect to each of the meetings. Plaintiffs also already have the audio recording from the Stark County Commissioners Work Session on February 2, 2021, in which the BOE’s director explained in detail the public process of obtaining bids and vetting options for acquiring new voting equipment. Thus, here, as in *Richardson*, it cannot be said that applying an executive-session privilege to limit the scope of depositions of the various BOE members, will unfairly prevent Plaintiffs from attempting to satisfy their burden and prove their case. See, *Richardson*, at *8.

In *Richardson*, the court noted that several of the executive sessions were entered into for the stated purpose of discussing the purchase of property for public use, pursuant to subsection (G)(2). In balancing the parties' interests, the court ordered as follows: "the court finds that for those executive sessions entered into under R.C. 121.22 (G)(2), regarding public property purchases, during depositions the relator may inquire into the topics discussed at these meetings, but not the substance of conversations that dealt with ... the purchase of property. If a deponent reveals that a topic was discussed that was not covered by...(G)(2), then the relator may inquire into the substance of those conversations."

This Court finds this approach eminently fair and reasonable and an appropriate balancing of the parties' competing interests. Furthermore, this approach affords Plaintiffs the opportunity to explore what is potentially relevant to their claims without permitting an unlimited fishing expedition into confidential matters wholly irrelevant to the case. Plaintiffs are entitled to conduct discovery in an attempt to develop evidence that the BOE's asserted justification for entering executive session was "invalid or inapplicable." To this end, Plaintiffs may inquire generally as to the *nature of topics discussed at the executive sessions in question*, specifically to determine whether the topics discussed related to "the purchase of property for a public purpose." Plaintiffs may not inquire into the substance or specific details of any information presented or any conversations that took place during those executive sessions. Inquiry beyond the Court's prescribed parameters is neither relevant nor necessary for Plaintiffs to prove their case, and no compelling justification exists to override the confidentiality generally protecting such discussions.

For all of the foregoing reasons, Defendants' Motion for Protective Order is hereby GRANTED. The depositions requested by Plaintiffs may proceed within the parameters prescribed by this Entry and consistently with the rulings set forth herein.

IT IS SO ORDERED.



JUDGE TARYN L. HEATH

CC (via email): Atty. Finney/Atty. Hartman
 Atty. Lysenko/Atty. Dawson

LYNN L. EDWARDS
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**IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO**

LOOK AHEAD AMERICA, et al.,

Plaintiffs

vs.

**STARK COUNTY BOARD OF
ELECTIONS, et al.,**

Defendants.

Case No. 2021CV00702

JUDGE HEATH

**PRETRIAL ORDER
REGARDING SCOPE OF
EXECUTIVE SESSIONS
UNDER R.C. 121.22(G)(2)**

This matter is before the Court upon the parties' request for a pretrial ruling regarding the permissible scope of executive sessions under R.C. 121.22(G)(2).¹ In this case, Plaintiffs allege that the BOE violated Ohio's Open Meeting Act by conducting executive sessions on December 9, 2020; January 6, 2021; February 9, 2021; and March 15, 2021 that did not comply with R.C. 121.22(G)(2). The crux of Plaintiffs' position relates to the specific language of section (G)(2), which permits executive sessions "[t]o consider the purchase of property for public purposes..."

The full text of this statutory subsection reads, "To consider the purchase of property for public purposes, the sale of property at competitive bidding, or the sale or

¹ The Court previously made a determination regarding this issue, but because that determination was made in the context of a discovery dispute and a protective order and not following specific briefing from the parties on the subject, the Court has permitted the parties to submit briefs on the issue if desired, so that a formal decision on the matter can be issued before trial, at the parties' request. Defendants have submitted a Motion in Limine on the topic, Plaintiffs have submitted a Bench Memorandum, and Defendants have submitted a Reply.

other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” With regard to each of the executive sessions at issue here, the BOE stated it was entering into executive session “to consider the purchase of property for public purposes”. Plaintiffs contend that this stated purpose is inadequate under the statute. Plaintiffs argue that the statute authorizes executive session to consider the purchase of property for public purposes only “*if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.*” (For ease of discussion, the Court will refer to this clause as the “if clause”.) Plaintiffs contend that unless the BOE can substantiate that this conditional “if clause” was fulfilled in connection with each executive session, each session was illegal. More precisely, Plaintiffs assert that “the Defendants must establish at trial, with appropriate evidence, that the executive sessions at issue herein clearly and convincingly satisfies [sic] all of the requirements under R.C. 121.22(G)(2), including that each executive session involved and was limited to consideration of information the premature disclosure of which would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” (Plaintiffs’ Bench Memo., pp. 8-9.) Plaintiffs seek to use this argument as a springboard to engage in a “full and unlimited inquiry” into all matters discussed during the executive sessions.

Caselaw

The Court disagrees with Plaintiffs' interpretation of the statute and declines to view the "if clause" as a mandatory prerequisite for executive sessions. "to consider the purchase of property for public purposes". In its Entry granting a protective order, this Court previously noted that "no court addressing this provision has required such a detailed explanation nor required a public body to disclose such minutiae in order to determine whether section G(2) was complied with." In fact, courts have routinely found that merely stating "purchasing property for public purposes" (or similar language) is sufficient to comply with the executive session requirements of G(2). See, *Univ. Estates, Inc. v. City of Athens, Ohio*, S.D.Ohio No. 2:09-CV-758, 2011 WL 796789, *2 (holding the phrase "Real Estate Acquisition" was legally sufficient notice to enter into a valid executive session.)

The decision urged by Plaintiffs (that an executive session to discuss the purchase of property is illegal, unless the additional criteria contained within the "if clause" can be established), would conflict with the decisions of the Fifth Appellate District and other courts as well. In *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. Fairfield No. 12-CA-8, 2013-Ohio-2295, the Fifth District Court of Appeals considered whether a violation of the Open Meetings Act could be established with respect to two separate executive sessions of the Board of Trustees which took place on April 7, 2019, and April 21, 2010. The minutes for each of those meetings stated, "Mr. Meyers made a motion to go into Executive Session...to discuss sale or purchase of property (according to ORC Section 121.22 G-2)". The Fifth District observed that the minutes contained "both a statutory reason for entering into executive session as well as a roll call vote as required by R.C. 121.22(G)(1)." *Id.* at ¶ 18. The Court granted summary judgment to the Board with

respect to these two executive sessions, finding "...Respondent's citation to an appropriate subsection on the foregoing dates coupled with a description of the topic to be discussed in the executive session satisfies the statutory requirements for entering an executive session." Nowhere in its decision does the Court even suggest that an inquiry into the "if clause" factors would be appropriate or necessary in order to demonstrate statutory compliance for the executive session.

Similarly, the federal district court in *Univ. Estates, Inc. v. City of Athens, Ohio*, S.D.Ohio No. 2:09-CV-758, 2011 WL 796789, *2, considered and rejected the precise argument urged by Plaintiffs here. In *Univ. Estates*, the Athens City Council went into executive session to discuss a real estate acquisition. The plaintiffs argued that the session was illegal and the resulting purchase was invalid, because although the city council stated its purpose was to consider the purchase of property, the city council failed to establish that "premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest." In rejecting this argument, the court reasoned as follows:

Plaintiffs' argument is unpersuasive. This Court disagrees that the city council ineffectively complied with the statutory requirements for effective invocation of an executive session. Ohio Revised Code § 121.22(G)(2) provides that a council can go into executive session to consider the purchase of property for public purposes "if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest ." Plaintiffs argue that by failing to state that its purpose was to avoid premature disclosure in the context described, as well as failing to disclose the detailed nature of the purpose to be considered, the city council failed to go into a proper executive session. Nowhere in Ohio Revised Code § 121.22 or in case law interpreting that statute is there an express requirement that council not only set forth the reason for an executive session using the magic words of the applicable statutory provision involved, but also state the condition precedent serving as justification for the closed proceeding.

Id. at *2. Similarly, the court in *Maddox v. Greene Cty. Children Servs. Bd. of Dirs.*, 2nd Dist. No. 2013-CA-38, 2014-Ohio-2312, 12 N.E.3d 476, ¶ 18, held that a public body is not required to “use exact statutory language when stating its purpose for entering executive session” but merely “must make clear which specific statutory purpose applies.”

Thus, no court has interpreted subsection G(2) of the statute to mean that a public body may go into executive session to consider purchasing property for public purposes *only if* that body also finds that “premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” In other words, no court has held that if a public body fails to demonstrate findings consistent with the “if clause”, its executive session is illegal and its subsequent actions are invalidated,² and a plain reading of the statute does not support such a conclusion.

Statutory Construction: Last Antecedent and Legislative History

In addition to relying upon the legal authority cited herein, this Court also previously applied the rule of the last antecedent as an additional, alternative basis for its decision, and concluded that Plaintiff’s interpretation of the statutory language was inconsistent with settled rules of construction. In considering this sentence in its entirety, the Court concluded that the most reasonable construction is that the “if clause” (“if

² The single “decision” provided by Plaintiffs is from a Clermont County Common Pleas case entitled *State of Ohio ex. rel. Hartman v. Knoop*, Case No. 2009-CVH-02058. However, the entry relied upon by Plaintiffs was not actually an adjudication of disputed issues by the court but rather, an Agreed Entry (presumably drafted by counsel) and approved by all counsel pursuant to a settlement agreement. Thus, the Court finds the weight of that entry as “persuasive authority” dubious at best.

premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest") applies only to the last phrase appearing immediately before it, namely "the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code." Plaintiffs assert that the Court's decision was incorrect because the rule of the last antecedent does not apply where a comma separates the last antecedent from the following clause. Essentially, Plaintiffs contend that a grammatical rule of punctuation overrides, or creates an exception to, the canon of construction upon which the Court alternatively relied.

The Court is aware that some courts have chosen to disregard the rule of the last antecedent where a comma exists between the last antecedent and the following clause. However, this is a grammatical guideline, not an immutable rule of law. In fact, the Sixth Circuit has cautioned against placing too much emphasis on grammar or punctuation, because those who draft contracts, agreements, and even legislation frequently commit errors. *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 499 Fed.Appx. 559, 565, citing *Payless Shoesource, Inc. v. Travelers Cos., Inc.*, 585 F.3d 1366, 1372 (10th Cir.2009) ("[W]hile the rules of English grammar often afford a valuable starting point to understanding a speaker's meaning, they are violated so often by so many of us that they can hardly be safely relied upon as the end point of any analysis of the parties' plain meaning.") Similarly, in *In re Monro*, 282 B.R. 841, 845, the court cautioned that "strict adherence to the technical rules of grammar is not always proper when a contrary meaning of the statute is clear." As was explained by the Supreme Court of the United States, "...analysis based only on punctuation is necessarily incomplete and runs the risk of

distorting a statute's true meaning. ...Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.” *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 454–55, 113 S.Ct. 2173, 2182, 124 L.Ed.2d 402 (1993).

Therefore, the Court is not persuaded that the placement of a comma before the “if clause” of (G)(2) requires the Court to accept Plaintiffs’ interpretation of the statute. In searching for additional guidance, the Court routinely looks to how other courts have interpreted the phrase, and the Court finds it significant that Plaintiffs have been unable to provide the Court with a single decision from any court, at any level, which supports Plaintiffs’ position here.³

Plaintiffs also argue that the legislative history of R.C. 121.22(G)(2) supports their interpretation. The Court disagrees.

Prior to an amendment that occurred in 2016, R.C. 121.22(G)(2) read as follows:

“To consider the purchase of property for public purposes, or for the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse

³ Plaintiffs submit the *Knoop* entry, as mentioned in Footnote 2, *supra*, as authority for their position. However, as the Court has already noted, that entry was an Agreed Entry approved by all counsel in accordance with a settlement agreement and is therefore of little value to this Court as “persuasive authority”. Moreover, the language in that Agreed Entry states that “executive sessions held pursuant to Section 121.22(G)(2) of the Ohio Revised Code are limited and constrained to the consideration of either the purchase of property for a public purpose or the sale of public property by competitive bidding, *and, then*, only to consider information such that the premature disclosure of that information in public would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.” (Emphasis added.) This language does not, to this Court’s satisfaction, clarify or eliminate the “last antecedent” question nor does it clearly support Plaintiffs’ position. In fact, through its use of language and punctuation, (“and, then”) this Entry could easily be interpreted to mean that the “premature disclosure” clause applies only to the sale of public property by competitive bidding and not to the purchase of property for a public purpose.

to the general public interest.” In this version, given the fact that the “if clause” specifically references a “competitive” advantage, the Court concludes that the “if clause”, in its original placement, was intended to refer to the immediately preceding phrase, “for the sale of property at competitive bidding.” When the legislature modified the statute to add the third phrase (disposition of obsolete property under R.C. 505.10), the legislature inserted that phrase after the “sale at competitive bidding” phrase, but before the “if clause”. This placement would, therefore, appear to indicate that both types of sales (sale of property at competitive bidding, and sale of obsolete property under R.C. 505.10), would be subject to the “if clause”. This conclusion would make logical sense, since the latter two categories both deal only with *sales* of property, while the first category deals solely with the *purchase* of property for public purposes. Furthermore, this Court’s reading of the statute would explain why no other courts in the state have apparently adopted the interpretation urged by Plaintiffs herein.

In light of the foregoing, the Court modifies its previous ruling and concludes that the “if clause” most likely intends to refer to the sale of property at competitive bidding and to the sale of obsolete property under R.C. 505.10. However, the Court reaffirms its previous decision that the “if clause” was not intended to apply as a mandatory prerequisite to executive sessions to consider the purchase of property.

Published Legal Guidelines and the Ohio Attorney General

This Court’s reading of the statute is additionally supported by, and consistent with, published legal guidelines, including the Ohio Administrative Law Handbook and Agency Directory published by the Ohio State Bar Association Administrative Law Committee, as

well as the Sunshine Laws Manual published by the Ohio Attorney General. The Ohio Administrative Law Handbook and Agency Directory provides the following explanation of how subsection G(2) is to be interpreted and applied by public bodies:

Purchase or sale of public property. A public body may move into executive session to consider the purchase of property for public purposes. It may also move into executive session to discuss the sale of property by competitive bid “if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest.”

Oh. Admin. Law, Public Records and Open Meeting, § 8:22, “When executive sessions may be held” (2021-2022 ed.). Thus, practice guides issued by the Ohio State Bar Association Administrative Law Committee make it clear that public bodies may move into executive session to consider the purchase of property for public purposes, with no other conditions or criteria required. The “premature disclosure” clause (“if clause”) is not applicable to the general category of “considering the purchase of property for public purposes.”

Perhaps more significantly, the Court has consulted the Ohio Sunshine Laws 2022 Manual published by the Ohio Attorney General’s Office, which is tasked with providing Sunshine Laws training to Ohio’s public officials. According to a statement from the Attorney General on the first page of the manual, the manual is “updated annually” by the Attorney General Office’s Public Record Unit, and it “incorporates Ohio’s Public Records and Open Meetings Acts, including law changes and legal decisions made since the previous edition.” (Ohio Sunshine Laws 2022: An Open Government Resource Manual, p. i.)

The Sunshine Laws Manual, which is well over 120 pages long, is divided into Chapters. Chapter Nine is devoted to the “Executive Session” concept and discusses at

length the statutory criteria which must be met in order for a public body to enter into a proper executive session. With regard to section (G)(2), the Manual states as follows:

2. Purchase or sale of property

A public body may adjourn into executive session to consider the purchase of property of any sort – real, personal, tangible, or intangible. A public body may also adjourn into executive session to consider the sale of real or personal property by competitive bid, or the sale or disposition of unneeded, obsolete, or unfit property under R.C. 505.10, if disclosure of the information would result in a competitive advantage to the person whose personal, private interest is adverse to the general public interest.

Thus, the Ohio Attorney General, who is entrusted with the training of public officials in the area of compliance with the Open Meetings Act pursuant to R.C. 109.43, has made it clear that the “if premature disclosure” clause does not apply to the purchase of property. Rather, according to the Manual, that condition precedent applies only when the sale of property by competitive bid, or the sale of obsolete property pursuant to R.C. 505.10, is being considered.

Plaintiffs argue that this Court’s interpretation of the statute does not comport with the statute’s purpose “to require that public business be conducted in a manner that is accessible to the public.” This Court disagrees. The statute states that it should be “liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings *unless the subject matter is specifically excepted by law.*” R.C. 121.22(A). The purchase of property for public use is one of the specific exceptions created by the legislature. Thus, this Court’s ruling comports with the letter and the spirit of the statute, and Plaintiffs have provided no case in which any court has ruled differently.

Vague and unworkable language

Finally, the Court concludes that regardless of whether the “if clause” was intended to apply to only the latter two phrases, or all phrases within this section, it is so vague and unworkable as to be unenforceable in this context. *Fed. Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 503, 127 S.Ct. 2652, 2686, 168 L.Ed.2d 329 (when a statute creates an unworkable rule, it is the Court’s responsibility to decline enforcement). First, the statute uses the phrase “premature disclosure of information” although it fails to specify what would be considered “*premature* disclosure”, and it fails to indicate what type(s) of “information” would trigger this clause. Second, the statute vaguely discusses “an unfair competitive or bargaining advantage” but fails to define what this term would encompass. Competitive against what, or against whom? What “bargaining” is contemplated by the statute? Third, the statute mysteriously references “a person whose personal, private interest is adverse to the general public”, but provides no explanation as to what is meant by this phrase. Who should make the determination as to what the interest of the “general public” is, and how does one determine whether or not a person’s private interest is “adverse”?

Fourth, the statute provides no procedural guidance as to how such a determination should even be made, or whether it must be supported by documentation, or whether the “person” has to be identified by name, or whether the public body must be required to demonstrate the existence of such person and the existence of the unfair advantage and the existence of the adverse “personal, private interest” on the record in open session. Do the unfair advantage and the adverse interest have to be proven by a preponderance of the evidence? Or by clear and convincing evidence? Or is it sufficient that the public body

merely concludes unilaterally that such circumstances exist? May the trial court make an *ex post facto* determination that these criteria were met, even if the public body itself did not do so? And if a public body were to make such a finding on the record, is it sufficient that the public body merely reiterate the words of the statute? If a public body states, on the record in open session, that executive session is appropriate “because the premature disclosure of information will give an unfair advantage to someone who has a personal interest adverse to the public”, will that statement suffice to prove compliance with this condition? Or will the courts be required to hold evidentiary hearings to explore the factual basis for such a statement? Will public bodies be required to hold pre-executive session hearings in order to determine whether this condition has been fulfilled? In short, this phrase (the “if clause”) begs the questions: how is any public body expected to comply and prove its compliance, how are the courts expected to enforce it, and what are the consequences –if any—of such a finding not having been made?

Due to the lack of procedural and substantive guidance from the legislature regarding the intended application of this clause, the Court finds that the phrase “if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest” is not applicable here for the reason that it is vague, unworkable, and has not been uniformly enforced throughout the State.

Conclusion Regarding the Application of Section (G)(2)

Given the Court’s perception, based upon its extensive research, that public bodies throughout the State have not been required to undertake such analysis or make such a

finding before moving into executive session to discuss the purchase of property (and indeed, noting that public officials are not even *trained* to do so by the Attorney General's office), a decision by this Court applying such requirements to executive sessions to discuss the purchase of property under section (G)(2), could result in an invalidation of countless actions by public governing bodies as well as expose public bodies throughout the state to a tidal wave of claims for injunctive relief and civil forfeiture. This Court declines to issue such a decision, particularly when no other court has done so.

For all of the reasons set forth herein, the Court rejects Plaintiffs' position and stands by its previous decision regarding the interpretation of Ohio Rev. C. 121.22(G)(2).

Pretrial Ruling on Evidentiary Questions of Relevance

The Court additionally rejects Plaintiffs' request for "full and unlimited inquiry and testimony concerning the discussions occurring during the executive sessions" at trial and stands by its previous rulings concerning the permissible scope of inquiry in this matter. Even if a violation were found with respect to any of the executive sessions, the Open Meetings Act does not provide the remedy sought by Plaintiffs or permit the proposed scope of inquiry.⁴ The statute provides, "Upon proof of a violation ...of this section ..., the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." R.C. 121.22(I)(1). Additionally, "If the court of common pleas issues an injunction pursuant to division (I)(1)..., the court shall order the

⁴ In fact, R.C. 102.03 would arguably prohibit any member of the BOE from disclosing any confidential information acquired in the course of executive sessions, since "the information discussed may be considered confidential under R.C. 102.03(B) because: the majority of a quorum of the public body voted that the executive session is necessary; the Open Meetings Act affords a privacy status to executive session discussions; and the Open Meetings Act strictly limits the types of approved government business permitted to be discussed in executive session." OH Eth. Op. 2020-02.

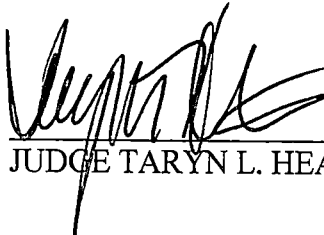
public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction..." R.C. 121.22(I)(2). Nowhere does the statute provide that if a public body is found to have entered into an executive session without proper statutory authority, the plaintiff may then conduct a "full and unlimited inquiry" into all matters discussed during the executive sessions.

At trial, Plaintiffs may conduct inquiry and present evidence to prove their claim that Defendants violated the Open Meetings Act by holding executive sessions without proper statutory authorization. Specifically, Plaintiffs are entitled to discover whether or not Defendants complied with section (G) of the statute, which states the public body may hold an executive session "only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of" one of the matters prescribed in subsections (G)(1) through (G)(8). In this case, the dispute is whether Defendants properly convened executive sessions "[t]o consider the purchase of property for public purposes" under R.C. 121.22 (G)(2).

Plaintiffs argue that the statute authorizes executive session to consider the purchase of property for public purposes only if "premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest." Plaintiffs contend that unless the BOE can substantiate that this conditional clause was fulfilled in connection with each executive session, each session was illegal. Plaintiffs then use this argument to justify their efforts to question the BOE members "without limitation" as to all matters discussed in executive session. As discussed above, the Court disagrees with Plaintiffs' assessment of

the legal import of the “premature disclosure” clause, but Plaintiffs will be permitted to make a record at trial by presenting evidence, by testimony or by proffer, as to whether such analysis was undertaken by the BOE in connection with each executive session. Moreover, even if such analysis was not undertaken, and even if any of the executive sessions are found to have been improperly entered into, Plaintiffs will still not be permitted to undertake a “full and unlimited inquiry” into all matters discussed during the executive sessions. Such evidence is irrelevant to any claim pending in this case as it would not tend to prove or disprove any fact that is of consequence to the determination of the action. Evid. R. 401.⁵

IT IS SO ORDERED.



JUDGE TARYN L. HEATH

CC (via email): Atty. Finney/Atty. Hartman
 Atty. Lysenko/Atty. Dawson

⁵ The only potential relevance of the actual matters discussed during an executive session is if a section (H) claim is viable. However, since the Ohio Supreme Court has spoken on this matter, making it impossible for this Court to invalidate the BOE’s vote to purchase Dominion machines, and since that is the only “formal action” or resolution at issue, a section (H) violation has no viability in the instant case and therefore, it is irrelevant what “deliberations” may or may not have taken place during the four executive sessions at issue. (Deliberations that took place during an illegal executive session are only relevant if a plaintiff seeks to invalidate a formal action that was allegedly taken as a result of such deliberations.)

Section 121.22 | Public meetings - exceptions.

Ohio Revised Code / Title 1 State Government / Chapter 121 State Departments

(A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

...

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.

...

(G) Except as provided in divisions (G)(8) and (J) of this section, the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

...

(2) To consider the purchase of property for public purposes, the sale of property at competitive bidding, or the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. No member of a public body shall use division (G)(2) of this section as a subterfuge for providing covert information to prospective buyers or sellers. A purchase or sale of public property is void if the seller or buyer of the public property has received covert information from a member of a public body that has not been disclosed to the general public in sufficient time for other prospective buyers and sellers to prepare and submit offers.

If the minutes of the public body show that all meetings and deliberations of the public body have been conducted in compliance with this section, any instrument executed by the public body purporting to convey, lease, or otherwise dispose of any right, title, or interest in any public property shall be conclusively presumed to have been executed in compliance with this section insofar as title or other interest of any bona fide purchasers, lessees, or transferees of the property is concerned.

...

(I)(1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.