

In The Supreme Court of Ohio

LOOK AHEAD AMERICA : Case: 2023-1059
and :
MERRY LYNNE RINI, :
Plaintiffs-Appellants, :
vs. :
STARK COUNTY BOARD OF ELECTIONS, ET :
AL., :
Appellee :

MERIT BRIEF OF AMICUS CURIAE BRIAN M. AMES IN SUPPORT OF APPELLANTS

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INTRODUCTION

One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached. There is great historical significance to this basic foundation of popular government, and our founding fathers keenly understood this principle. *White v. Clinton Cty. Bd. of Comms.*, 76 Ohio St.3d 416, 420 (1996).

The Court of Appeals for the Fifth Appellate District (“5th District”) has intruded into the realm of the legislature by establishing a broad general exception to R.C. 121.22 “a public body can enter executive session to discuss the purchase of property without additional qualification.” Opinion ¶ 22.

County boards of election are clearly creatures of statute and, as such, subject to the public policies the General Assembly has chosen to establish. This includes the policy of open government enacted as the Sunshine Laws, R.C. 121.22 and R.C. 149.43. The exercise by the courts of the powers reserved to the General Assembly by the Ohio Constitution raises a substantial constitutional question: may the judicial branch permit what the legislative branch proscribes?

STATEMENT OF AMICUS INTEREST

Amicus curiae Brian M. Ames has prosecuted numerous public bodies for violations of Ohio’s Sunshine Laws, R.C. 121.22 and R.C. 149.43 both pro se and through counsel and has established a considerable body of decisional law that is widely cited. Perhaps the most salient case is *State ex rel. Brian Ames v. Ohio Coalition for Equity and Adequacy of School Funding*, case no. 2023-0495, which resulted in the Coalition, who had not complied with the Sunshine

Laws since it founding in 1990, agreeing to do so from the time of settlement going forward. Mr. Ames has many years of experience with defense acquisitions where the protection of source selection sensitive information was mandatory.

Mr. Ames has and continues to champion the people's interest in the public policy of openness in government in the belief that such policy advances the interests of both the public and the government. In furtherance of transparency, Mr. Ames has founded and is president of a non-profit, Open Government Advocates, which has prosecuted cases in Ashtabula, Belmont, Butler, Columbiana, Delaware, Franklin, Jefferson, Hamilton, Highland, Lake, Lorain, Lucas, Miami, Montgomery, Trumbull, and Wayne counties

STATEMENT OF THE CASE AND FACTS

For the purposes of this memorandum, Amicus curiae Brian M. Ames hereby adopts the Statement of Case and Facts as set forth by Appellants, Look Ahead America and Merry Lynne Rini, and incorporates the same by reference as if fully rewritten herein.

ARGUMENT

Proposition of Law:

If two interpretations of a single exception set forth in R.C. 121.22(G) arise, R.C. 121.22(A) requires the court to apply the more specific one.

The exception at issue here is that set forth in the first paragraph of R.C. 121.22(G)(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.

The first sentence consists of four clauses separated by commas:

1. the purchase of property for public purposes,
2. the sale of property at competitive bidding,
3. the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code,
4. 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.

It is notable that the 5th District has deleted the modifier “for public purposes” from the first clause to arrive at “a public body can enter executive session to discuss the purchase of property without additional qualification.” Opinion ¶ 22. Left to stand, this would allow public bodies to enter executive session to discuss the purchase of property for private purposes with all the attendant mischief.

The modifier “at competitive bidding” clearly applies to clause 1 as well as clause 2 under the series-qualifier canon. The correctness of this interpretation is supported by the interchangeable use of “buyer” and “sellers” in the context of the following sentence and “seller” and “buyer” in the second following sentence. Therefore, the proper interpretation of clause 1 given clause 2 is “the purchase of property for public purposes at competitive bidding”. This alone is far narrower than the 5th District’s expansive interpretation.

Before the statute was amended in 2016, the first sentence of the first paragraph of R.C. 121.22(G)(2) read as follows:

To consider the purchase of property for public purposes, 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.

Opinion ¶ 26. This proves the correctness of applying the conditional clause 4 to clause 2 in the current enactment. It was clearly so applied in the prior version of the statute.

The General Assembly is well aware of the series-qualifier canon. It is clear that the lawmakers relied on the series-qualifier canon to preserve the application of the conditional clause to clause 2 when amending the statute in 2016. Therefore the series-qualifier canon is properly used to apply the conditional clause 4 to clauses 1, 2, and 3 with the result being “the purchase of property for public purposes 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”.

It is necessary here to determine the meaning of the word “property” which is not defined in R.C. 121.22. However, the Ohio Attorney General has opined:

The word "property," as it is used in R.C. 121.22(G)(2), means real and personal property, which includes both tangible and intangible property.

1988 Ohio Atty.Gen.Ops. No. 003, syllabus. A common dictionary definition of the word “property” is:

Collectively, the rights in a valued resource such as land, chattel, or an intangible.

Black’s Law Dictionary 11th Edition p. 1470. A common dictionary definition of real property is:

Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.

Black’s Law Dictionary 11th Edition p. 1471. A common dictionary definition of real property is:

Any movable or intangible thing that is subject to ownership and not classified as real property.

Id. The property that a public body purchases includes many things, some as mundane as postage stamps. Yet the opinion of the 5th District would permit a public body to enter executive session to discuss the purchase of such. The opinion of the 5th District leads to an absurd result.

The 5th District’s interpretation of R.C. 121.22(G)(2) is unjustifiably broad. The 5th District has provided no explanation for deleting the words “for public purposes” from the statutory language. *Opinion passim.*

In its opinion, the 5th District states:

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.

Opinion ¶ 23. It provides no explanation of how the application of the conditional clause to the purchase of property would hinder a public body getting the best value for the public.

The interpretation accepted by the 5th District is general. It permits the discussion of property purchases from decades ago when the opportunity for a seller to gain advantage has long passed. Indeed, it is likely that the only information available would be preserved in the public records of the public body. There is no exception to R.C. 149.43 that prevents the release of those records to the public. That said, there is no public purpose better served by a broad, general exception crafted by the 5th District rather than by the specific exception General Assembly.

The General Assembly’s intent to narrow the exceptions to R.C. 121.22 is evident in the limiting of subdivision (G)(3) to “conferences with an attorney for the public body concerning disputes involving the public body that are the subject of *pending* or *imminent* court action”. (Emphasis added.) Just as the language “pending or imminent” proscribes the holding of executive sessions under (G)(3) after the court action is resolved, the Limiting Condition

proscribes the holding of executive sessions under (G)(2) after the decision to purchase property for public use is made. The broad, general interpretation accepted by the 5th District is unwarranted.

R.C. 121.22(A) limits executive sessions to subject matters specifically excepted by law.

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. (Emphasis added.)

The interpretation of R.C. 121.22(G)(2) advanced by the Appellees is a broad, general grant of secrecy to public bodies that lacks specificity required to comply with R.C. 121.22(A). It must therefore be rejected.

The interpretation of R.C. 121.22(G)(2) advanced by Appellants is specific in that it limits the holding of executive sessions to those cases where source selection sensitive information is involved. However, even that interpretation is not complete.

The proper interpretation is the following:

To consider the purchase of property for public purposes * * * 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.

The second and third sentence of R.C. 121.22(G)(2) contemplate the existence of sellers that may require competitive bidding depending on legal requirements. If competitive bidding is not required to select the source from which the property is to be purchased, then there is no source selection sensitive information and hence no public purpose served by excluding the public from the discussions. The language “at competitive bidding” prevents the unnecessary exclusion of the public from those discussions. Otherwise, the specific exception would permit the exclusion of the public.

CONCLUSION

For all the reasons set forth above, Amicus Curiae Brian M. Ames urges this Court to reverse the opinion of the 5th District and remand the matter for further proceedings.

Respectfully Submitted,



Brian M. Ames
Amicus Curiae

PROOF OF SERVICE

I hereby certify that on the 17th day of January, 2023 a true copy of the foregoing was, in accordance with Civ.R. 5(B)(2)(f), sent by electronic mail to:

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