IN THE SUPREME COURT OF OHIO

LOOK AHEAD AMERICA, *et al.*,	)	Case No. Case No. 2023-1059
Appellants,	)	
	)	On Appeal from the
v.	)	Fifth District Court of Appeals
	)	Stark County, Ohio
STARK COUNTY BOARD OF ELECTIONS, *et al*.,	)	Case No. 2022-CA-00152
*Appellees***.**	)	

MERIT BRIEF OF APPELLEES STARK COUNTY BOARD OF ELECTIONS, *ET AL***.**

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INTRODUCTION

This matter began with Appellants, Look Ahead America, a Washington D.C. based non-profit that involves itself in the election process, and Merry Lynne Rini, a Stark County resident, (collectively "Look Ahead") filing a complaint alleging violations of the Open Meetings Act ("OMA") against the Stark County Board of Elections and Individual Members of the Stark County Board of Elections: Samuel J. Ferruccio, Jr., Frank C. Braden, William S. Cline, and Kody V. Gonzalez, (collectively the "Board"). *Complaint* (T.d., 1), ¶ 1-2. Look Ahead initiated this action in a thinly veiled effort to utilize the OMA to effectuate its goal of preventing the Board from acquiring Dominion voting equipment. When Look Ahead failed in its initial efforts to invalidate the contract for the purchase of Dominion voting equipment, they continued to pursue claims under the OMA based on conjecture, but lacking any evidence that the Board violated the OMA when it entered executive sessions on December 9, 2020; January 6, 2021; February 9, 2021; and March 15, 2021. The trial court and the appellate court below rejected Look Ahead's claims.

This Court accepted this appeal upon a single[1] proposition of law, wherein Look Ahead challenges the widely accepted meaning of R.C. 121.22(G)(2), which states, in pertinent part, that a public body may hold an executive session 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.

[1] The Court rejected Look Ahead's second and third propositions of law. Yet, throughout their merit brief, Look Ahead attempts to shoehorn in arguments relating to those rejected propositions.

Look Ahead implies that the statute, upon adding the words "but, then, only" in place of the word "if," could somehow create a prerequisite to the public body's ability to enter executive session to discuss the purchase of property for a public purpose, and/or impose a limitation on a public body's ability to discuss the topic while in executive session. Although the proposition of law seeks to alter the language of the statute, it is unclear how, as a practical matter, Look Ahead's interpretation would limit the discussion of the purchase of property to in such a manner.

Look Ahead and amici curiae, Gatehouse Media Ohio Holdings II, Inc. d/b/a The Columbus Dispatch, The Cincinnati Enquirer, a Division of Gannett GP Media, Inc., and Copley Ohio Newspapers, Inc. d/b/a Akron Beacon Journal both argue that the 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 to a public body's discussion of the purchase of property. *A.C. Br.*, at 4-5. But the amici concede in that brief that such a reading of the statute would allow a public body to enter executive session to discuss the purchase of property if the public body wanted to discuss offers, negotiation strategy, or material terms of a purchase without divulging "critical details" to a potential seller of a party with an interest adverse to the public interest. *Id*. at 6.

Regardless, R.C. 121.22(G)(2) does not constrain or constrict a public body's discussion of the purchase of property for a public purpose in any of the ways Look Ahead contends. The proposition of law is incompatible with a plain reading of the statute or any reasonable interpretation thereof. Furthermore, under any interpretation of R.C. 121.22(G)(2), the Board did not violate the OMA.

STATEMENT OF FACTS

For years, the Board was aware that Stark County needed to purchase new voting machines. *See, generally* Affidavit of Jeffrey Matthews, April 26, 2021, (Trial Exhibit "T.Ex.") 32. The "purchase, preservation, and maintenance of * * * equipment used in * * * elections" is a statutory duty imposed upon a board of elections pursuant to R.C. 3501.11(C). R.C. 3506.02 provides in pertinent part that "[v]oting machines, marking devices, and automatic tabulating equipment may be adopted for use in elections in any county * * *[b]y the board of elections[or] [b]y the board of county commissioners of such county on the recommendation of the board of elections[.]" R.C. 3506.02(A)-(B). R.C. 3506.03 details what must occur "[u]pon the adoption of voting machines, marking devices, and automatic tabulating equipment" as described in R.C. 3506.02, the "board of county commissioners *shall* acquire the equipment[.]"

The Board "included the projected cost of new machines in its budget proposals to the commissioners for several years, and the commissioners ha[d] reserved funds for the purchase." *State ex rel. Stark Cty. Bd. of Elections v. Stark Cty. Bd. of Commrs.*, 165 Ohio St.3d 201, 2021-Ohio-1783, ¶ 3 ("*Stark County*"). In July 2018, new opportunities for the acquisition of voting equipment emerged in the state when the General Assembly enacted Am.Sub.S.B. No. 135 ("S.B. 135"), which allocated approximately $104.5 million in state funds for boards of election to purchase new voting equipment. Matthews Aff., ¶ 15; *Stark County* at ¶ 3. To be eligible for the funding, a board of elections was required to select from a list of vendors certified by the Ohio secretary of state under R.C. 3506.05. S.B. 135, Section 5(B). *Id*.

During the second half of 2018, the Board and staff began the long process of contacting approved vendors, obtaining information, and scheduling live demonstrations of voting equipment, which were open to the public. Matthews Aff., ¶ 22-26. This vetting process culminated with a Board meeting in December 2020, where, under the backdrop of intense public

interest and scrutiny related to allegations and controversies regarding voting equipment, the Board staff presented their recommendation for the Board to purchase Dominion voting equipment. Matthews Aff., ¶ 36-37, 42.

The Open Meetings Act and Meetings of the Board

The intent of the OMA, as stated in R.C. 121.22, is that it "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." R.C. 121.22(A). R.C. 121.22(G) provides exceptions for specifically stated subject matter. It permits the members of a public body to hold an executive session, at a regular or special meeting, "only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session" and for the sole purpose of the consideration of any of the matters stated in R.C. 121.22(G)(1)-(8).

Under R.C. 121.22(G)(2) a public body may hold an executive session 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.

(Emphasis added.) R.C. 121.22(G)(2). The minutes of the meeting "need only reflect the general subject matter of discussions in executive sessions authorized under" R.C. 121.22 (G) or (J). R.C. 121.22(C). "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 [R.C. 121.22(G)] and conducted at an executive session held in compliance with this section." R.C. 121.22(H).

Any person may bring an action to enforce the OMA within two years after the date of the alleged violation. R.C. 121.22(I)(1). "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." *Id*. However, "[i]f the court of common pleas does not issue an injunction pursuant to [R.C. 121.22(I)(1)] and the court determines at that time that the bringing of the action was frivolous conduct, as defined in [R.C. 2323.51(A)], the court shall award to the public body all court costs and reasonable attorney's fees, as determined by the court." R.C. 121.22(I)(2)(b).

During the Board's December 9, 2020 special board meeting, members went into executive session "to discuss the purchase of property for public purposes." T.Ex. 5, 6, & 24. The Board complied with the procedural requirements of R.C. 121.22 when entering executive session. Trial Transcript ("Tr.") p. 21 (The parties stipulated that there was "no procedural error with respect to entering into * * * executive session[.]"). While in executive session, they discussed the purchase of voting equipment for Stark County. Tr. p. 42-43; T.Ex. 5, 23.

Upon leaving executive session, the Board publicly voted on a motion to approve the staff recommendation to acquire Dominion voting equipment, to add one additional piece of equipment to that recommendation, and to "notify the commissioners of the selection and request funding from them for the purchase on the terms that have been presented[.]" T.Ex. 5, 23. Members also referred to the approximately three-year-long vetting process the Board went through to acquire replacement voting equipment and to make "sure that the Board would choose wisely to purchase equipment and make a strong decision for the voters of Stark County." T.Ex. 5. The meeting minutes reflect that the members also acknowledged allegations and controversies regarding voting equipment, and noted the bipartisan nature of the selection process. *Id*. However, "[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." *Stark County,* 2021-Ohio-1783, at ¶ 5.

During the next regular meeting on January 6, 2021, the Board again went into a properly convened executive session "to discuss the purchase of property for public purposes." T.Ex. 7, 8 & 25; Tr. p. 21. Following the executive session, Chairman Ferruccio stated in open session that they had discussed the previous decision to purchase Dominion voting equipment in light of claims made against Dominion. T.Ex. 7. The members dismissed as false the claims against Dominion, indicated the intention to stand by their prior decision to adopt Dominion voting equipment, and planned to contact the commissioners with the hope of meeting their timeline to have the voting equipment in place for the May 4, 2021, primary election. *Id*.

The Board again entered a properly convened executive session "to discuss the purchase of property for public purposes" during the February 9, 2021, regular board meeting. T.Ex. 11 and 12; Tr. p. 21. Once the Board exited executive session, the meeting minutes reflect that the Board publicly directed the staff to contact the commissioners regarding a firm date for their decision on the request, and to "review the Board's legal options going forward." T.Ex. 11. But, on March 10, 2021, the commissioners voted unanimously not to adopt the Board's recommendation. *Stark County*, 2021-Ohio-1783, at ¶ 5; *J.E. granting motion to dismiss* (T.d. 78) at 9.

At the March 15, 2021, special board meeting, the Board entered a properly convened executive session "for the purpose of discussing the purchase of property for public purposes." T.Ex. 15, 16 & 27; Tr. p. 21. Upon exiting executive session, Chairman Ferruccio expressed that the Board was not inclined to revisit the Board's previous recommendation and decision on the Dominion voting equipment. T.Ex. 15. He indicated the commissioners had contacted ES&S, one of the voting equipment companies the Board did not select, and solicited a revised bid from ES&S. *Id*. Further, Chairman Ferruccio and two other members noted their objections to considering the

revised bid on the grounds that it would be unfair to consider it, or because that bid was for the purchase of used equipment and the Board sought to purchase new equipment. *Id*.

The Board reaffirmed the selection of Dominion voting equipment during a March 26, 2021, board meeting in open session. Tr. p. 164-166. In the March 26 meeting, the Board "unanimously passed another motion, this time expressly stating that it was 'adopt[ing]' Dominion's voting system 'pursuant to R.C. 3506.02(A)' and "demand[ing] that [the Commissioners] take all steps necessary to immediately acquire and fund the same pursuant to its duty under R.C. 3506.03." *Stark County* at ¶ 6. The commissioners, however, maintained that they had already voted on the recommendation and would not be taking additional action "concerning the purchase of new voting machines." *Id*. On April 2, the Board filed an original action with this Honorable Court, seeking a writ of mandamus to compel the commissioners to acquire the new voting machines from Dominion. *Id*. at ¶ 1, 7.

Look Ahead Commences OMA Action

On May 18, 2021, Look Ahead filed its original complaint against the Board alleging two types of claims under the OMA. First, Look Ahead claimed the Board failed to comply with R.C. 121.22(G)(2) by allegedly not "limiting meetings convened in executive session under R.C. 121.22(G)(2) only to those 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.'" *Complaint* at ¶ 85. Second, Look Ahead alleged the Board's December 9, 2020 decision selecting Dominion voting machines was "invalid" under R.C. 121.22(H) because it "resulted from deliberations in meetings" not "open to the public" and "in violation" of the OMA. *Complaint* at ¶ 86. Look Ahead contemporaneously filed a motion for a

preliminary injunction seeking to prohibit the Board and the commissioners from taking any further actions relative to the purchase of voting equipment from Dominion.

In the pending litigation between the Board and the commissioners, this Court issued a decision on May 24, 2021, holding that the commissioners "must acquire the voting machines selected by the elections board" and granted the writ of mandamus. *Stark County* at ¶ 14. Days later, Look Ahead filed an amended complaint (also accompanied by a motion for preliminary injunction) adding the commissioners and Dominion as defendants. *First Amended Complaint* (May 27, 2021). The amended complaint listed some additional facts. Still, the only cause of action asserted was the Board's alleged violations of the OMA. Significantly, the amended complaint did not assert any cause or claim relevant to either the commissioners or Dominion.

In the underlying matter, the commissioners and Dominion filed their respective motions to dismiss the amended complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Commissioners' Motion*, (T.d. 41). The trial court entered judgment on August 20, 2021, granting the motions as to the amended complaint and dismissing the Commissioners and Dominion as parties to the action. The trial court found that, even if it were to accept as true Look Ahead's allegations that the Board improperly entered executive sessions on the four dates listed in the amended complaint, R.C. 121.22(H) would not permit the injunctive relief Look Ahead sought as it related to the commissioners and Dominion. The trial court determined that Look Ahead "presented no legal authority that R.C. 121.22(G) permits the Court to restrain the actions of third parties who are not alleged to have violated the [OMA]," and found "the plain language of R.C. 121.22 does not so permit." *J.E.* (T.d. 78) at 11.

As discovery progressed, the Board was eventually forced to file a motion for protective order, pursuant to Civ.R. 26, to prevent Look Ahead from using depositions to invert the burden

of proving an OMA violation. *Motion for Protective Order*, (T.d. 88). Specifically, the Board averred that it had already produced all relevant records and discovery responses and, therefore, could not be (1) forced to relinquish details of executive sessions in order to disprove an otherwise unsubstantiated claim, nor (2) put in the untenable position of needing to recall or produce information that R.C. 121.22(C) does not require the public body to keep.

The trial court granted the motion for protective order. *J.E. Granting Protective Order* (T.d. 91). In consideration of the issues raised in the motion, the trial court referred back to the August 20, 2021 judgment entry, the holding of which established as moot Look Ahead's claim seeking to invalidate or undo the Board's decision to purchase Dominion voting equipment. Because Look Ahead lacked a viable claim under R.C. 121.22(H), the court found that "inquiries into 'executive session deliberations' allegedly resulting in the [Board's] formal action are irrelevant." *Id*. at 7. However, the court expressly permitted Look Ahead to conduct discovery to develop evidence that would support their claim that the Board failed to properly convene executive session under R.C. 121.22(G)(2) to consider the purchase of property for a public purpose. Further, the court permitted Look Ahead to inquire into the nature of the topics discussed at the executive sessions at issue but, absent a revelation that an improper topic was discussed, Look Ahead could not inquire into specific details or substance of those discussions. *Id*. at 18.

The day of the final pretrial hearing, the Board filed a motion in limine asking the court to issue an order restricting the permissible areas of inquiry in anticipated testimony and confining the scope of evidence at trial to the parameters imposed in the previously issued protective order. *Motion in Limine* (T.d. 94). The motion aimed to clarify and streamline issues for trial, while curtailing needless objections to impertinent lines of inquiry. Look Ahead then filed a bench

memorandum on permissible "inquiry/testimony concerning discussions in executive session," and another on "permissible scope of executive sessions under R.C. 121.22(G)[.]" (T.d. 96-96).

The court issued a "pretrial order" regarding the permissible "scope of executive sessions under R.C. 121.22(G)(2)[.]" *Pretrial Order*, (T.d. 99). In the order, the trial court summarized Look Ahead's position as follows: (1) the executive sessions under R.C. 121.22(G)(2) were illegal unless they involved, and were limited to, the 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, (2) that Look Ahead believed the Board had the burden to present evidence at trial to show compliance with the statute, and (3) that Look ahead sought "to use this argument as a springboard to engage in a 'full and unlimited inquiry' into all matters discussed during the executive sessions." *Id*. at 2.

The trial court rejected Look Ahead's interpretation of R.C. 121.22(G)(2), reiterating that "merely stating 'purchasing property for public purposes' (or similar language)" is legally sufficient for entering a valid executive session. *Id.* at. 3. Further, the court reaffirmed its position that the "premature disclosure" clause of R.C. 121.22(G)(2) is not applicable to consideration of the *purchase* of public property during executive session. *Id*. at 5-13. The court also rejected Look Ahead's "request for 'full and unlimited inquiry and testimony concerning the discussions occurring during the executive sessions' at trial[.]" *Id*. at 13. The court held that, at trial, Look Ahead "may conduct inquiry and present evidence to prove their claim that [the Board] violated the [OMA] by holding executive sessions without proper statutory authorization." *Id*. at 14.

The matter proceeded to trial, whereupon Look Ahead called two witnesses as if on cross-examination: Jeffrey A. Matthews, Director of the Stark County Board of Elections, Tr. p. 23, and Samuel J. Ferruccio, Jr., Chairman of the Board, Tr. p. 133. At trial, the parties stipulated that "the

four meetings in question were to the exclusion of the public" and the Board committed "no procedural error with respect to entering into any of the four executive sessions." Tr. p. 21. Following the admission of evidence, Look Ahead rested their case. Tr. p. 179. The Board then moved the court to enter judgment in favor of the defense based on Look Ahead's failure to meet their burden to present evidence to support its claims under the OMA, i.e., having failed to present any evidence that the Board failed to comply with the Chapter R.C. 121.22 in any of the four meetings in which the Board went into executive session to discuss the purchase of property for a public purpose. Tr. p. 180, 182-183. The court tentatively granted the motion, formally took the matter under advisement, and then issued a written decision entering judgment and dismissing Look Ahead's claims pursuant to Civ.R. 41(B)(2).

Look Ahead appealed the trial court's judgment to the Fifth District Court of Appeals. *Look Ahead America v. Stark Cnty. Bd. of Elections*, 5th Dist. No. 2022-CA-00152, 2023-Ohio-249, 221 N.E.3d 896, ¶ 22. The court overruled each of Look Ahead's assignments of error and affirmed the judgment of the common pleas court. *Id*. at ¶ 62.

ARGUMENT

Response to Proposition of Law No. 1

Under R.C. 121.22(G)(2), the ability of members of a public body to meet in an executive session to consider "the purchase of property for a public purpose" is not limited only to the discussion of, or circumstances where the public body has determined prior to entering executive session, "the premature disclosure information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest."

Both the trial court and the appellate court below ruled that the premature disclosure clause does not apply to the purchase of property, and that remains the Board's position as well. Upon following the procedural requirements outlined in the OMA, a public body may discuss certain subject matter privately in an executive session. *State ex rel. Huth v. Village of Bolivar*, 5th Dist. Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-3460, ¶ 29, citing *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 185 Ohio App.3d 707, 2009-Ohio-6993, 925 N.E.2d 641, ¶ 64 (10th Dist.). The exception at issue in this appeal is R.C. 121.22(G)(2).

Look Ahead argues for the application of the premature disclosure clause of R.C. 121.22(G)(2) to a public body's consideration of the purchase of property for a public purpose. To begin, the Board contends that is not a proper reading of the statute. Moreover, as noted in the introduction section, Look Ahead fails to consider how, exactly, that application would affect a public body's ability to go into executive session to discuss the purchase of property for a public purpose. Look Ahead's objective is to weaponize R.C. 121.22(G)(2) by interpreting it in any manner that might support their contention that the Board must have committed some violation of the OMA. But the clause is neither a prerequisite for entering executive session to discuss the purchase of property for a public purpose, nor a limit on a public body's ability to discuss the purchase of property for a public purpose in a properly convened executive session.

This proposition of law calls upon the Court to interpret a statute; a question of law, which the Court reviews de novo. *See Columbus Bituminous Concrete Corp. v. Harrison Twp. Bd. of Zoning Appeals*, 160 Ohio St.3d 279, 2020-Ohio-845, 156 N.E.3d 841, ¶ 19. The Court first endeavors to "determine legislative intent from the plain language of a statute." *State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 7.

The OMA "requires public bodies in Ohio to conduct all deliberations on official business in meetings that are open to the public. And the OMA states that it "shall be liberally construed" to meet that end." *State ex rel. Hicks v. Clermont Cnty. Bd. of Commrs.*, 2022-Ohio-4237, __ N.E.3d __, ¶ 40. However, a liberal construction of the OMA, does not permit Look Ahead to add language into the statute to manufacture a new basis for claiming a violation. *State v. Jeffries*, 160 Ohio St.3d 300, 2020-Ohio-1539, 156 N.E.3d 859, ¶ 18 (stating that courts have a "clear duty not to alter the language of a statute by adding or removing words."); *Hicks* at ¶ 12.

I. <u>The language of R.C. 121.22(G)(2) cannot support Look Ahead's proposed interpretation.</u>

R.C. 121.22(G)(2) is not ambiguous: the plain language does not require that the "premature disclosure" clause apply to the purchase of property for a public purpose.

The language of R.C. 121.22(G)(2) plainly permits a public body to enter executive session to consider the purchase of public property without prerequisites or additional requirements. When a statute is not ambiguous, a court must abide by the words employed by the legislature rather than resorting to application of the rules of statutory construction. *State ex rel. Clay v. Cuyahoga Cty. Med. Examiner's Office*, 152 Ohio St.3d 163, 2017-Ohio-8714, ¶ 15, citing *State v. Waddell*, 71 Ohio St.3d 630, 631 (1995), *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, ¶ 22–23. Courts " ' "do not have the authority to dig deeper than the plain meaning of an unambiguous statute under the guise of either statutory interpretation or liberal construction." ' " *Clay*, quoting *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8,

quoting *Morgan v. Adult Parole Auth.*, 68 Ohio St.3d 344, 347 (1994). To be ambiguous, a statutory provision must be "'*capable*'" of bearing more than one meaning. (Emphasis added.) *Clay* at ¶ 17, quoting *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, ¶ 16. R.C. 121.22(G)(2) is not capable of bearing the meaning Look Ahead proposes, because construing it in that manner would produce an unworkable result.

> R.C. 121.22(G)(2) a public body may hold an executive session 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.

The language of the statute supports a reading that allows a public body to hold an executive session to consider the purchase of property without additional qualification. The premature disclosure clause, originally related only to the sale of property at competitive bidding, now also relates to the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with R.C. 505.10.[2] But, even as the clause applies to those topics, it does not place any requirements on a public body to determine the existence of such information before entering executive session. Nor does it require a public body to limit its discussion of the sale or disposition of property solely to information described in the premature disclosure clause.

The reasonableness of the Board's position is supported by the long-standing application of the statute. Public bodies throughout the state of Ohio have relied on the unvarying reading of R.C. 121.22(G)(2), which requires only that a public body consider the purchase of public property

[2] Look Ahead acknowledges this reading of R.C. 121.22(G)(2) but, ironically, dismisses it as a logical or rational conclusion based upon a canon of statutory construction that, as is discussed later in this brief, would not apply.

for a public purpose during executive session. For example, the 2022 Sunshine Laws Manual is published by the Ohio Attorney General, whose office "is tasked with providing Sunshine Laws training to Ohio's public officials." *Judgment for Defendants*, p. 6; R.C. 109.43; Ohio Attorney General Dave Yost, Ohio Sunshine Laws 2022: *An Open Government Resource Manual*, https://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/Sunshine-Laws-Publications/2022-Sunshine-Manual.aspx (accessed Feb. 19, 2023). The Sunshine Laws Manual states, without condition, that "[a] public body may adjourn into executive session to consider the purchase of property of any sort – real, personal, tangible, or intangible." Sunshine Laws Manual at p. 120. By contrast, it states that "[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*." (Emphasis added.) *Id*. Hence, as our Attorney General instructs public bodies, the premature disclosure clause applies to the sale or disposition of property. It *does not apply* to the purchase of property.

Additionally, regarding when executive session may be held to consider the purchase or sale of public property, the Ohio Administrative Law Handbook and Agency Directory published by the Ohio State Bar Association Administrative Law Committee explains: "A public body may move into executive session to consider the purchase of property for public purposes." Oh. Admin. Law., *When executive sessions may be held*, § 8:22 (2022-2023 ed.). The publication does not attach the premature disclosure clause to the *purchase* of property. Compare that to the handbook's explanation of the *sale* of property: "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." *Id*.

The Board is unaware of any binding legal authority interpreting the premature disclosure clause to apply to the purchase of property; it is not a reasonable or acceptable interpretation of R.C. 121.22(G)(2). In *University Estates*, the federal district court case Look Ahead cites in their merit brief, the court did not purport to interpret the language of R.C. 121.22(G)(2). *See Univ. Estates, Inc. v. City of Athens, Ohio*, S.D.Ohio No. 2:09-CV-758, 2011 WL 796789, *2. Without considering *whether* the premature disclosure clause limited a public body's discussion of the purchase of property for a public purpose, the court proceeded under the assumption that it was a condition precedent. *Id*. In citing to this non-binding federal case law, Look Ahead conveniently omits that from their merit brief, and also fails to mention the holding in *University Estates*: the court explicitly rejected the argument that the public body was required to "state that its purpose was to avoid premature disclosure in the context described," and "to disclose the detailed nature of the purpose to be considered," in order "to go into a proper executive session." *Id*.

University Estates stated that nowhere in R.C. 121.22 "or in case law interpreting that statute is there an express requirement that [a public body] 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*. The court recognized that, while R.C. 121.22 requires a public body to specifically state the purpose for entering executive session, the statute does not require the public body to divulge the specific nature of the matter to be considered. *Id*. citing *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 93 (12th Dist.). And the court concluded the public body's motion, which publicly "stated that the executive session would include the topic of 'Real Estate

Acquisition,' " was effective to satisfy the requirement to enter into executive session " '[t]o consider the purchase of property for public purposes' " under R.C. 121.22(G)(2). *Id*. Look Ahead also refrains from referencing the conclusion that, "[b]ecause city council properly went into executive session, the contents of those sessions remain confidential." *Id*.

The trial court reasoned that, if the premature disclosure clause applied to the purchase of property, "it is so vague and unworkable as to be unenforceable in this context." *Pretrial Order* (T.d. 99) at 11, citing *Fed. Election Comm. v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 503, 127 S.Ct. 2652 (2007). The trial court pointed out the practical impossibility of applying the clause because the statute provides no guidance on what constitutes "premature disclosure," what type of "information" would trigger the clause, or what type of "bargaining advantage" is contemplated. *Id*. at 11. Further, the statute gives no indication as to who determines whether a person's "personal, private interest is adverse to the general public interest," when that determination should be made, nor how to ascertain whether the criteria was met. *Id*. Look Ahead has not identified any legal authority that would resolve the glaring issues presented by their proposed interpretation.

And the appellate court below held that "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." *Look Ahead America*, 2023-Ohio-249, at ¶ 22. Demonstrating the reasonableness of such a reading in the face of the absurdity of Look Ahead's position, the court provided an "examination of how this would work in practice" to support its conclusion. *Id*. The court considered a scenario where a public body is seeking to purchase property, and then compared and contrasted it with a public entity selling or disposing of property. *Id*. at ¶ 23-25.

Look Ahead asks the Court to engage in algebraic gymnastics to avoid the plain meaning of the statute. "'[I]t is the duty of the courts, if the language of a statute fairly permits or unless

restrained by the clear language thereof, so to construe the statute as to avoid [an unreasonable or absurd] result.'" *State v. Herrick*, 11th Dist. Geauga No. 2018-G-0161, 2019-Ohio-5047, 137 N.E.3d 1262, ¶ 12, quoting *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 92 N.E.2d 390 (1950), paragraph one of the syllabus. The "absurd-result exception" provides that an interpretation of a statute that would produce an absurd result must be avoided if an alternative interpretation consistent with the legislative purpose is available. *Herrick*, quoting *Lawson v. FMR, L.L.C.*, 571 U.S. 429, 471, 134 S.Ct. 1158 (2014) (Sotomayor, J., dissenting). The statute cannot be construed to produce an absurd result.

To reach its desired interpretation, Look Ahead's proposition of law includes the words "but, then, only" in place of "if." Look Ahead also contends the statute should be read to include the words "but if and only if." *Aplt. Br*. at 19. Look Ahead asks the Court to alter the language of R.C. 121.22(G)(2) such that a public body can hold executive session to consider "the purchase of property for public purposes [*but if any only if to consider information such that the 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." But, "a statute is ambiguous when its language is subject to more than one *reasonable* interpretation." (Emphasis added.) *Clark v. Scarpelli,* 91 Ohio St.3d 271, 274, 744 N.E.2d 719 (2001). *Lang v. Dir., Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 14. And a court may not "insert language to modify an unambiguous statute under the guise of statutory interpretation." *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools*, 163 Ohio St.3d 314, 2020-Ohio-5149, 170 N.E.3d 748, ¶ 11; *State ex rel. Sears, Roebuck & Co. v. Indus. Comm.*, 52 Ohio St.3d 144, 148, 556 N.E.2d 467 (1990). Look Ahead's proposition is simply *not* what the statute says and is *not* a reasonable interpretation of the meaning of the statute.

If this Court finds ambiguity requiring a deeper analysis, the rules of statutory construction do not support Look Ahead's interpretation of R.C. 121.22(G)(2).

Having found that the language of the statute was sufficient to determine its meaning, the appellate court found it unnecessary to resort to application of the rules of statutory construction. *See Clay*, 2017-Ohio-8714, ¶ 15. Yet, even if this Court finds the language to be subject to interpretation, Look Ahead's arguments are unavailing.

The legislative history of R.C. 121.22 shows that, prior to the legislature's 2016 amendment to the OMA, R.C. 121.22(G)(2) permitted a public body to enter executive session to "consider the purchase of property for public purposes, <u>or</u> 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." (Emphasis added.) This reflects that the premature disclosure clause was intended to apply to the *sale of property at competitive bidding*, not to the tpurchase of property. The 2016 amendment altered section (G)(2) to add "or the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with [R.C. 505.10.]" Sub. H.B. No. 413, 2016 Ohio Laws File 119. The inclusion of the additional phrase did not alter the statute in any way that would make the premature disclosure clause applicable to the purchase of property.

Look Ahead resorts to the "last-antecedent canon" and the "series-qualifier canon" to connect the conditional phrase to the purchase of property. The last-antecedent canon is a grammatical rule that applies "*in the absence of an expressed contrary intention*," to read referential and qualifying words and phrases to refer solely to the last antecedent. (Emphasis added.) *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 26. The "series-qualifier" canon is an interpretive grammatical rule that, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier

placed at the end a series normally applies to the entire series. a modifier at the end of the list "normally applies to the entire series." *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402–03, 141 S.Ct. 1163, 1169, 209 L.Ed.2d 272, quoting A. Scalia & B. Garner, Reading Law: *The Interpretation of Legal Texts* 147 (2012) (Scalia & Garner); *Paroline v. United States*, 572 U.S. 434, 447, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014).

Look Ahead urges that, under the rule, the placement of a comma before the premature disclosure clause is "evidence" the clause was intended to apply to all antecedents not just the antecedent immediately preceding it. *Aplt. Br.*, 13-14. However, the General Assembly expressed a contrary intention, which is evidenced in the pre-2016 amendment language. The statute read:

> To consider the purchase of property for public purposes**, or** 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.

(Emphasis added.). By separating "the purchase of property for public purposes" with a comma before the word "or," the legislature detached the purchase of property from "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." Prior to the amendment, the statute did not include a series or a list, but stated two distinct topics related to public property. Accordingly, application of either the last-antecedent or series-qualifier canon to the pre-amendment version of R.C. 121.22(G)(2) would result in interpreting the statute such that the premature disclosure clause did not apply to the purchase of property.

When the General Assembly amended the statute, they included "the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with [R.C. 505.10.]" Sub. H.B. No. 413, 2016 Ohio Laws File 119. This converted the two previously stated topics into a list of three topics. Post-amendment, the premature disclosure clause may apply to either of the

two topics that immediately precede it. But the placement of commas that resulted from the amendment does not support the conclusion that the legislature intended to alter the meaning of the statute so that the premature disclosure clause would apply to the purchase of property.

Further, the placement of the comma is insufficient evidence where the well-settled meaning of R.C. 121.22(G)(2) is contrary to the reading that would result if the comma were used to alter the application of the premature disclosure clause. *Paroline*, 572 U.S. at 447 (noting the last antecedent rule is "not an absolute and can assuredly be overcome by other indicia of meaning.") The rule is not to be applied "in a mechanical way where it would require accepting 'unlikely premises.'" *Id*. quoting *United States v. Hayes*, 555 U.S. 415, 425, 129 S.Ct. 1079, (2009). Look Ahead's "series-qualifier" argument is equally unconvincing because applying the premature disclosure clause to the purchase of property is not a "straightforward, parallel construction" of the statute. *See Duguid*, 141 S.Ct. at 1169.

II. Even if the "premature disclosure" clause is applied to the purchase of property, it does not support the interpretation Look Ahead seeks.

Assuming for the sake of argument that the statute could be read to state that a public body may go into executive session to consider any one of those three topics 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," R.C. 121.22(G)(2) does not create a precondition for entering executive session to discuss the purchase of property, nor does it limit the discussion of the purchase of property exclusively to the type of information described in the premature disclosure clause.

The merit brief of amici curiae acknowledges that, even if the premature disclosure clause applied, it would not result in the strict constraints Look Ahead wants to read into the statute. *A.C. Br.* (Gatehouse Media Ohio Holdings II, Inc. d/b/a The Columbus Dispatch, The Cincinnati

Enquirer, a Division of Gannett GP Media, Inc., and Copley Ohio Newspapers, Inc. d/b/a Akron Beacon Journal), at 6. The amici curiae cite to the following portion of the appellate court's opinion:

> 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.

Look Ahead, 2023-Ohio-249, at ¶ 23. The appellate court found that the premature disclosure clause did not apply *because* R.C. 121.22(G)(2) permits a public body to hold executive session under these circumstances. But amici curiae argue that the premature disclosure clause "accounts for this prospect." *A.C. Br.* at 6, Under the circumstance described in the appellate court's opinion, the amici curiae contend the statute *would* allow for an executive session because it is an instance in which "premature disclosure of the information would benefit a party whose interests are adverse to the public body." *Id*.

The premature disclosure clause of R.C. 121.22(G)(2) does not require a public body to determine in advance, by vote or any other means, that the executive session is necessary to protect the disclosure of information.

Had the General Assembly intended to for the premature disclosure clause to restrict a public body's ability to consider the purchase of property for a public purpose, it could have expressly included language to that effect. *E.g.*, R.C. 121.22(G)(8). *See State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools*, 163 Ohio St.3d 314, 2020-Ohio-5149, 170 N.E.3d 748, ¶ 24. One need not look far to see exactly how the General Assembly would have imposed such a prerequisite had that been the legislative intention; a comparison of R.C. 121.22(G)(2) to R.C. 121.22(G)(8), (a) and (b) illustrates this point.

R.C. 121.22(G)(8) allows a public body to

> consider confidential information related to the marketing plans, specific business strategy, production techniques, trade secrets, or personal financial statements of an applicant for economic development assistance, or to negotiations with other political subdivisions respecting requests for economic development assistance, ***provided that both of the following conditions apply***:
>
> (a) The ***information is directly related to*** a request for economic development assistance that is to be provided or administered under any provision of Chapter 715., 725., 1724., or 1728. Or sections 701.07, 3735.67 to 3735.70, 5709.40 to 5709.43, 5709.61 to 5709.69, 5709.73 to 5709.75, or 5709.77 to 5709.81 of the Revised Code, or that involves public infrastructure improvements or the extension of utility services that are directly related to an economic development project.
>
> (b) A unanimous quorum of the ***public body determines***, by a roll call vote, that ***the executive session is necessary to protect the interests*** of the applicant or the possible investment or expenditure of public funds to be made in connection with the economic development project.

(Emphasis added.). So, R.C. 121.22(G)(8) first provides for a subject matter that a public body may consider in executive session relative to economic development assistance and then states two specific conditions that must apply: the "what" and the "how." R.C. 121.22(G)(8)(a) defines what type of economic development information a public body may consider. Then, R.C. 121.22(G)(8)(b) defines the how, by specifying the procedure the public body must follow to determine that an executive session is *necessary to protect the interests* of an applicant, an investment, or an expenditure of public funds linked to the economic development project at issue.

R.C. 121.22(G)(2) contains no language comparable to R.C. 121.22(G)(8), and imposes no requirements of this nature. The entirety of R.C. 121.22(G)(2) states:

> 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.

The statute does not state that a public body may enter executive session 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, [***provided that the following condition applies***:] 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." *See, e.g.*, R.C. 121.22(G)(8). But even assuming the word "if" on its own was sufficient to transform the remaining words of the clause into a qualification or limitation with regard to the subjects listed in R.C. 121.22(G)(2), the (G)(2) subsection—unlike the (G)(8) subsection—*does not require* that a public body:

> determine "that the executive session is necessary to protect" information, the premature disclosure of which would give an unfair competitive or bargaining advantage to a person with a private interest adverse to the general public interest; or
>
> take any additional procedural steps whatsoever, such as a unanimous quorum of the public body making a determination by a roll call vote.

Compare R.C. 121.22(G)(2) *with* R.C. 121.22(G)(8).

In R.C. 121.22(G)(8) the General Assembly included language that explicitly stated a condition, made a determination of that condition a prerequisite to entering executive session, and imposed the procedural requirement for making that determination in advance of executive session. The absence of such language in R.C. 121.22(G)(2) creates an inference that the General Assembly did not intend to impose such condition or requirements in that subsection. Courts of

this state do not have the authority to add a requirement the legislature chose to omit from a statute. *See Gabbard v. Madison Local School Dist. Bd. of Education*, 165 Ohio St.3d 390, 2021-Ohio-2067, 179 N.E.3d 1169 (Fischer, J., dissenting) citing *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 61. Moreover, when the General Assembly crafts legislation that contains a series—such as the statutory subsections found in R.C.121.22(G)(1)-(8)—and includes a restriction or condition as to only one of those subsections, under the doctrine of expressio unius est exclusio alterius, the legislature's decision to omit the requirement or condition from another subsection supports the conclusion that the legislature did not intend to impose that requirement or condition in that subsection. *See Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 172 Ohio St.3d 160, 2023-Ohio-3398, 222 N.E.3d 621, ¶ 25; *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 36, quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) ("[T]he canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.").

The premature disclosure clause cannot restrict a public body's discussion of the purchase of property exclusively to the type of information described in the clause.

While R.C. 121.22(G)(2) permits a public body to privately consider the purchase of property for a public purpose, that discussion will obviously implicate matters inherently related to the purchase of property. *See State ex rel. Huth v. Village of Bolivar*, 5th Dist. Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-3460, ¶ 46. There is no OMA violation so long as the discussion remains focused on a permissible executive session topic. *Id*. This would remain true even if the premature disclosure clause were applied. In other words, the Board's consideration of the

purchase of property for a public purpose could not be limited strictly to those aspects of the purchase that involve information described in the clause. How could a public body discuss such things in a vacuum?

If this Court finds that the premature disclosure clause does apply, considering the foregoing, it would, at best, mean that the public body may hold executive session if it wants to discuss potentially sensitive information in the context of the purchase of property. In other words, executive session would be appropriate when there is a perceived need to discuss some aspect of a property transaction in a closed session before a public body proceeds to make a decision on the matter in an open session. But, that is the practice that is generally employed by public bodies, including the Board. Here, for example, when asked during trial whether there was information that needed to be kept confidential, Mr. Matthews said, "In my opinion, yes." Tr. p. 82.

CONCLUSION

The Stark County Board of Elections asks this Honorable Court to reject Look Ahead's proposition of law and hold that the premature disclosure clause of R.C. 121.22(G)(2) does not apply to a public body's consideration of the purchase of property for a public purpose. In the alternative, the Board would ask the Court to hold that the premature disclosure clause does not establish a prerequisite for a public body to hold executive session. Finally, the Board asks the Court to find that, regardless of the interpretation, the Board did not violate the OMA when it held executive session at any of the four meetings at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing BRIEF OF APPELLEE was sent electronically on February 16, 2024, to: Curt Hartman at hartmanlawfirm@fuse.net, Christopher A. Finney at chris@finneylawfirm.com, counsel for Appellants; John C. Greiner at jgreiner@ficlaw.com, counsel for Appellants Amici Curiae; Brian M. Ames, at Bmames00@gmail.com, pro se Appellant Amicus Curiae.

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