IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DAVID ESRATI	:	**CASE NO. CA028062**
	:	
Plaintiff-Appellant,	:	**TRIAL COURT CASE NO.: 2018CV00593**
	:	
v.	:	
	:	
DAYTON CITY COMMISION, ET AL.	:	**ORAL ARGUMENT REQUESTED**
	:	
Defendants-Appellees.	:	
	:	

BRIEF OF DEFENDANTS-APPELLEES DAYTON CITY SCHOOL DISTRICT BOARD OF EDUCATION AND MOHAMED AL-HAMDANI

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

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

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

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S&W

Subashi
& Wildermuth

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

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

S&W

Subashi & Wildermuth

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

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

TABLE OF AUTHORITIES

CASES

S&W

Subashi
& Wildermuth

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

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

STATUTES/ADMINISTRATIVE CODE

S&W

Subashi
& Wildermuth

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

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

ASSIGNMENTS OF ERROR AND ISSUES PRESENTED FOR REVIEW

Sole Assignment of Error: The trial court erred in granting Defendants' motions for summary judgment and dismissing the action.

First Issue Presented for Review: Whether the trial court correctly concluded that the OMA was inapplicable to the Task Force's February 6, 2018 bus tour.

Second Issue Presented for Review: Whether the trial court's decision should be affirmed on additional legal grounds raised by Appellees.

Third Issue Presented for Review: Whether the trial court was obligated to give Esrati leniency in proving his OMA claim.

S&W

Subashi
& Wildermuth

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

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

STATEMENT OF THE CASE

On February 5, 2018, Appellant, David Esrati, brought this action under the Open Meetings Act ("OMA"), R.C. 121.22, against Appellees, Dayton City Commission, Jeffrey J. Mims Jr., Dayton Board of Education (the "Board"), and Mohamed Al-Hamdani, seeking injunctive and monetary relief. (Complaint p. 1.) On February 6, 2018, Esrati separately moved the trial court for a temporary restraining order and injunction to enjoin Appellees from touring certain facilities of Dayton Public Schools. (Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum in Support p. 1-2.) The trial court ultimately denied Esrati's motion for temporary injunctive relief on the basis that the issue raised by the motion was moot. (Entry and Order Setting Submission Date of 2/12/18 for Legal Briefs p. 1.)

Esrati then moved the trial court for a preliminary injunction to enjoin any further meetings of a group referred to as the School Facilities Task Force (the "Task Force"). (Request for Injunctive Relief p. 1-2.) After an evidentiary hearing, the trial court denied Esrati's motion for a preliminary injunction and set the matter for trial. (Decision and Entry p. 1-6.) Before reaching trial, Appellees moved for summary judgment on Esrati's OMA claim. (Defendants', Dayton Board of Education and Mohamed Al-Hamdani, Motion for Summary Judgment.) The trial court granted summary judgment and dismissed Esrati's complaint with prejudice. (Decision and Judgment Entry Granting Motions for Summary Judgment & Dismissing Action p. 1-3.) Esrati appealed. (Notice of Appeal.)

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Subashi
& Wildermuth

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

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

STATEMENT OF FACTS

As early as September 2016, Dayton Public Schools observed an "enrollment problem." (Preliminary Injunction Hearing Transcript ("Transcript") p. 64.) In response, it initiated enrollment studies and began discussing the need to move teachers and students. (Transcript p. 65.) Those discussions led to a "reduction in force" of staff members in November 2016. (Transcript p. 65.)

In November 2017, the Board appointed Dr. Elizabeth Lolli as acting superintendent of Dayton Public Schools. (Transcript p. 66-67, 116.) Dr. Lolli had 40 years of experience in education. (Transcript p. 116.) She had served as a teacher, assistant principal, principal, professor at Kent State University, and school district superintendent. (Transcript p. 117.)

A. Dr. Lolli Creates the Task Force

In December 2017, the Board instructed Dr. Lolli to study facility issues and provide a recommendation. To that end, Dr. Lolli sought out business people "who could offer a different viewpoint." (Transcript p. 85.) With assistance from the Mayor of the City of Dayton, Dr. Lolli assembled the Task Force as an information-gathering tool. (Transcript p. 125.) Three of the Task Force members were also Board members: Al-Hamdani, Dr. Harris, and Dr. Walker. (Transcript p. 128.) No other Board members participated in the Task Force. (Transcript p. 128-29.)

The Task Force held its first meeting on January 24, 2018. (Transcript p. 132, Ex. 2.) At the meeting, the Task Force members discussed the purpose of "right-sizing" the district, Dayton Public Schools' position for growth in enrollment, its guiding principles, prioritization criteria, and district reports. (Transcript p. 132, Ex. 2.) Esrati attended the January 24, 2018 meeting. (Transcript p. 102.) He video recorded the meeting. (Transcript p. 102.)

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

B. The Task Force Attends a February 6, 2018 Bus Tour

On the morning of February 6, 2018, the Task Force members boarded a school bus at Dayton Public Schools' administrative headquarters for a tour of several facilities operated by Dayton Public Schools. Media personnel, Task Force members, and school administrative personnel were on the bus. (Transcript p. 93.) The three Board members who were also Task Force members were in attendance. (Transcript p. 129-29.) Between headquarters and arriving at the tour's first stop, Valerie Elementary School, Al-Hamdani asked to exit the bus. (Transcript p. 71-72.) When the bus arrived at Valerie Elementary School, Esrati was waiting in the portico with a video camera. (Transcript p. 72.) He verbally stated that the bus tour was an "illegal secret meeting." (Transcript p. 72-73.)

By that point, Esrati had moved the trial court for a temporary restraining order and preliminary injunction. (Plaintiff's Motion for Temporary Restraining Order.) As the Task Force was completing its tour of Valerie Elementary School, Dr. Lolli received notification that the trial court had requested that the tour be halted. (Transcript p. 75.) She immediately stopped the tour. (Transcript p. 75.) The trial court later denied Esrati's motion as moot. (Entry and Order Setting Submission Date of 2/12/18 for Legal Briefs, 1.)

C. The Trial Court Denies Esrati's Request for Injunctive Relief

On March 8, 2018, Esrati moved for an expedited hearing and requested an enjoinment of any further discussions concerning the issue of school closings. (Request for Injunctive Relief p. 1-2.) One week later, the trial court held an evidentiary hearing on Esrati's request. (Entry and Order Setting Evidentiary Hearing and Argument p. 1.) At the hearing, Esrati conceded that his sole claim concerned the February 6, 2018 bus tour. (Transcript p. 102.) Further, Esrati admitted that he had no idea what transpired among the Task Force members who attended the bus tour. (Transcript p. 106.)

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

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

Dr. Lolli testified that, in her prior work as a school district superintendent, she had been asked to prepare recommendations for the district's board of education on a "fairly-common" basis. (Transcript p. 123.) She explained that a district's superintendent, treasurer, and board members are the only individuals who may provide any such recommendations. (Transcript p. 123-24.) She had gone through the process of developing a recommendation for a board of education on numerous occasions. (Transcript p. 124.) During those prior experiences, she never felt constrained to consider only certain information. (Transcript p. 124.) And she always talked to community members in her efforts to gather information. (Transcript p. 124-25.)

On March 19, 2018, the Court issued an order denying Esrati's request for injunctive relief. (Decision and Entry p. 1-6.) It found, in particular, that Esrati failed to meet his burden to show the Task Force conducted "deliberative discussion" during the February 6, 2018 bus tour. (Decision and Entry p. 5.)

D. The Trial Court Grants Appellees' Motions for Summary Judgment

In early June 2018, Appellees moved the trial court for summary judgment and dismissal of Esrati's complaint with prejudice. (Defendants', Dayton Board of Education and Mohamed Al-Hamdani, Motion for Summary Judgment p. 1.) In their supporting memorandum, the Board and Al-Hamdani explained, among other things, that they were entitled to judgment as a matter of law because (1) the Task Force was not a public body as defined by the OMA and (2) it did not conduct deliberations during the February 6, 2018 bus tour. (Defendants', Dayton Board of Education and Mohamed Al-Hamdani, Motion for Summary Judgment p. 8-11.)

The trial court agreed that the Task Force did not conduct deliberations during the February 6, 2018 bus tour and, accordingly, granted summary judgment in Appellees' favor.

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

(Decision and Judgment Entry Granting Motions for Summary Judgment & Dismissing Action p. 1-2.) Specifically, the trial court found that "there [was] no evidence that any deliberation occurred during the bus tour or any discussion of the prospective closing of school buildings." (Decision and Judgment Entry Granting Motions for Summary Judgment & Dismissing Action p. 1.)[1] The trial court noted that Esrati did not present any evidence in supplement to the preliminary injunction hearing transcript and that Esrati "advised the [trial court] that he would stand on his response to the defense motions." (Decision and Judgment Entry Granting Motions for Summary Judgment & Dismissing Action p. 1.)

Esrati's appeal brings this matter before the Court.

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

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

[1] The trial court also found that "the individual [defendants, Mohamed Al-Hamdani and Jeffrey J. Mims Jr., were] not proper parties and [Esrati did] not state[ ] a viable claim against them under the statute." (Decision and Judgment Entry Granting Motions for Summary Judgment & Dismissing Action p. 2.) The Board and Al-Hamdani do not address this issue in their appellee's brief since Esrati did not raise it in his appellant's brief and, therefore, waived the right to challenge that finding of the trial court.

STANDARD OF REVIEW

An appellate court's review of trial court rulings on summary judgment motions is *de novo*. *Hicks v. State Farm Mut. Auto. Ins. Co.*, 2d Dist. Montgomery No. 27103, 2017-Ohio-7095, ¶ 17. In *de novo* review, an appellate court applies "the same standard that the trial court should have used, and [ ] examine[s] the evidence to determine whether, as a matter of law, no genuine issues exist for trial." (Citations omitted.) *Id.*

Summary judgment is appropriate where the moving party establishes that (1) there is no genuine issue of material fact, (2) reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made, and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26. The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27. Once the moving party meets that initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to come forward with facts showing that there is a genuine issue remaining for trial. *Dresher* at 293.

An appellate court must affirm a decision of the trial court where the decision is legally correct on other grounds. *Rodefer v.* Colbert, 2015-Ohio-1982, 35 N.E.3d 852, ¶ 17 (2d Dist.). That is, the trial court's decision achieves the right result for the wrong reason. *Id.*

S&W

Subashi
& Wildermuth

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

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

ARGUMENT

As his sole assignment of error, Esrati contends that the trial court erred in granting summary judgment in Appellees' favor and dismissing his complaint with prejudice. (Appellant's Brief p. 6-12.) In support of this assignment, Esrati first claims that the trial court erred in finding the OMA was not applicable to the Task Force's February 6, 2018 bus tour. He next seems to assert that the trial court should have found an OMA violation despite the lack of deliberations during the bus tour. Finally, he argues that the trial court should have given him leniency in proving an OMA violation. (Appellant's Brief p. 5-12.)[2]

As further explained below, Esrati's claims fail to establish any reversible error. The trial court correctly found that the Task Force did not conduct "deliberations" during the February 6, 2018 bus tour. Further, in any event, a review of the undisputed evidence supports only that the Task Force did not constitute a "public body" as defined by the OMA. And Esrati's remaining arguments are wholly without merit. As a matter of law, Appellees were entitled to judgment in their favor. Accordingly, this Court should affirm the trial court's decision to grant summary judgment in Appellees' favor and dismiss Esrati's complaint with prejudice.

A. The OMA is not applicable to the Task Force's February 6, 2018 bus tour.

First Issue Presented for Review: Whether the trial court correctly concluded that the OMA was inapplicable to the Task Force's February 6, 2018 bus tour.

The OMA, codified as R.C. 121.22, imposes open meeting requirements on public bodies. *Paridon v. Trumbull County Children's Services Board*, 2012-T0035, 2013-Ohio-881, ¶ 16, 988 N.E.2d 904 (11th Dist.). It intends "to require governmental bodies to deliberate public issues in public." *Berner v. Woods*, 9th Dist. Lorain No. 07CA009132, 2007-Ohio-6207,

[2] Esrati does not challenge the trial court's finding that the OMA does not apply to the individual defendants, Mohamed Al-Hamdani and Jeffrey J. Mims Jr., and that argument is therefore waived for purposes of this appeal. (Appellant's Brief, 5-12.)

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

¶ 15, citing *Moraine v. Board of County Comm'rs*, 67 Ohio St. 2d 139, 145, 423 N.E.2d 184 (1981). "A violation of the open-meeting requirement, or of the notice provision, is a predicate to invalidation of any legislative action." *Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Public School Employees*, 106 Ohio App. 3d 855, 863, 667 N.E.2d 458 (9th Dist. 1995).

In particular, the OMA requires that public bodies "take official action and * * * conduct all deliberations upon official business only in open meetings * * *." R.C. 121.22(A). Thus, for the OMA to apply, a plaintiff has the burden to show that (1) a "public body" (2) conducted a "meeting" (3) in which it conducted "deliberations" concerning "public business." R.C. 121.22(B)(2); *accord Berner* at ¶ 17; *Holeski v. Lawrence*, 85 Ohio App.3d 824, 829-30, 621 N.E.2d 802 (11th Dist. 1993).

A review of the undisputed evidence reveals that the Task Force did not conduct "deliberations" during the February 6, 2018 bus tour and that it was not a "public body" as defined by the OMA. As a matter of law, Appellees were entitled to judgment in their favor. The Court should therefore affirm the trial court's judgment.

1. The Task Force did not "deliberate" over "public business" during the February 6, 2018 bus tour.

For the OMA to apply, a public body must "deliberate" over public business at a meeting. R.C. 121.22. "'Deliberation' is defined as 'the act of weighing and examining the reasons for and against a choice or measure' or 'a discussion and consideration by a number of persons of the reasons for and against a measure.'" *Radtke v. Chester Twp.*, 11th Dist. Geauga No. 2014-G-3222, 2015-Ohio-4016, ¶ 25, citing Webster's Third New International Dictionary (1961) 596. A public body deliberates "by thoroughly discussing all of the factors involved [in a decision], carefully weighing the positive factors against the negative factors, cautiously

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

considering the ramifications of its proposed action, and gradually arriving at a proper decision which reflects the legislative process." *Theile v. Harris*, 1st Dist. No. C-860103, 1986 Ohio App. LEXIS 7096, (June 11, 1986); *accord State ex rel. Huth v. Vill. of Bolivar*, 2018-Ohio-3460, ¶ 39.

"The mere fact an issue of public concern is raised in closed session does not necessarily mean the action was deliberated." *Stainfield v. Jefferson Emergency Rescue Dist.*, 11th Dist. Ashtabula No. 84-CA-51, 2010-Ohio-2282, ¶ 35. It is well established that "'deliberations' involve more than information-gathering, investigation, or fact-finding." *Berner* at ¶ 15, citing *Holeski* at 829. Information-gathering and fact-finding are essential functions of any board, but do not constitute deliberations that can serve as a basis for a violation of the OMA. *Id*; *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703 (1st Dist.) (holding that, in the absence of deliberations or discussions by board members during a non-public information-gathering and investigative session with legal counsel, the session was not a "meeting" as defined in the OMA).

Here, the evidence in the record supports only that the Task Force was an information-gathering endeavor. Dr. Lolli specifically testified that she created the Task Force for the purpose of gathering information and that she alone would provide a recommendation to the Board regarding facilities issues. (Transcript p. 140-41.) The Task Force had no decision-making authority. Dr. Lolli was the sole arbiter of any recommendation that she gave to the Board. (Transcript p. 130.) Although Dr. Lolli considered outside viewpoints and information, outside groups, including the Task Force, did not make a decision or provide a recommendation to the Board. (Transcript p. 130.)

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Subashi
& Wildermuth

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

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

Further, the evidence in the record establishes only that the February 6, 2018 bus tour was fact-finding in nature. At the preliminary injunction hearing, Dr. Lolli described that no deliberative dialogue took place during the February 6, 2018 bus tour:

> [BY MR. ESRATI:]
>
> Q. [W]hy weren't [the Task Force members] allowed to go into Wogaman?
>
> A. We got a phone call at Valerie, at the conclusion of our tour, that said that the judge had requested that we stop the tour because of what you filed. So, we did.
>
> Q. Okay. But you had already had a tour of one building at that point?
>
> A. We were in the building finishing that tour --
>
> Q. Okay.
>
> A. -- when we got the phone call from our attorney.
>
> Q. And did you distribute handouts and information during that tour?
>
> A. We gave everyone a packet of that, and it's all posted on the website and was posted on the website. It was information for them about [survey results and current enrollment.]
>
> * * *
>
> Q. [Did the Task Force members] ask questions during the course of the tour about [the survey results or current enrollment] or discuss that amongst each other or with you during the time –
>
> A. I can't address if they talked among themselves on the tour, because I was in the front of the bus. And if you've been on a school bus lately, you know how loud it is.
>
> Q. But within Valerie [Elementary]?
>
> A. Within Valerie, they did not. Rick Rayford gave a tour of the facility inside, where the problem areas are with the maintenance. He showed them places where asbestos was contained. He showed them down a step where -- into our basement, where the boiler system is. He showed them where the pipes

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Subashi
& Wildermuth

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

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

were pinned together. And he talked, he conducted the tour, giving them the factual information about the maintenance and the repair needs of that building.

Q. Did they ask questions of Mr. Rayford?

A. They asked questions about the particular maintenance issues. I don't recall a lot of questions, but we weren't in there a long time, as you know.

(Transcript p. 75-77.) Esrati presented no contrary evidence. He even conceded at the preliminary injunction hearing that he had no idea what transpired among the Task Force members who attended the bus tour. (Transcript p. 106.)

In his appellate brief, Esrati admits this point also. He recognizes that no evidence supported that "deliberations" occurred during the February 6, 2018 bus tour. (Appellant's Brief p. 8.) He decries that, "[i]f no recording were allowed, and entrance was barred, how would anyone know what happened." (Appellant's Brief p. 8.) Of course, numerous discovery methods could have shed light on the evidentiary issue raised by Esrati. He very well could have subpoenaed for depositions any nonparty passengers on the bus and inquired as to the content of discussions. Esrati did not avail himself of those discovery methods and, instead, expressly told the trial court that he rested on the material submitted with his memorandum in opposition to Appellees' motions for summary judgment. (Decision and Judgment Entry Granting Motions for Summary Judgment & Dismissing Action p. 1.)

Based on the undisputed evidence, reasonable minds could only conclude that the February 6, 2018 bus tour was an information-gathering endeavor and that no deliberations occurred. As a matter of law, Appellees were entitled to judgment in their favor. On this basis, the Court should affirm the trial court's judgment.

S&W

Subashi
& Wildermuth

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

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

2. The Task Force was not a "public body" as defined by the OMA.

Second Issue Presented for Review: Whether the trial court's decision should be affirmed on additional legal grounds raised by Appellees.

R.C. 121.22(I) provides the sole legal and jurisdictional basis for an OMA claim. To prevail on an OMA claim, a claimant has to establish that the alleged violation involved a "public body." In relevant part, R.C. 121.22(B)(1) defines "public body" as:

> Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution; [or] [a]ny committee or subcommittee of a body described [above];

For practical purposes, R.C. 121.22(B)(1) creates three categories of public bodies: (1) any committee created by the State of Ohio; (2) any committee created by a county, municipality, or other political subdivision, including a school district; and (3) any committee or subcommittee created by the State of Ohio, a county, a municipality, or another political subdivision, including a school district. Conspicuously, R.C. 121.22(B)(1) does not include a committee or subcommittee created by a public employee. *See Beacon Journal Publishing Co. v. Akron*, 3 Ohio St.2d 191 (1965) (finding boards, commissions, committees, etc., created by executive order of the mayor and chief administrator were not subject to the OMA); *accord* 1994 Ohio Op. Att'y Gen. No. 096 (determining that, when a committee of private citizens and various public officers or employees is established solely pursuant to the executive authority of the administrator of a general health district for the purpose of providing advice pertaining to the administration of a grant, such a committee is not a "public body" as defined by the OMA).

Here, it is undisputed that the Task Force was a creation of Dr. Lolli, a Dayton School District employee. Contrary to the trial court's finding, no evidence supports that the Task Force was a committee or subcommittee of the Board. Rather, it is undisputed that the Board

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

instructed Dr. Lolli to provide a recommendation concerning right-sizing of the district. It did not create the Task Force or instruct Dr. Lolli to create the Task Force. Instead, Dr. Lolli's testimony suggests only that she created the Task Force as a tool to provide her with information, so that she could formulate an opinion and make a recommendation to the Board.

Moreover, Esrati did not establish that the Task Force was a decision-making body of the Board. To show that a group qualifies as a decision-making body, a claimant must show—at the very least—that the body makes decisions "in the process of reaching consensus for recommendations to a higher authority." *Cincinnati Enquirer* at syllabus. In this instance, Esrati presented no evidence whatsoever as to whether the Task Force "reach[ed] consensus for recommendations." He offered no evidence of supposed Task Force "recommendations" to anyone. Instead, the evidence supported only that the Task Force was an information-gathering tool and that Dr. Lolli was the sole arbiter of any recommendation that she gave to the Board. Dr. Lolli, alone, would provide a recommendation to the Board regarding facilities issues. (Transcript p. 130, 140-41.)

Finally, Esrati's reliance on *Thomas v. White*, 85 Ohio App.3d 410, 620 N.E.2d 85 (9th Dist. 1992), is unavailing. In that case, evidence supported that the citizens advisory board made recommendations to a state agency, the Summit County Children Services Board. Further, the advisory board's enabling statute specifically provided that it complete its duties in cooperation with the Summit County Children Services Board and other agencies, advising them on policies pertaining to the provision of service to children. In contrast, no summary judgment evidence supports that the Task Force made recommendations concerning right-sizing the district. Further, it was not created by statute. Rather, its creator—Dr. Lolli—intended the Task Force to be a fact-finding mechanism.

S&W

Subashi
& Wildermuth

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

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

For those reasons, based on the undisputed evidence, reasonable minds could only conclude that the Task Force was not a "public body" as defined by the OMA. As a matter of law, Appellees were entitled to judgment in their favor. As such, the Court should affirm the trial court's judgment.

3. The OMA did not require there to be public access to the February 6, 2018 bus tour.

Despite its finding that "deliberations" did not occur during the February 6, 2018 bus tour, Esrati seems to assert that the trial court should have nonetheless found an OMA violation occurred. (Appellant's Brief p. 7-10.) Specifically, he claims that the trial court should have considered whether Appellees allowed public access to the bus tour. (Appellant's Brief p. 8-9.) He describes the trial court's decision as based "on procedural legal technicalities" and asserts that video exists "of repeated examples of denying access to the school being toured and the bus with closed doors at the other building." (Appellant's Brief p. 7-8.) Further, he contends that the Task Force did not vote or make a decision to hold an executive "[session] to discuss any of the enumerated reasons [to hold a private meeting]" and therefore that the Task Force violated the OMA. (Appellant's Brief p. 10.)

But these arguments fail as a matter of course. Esrati cannot maintain a viable claim if the so-called procedural technicalities thwart application of the OMA. Ohio law is clear that, "[t]o violate the [OMA], a public body must simultaneously (1) conduct a "meeting" and (2) "deliberate" over "public business." *Berner* at ¶ 17. And, as demonstrated above, reasonable minds could only conclude that the Task Force was not a public body and that it did not conduct deliberations during the February 6, 2018 bus tour. In turn, the OMA did *not* require there to be public access to the February 6, 2018 bus tour—the OMA did not apply to it.

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Subashi
& Wildermuth

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

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

Further, Esrati's reference to alleged video footage showing he was denied access to the bus tour is not appropriate for this appeal. The evidence was never submitted in any form during the proceedings below. Instead, Esrati specifically represented that his sole OMA claim rested on the February 6, 2018 bus tour and that he was not presenting any additional evidence outside of the March 15, 2018 hearing transcript. (Decision and Judgment Entry Granting Motions for Summary Judgment & Dismissing Action p. 1.)

In sum, the trial court correctly found that the OMA did not require there to be public access to the February 6, 2018 bus tour. The Court should therefore affirm the trial court's decision to grant Appellees' motions for summary judgment.

B. Esrati was not entitled to any leniency in proving an OMA violation.

Third Issue Presented for Review: Whether the trial court was obligated to give Esrati leniency in proving his OMA claim.

As a final argument, Esrati claims that, "[a]s a matter of policy, expecting common citizens to enforce [the OMA] is unconscionable." (Appellant's Brief p. 10.) He laments that "there are no public offices to assist, or to enforce[,] any initial violation of [the] OMA." (Appellant's Brief p. 10.) He complains that, as a matter of public policy, the trial court should have granted him leniency in proving an OMA violation. (Appellant's Brief p. 11.)

Yet, for several reasons, Esrati's claim that he was entitled to leniency in proving an OMA violation fails. As an initial matter, Esrati did not preserve this issue for appeal; he did not raise it below. Notwithstanding, Ohio law is clear that Esrati is not entitled to any leniency simply because he is a *pro se* litigant. Finally, the Second District, acting in its judicial capacity, does not have the authority to remedy Esrati's complaint regarding the OMA's lack of an enforcing agency or body.

|S&W|

Subashi & Wildermuth

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

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

1. Esrati failed to preserve this issue for appeal.

It is well-established procedure that a party seeking to appeal a particular issue must preserve the issue by appropriately raising it in the proceedings below. *Patton v. Ditmyer*, 4th Dist. Athens Nos. 05CA12, 05CA21, 05CA22, 2006-Ohio-7107, ¶ 52, citing *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 220, 574 N.W.2d 457 (1991), *overruled on other grounds by Collins v. Sotka*, 81 Ohio St.3d 506, 1998 Ohio 331, 692 N.E.2d 581 (1998). In the context of a motion for summary judgment, "'[d]espite the fact that appellate courts review summary judgment decisions de novo, "[t]he parties are not given a second chance to raise arguments that they should have raised below."'" *Litva v. Richmond*, 172 Ohio App.3d 349, 2007-Ohio-3499, 874 N.E.2d 1243, ¶ 18 (7th Dist.), quoting *Aubin v. Metzger*, 3d Dist. Allen No. 1-03-08, 2003-Ohio-5130, ¶ 10, quoting *Smith v. Capriolo*, 9th Dist. Summit No. 19993, 2001 Ohio App. LEXIS 1668 (Apr. 11, 2001). In this appeal, Esrati raises—for the first time—the claim that the trial court should provide leniency to *pro se* litigants seeking to prove an OMA violation. He did not raise this issue in his memorandum in opposition to summary judgment or court conferences in which the parties and the trial court discussed Appellees' motions for summary judgment. In turn, he waived this issue for the purposes of appeal and is barred from now asserting it.

2. Esrati was not entitled to any leniency in proving an OMA violation.

"In Ohio, a *pro se* litigant 'is presumed to have knowledge of the law and of correct legal procedure and is held to the same standard as all other litigants.'" *Citibank S.D., N.A. v. Wood*, 169 Ohio App. 3d 269, 2006-Ohio-5755, 862 N.E.2d 576, ¶ 57 (2d Dist.), quoting *Kilroy v. B.H. Lakeshore Co.*, 111 Ohio App.3d 357, 363, 676 N.E.2d 171 (8th Dist. 1996). To that end, "'"*pro se* litigants are not afforded greater rights than parties who retain counsel' [or, in particular,] entitled to a court's assistance 'in remedying deficient pleadings.'" *State ex rel.*

S&W

Subashi
& Wildermuth

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

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

Evans v. McGrath, 151 Ohio St.3d 345, 2017-Ohio-8290, 88 N.E.3d 957, ¶ 7, quoting *Prewitt v. Wood Cty. Prosecutor's Office*, 6th Dist. Wood No. WD-15-029, 2016-Ohio-1477, ¶ 5; *accord Citibank S. D., N.A.* at ¶ 8. In this instance, Esrati knowingly chose to represent himself in pursuing a claim of an OMA violation. In so choosing, he accepted the challenges that one might encounter in litigating a civil action without a formal legal education. Ohio law did not grant him an entitlement to leniency of any sort, and the trial court did not err in declining to grant any such leniency.

3. The Court does not have authority to remedy Esrati's complaint.

The General Assembly is vested with the legislative power of this state, and it may enact any law that is not in conflict with the Ohio and United States Constitutions. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 36; *City of Toledo v. State*, Slip Opinion No. 2018-Ohio-2358, ¶ 2. The separation of powers doctrine prevents the judiciary from asserting control over "the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control." *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633, 716 N.E.2d 704 (1999). "A court can no more prohibit the General Assembly from enacting a law than it can compel the legislature to enact, amend, or repeal a statute—'the judicial function does not begin until after the legislative process is completed.'" *City of Toledo* at ¶ 27, citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 1999-Ohio-123, 715 N.E.2d 1062 (1999); *see also State ex rel. Slemmer v. Brown*, 34 Ohio App.2d 27, 28, 295 N.E.2d 434 (10th Dist.1973) ("The judiciary has no right or power to command the General Assembly to adopt joint resolutions").

In actuality, Esrati's claim is a criticism of the OMA and not a basis for any relief in this matter. He asks the Court to circumvent the General Assembly's authority to enact law. He

S&W
Subashi
& Wildermuth

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

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

does not complain that the OMA is unconstitutional; he claims only that the OMA is, essentially, poor policy. Yet, the Court does not have authority to create law or provide advantages a *pro se* to litigant because a law is supposedly unfair to that litigant. *See City of Toledo* at ¶ 27. Esrati must direct those criticisms toward the General Assembly. The Court lacks authority to remedy his complaint.

In addition, Esrati has failed to demonstrate how "leniency" would have somehow changed the outcome. The ordinary procedure under Civ.R. 56 gives the responding party the benefit of any doubt. Here, the facts presented required summary judgment in favor of Appellees. For those several reasons, Esrati's final argument that the trial court erred in not providing him leniency in proving an OMA violation is wholly without merit. The Court should affirm the trial court's judgment.

S&W

Subashi & Wildermuth

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

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

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's decision granting summary judgment in Appellees' favor and dismissing Esrati's complaint with prejudice.

Respectfully submitted,

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

S&W
Subashi
& Wildermuth

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

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by ordinary mail this 19 day of November, 2018, upon:

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

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

Brian L. Wildermuth (0066303) (0097169) FOR

S&W
Subashi
& Wildermuth

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

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