

ADMINISTRATIVE LAW (MUNICIPAL)

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Elected Officials Academy: Personal Leadership

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I. HOME RULE AND STATUTORY LAW

Municipal corporations¹ in Ohio are authorized by the 1912 Amendments to the Ohio Constitution at Article XVIII. Prior to 1912, municipalities were individually chartered by the Ohio legislature and controlled solely by the laws passed by the Ohio legislature. The reasons given for the home rule amendments are:

- a. To permit municipalities to be free from control by the State legislature and State officials as to local matters -- i.e., granting powers of local self-government;
- b. To permit municipalities to adopt charters to provide for their own structure and organization; and
- c. To permit the operation of utilities by municipalities.

The Ohio legislature, however, has provided the authority for municipalities to exercise those powers granted to them by the Ohio Constitution through statutes passed by the Ohio General Assembly. These extensive statutes are generally found in Title VII (7): Municipal Corporations, chapters 701 through 765. It must be noted that municipalities need not rely on the authority granted by these State statutes and may pass certain ordinances to govern their own affairs and proscribe or prohibit certain conduct in their local municipality under the authority of the Ohio Constitution and/or a municipal charter adopted by the municipal electorate thereunder. (More on this below.)

Municipal Clerks

Municipal clerks are authorized by Ohio Rev. Code § 731.04 (cities) and § 733.26 (villages – elected position) but will likely be authorized by a municipal charter in those municipalities that have adopted a charter. The clerk's duties vary widely depending upon whether a clerk is in a city or village and depending upon local ordinances and charter provisions and are too numerous to mention. The duties of a "village clerk" in Ohio are set out in more detail in the Ohio Revised Code than are those of a city council clerk, particularly where a village council has combined the position of clerk with the position of treasurer under Revised Code § 733.261. (See generally O.R.C. Chapters 731 and 733 for references to municipal clerks.)

Home Rule Analysis

The most significant sections of the home rule amendments of Article XVIII of the Ohio Constitution are:

Municipal Powers of Local Self-Government.

§3 Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such

¹ Per Ohio Constitution Art. XVIII, Section 1, municipal corporations are classified as either cities or villages. Cities are those municipalities with populations of 5,000 or more.

local police, sanitary and other similar regulations, as are not in conflict with general laws.

* * *

Home Rule; Municipal Charter.

§7 Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of the article, exercise thereunder all powers of local self-government.

* * *

Section 3 contains three provisions:

- a. Power to exercise all powers of local self-government;
- b. Power to exercise police powers concurrently with the State; and
- c. The “conflict” provision, which Ohio courts have consistently held to modify only the 2nd clause - - the police powers.

In 1923 the Ohio Supreme Court held that these Constitutional powers of municipalities are self-executing. *Perrysburg v. Ridgeway* (1923), 108 Ohio St. 245. In other words, these powers *do not* require the Ohio legislature to pass statutes to authorize municipalities to implement them and they do not require a municipality to adopt a charter to take advantage of these powers.

However, to reconcile the powers as set forth in Ohio Constitution, Article XVIII, §§3 and 7 – i.e., the power to exercise all powers of local self-government vs. the power to adopt a charter in order to "exercise thereunder all powers of local self-government" – the Ohio Supreme Court created a procedural powers versus substantive powers distinction.

Therefore, as a general rule, municipalities without a charter must follow the procedural provisions of state statutes for the governance (the form or structure of government and its procedures) of the municipality. Of course, even if a municipality has a charter and its charter or ordinances are silent as to a matter of procedure or a governance issue, state statutes apply. Equally important is that noncharter municipalities can adopt procedural ordinances and rules so long as they do not conflict with state statutes.

Conversely, as to matters of substantive powers, regardless of whether the municipality has a charter, a municipality's exercise of such substantive powers of local self-government prevails over state law. An example of such a substantive power is a decision as to what types of employees to have and how much they are paid.

A typical municipal charter provision that most broadly exercises the municipal powers of local self-government is:

POWERS

The Municipality shall have all the powers, general or special, governmental or proprietary, that may now or hereafter lawfully be possessed or exercised by municipal corporations under the Constitution and general laws of the State of Ohio. The powers of this Municipality shall be exercised in the manner prescribed in this Charter, or, to the extent that the manner is not prescribed herein, in such manner as the Council may determine. The powers of the Municipality may also be exercised, except as contrary intent or implication appear in this Charter or in the enactments of the Council, in such manner as may now or hereafter be provided by the general laws of the State of Ohio. The enumeration of particular powers by this Charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated herein, or implied hereby, or appropriate to the exercise thereof, the Municipality shall have, and may exercise, all other powers which, under the Constitution and the laws of Ohio, it would be competent for this Charter specifically to enumerate.

"Statewide Concern" Doctrine

The initial determination to be made when deciding whether an exercise of power by a municipality is a power of local self-government is whether the matter has extra-territorial impact when the power is exercised by the municipality. Ohio courts have termed this extra-territorial impact analysis the "statewide concern" doctrine. The courts will apply a balancing test when considering whether a power of local self-government is being properly exercised by the municipality to determine whether the municipality's interests are predominate or the State's interest are predominate. Examples of powers the courts have held to be of local self-government are: power to tax; salaries; the structure and form of government; and others. Examples where the courts have denied a municipality the power of local self-government are: sewage treatment; cross-country electric transmission lines; prevailing wage law; and union labor relations.

In areas of certain employment relations, such as union/collective bargaining issues and residency requirements of municipal employees, the Ohio Supreme Court has analyzed these matters under a separate provision of the Ohio Constitution, Article II, §34, that by its terms prevails over the Constitution's home rule provisions in Article XVIII, §3. *Rocky River v. State Employment Relations Bd.* (1989) 43 Ohio State 3d 1; and *Lima v. State* (2009), 122 Ohio St. 3d 155.

Police Powers and the "Conflict" Clause

Examples of the exercise of municipal police powers are: misdemeanor traffic and criminal offense ordinances, business regulation ordinances, zoning ordinances, etc. The specific provisions of these types of ordinances cannot conflict in substance with specific provisions on the same subject matter under state law. For example, the Ohio Revised Code contains most, if not all, of the same misdemeanor traffic and criminal offenses as a municipal code, but the penalties for these offenses cannot be less severe than they are under

state law. The municipal penalties can, however, be more severe than those under state law and not be in conflict. The Ohio courts have found conflicts in areas of building code regulations and regulation of certain business practices such as monetary lending practices to declare invalid local ordinances on these subjects.

II. SOVEREIGN IMMUNITY (The King can do no wrong!)

From the beginning of municipalities in the State of Ohio, circa 1803, until the case of *Haverlack v. Portgage Homes, Inc.* (City of Aurora) (1982) 2 Ohio St.3d 26, municipalities enjoyed immunity from liability. In the *Haverlack* case, the Ohio Supreme Court overturned the age-old doctrine of sovereign immunity that went back through the common law to early English times and found the City of Aurora could be found liable for damages resulting from a sewage plant that caused a nuisance.

In 1984, only two years after *Haverlack*, the Ohio legislature responded by passing Ohio Revised Code Chapter 2744 to impose sovereign immunity by statute, but with several exceptions.

Generally, under O.R.C. Chapter 2744, municipalities and other political subdivisions in Ohio - - counties, townships, school districts, etc. - - and their officials and employees (including municipal clerks) are immune from liability for negligence in the performance of virtually all governmental functions.

Local government officials and employees are generally immune from liability if:

- (1) they are acting in the course and scope of their government employment; and
- (2) the employee's acts or omissions were not malicious, in bad faith, or wanton and reckless.

The important sections of Ohio Revised Code Chapter 2744 are:

CHAPTER 2744: POLITICAL SUBDIVISION TORT LIABILITY

2744.01 Political subdivision tort liability definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, **whether or not compensated or full-time or part-time,** who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. **"Employee" includes any elected or appointed official of a political subdivision.** "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) **"Governmental function"** means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

- (q) Urban renewal projects and the elimination of slum conditions;
- (r) Flood control measures;
- (s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;
- (t) The issuance of revenue obligations under section 140.06 of the Revised Code;
- (u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:
 - (i) A park, playground, or playfield;
 - (ii) An indoor recreational facility;
 - (iii) A zoo or zoological park;
 - (iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;
 - (v) A golf course;
 - (vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;
 - (vii) A rope course or climbing walls;
 - (viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;
- (ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.
- (x) A function that the general assembly mandates a political subdivision to perform.
- (D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.
- (E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.
- (F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district

established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) **"Proprietary function"** means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

2744.02 Governmental functions and proprietary functions of political subdivisions.

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007

2744.03 Defenses - immunities.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, **the employee is immune from liability unless one of the following applies:**

(a) **The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;**

(b) **The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;**

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

Effective Date: 04-09-2003

2744.04 Statute of limitations - demand for judgment for damages.

(A) An action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, **shall be brought within two years after the cause of action accrues**, or within any applicable shorter period of time for bringing the action provided by the Revised Code. The period of limitation contained in this division shall be tolled pursuant to section 2305.16 of the Revised Code. This division applies to actions brought against political subdivisions by all persons, governmental entities, and the state.

(B) In the complaint filed in a civil action against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission in connection with a governmental or proprietary function, whether filed in an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, the complainant shall include a demand for a judgment for the damages that the judge in a nonjury trial or the jury in a jury trial finds that the complainant is entitled to be awarded, but shall not specify in that demand any monetary amount for damages sought.

Effective Date: 04-09-2003

2744.05 Damage limitations.

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded.

(B)(1) If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to those benefits.

The amount of the benefits shall be deducted from an award against a political subdivision under division (B)(1) of this section regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim. A claimant whose benefits have been deducted from an award under division (B)(1) of this section is not considered fully compensated and shall not be required to reimburse a subrogated claim for benefits deducted from an award pursuant to division (B)(1) of this section.

* * *

(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

* * *

2744.06 Satisfying a judgment against political subdivision.

* * *

2744.07 Defending and indemnifying employees.

(A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

(2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.

(B)(1) A political subdivision may enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function.

(2) No action or appeal of any kind shall be brought by any person, including any employee or a taxpayer, with respect to the decision of a political subdivision pursuant to division (B)(1) of this section whether to enter into a consent judgment or settlement or to secure releases, or concerning the amount and circumstances of a consent judgment or settlement. Amounts expended for any settlement shall be from funds appropriated for this purpose.

(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, upon the motion of the political subdivision, the court shall conduct a hearing regarding the political subdivision's duty to defend the employee in that civil action. The political subdivision shall file the motion within thirty days of the close of discovery in the action. After the motion is filed, the employee shall have not less than thirty days to respond to the motion.

At the request of the political subdivision or the employee, the court shall order the motion to be heard at an oral hearing. At the hearing on the motion, the court shall consider all evidence and arguments submitted by the parties. In determining whether a political subdivision has a duty to defend the employee in the action, the court shall determine whether the employee was acting both in good faith and not manifestly outside the scope of employment or official

responsibilities. The pleadings shall not be determinative of whether the employee acted in good faith or was manifestly outside the scope of employment or official responsibilities.

If the court determines that the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities, the court shall order the political subdivision to defend the employee in the action.

Effective Date: 04-09-2003

[2744.08 Liability and self-insurance programs.](#)

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[2744.081 Joint self-insurance pool - risk-management.](#)

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[2744.082 Reimbursement of general fund for self-insurance payments.](#)

* * *

[2744.09 Exceptions.](#)

This chapter does not apply to, and shall not be construed to apply to, the following:

(A) Civil actions that seek to recover damages from a political subdivision or any of its employees for **contractual liability**;

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the **employment relationship** between the employee and the political subdivision;

(C) Civil **actions by an employee** of a political subdivision against the political subdivision **relative to wages, hours, conditions, or other terms of his employment**;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) **Civil claims based upon alleged violations of the constitution or statutes of the United States**, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

Effective Date: 11-20-1985

[2744.10 Immunity as to Year 2000 compliant claims.](#)

III. ZONING/LAND USE REGULATION

One area of law that is highly regulated in most instances by municipalities is zoning and land use. This area of regulation usually constitutes an inordinate amount of a municipality's activities and is frequently a source of litigation whether from the municipality enforcing the regulations or through property owners and developers challenging municipal regulations. The municipal powers to adopt, enforce, and administer zoning and land use regulations can come from either state statute or municipal ordinance. Such authority has been deemed by Ohio courts to be a "police power" under the Ohio Constitution.

Statutes Governing Cities And Villages ²

- (a) R.C. Chapter 709 -- Annexation of unincorporated lands to cities and villages
- (b) R.C. Chapter 711 -- Subdivision of real property R.C. Chapter 713 -- Planning and zoning powers of municipalities R.C. 713.13 -- Power of city or abutting and neighboring property owners to seek injunction to stop violation of zoning regulations. R.C. 713.15 -- Prohibition against retroactive zoning laws. (Allowance for prior nonconforming uses).
- (c) R.C. 715.41 -- Drainage of private lands
- (d) R.C. 715.44 -- Municipal power to abate nuisances
- (e) Definition of "nuisance": "What amount of annoyance or inconvenience will constitute a nuisance, being a question of degree dependent on varying circumstances, cannot be precisely defined." *Columbia Gas & Light & Company v. Freedland* (1861), 12 Ohio St.392. (See *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. _____, 112 S. Ct. 2886, 120 L.Ed.2d 798.)

Local Municipal Standards and Procedures

Pursuant to the home rule sections of the Ohio Constitution, Article XVIII, Sections 3 and 7, cities and villages have the power to adopt local police regulations not in conflict with general state law. Zoning ordinances with a rational relationship to the health, safety or general welfare of a community are constitutionally within the police power of a municipal government. *Garcia v. Siffrin* (1980), 63 Ohio St.2d 259. Municipal ordinances enjoy a presumption of constitutionality. Therefore, local zoning, subdivision, and other land use regulations are presumed to be valid unless a property owner/developer can demonstrate that the regulation clearly ("beyond fair debate") is arbitrary and unreasonable and without substantial relation ("bear a rational relation") to the health, safety or general welfare of the community, or are specifically preempted by federal law. *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207; see also, *Jaylin Investments, Inc. v. Moreland Hills* (2006), 107 Ohio St.3d 339.

Types of local land use standards and procedures are: zoning and planning codes, subdivision regulations, building and housing codes, business regulation codes, health codes, and environmental codes (pretreatment of waste water, impact fees, steep slopes, riparian corridor, and storm water regulations, etc.)

² Townships are statutory creatures without powers conferred by the Ohio Constitution, unlike cities and villages. A township has only those zoning powers conferred by R.C. 519.02.

Planning Commissions

Municipal planning commissions are established in Ohio through either Chapter 713 of the Ohio Revised Code or by local charter and ordinances. Municipal planning commissions are generally responsible for approval of subdivisions, adoption of subdivision regulations, recommendations with respect to zoning regulations and zoning map land use designations, and the amendments thereto. Planning commissions are also given the responsibility in many instances for developing comprehensive plans and recommendations to the local legislative authority with respect to public improvements within the municipality. Planning commissions are often given approval authority over site plans for all kinds of development in the municipality to determine the extent and location of appropriate parking areas and open areas and traffic and pedestrian flow.

Ohio Revised Code 713.01 permits, but does not require, municipal corporations to establish planning commissions. If a commission is established, it has the platting authority under Revised Code Chapter 711. The specific powers and duties of a city planning commission are set forth by statute in Revised Code 713.02.

Boards of Zoning Appeals

Municipal boards of zoning appeals in Ohio are authorized and their powers governed by either Ohio Rev. Code 713.11 or by municipal charter and/or ordinance.

A Clerk's Role

A municipal clerk's role in municipal zoning and land use matters can vary widely depending upon the particular charter and ordinance provisions and customary practices of a particular municipality. Particular tasks of a clerk with respect to zoning and land use matters may be: providing notice (posting, newspaper, cable television access channel, and direct mailings to landowners) of code and zoning map amendments and public hearings for the same; recording of minutes of public hearings and quasi-judicial/administrative hearings; responding to public records requests; and providing transcripts of evidence from municipal hearings to the courts upon administrative appeals.

Therefore, it is helpful for a municipal clerk to know the legal underpinnings of zoning and land use, as well as the constitutional issues that arise in zoning and land use regulation. This is particularly true with respect to procedural due process rights of landowners regarding notice and an opportunity to be heard.

DUE PROCESS CHALLENGES TO ZONING AND LAND USE REGULATIONS

The constitutionality of a zoning ordinance may be challenged either by an administrative appeal to court under Ohio Revised Code Chapter 2506 or by a declaratory judgment action pursuant to Revised Code Chapter 2721. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 15; *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263.

Prior to instituting a declaratory judgment action to determine the validity of a zoning ordinance as applied to a specific parcel of property, a party ordinarily must exhaust administrative remedies.

Constitutional attacks can be brought under both the federal and Ohio constitutions in either federal or state courts. Obviously, at least one federal constitutional claim is required for a federal court to have jurisdiction over the case. Challenges to local government action or land use laws under the federal constitution must be brought through 42 U.S.C. §1983. State constitutional claims are often added by property owners to their federal claims in federal court cases. Almost all claims under the federal constitution have mirror image state constitutional claims.

(a) Types of Constitutional Claims.

- (i) Due process claims (U.S. Const., 14th Amendment; Ohio Const., Article I, Sections 1, 16 and 19)

Procedural due process
Substantive due process

- (ii) Equal protection claims (U.S. Const., 14th Amendment)

- (iii) Takings claims (U.S. Const., 5th Amendment, via the 14th Amendment)

- (iv) Privacy/familial rights claims (U.S. Const., 14th Amendment) – e.g., defining family relationships for residences.

- (v) First Amendment claims (U.S. Const., 1st Amendment, via the 14th Amendment; Ohio Const., Article I, Section 11) – e.g., sign regulations, sexually-oriented business regulations.

(b) Due Process Claims.

Procedural Due Process

What is at issue is not whether government action has deprived the plaintiff of a constitutionally protected property interest, but whether the deprivation of such an interest is without the procedural protections required by the constitution -- i.e., "due

process of law". *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 119, citing *Zinerman v. Burch* (1990), 494 U.S. 113.

- (1) Threshold issue: A property right must be involved. Property interests are created and defined by existing rules or understandings that stem from independent source of law, such as state law. *Board of Regents v. Roth* (1972), 408 U.S. 564.
- (2) Generally applies to administrative (adjudicative) action, not to legislative action.
- (3) Right to notice and fair hearing.
- (4) Applicant's procedural rights are:
 - timely notice
 - presentation of evidence
 - cross-examination
 - decision on record
 - written findings
 - unbiased decision maker
- (5) **Note:** Under “typical” 42 U.S.C. §1983 claim (*e.g.*, denial of First Amendment rights), the constitutional violation is actionable under §1983 when the wrongful action is taken. *Zinerman, supra*, at 494 U.S. 125. Under a claim of denial of procedural due process, the violation is not actionable under §1983 when the alleged deprivation occurs. It is not an actionable wrong unless and until the State fails to provide due process. *Id.* at 494 U.S. 126.

(c) Substantive Due Process

The Due Process Clause of the 14th Amendment contains a substantive component that bars certain arbitrary, capricious, and unreasonable government action depriving a person of a property right.

- (i) The requirement of substantive due process is that there must be some reasonable basis to believe that a regulation will promote the public health, safety or general welfare (some legitimate public purpose)
- (ii) Minimum Rationality Test: A plaintiff must show that the land use regulation is not rationally related to a legitimate public purpose (land use concern). The local government need not

select the best or least restrictive method of obtaining its goals. *Schenck v. City of Hudson* (6th Cir. 1997), 114 F.3d 590, 593-94.

- (iii) A regulation may be arbitrary and unreasonable "on its face".
- (iv) A regulation may be arbitrary and unreasonable "as applied" under the facts and circumstances of a particular case.

PUBLIC HEARINGS (Compare and Contrast With Quasi-Judicial Proceedings)

In the context of municipal actions, “public hearings” are those “public meetings” dealing with legislation and/or the public policies of the public body.

Applications for rezoning are legislative in nature and are subject to a public hearing before a planning commission in most communities, with a recommendation of approval or disapproval based upon governmental, political and policy considerations. . . . A public hearing is one where members of the general public may speak and express their views on the question of governmental, public and policy considerations as to whether certain legislation should be adopted. (emphasis added).

In re Rocky Point Plaza Corp. (1993), 86 Ohio App.3d 486, 491.

QUASI-JUDICIAL [OR "ADMINISTRATIVE ACTION"] PROCEEDINGS

GENERALLY — THE CHARACTERISTICS OF QUASI-JUDICIAL ACTION

1. The public body provides notice of hearing and an opportunity to introduce evidence and testimony of witnesses;
2. The public body’s decision may be appealed to the courts; and,
3. The public body’s decision involves the exercise of discretion.

Note 1: When acting in a quasi-judicial capacity, the individual members of the public body shall be afforded the same absolute immunity as judges. *Castle Manufactured Homes, Inc., supra.*

Note 2: When acting in a quasi-judicial capacity, the Ohio Open Meetings Law (O.R.C. §121.22) does not apply to the public body’s deliberations. *TBC Westlake, Inc., supra; Castle*

Manufactured Homes, Inc., supra; and, *Jones v. Liquor Control Comm'n* (Ohio App. 10th Dist., Dec. 20, 2001), unreported, 2001 Ohio 8766, 2001 Ohio App. LEXIS 5719. BUT, other legal principles dictate that the hearing process, as opposed to the deliberative process, must be open under the Ohio Sunshine laws discussed below. *See* also, *Graff-Knight v. Bd. of Zoning Appeals of Liberty Twnshp*, Delaware App. No. 03CAH08042, 2004 Ohio App. LEXIS 2856.

Note 3: An adjudicatory or administrative decision is not, under the Ohio Constitution, subject to referendum. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls* (1998), 82 Ohio St.3d 539, ¶ 2 of syllabus. Thus, city council's passage of an ordinance approving a site plan for development under existing zoning regulations constitutes administrative action and is not subject to referendum.

Note 4: Legislative action is not appealable to a Common Pleas Court under Ohio Revised Code Chapter 2506. *Ivkovich v. Steubenville* (2001), 144 Ohio App.3d 25, 30; *Schropshire v. Englewood* (1993), 92 Ohio App.3d 168, 171; and, *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1.

A quasi-judicial hearing is not a "public meeting" as that term is defined by the Ohio Revised Code. Instead, it is an adjudicatory hearing, determining the rights of specific persons based upon direct evidence presented at a hearing. *Heiney v. Sylvania Township Board of Zoning Appeals* (1998), 126 Ohio App.3d 391, 396; *Adelman Real Estate Co. v. Gabanic* (1996), 109 Ohio App.3d 689, 694-695.

Note 5: "[A]n administrative officer, sitting in a quasi-judicial capacity and required to reach a conclusion based on evidence presented to him, cannot be called by either party to the proceedings and examined as to his mental processes in arriving at such conclusion." *Libis v. Bd. of*

Zoning Appeals (1972), 33 Ohio App. 2d 94, 97. Cited with approval in *TBC Westlake, Inc. v. Hamilton County Board of Revision* (1998), 81 Ohio St.3d 58, 64. See, also, *T. Marzetti Co. v. Doyle* (1987), 37 Ohio App. 3d 25.

THE NATURE OF A QUASI-JUDICIAL HEARING — DUE PROCESS OF LAW

“Due process rights guaranteed by the United States and Ohio Constitutions apply in administrative proceedings.” *Chirila v. Ohio State Chiropractic Bd.* (2001), 145 Ohio App.3d 589.

A quasi-judicial proceeding must afford an individual “due process” of law. As held in *Gibraltar Mausoleum Corp. v. Cincinnati* (1981), 1 Ohio App.3d 107, 109-110: “The essence of due process dictates, at the very least, that an individual have an opportunity to be heard and to defend, enforce and protect his rights before an administrative body in an orderly proceeding.”

This holding was relied upon in *Frost v. City of Roamington* (12th Dist. Case No. CA85-08-014, January 31, 1986), unreported, 1986 W.L. 1393, and the court further held: “In this context, *due process includes the right to a hearing before an unbiased and fair and impartial tribunal.*” (emphasis added).

THE DIFFERENCE BETWEEN AN ADJUDICATORY AND A LEGISLATIVE HEARING

In the case of *In re: Rocky Point Plaza Corp.* (1993), 86 Ohio App.3d 486, the court went into great detail in its analysis of the difference between an adjudicatory and a legislative “public hearing”:

This case epitomizes one of the common problems with administrative hearings conducted by local governmental agencies, especially in the zoning area and especially planning commissions and boards of zoning appeals. There seems to be a blurring of applications for zoning, applications for variances, and applications for conditional use permits, each of which requires a separate and distinct procedure and approach. Applications for rezoning are legislative in nature and are subject to a public hearing before a planning

commission in most communities, with a recommendation of approval or disapproval based upon governmental, political and policy considerations. On the other hand, both applications for variances and applications for permits, such as conditional use permits, require adjudication hearings, not legislative hearings.

In other words, there is no public hearing upon an application for a variance or an application for a conditional use permit but, instead, an adjudication hearing, which is open to the public. A public hearing is one where members of the general public may speak and express their views on the question of governmental, political and policy considerations as to whether certain legislation should be adopted. Adjudication hearings, however, are not subject to such public comment but, instead, involve the determination of rights of specific persons and whether such rights should be granted based upon evidence (not public opinion) presented at the hearing. Therefore, different procedures are necessary and different rules apply. Only variances and conditional use permits (and some other permits) come before a board of zoning appeals in the ordinary situation. (emphasis added).

Id. at 491-492. *See, also, Heiney v. Sylvania Township Board of Zoning Appeals, supra*, at 396: “A hearing upon an application for a conditional use permit is an adjudicatory hearing, which, although open to the public, is not a public hearing where members of the general public may speak. . . . At adjudicatory hearings, the rights of specific persons are determined based upon the direct evidence presented, not public opinion.”; *Adelman Real Estate Co. v. Gabanic* (1996), 109 Ohio App.3d 689, 694: “The fact that adjudicatory hearings are to be open to the public does not result in their transformation into legislative public hearings with a corresponding right to receive input or public comment at that time.”; and, *Dutton v. Sylvania Twp. Bd. Of Zoning Appeals* (April 28, 2000, 6th Dist. Case No. L-99-1052), unreported, 2000 W.L. 491375, *citing In re: Rocky Point Plaza Corp., supra*.

WHAT MAKES A HEARING “QUASI-JUDICIAL”?

In *Talbut v. Perrysburg* (1991), 72 Ohio App.3d 475, 478, the court discussed what has traditionally been considered when an action is quasi-judicial in nature:

In determining whether the function of the administrative body is quasi-judicial, the Supreme Court of Ohio has established that the proceeding must resemble court proceedings and that an exercise of discretion is employed in *adjudicating* the rights and duties of parties with conflicting interests. . . . The second requirement is that notice, hearing, and the opportunity to produce evidence be provided.

* * *

The line of cases considering whether the acts of a legislative body are subject to review under R.C. Chapter 2506 that is, are quasi-judicial, does not greatly emphasize the need for written requirements mandating due process procedures. Rather, those cases have focused upon whether the legislative body is enacting a law or other rule or executing or administering a law already in existence. . . . The question posed is whether the legislative body is applying the law in an adjudicatory manner.

FUNDAMENTAL REQUIREMENTS OF PROCEDURAL DUE PROCESS

The fundamental requirement of procedural due process in quasi-judicial hearings is notice and hearing, that is, the opportunity to be heard. “Notice and hearing are necessary to comply with due process in an administrative proceeding . . .” *Korn v. Ohio State Medical Bd.* (1988), 61 Ohio App.3d 677, 684.

At a minimum, procedural due process of law requires that the person being heard receive notice of what is expected of them and an opportunity to be heard. *Shumaker v. Ohio Dept. of Human Resources* (1996), 117 Ohio App.3d 730.

This same principal was stated in *Wright v. Bayowski* (7th Dist. Ct. App., 1957), 78 Ohio Law Abs. 321:

. . . *The inexorable safeguard with the due process clause assures in the exercise of a judicial or quasi-judicial power is that the trier of fact shall be an*

impartial tribunal legally constituted to determine the right involved; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedures were observed. (Emphasis added).

These principles were restated in *Broadway Video v. Cleveland Bd. Of Zoning Appeals* (8th App. Dist. Case No. 71184, June 12, 1997), unreported, 1997 Ohio App. LEXIS 2552: “It is well established that an unbiased tribunal is a constitutional necessity in a quasi-judicial hearing, and a denial of the same is a denial of due process.”

Notice generally means that the person affected by the quasi-judicial action is given notice of his/her right to a hearing, including the reasons for the proposed action and the law or rule or statute directly involved, and a statement informing him that he/she is entitled to a hearing within a specified period of time. *Id.* In addition, if the requirements of R.C. §2506.03 are met, then procedural due process has been afforded the applicant in the hearing, that is, he/she has received a fair — and full — hearing.

“EVIDENCE” THAT THE PUBLIC BODY CAN RELY ON

While court decisions concerning the evidence to be considered and weighed by administrative bodies are not entirely consistent, it is clear that mere hearsay, unsworn and/or “opinion” testimony will not suffice to support the board’s decision. The following is a listing of representative cases and their holdings concerning the evidence to be considered by an administrative body in a quasi-judicial function.

In *Adelman Real Estate Co. v. Gabanic*, *supra*, the court held as follows:

The fact that *adjudicatory* hearings are to be open to the public does not result in their transformation into legislative public hearings with a corresponding

right to receive input of public comment at that time. *The ploy of swearing in the members of the public does not alter the fact that the bulk of these witnesses are merely offering their subjective and speculative comments and unsubstantiated opinions. Such testimony cannot rise to a level of the reliable, probative, and substantial evidence required under Kisil and Dudukovich unless there are facts included as part of those opinions.*

Further, cross-examination is intended to be a vital part of those adjudicatory hearings. It would appear that only appellant's witnesses were subjected to any type of cross-examination, and even that would be a rather loose use of the term because such questioning was not conducted by the prosecutor; instead it was done directly by the "witnesses" who were opposed to the request. (emphasis added).

Id. at 694.

IV. ADMINISTRATIVE APPEALS OF MUNICIPAL DECISIONS TO COURT

Ohio Revised Code §2506.01 governs appeals from decisions of any agency of any political subdivision, including municipalities, and reads:

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code, except as modified by this chapter.

The appeal provided in this chapter is in addition to any other remedy of appeal provided by law.

A "final order, adjudication or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

The legal principles related to administrative appeals from municipal boards and commissions are:

1. 30 days to appeal final decision of local boards in Ohio Rev. Code §§ 2505.03 and 2505.04; Ohio App. Rule 4(A). Otherwise, administrative *res judicata* may apply. *Grava, supra*; see *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260. (Exception for changed circumstances).
2. Notice of appeal and praecipe must be filed with the local administrative board within 30 days of the final decision. Ohio Rev. Code §§2505.04 and 2506.02; *Guysinger v. Chillicothe Bd. of Zoning Appeals* (Ross Cty. 1990), 66 Ohio App.3d 353; *Hanson v. Shaker Heights* (Cuy. Cty. 2003), 152 Ohio App.3d 1 (the appellant's service of a copy of a notice of appeal which was filed with the court upon a local board is sufficient to perfect the appeal); *Voss v. Franklin Cty. BZA* (Franklin), 2008 Ohio App. LEXIS 5772 and *Jura v. Hudson* (Summit Cty.) 2004 Ohio App. LEXIS 6269(service of the notice of appeal with a summons by the court upon the administrative body is not sufficient to perfect the appeal); *Hagan v. Marlboro Twp. Bd. of Zoning Appeals* (Jan. 29, 1996), Stark App. No. 95 CA 0086, unreported (Notice of appeal need not be filed with court within 30 days).
3. A local zoning board has no jurisdiction to rehear or modify its decision after the 30-day appeal time has expired, unless there exist changed circumstances of a material and relevant nature. *E.g., State, ex rel. Borsuk v. Cleveland* (1972), 28 Ohio St.2d 224 and *Set Products, Inc., supra*.
4. If a stay of construction pursuant to a variance is not obtained from the court, and construction commences, the appeal of any grant of a variance or other zoning permit may be rendered moot. *Gajewski v. BZA* (Cuyahoga Cty.), 2008 Ohio App. LEXIS 4446; *Smola v. Legeza* (Ashtabula Cty.), 2005 Ohio App. LEXIS 6353.
5. Appellant's right to present additional evidence to the court beyond evidence in the administrative board's record is governed by the strict application of standards in Ohio Rev. Code §2506.03 -- i.e., one of the following applies:
 - (a) the transcript does not contain a report of all evidence admitted or proffered by the appellant;
 - (b) The appellant was not permitted to appear and be heard in person, or by his attorney, in opposition to the final order, adjudication, or decision appealed from, and to do any of the following:
 - (i) present his position, arguments, and contentions;
 - (ii) offer and examine witnesses and present evidence in support;
 - (iii) cross-examine witnesses purporting to refute his position, arguments, and contentions;

- (iv) offer evidence to refute evidence and testimony offered in opposition to his position, arguments, and contentions;
 - (v) proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.
- (c) the testimony adduced was not given under oath;
 - (d) the appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body;
 - (e) the officer or body failed to file with the transcript, conclusions of fact supporting the final order, adjudication, or decision appealed from. (A failure of the board to make conclusions of fact or findings to support its decision may lead the court to reverse the decision remand the case to the board for findings. *Kubbs v. BZA of City of Pataskala* (10/19/07), Licking Cty., 2007 Ohio App. LEXIS 5120.)

However, an appellant must object to certain of the above deficiencies before the administrative body in order not to waive them at the trial court level.

An appellate court held that the local government has the right to move to present additional evidence under Ohio Rev. Code § 2506.03. *E.g., Route 20 Bowling Alley, Inc. v. City of Mentor* (Dec. 26, 1995), Lake App. No. 94-L-141, *unreported*.

6. Neighboring property owners have standing as parties in Ohio Rev. Code § 2506 appeals if they appeared at the administrative hearing and testified in opposition to an application. *Roper v. Bd. of Zoning Apps. of Richfield Twp.* (1962), 173 Ohio St. 168. *In Alihassan v. Alliance Bd. of Zoning Appeals* (12/18/00), 2000 Ohio App. LEXIS 6024, the Stark County Court of Appeals held that a neighboring owner may have standing to appeal under Ohio Rev. Code § 2506 where it did not appear before the local administrative board due to inadequate notice of the nature of the variance being requested. Injunctive relief is also available through Ohio Rev. Code § 713.13 but this remedy may be precluded if the person bringing the action under § 713.13 failed to appeal on administrative ruling pursuant to R.C. § 2506.01, *et seq. Murray Energy Corp. v. City of Pepper Pike* (Cuyahoga), 2008 Ohio App. LEXIS 2364. *See, Guttentag v. Etna Twp. BZA* (Licking), 2008 Ohio App. LEXIS 2232 (no standing by NIMBY because he did not contest the zoning permit or own land contiguous to the subject property).
7. However, it has been consistently held by courts of appeals in Ohio that neither a nonprofit corporation nor an unincorporated association may pursuant a R.C. 2506 appeal because it is not "within that class of persons whose rights have been directly

affected by the administrative decision." *See, Noe Bixby Road Neighbors v. Columbus City Council*, 150 Ohio App.3d 305 (November 26, 2002), 10th Appellate District; *Women of the Old West End, Inc., et al. v. City of Toledo*, (6th Appellate District, Lucas County), 1998 Ohio App.LEXIS 2394; *Brady Area Residents Association, et al. v. Franklin Township Zoning Board of Appeals, et al.* (11th Appellate District, Portage County), 1992 Ohio App.LEXIS 6216; *Northern Woods Civil Association, et al. v. City of Columbus Graphics Commission, et al.*, 31 Ohio App.3d 46 (1986, 10th Appellate District, Franklin County). This statement assumes the nonprofit corporation is not an owner or lessee of property that may abut or be in the immediate vicinity of the subject property. This legal principle is based on R.C. Chapter 2506 expressly limiting the availability of an appeal thereunder to those whose rights, duties, privileges, benefits or legal relationships have been determined by the decision. *See, In re: Appeal of Bass Lake Community, Inc.* (1983), 5 Ohio St.3d 141, 144. The classic example of such groups not having standing to appeal are homeowners associations contesting a particular landowner's land use approval (and the group does not own contiguous property) and public interest groups contesting approvals by local administrative boards, even when a contiguous property owner may be a member of the group.

8. A charter municipality may have standing to contest the decision of its own BZA *only* where its charter provides for such an appeal. *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24. Townships cannot appeal.
9. Common pleas court standard of review: If there exists a "*preponderance of substantial, reliable, and probative evidence on the whole record*" before the administrative board to support the local board's decision, it will be upheld. Ohio Rev. Code §2506.04; *Dudukovich v. Housing Authority* (1979), 58 Ohio St.2d 202. Board's decision accorded a presumption of validity. *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298.

"Direct evidence" is required and not subjective and speculative comments or unsubstantiated public opinion. *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals* (1993), 66 Ohio St.3d 452; *Adelman Real Estate Co. v. Gabanic* (Geauga 1996), 109 Ohio App.3d 689. Oral arguments at hearings are not evidence upon which to base a board decision. *Kohrman v. Cincinnati Zoning Board* (Hamilton Cty. 2005), 165 Ohio App.3d 401.
10. If the local board's decision precludes any development of the property, constitutional claims may be raised by the property owner in a Ohio Rev. Code § 2506 appeal which must be tried de novo by the court. *SMC, Inc. v. Laudi* (Cuyahoga 1975), 44 Ohio App.2d 325; *Brown v. Painesville Twp. BZA* (Lake Cty.), 2005 Ohio App. LEXIS 5062. *See, Haisley v. Mercer County Bd. of Zoning App.* (Mercer Cty.), 2007 Ohio App. LEXIS 5304 (Case remanded by appellate court to trial court to develop a record with burden on property owner to prove unconstitutionality of ordinance's application.)

11. A trial court or appellate court has the authority to remand a variance case back to the local board when there are procedural irregularities or a transcript of proceedings is not made by the local board. See *Schellhardt v. Mercer County BZA* (Mercer Cty.), 2008 Ohio App. LEXIS 1825.

V. CONTACT LAW

Municipal Requirements to Competitively Bid

- A. Competitive Bidding is a Legislative Requirement. “[A] public entity is not required to engage in competitive bidding in the absence of legislation requiring it.” *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Management Dist.*, 73 Ohio St. 3d 590, 601 (1995).
- B. Purpose. The purpose of competitive bidding under either statute or municipal charter is to provide for open and honest competition in bidding for public contracts and to save the public and bidders from the harm of favoritism and fraud. *Cedar Bay Constr. v. City of Fremont*, 50 Ohio St. 3d 19, 21 (1990).
 1. Public Policy. The issue goes beyond the specific merits of each bid. The real issue is public policy and public perception. “No amount of post-bidding explanation regarding the harmlessness of deviation will cure the appearance of some sort of impropriety.” *Rien Constr. Co. v. Trumball Cty.*, 138 Ohio App. 3d 622, 630 (Trumball Cty., 2000).
- C. Charter Municipalities
 1. A charter municipality, in the exercise of its powers of local self-government under the Ohio Constitution may, pursuant to its charter enact a bidding process that differs from the bidding process contained in the Ohio Revised Code. *Greater Cincinnati Plumbing Contractors Assoc. v. City of Blue Ash*, 106 Ohio App. 3d. 608, 613-14 (Hamilton Cty., 1995) (design-build bidding process conformed with the city’s broad charter provisions – “Council shall authorize acceptance of the bid made by the responsible bidder who in council’s judgment offers the best and most responsive proposal to the City, considering quality, service, performance, record, and price”).
 2. Express charter authorization is necessary to enable municipalities to adopt ordinances or administrative rules that will prevail over statutory provisions. *State, ex rel. Lightfield v. Village of Indian Hill*, 69 Ohio St. 3d. 441, at syllabus (1994) (general charter statements about promotion of village employees was insufficient to prevail over statutory requirements).
 3. The reservation of powers in a charter is sufficient to enact an ordinance at odds with the Ohio Revised Code. *State, ex rel Bednar v. City of North Canton*, 69 Ohio St. 3d 278, 281 (1994).

4. Decision to restrict bidding for public works projects to aggregate bids is a matter of local self-government. *Nat'l Elec. Contractors Assoc. v. City of Mentor*, 108 Ohio App. 3d 373, 378 (Lake Cty., 1995) (Where charter required competitive bidding pursuant to R.C. 735.05, but also provided that council could supersede the charter provisions by ordinance, council was not bound by R.C. 153.50 and 153.51, but only after ordinance allowing aggregate bidding had been passed).
5. State law applies when charter and ordinances are silent. *Great Plains Exploration v. City of Willoughby*, 2006 Ohio 7009, P31 (Lake Cty., 2006) (charter had reserved city's home rule power to authorize council to supersede state law in areas of competitive bidding, but resolution authorizing mayor to enter into lease was not enacted to address competitive bidding and advertising requirements for the lease of city owned real estate and was insufficient to override requirements of R.C. 721.03).
6. A charter municipality, in exercise of powers of local self-government may enact retainage provisions for a contract for improvements to municipal property that differ from the retainage provision of R.C. 153.13. *Dies Elec. Co. v. City of Akron*, 62 Ohio St. 2d 322, 327 (1980)

D. Municipal Statutory Requirements

1. Contracts by Director of Public Service. R.C. 735.05. Director may make any contract, purchase supplies or material or provide labor (other than compensation of persons employed by the department) for any work under the supervision of department of public service. If the amount exceeds \$25,000
 - a. it must be authorized by council,
 - b. competitively bid, and
 - c. awarded to the lowest and best bidder.
2. Contracts by Village Legislative Authority or Administrator.
 - a. Village Council. R.C. 731.14. All contracts (other than compensation for persons employed by the village) in an amount that exceeds \$25,000 shall be competitively bid and awarded to the lowest and best bidder.
 - b. Village Administrator. R.C 731.141. Village administrator may make any contract, purchase supplies or material or provide labor (other than compensation for persons employed by the Village) for any work under the administrator' supervision. If the amount exceeds \$25,000
 - i. Authorized by council,

- ii. It must be competitively bid, and
 - iii. awarded to lowest and best bidder.

- 3. Sale or lease of municipal real estate. R.C. 721.03. Contract for the sale or lease of real estate belonging to a municipality must be authorized by a 2/3 vote of council and by board or officer having supervision or management of the real estate. It must be competitively bid and awarded to highest bidder. (Again, a municipality exercising authority pursuant to a reservation of powers under its charter may avoid competitive bidding in this situation by ordinance passed pursuant to such reservation of powers. *State ex rel. Leach v. Redick* (1959), 168 Ohio St. 543; *Babin v. Ashland* (1953), 160 Ohio St. 328; *Hugger v. Ironton* (1947), 83 Ohio App. 21; *see also, Brady v. Carlson* (1983), 9 Ohio App.3d 24; *Green v. Thomas* (1930), 37 Ohio App. 489; and *Cleveland v. Public Library Bd.* (1916), 94 Ohio St. 311; (all involving the exchange of public property.)

- 4. Contract for construction, reconstruction, widening, resurfacing or repair of a street or other public way. R.C. 723.52. Where the total estimated cost of any such work exceeds \$30,000, the municipality is required to invite and receive competitive bids for furnishing all labor, materials and equipment and doing the work construction, reconstruction, widening, resurfacing or repair after newspaper advertisement as provided by law. The municipality shall consider and may reject all bids. If all bids are rejected the work may be done in compliance with the plans and specification upon which the bids were based. It is unlawful to divide a street or connecting streets into separate sections for the purpose of avoiding competitive bidding.

- 5. Buildings and Supplies for Police Stations and Fire Departments. R.C. 737.03. Contracts and expenditures of money for acquiring land for building or repairing police and fire facilities and for the purchase of equipment and supplies are subject to R. C. 735.05 bidding requirements.

- 6. Department of purchase, construction and repair. R.C. 715.18. Any contract for purchase, construction, alteration or repair done by a municipal department of purchase, construction and repair, is subject to R.C. 735.05 competitive bidding requirements if the cost exceeds \$10,000.

- 7. Lease-Purchase Plans. R.C. 715.011. A municipality may lease for a period not to exceed 40 years pursuant to a contract for construction under a lease-purchase plan, buildings structures and other improvements for any authorized municipal purpose. Council must competitively bid the lease and award it to the lowest and best bidder.

- 8. Purchase of Services or Supplies via Reverse Auction on the Internet. R.C. 9.314. A political subdivision may purchase services or supplies by “reverse auction” if it determines that the process is advantageous to it. The reverse

auction procedure will satisfy any requirements that the political subdivision otherwise competitively bid contracts for those services or supplies.

- a. A “reverse auction” means a purchasing process in which offerors submit proposals in competing to sell services or supplies in an open environment via the internet.
- b. A political subdivision shall solicit proposals through a request for proposals, which shall state the relative importance of price and other evaluation factors. The political subdivision shall provide notice in accordance with rules that it adopts.
- c. To ensure understanding of and responsiveness to requirements, the political subdivision may conduct discussions with responsible offerors who submit proposals determined to be reasonably likely of being selected for award. The political subdivision shall treat offerors fairly and equally with respect to opportunities for discussing any clarification, correction or revision of its proposals.
- d. A political subdivision may award a contract to the offeror whose proposal it determines to be the most advantageous to it, taking into consideration factors such as price and the evaluation criteria set forth in its request for proposals.

Exceptions to Competitive Bidding

A. Personal Services.

1. Contracts for personal services are a well recognized exception to competitive bidding. *State, ex rel. Doria v. Ferguson*, 145 Ohio St 12, at syllabus ¶ 2 (1945) (contract to furnish real property abstracts of title constituted professional services even though it did not require a legal opinion and, therefore, did not fall within the practice of law).
2. A personal services contract is one in which the offeree is vested with discretion to accomplish the assigned tasks because his or her skills, knowledge, experience and expertise are unique to the area and could not be performed by others not similarly qualified. As the ability to define the task and requests for specific conclusions expand, discretion to add input and knowledge to the outcome lessens. Where specific guidelines exist, the need for a personal service diminishes. *Yellow Cab of Cleveland v. Greater Cleveland Transit Auth.*, 72 Ohio App. 3d 558, 563 (Cuyahoga Cty., 1991).

B. Statutory Exceptions.

1. Department of Public Services Emergencies. R.C. 735.051. Competitive bidding not required where there is a real and present emergency arising in connection with the operation and maintenance of the department of public service, including all municipally owned utilities, the department of public safety, or any other department, division, commission, bureau, or board of the

municipality, for work to be done or for the purchase of supplies or materials. Requires 2/3 vote of council.

2. Purchase of Used Equipment. R.C. 735.052. Competitive bidding is not required when a municipality purchases used equipment or supplies at an auction open to the public, or at a sale at which used equipment or supplies are to be sold by submitting written bids to the vendor, if the public is invited to bid or if there is more than one bid. Must be authorized by ordinance.
3. Regional Planning Commission. R.C. 713.23(D). Contracts for the purchase of supplies, services, materials and equipment.
4. Department of Administrative Services. R.C. 125.04. Participation in ODAS contracts for supplies and services.
5. Department of Transportation. R.C. 5513.01. Participation in ODOT contracts for the purchase of machinery, materials and supplies.
6. Purchase of Supplies and Commodities. R.C. 9.25. Political subdivision may purchase surplus commodities from the federal government, either directly or from the state superintendent of purchases and printing or the director of transportation without competitive bidding, when personal property can be obtained at prices less than would be obtained by competitive bidding.
7. Contracts for Utility Services. R.C. 9.30 and R.C. 735.09. Municipality may acquire the service, product, or commodity of a public utility without competitive bidding.
8. Municipal Utility. R.C. 735.08. With legislative authority, municipal utility may purchase power without competitive bidding.
9. Qualified Nonprofit. R.C. 125.60 through R.C. 125.6012. Contracts for equipment and services required to be purchased by a village from a qualified nonprofit (community rehabilitation program) may avoid competitive bidding.
10. Urban Renewal. R.C. 721.28. Transfer, lease, conveyance of real property for urban redevelopment or urban renewal, may be done without competitive bidding.
11. Joint Purchasing Authority. R.C. 9.48. A municipality may participate in contracts without competitive bidding with:

- a. one or more political subdivisions for the acquisition of equipment, materials, supplies or services if the contract in which it is participating was competitively bid;
- b. a joint purchasing program operated by or through a national or state municipal association if the contract in which it is participating was competitively bid;
- c. the federal government.

Advertisement of Bids

- A. Contracts by the director of public service or village administrator that are subject to competitive bidding requirements must be advertised in a newspaper of general circulation in the municipality once a week for not less than 2 nor more than 4 consecutive weeks. R.C. 735.05 (director of public service) and R.C. 731.141 (village administrator).
- B. Contracts by the village legislative authority that are subject to competitive bidding requirements must be advertised in a newspaper of general circulation in the municipality at least once a week for at least 2 consecutive weeks. Advertisement may also be made by trade papers or other publications, and by electronic means, including the village’s website. If by electronic means, the second newspaper notice may be eliminated if the first notice:
 - 1. is at least 2 weeks prior to bid opening, and
 - 2. includes a statement that the notice is on the website, with the website address and instructions on how to access the website. (Effective 9/12/08).
- C. Contacts for the sale or lease of municipal property that are subject to competitive bidding must be advertised in a newspaper of general circulation within the municipality once a week for five consecutive weeks. R.C. 721.03.
- D. Contracts for lease-purchase must be advertised once each week for 4 consecutive weeks, the last publication to be at least 8 days before the day the bids are opened. R.C. 715.011.

Bid Requirements and Specifications

- A. Identity of Interested Persons. Each bid under R.C. 731.14, R.C. 731.141 and R.C. 735.06 must contain the full name of each person interested in the bid. R.C. 731.15 and 735.06.
- B. Bid Guaranty to be Filed with Bid.

1. Contracts for services or supplying materials for the construction, demolition, alteration, repair or reconstruction of an improvement must meet the requirements of R.C. 153.54: (R.C. 715.011, R.C. 731.15 and R.C. 735.06)
 - a. Bond that indemnifies the municipality and is conditioned to provide that if the bid is accepted the bidder will enter into a contract in accordance with the bid, plans, detail, specification and bills of material. If the bidder fails to enter into the contract for any reason other than authorized by R.C. 9.31, and
 - i. if the municipality determines to award the contract to the next lowest bidder, the bidder and surety are liable for the difference between the bid and the next lowest bid or a penal sum not to exceed 10% of the amount of the bond, whichever is less; or
 - ii. if the municipality determines to resubmit the project for bidding, the bidder and the surety are liable to the municipality for a penal sum not to exceed 10% of the amount of the bid or the costs of resubmission, including printing new contract documents, advertising, and printing and mailing notice to prospective bidders, whichever is less.
 - b. Certified check, cashier's check or letter of credit, conditioned to provide that if the bid is accepted the bidder will enter into a contract in accordance with the bid, plans, detail, specification and bills of material.
 - c. If the bidder fails to enter into the contract for any reason other than authorized by R.C. 9.31, and
 - i. if the municipality determines to award the contract to the next lowest bidder, the bidder is liable for the difference between the bid and the next lowest bid or a penal sum not to exceed 10% of the amount of the bid, whichever is less; or
 - ii. if the municipality determines to resubmit the project for bidding, the bidder is liable to the municipality for a penal sum no to exceed 10% of the amount of the bid or the costs of resubmission, including printing new contract documents, advertising, and printing and mailing notice to prospective bidders, whichever is less.
 - d. If awarded the contract, the bidder shall file a bond for the amount of the contract to indemnify the municipality against all damage for failure to perform the contract as specified and to pay all lawful claims of subcontractors, material suppliers and laborers.

- e. Bid guarantees shall be returned to all unsuccessful bidders immediately after the contract is executed.
 - f. When the municipality awards the contract it must simultaneously notify the surety on the contractor's bond and the agent of the surety who executed the bond on behalf of the surety of the award in writing. R.C. 9.32.
 - g. A bid shall be deemed nonresponsive and rejected if the bidder submits a bid bond executed by a surety not licensed by the superintendent of insurance to execute such a bond in the state. All bonds shall state on their face that the surety is authorized to execute bonds in the state. R.C. 9.311.
 - h. Municipality may not require that any bid bond required under a contract be furnished by or acquired from a particular surety or insurance company or a particular agent or broker. R.C. 9.315.
 - i. See R.C. 153.57 and R.C. 153.571 for Forms of Bond to be used.
2. For any other contract authorized by R.C. 731.14, R.C. 731.141 and R.C. 735.05, a bid must include a bond, certified check, cashier's check or money order on a solvent bank or savings and loan, sufficient to ensure that the bidder will enter into a contract if the bid is accepted, and that performance of the contract is properly secured. R.C. 731.15 and R.C. 735.06.

C. Separate Bids For Labor and Materials.

- 1. If the bid for work includes both labor and material, the price of each must be separately stated. R.C. 731.14, R.C. 731.141 and R.C. 735.06.
- 2. R.C. 153.50 through R.C. 153.52. For contracts greater than \$50,000 for the erection, repair, alteration or rebuilding of a public building, institution, bridge, culvert or improvement subject to competitive bidding shall require separate and distinct bids for furnishing or doing work for:
 - a. plumbing and gas fitting;
 - b. steam and hot-water heating, ventilating apparatus and steam-power plant;
 - c. electrical equipment.

A single aggregate bid or a contract for two or more branches of work can be awarded to the lowest and best bidder if the separate bids do not cover all the

work and materials required or the bids for the whole or for 2 or more kinds of work or materials are lower than the separate bids.

3. Exception: Neither the director of transportation or a political subdivision is required to solicit separate bids or award separate contracts for any branch of work in a contract for the construction or improvement of a road or highway funded in whole or in part by or through the department of transportation. R.C. 5525.011.

D. Bonus and Penalty. When a bonus is offered for completing the contract before a specific date, a prorated penalty in the same amount may be exacted for each day of delay beyond the specified date. R.C. 731.15 and R.C. 735.07.

E. Prevailing wage. R.C. 4115.03 – 4115.21.

1. Every public authority authorized to contract for the construction of a public improvement, before advertising for bids, shall have the Ohio Director of Commerce determine the prevailing rates of wages for mechanics and laborers of class of work involved in the public improvement in the locality where the work will be performed.
 - a. The schedule of wages shall be attached to and made a part of the specification for the work, and shall be printed on the bidding blanks.
 - b. A copy of the bidding blank shall be filed with the Director of Commerce before the contract is awarded.
2. “Construction” (4115.03) means either of the following:
 - a. any new construction of a public improvement, the total overall project cost of which is estimated to exceed \$50,000, as adjusted every 2 years since 1996 by the Director of Commerce.
 - b. any reconstruction, enlargement, alteration, repair, remodeling, renovation or painting of a public improvement which is estimated to exceed \$15,000, as adjusted every 2 years since 1996 by the Director of Commerce.
3. “Public improvement” includes all buildings, roads, streets, alleys, sewers, ditched, sewage disposal plants, waterworks and all other structures or works constructed by a public authority, or by any person pursuant to a contract with a public authority. See also *U.S. Corrections Corp. v. Ohio Dept. Indus. Rel.*, 73 Ohio St. 3d 210, 218 (1995). (A “public improvement” is any project constructed by a public authority or pursuant to a contract with a public authority).

- F. Project Specifications. Bid Invitations shall include architectural or engineering plans that include the reasonably definite required elements of the project. *Danis Clarkco Landfill*, 73 Ohio St. 3d at 600. “A particular or detailed statement . . . of the various elements, material, dimension, etc. involved”. *Id.* quoting Black’s Law Dictionary (6 Ed.1990). Competitive bidding is based on the premise that submitted proposals can be judged as “apples against apples”. *Id.* at 601.
- G. Lease-Purchase Plans. R.C. 715.011.
1. The clerk of council shall have on file the basic plans, specifications, bills of materials and estimates of cost with sufficient detail to provide bidders with all needed information or shall file the following plans, details, bills of materials and specifications:
 - a. full and accurate plans, suitable for the use of mechanics and other builders in the construction, improvement, addition, alteration or installation;
 - b. details to scale and full sized, drawn and represented to be easily understood;
 - c. accurate bills showing the exact quantity of different kinds of material necessary to the construction;
 - d. definite and complete specification of the work to be performed, together with directions that will enable a competent mechanic or other builder to carry them out and provide bidders with all needed information;
 - e. a full and accurate estimate of each item of expense and of the aggregate cost.
 2. Bids shall contain the terms on which the builder proposes to lease the building, structure or other improvement. The form of bid approved by council shall be used and a bid shall not be considered if the form is changed or altered.
 3. No lease agreement shall be entered into until the bureau of workers’ compensation has certified that the bidder has complied with R.C. Chapter 4123, and the secretary of state has certified that the bidder is authorized to do business in the state and the director of law has certified his or her approval.
 4. Council shall investigate the bids received within 30 days after bids are received and may award the contract to the lowest and best bid within 10 days of completing the investigation.

H. Proceedings For Opening of Bids.

1. Bids are to be opened publicly and read aloud by the appropriate official at the time, date and location specified in notice. R.C. 715.011, R.C. 731.14, R.C. 731.141 and R.C. 735.06.
2. City Auditor or his or her chief deputy must attend and assist at bid opening and inspect bids, when contracts of director of public service or director of public safety require competitive bidding. R.C. 733.18.
3. Extension of Bid Opening. Bid opening may be extended to a later date provided that written or oral notice of the change is given to all persons who have received or requested specifications no later than 96 hours prior to the original time and date fixed for the opening. R.C. 731.14, R.C. 731.141 and R.C. 735.06

I. Withdrawal of Bid Made in Error. R.C. 9.31.

1. A bidder for a contract for the construction, demolition, alteration, repair or reconstruction of any public building, structure, highway or other improvement may withdraw a bid from consideration if:
 - a. the bid was substantially lower than other bids; and
 - b. the bid was submitted in good faith; and
 - c. the reason for the bid price being substantially lower was a clerical mistake (not a mistake in judgment) and was actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor or material made directly in compilation of the bid.
2. Notice of withdrawal of the bid must be made in writing and filed with the contracting authority within 2 business days after the conclusion of the bid opening procedure.
3. No bid may be withdrawn if the result is the award of the contract on another bid of the same bidder.
4. No bidder who has withdrawn a bid may supply any material or labor or perform any subcontract or other work agreement for the bidder to whom the contract is awarded or otherwise directly or indirectly benefit from the performance of the project without the approval of the contracting authority.

5. The contracting authority may award the contract to the next lowest bidder or reject all bids and resubmit the project for rebidding, in which case the withdrawing bidder shall pay the costs of resubmission.
6. The contracting authority may hold a hearing to contest a bidder's right to withdraw a bid.

Bid Award

- A. Lowest and Best Bid. A requirement to award a bid to the "lowest and best bid" does not require acceptance of the bid with the lowest dollar amount, but gives the municipality discretion to determine which bidder under all the circumstances is the lowest and best bidder for the work in question. *Cedar Bay Constr.*, 50 Ohio St 3d at 21. Public agencies are given considerable latitude and allowed to engage in a qualitative analysis of which bid is better. *Rien Constr. Co.*, 138 Ohio App. 3d at 629. Discretion is vested in the municipal authorities and courts will not interfere in the exercise of that discretion absent an abuse of discretion. *Cedar Bay Constr.*, 50 Ohio St 3d at 22.
 1. "Abuse of discretion" connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude. *Id.*
 - a. Modification of requirements without notice is an abuse of discretion. *Dayton, ex rel. Scandrick v. McGee*, 67 Ohio St. 2d 356, 359 (1989) (unannounced residency criterion in determining which bid was the lowest and best was an abuse of discretion).
 - b. A municipality's decision not to waive minor defects in a bid due to the bidder's inattention to detail and failure to attend pre-bid meeting and read the entire bidding manual was not an abuse of discretion. *Miami Valley Contractors, Inc. v. Village of Oak Hill*, 108 Ohio App. 3d 745, 751 (Jackson Cty., 1996)
- B. Responsive and Reasonable. R.C. 9.312. A political subdivision required by law to award contracts by competitive bidding may, by ordinance or resolution, adopt a policy requiring that competitively bid contracts be awarded to the lowest responsive and responsible bidder.
 1. A bid is responsive if the bid responds to bid specifications in all material respects and contains no irregularities or deviations from the specifications that would affect the bid amount or otherwise give the bidder an advantage.
 2. In determining if a bidder is responsible, the political subdivision shall consider factors that include the bidder's experience, the bidder's financial condition, conduct and performance on previous contract, facilities management skills and ability to execute the contract properly.

- a. Submission of a bind guaranty pursuant to R.C. 153.54 is evidence of financial responsibility but a political subdivision may request additional financial information for review from an apparent low bidder after it opens all submitted bids.
 - b. If the political subdivision awards the contract to a bidder other than the lowest bidder or bidders, it shall
 - i. Notify the bidder of the reason that it was found not to be responsive and responsible in writing by certified mail
 - ii. Meet with the unsuccessful low bidder, if that bidder submits a written protest within 5 days of being notified of the reasons it was not awarded the contract. The contract shall not be awarded until the political subdivision either affirms or reverses its original determination.
- C. Nonresponsive Bid. A bidder's failure to comply with the bid specifications is a nonresponsive bid. *Miami Valley Contractors*, 108 Ohio App. 3d at 749.
- D. Clarification of Bid. Municipality may seek clarification of a bid where the bid contains minor irregularities and legal notice for advertising bids and contract documents reserved right to waive irregularities and conduct any investigation deemed necessary to establish the responsibility, qualification and financial ability of the bidders and others that would do the work required of the bid specifications. *Cedar Bay Constr.*, 50 Ohio St. 3d at 22-23.
 - 1. Clarification letter sent after the opening of bids to explain that higher price was due to mistaken inclusion of janitorial services was substantial and material deviation which destroyed the competitive nature of the bidding process. *Rien Constr. Co.*, 138 Ohio App. 3d at 629-30.
- E. Waiver of Technical or Minor Defects. Municipalities may waive a minor or technical bid deficiency and classify the bid as responsive, but only if the bidder receives no competitive advantage from the deficiency. *Miami Valley Contractors*, 108 Ohio App. 3d at 751 (failure to provide compliance with Minority and Women's Business Enterprise was minor and could have been waived but failure to waive was not an abuse of discretion); *Cementech v. City of Fairlawn*, 2003 Ohio 2632 (Summit Cty., 2003) (Award of contract to bidder whose bid failed to include duplicates of 2 bid pages and where the affidavit was witnessed but not signed by notary was not an abuse of discretion where city reserved right to waive technical bid defects). See related case *Cementech v. City of Fairlawn*, 203 Ohio 3145 (Summit Cty., 2003), on remand, 160 Ohio App.3d 450, reversed 109 Ohio St.3d 475 (2006).
- F. Material and Substantial Defect. It is contrary to the purpose of competitive bidding to allow one bidder to offer benefits and advantages beyond those required by the

specification. *Rien Constr. Co.*, 138 Ohio App. 3d at 629-30 (clarification letter sent after the opening of bids to explain that higher price was due to mistaken inclusion of janitorial services was substantial and material deviation which destroyed the competitive nature of the bidding process). See also, *Smith & Johnson Constr. Co. v. Ohio Dept. of Transportation*, 134 Ohio App.3d 521, 528 (Franklin Cty., 1993) (bid “error” of leaving the clearing and grubbing portion of the proposal blank was not a substantial error because it constituted only 2.5% of the total project cost); *EFA Assoc. v. Dept. of Admin. Services*, 2002 Ohio 2421 (Franklin Cty., 2002) (contractor was not entitled to unilaterally change the rate of payment specified in the bid specifications).

- G. Rejection of Bids. The municipality may reject any and all bids. R.C. 715.011, R.C. 731.15. and R.C. 735.06.
- H. Collusion. A municipality shall reject all bids when there is reason to believe there is collusion or combination among bidders. R.C. 715.011, R.C. 731.15 and R.C. 735.06.

Relief

- A. Monetary Damages. Where a municipality violates competitive bidding laws in awarding a competitively bid project, the rejected bidder is not entitled to recover lost profits as damages. *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St. 3d 475, at syllabus (2006). The purposes of competitive bidding clearly militate against allowing lost profit damages to rejected bidders. Although allowing lost profit damages would protect bidders from corrupt practices, it would also harm taxpayers who would be forced to pay the extra cost of the rejected bidder’s lost profits. *Id.* at 477. See also, *Mechanical Contractors Assoc. of Cincinnati, v. Univ. of Cincinnati*, 141 Ohio App. 3d 333, 343 (Franklin Cty., 2001); *Metzger-Gleisinger Mechanical, Inc. v. Mansfield City School Dist.*, 2005 Ohio 2727, *P14 (Richland Cty., 2005) (contractor was not entitled to recover monetary damages because it had failed mitigate damages by immediately seeking injunctive relief).
- B. Claim Procedure. Contractor must strictly follow claim procedure in contract. *Dugan & Meyers Construction Co., Inc. v. Ohio Dept. of Admin. Services, et al.*, 113 Ohio St.3d 226 (2007).
- C. Injunctive Relief. A rejected bidder is therefore limited to injunctive relief. *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St. 3d at 477. In the competitive bidding context, injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public and the bidders. The injunctive process and the resulting delays also serve as a deterrent to a municipality’s violation of competitive bidding laws. *Id.*
- D. Punitive Damages. Ohio has long prohibited the assessment of punitive damages against a municipality, except when specifically permitted by statute. *Id.*

Technical Requirements for Validity of Municipal Contracts

A. Fiscal Officer's Certificate. ORC 5705.41 reads in pertinent part:

No subdivision or taxing unit shall:

* * *

(D)(1)* * *make any contract or give any order involving the expenditure of money *unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances.* This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. If no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any encumbrances, such taxing authority may authorize the drawing of a warrant in payment of amounts due upon such contract, but such resolution or ordinance shall be passed within thirty days after the taxing authority receives such certificate* * *. (Emphasis added.)

Based on the foregoing, when a political subdivision in Ohio enters into a contract, there must be attached to the contract a certificate signed by the fiscal officer stating that the amount required to meet the local government's financial obligation under the contract has been appropriated and deposited into an appropriate fund, or is in the process of being collected and deposited into such a fund. Any contract made without the fiscal officer's certificate is deemed void. *See, Hawley v. City of Toledo* (Lucas Cty. 1934), 47 Ohio App. 246, 247 (finding contract entered into by city without fiscal officer's certificate to be "absolutely void and of no binding effect on the city."); *Pincelli v. Hoio Bridge Corp.* (Athens Cty. 1965), 1 Ohio App.2d 342 (finding trial court had power the permanently enjoin county officials from making payments for construction and repair of bridges where the county did not following the competitive bidding requirements and there was no fiscal officer certificate.) However, if the fiscal officer's certificate was not attached to a contract, the fiscal officer may issue a certificate after the contract has been executed stating that at the time the contract was executed and at the time the certificate was signed the amount required to meet the city's financial obligation under the contract had been appropriated and deposited in an appropriate fund or in the process of being collected. *See, Bower v. Village of Mt. Sterling*, Madison App. No. CA99-10-025, 2000 WL 485497 (acknowledging that a valid contract may be made and paid pursuant to R.C. 5705.41(D)(1) by two methods: at the time of execution or after execution.)

R.C. 5705.41(D)(3) states, in part, that the fiscal officer's certificate and the facts contained therein are binding upon the local government.

R.C. 5704.44 also provides in pertinent part:

When contracts or leases run beyond the termination of the fiscal year in which they are made, the fiscal officer of the taxing authority shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such fiscal year. The amount of the obligation under such contract or lease remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge.

Based on this provision, if the term of a contract will run beyond the current fiscal year, the fiscal officer's certificate must certify that the amount required to meet the local government's obligation under the contract in the current fiscal year has been appropriated. Any amount of the local government's obligation under the contract that is attributable to the local government's expenditures in the next fiscal year must be included in the local government's annual appropriations for the next year. *But see*, Ohio Attorney General Opinion No. 87-069 (finding that if a political subdivision enters into a continuing contract under which it cannot, in good faith, determine whether the obligation to make payment will take place in the current fiscal year or the ensuing fiscal year, the fiscal officer must certify the *entire* amount due under the contract as available during the fiscal year in which the contract is made.)

B. Legislative Authorization and Appropriation of Funds for Public Contract.

Most municipal charters provide that municipal funds may not be expended unless those funds have been first appropriated by Council. *Seven Hills*, supra, at 161. Most charters also authorize the mayor or city manager to sign a contract only after the contract has been approved by Council. *Shampton, et al. v. City of Springboro, et al.* (2003), 98 Ohio St.3d 457, P29.

In *Shampton*, the city manager was trying to negotiate a long-term lease with a company for the operation of a restaurant at the city's golf course. The parties reached a temporary lease agreement with the understanding that they would continue to attempt to negotiate a long-term lease. Council passed legislation authorizing the city manager to sign the temporary lease agreement. The parties never entered into a long-term lease. Due to a dispute between the parties, the restaurant owner sued the city claiming the city manager had the authority under the resolution to enter into a long-term lease. Interpreting the applicable charter provisions, the court concluded that the resolution only gave the city manager the authority to execute the temporary lease. If a long-term lease agreement had been achieved, which it was not, council would have needed to pass another resolution authorizing the city manager to enter into that agreement.

Based on the foregoing, in order to have a valid municipal contract requiring the expenditure of municipal funds, a municipal must approve the appropriation of the funds and must authorize the contract. The fiscal officer must then issue a certificate verifying that the money has been appropriated for the contract.

C. Role of City Director of Law/Village Solicitor. A city director of law or village solicitor is charged by ORC 705.11 and 733.51 with preparing all city contracts. Municipal charters and/or ordinances usually set forth the same duty. ORC 705.11 also requires a city director of law and a village solicitor to "indorse on each [contract] his approval of the form and correctness thereof" and that no municipal contract shall take effect until such approve is indorsed thereon.

D. Indemnification by Contract by Local Government. While the Ohio Constitution and the Ohio Revised Code do not expressly prohibit the use of indemnification clauses in public contracts, the Ohio Attorney General has opined that their use creates constitutional issues, specifically whether they create a debt on the part of the state or a political subdivision of the state (in violation of Ohio Const., Art. VIII §§1-3, 4 and Art. II §22) and/or constitute an extension of the state's or a political subdivision's credit in aid of private enterprise (in violation of Ohio Const., Art. VIII §§4&6).³

An indemnification clause commits a party to a financial obligation that is generally unknown at the time the contract is made. Under O.R.C. 5705.41, public entities and taxing units, including counties, municipal corporations, and school districts, are required to certify at the time a contract is made that the public entity has sufficient funds to pay an obligation under a contract. As a result, a municipal corporation cannot enter into a contract unless there are assurances that adequate funds are available to meet the public entity's obligations. This requirement cannot be met if an indemnification clause would permit liability of an unknown or undefined amount.⁴ A contract that provides for future payments without funds sufficient to make these payments creates indebtedness in violation of the Ohio Constitution and the Ohio Revised Code.

As a result, an "indemnification clause is valid and enforceable only if: (1) the contract specifies a maximum dollar amount for which the public entity is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1); and (2) the contract provides the public entity consideration sufficient to support the financial obligation that the public entity assumes under the indemnification clause."⁵

In addition to the foregoing **the presence of an open-ended indemnification clause may result in personal liability of an individual who makes or participates in making a public contract.**⁶

VI. OHIO'S SUNSHINE LAW

"One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached."

³ Ohio Atty. Gen. Op. No. 96-060.

⁴ OAG No. 99-049

⁵ OAG No. 05-007

⁶ OAG No. 05-007

White v. Clinton Cty. Bd. of Commrs. (1996), 76 Ohio St.3d 416.

A. Ohio’s Sunshine Law is comprised of the Open Meeting Law in R.C. Chapter 121 and the Public Records Law in R.C. Chapter 149.

B. Open Meeting Law.

1. Open to the public.

“All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.” R.C. 121.22(C)

“This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.” R.C. 121.22(A)

2. Public body.

Includes 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. R.C. 121.22(B)(1)

3. Meeting.

Any prearranged discussion of the public business of the public body by a majority of its members. R.C. 121.22(B)(2)

4. Notice.

“Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four hours’ advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

The rule shall provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meeting at which any specific type of public business is to be discussed. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed, stamped envelopes provided by the person.” R.C. 121.22(F)

5. Validity of action taken.

A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. R.C. 121.22(H)

6. Exceptions.

a. R.C. 121.22(D)

- A grand jury;
- An audit conference conducted by the auditor of state or independent certified public accountants with officials of the public office that is the subject of the audit;
- The adult parole authority when its hearings are conducted at a correctional institution for the sole purpose of interviewing inmates to determine parole or pardon;
- The organized crime investigations commission;
- Meetings of a child fatality review board;
- The state medical board when determining whether to suspend a certificate without a prior hearing;
- The board of nursing when determining whether to suspend a license or certificate without a prior hearing;
- The board of pharmacy when determining whether to suspend a license without a prior hearing;
- The state chiropractic board when determining whether to suspend a license without a hearing;
- The executive committee of the emergency response commission when determining whether to issue an enforcement order or request that a civil action, civil penalty action, or criminal action be brought;
- The controlling board, the development financing advisory council, the industrial technology and enterprise advisory council, the tax credit authority, or the minority development financing advisory board when considering certain information received confidentially. R.C. 121.22(E)

b. Executive sessions: R.C. 121.22(G)

A public body may hold an executive session only after a majority of a quorum of the public body determines, by roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of the following matters:

- Employment: Appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee or official, licensee, or regulated individual unless the individual requests a public hearing. The motion and vote to hold an executive session to discuss employment matters must specify that one or more of the foregoing purposes are the purposes for which the executive session is being held. A public body cannot hold an executive session to discuss the discipline of an elected official for conduct related to the performance of his or her official duties or the removal of an elected official from office.
- Property: To consider the purchase of property for public purposes, or for the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person with a personal, private interest adverse to the general public interest.

NOTE: The Ohio Attorney General has found that the word “property” means real and personal property. In OAG Opinion No. 88-003, the Ohio Attorney General found that the Public Employees Retirement Board may discuss in executive session the purchase or sale of tangible or intangible property including bonds, notes, stocks, shares, securities, and debt or equity interests.

- Court action: Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action.
- Collective bargaining: Preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees concerning the terms and conditions of their employment.
- Confidential by law. Matters required to be kept confidential by federal or state law.
- Security. Details regarding the security arrangements and emergency response protocols of a public body or a public

- Trade secrets. Discussion of trade secrets by a county hospital, joint township hospital or municipal hospital.

NOTE: The Ohio Supreme Court has interpreted municipal charter provisions requiring all council meetings to be open to the public and making no reference to executive sessions as precluding executive sessions held pursuant to a municipal ordinance or R.C. 121.22. *State ex rel. Inskip v. Staten* (1996), 74 Ohio St.3d 676; *Fenley v. Kyger* (1995), 72 Ohio St.3d 164; *State ex rel. Craft v. Schisler* (1988), 40 Ohio St.3d 149; *Fox v. Lakewood* (1988), 39 Ohio St.3d 19.

c. Private deliberations of administrative bodies:

In *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revisions*, 81 Ohio St.3d 58 (1998), the Ohio Supreme Court considered whether hearings of the Hamilton County Board of Revision were “meetings” within the provisions of Revised Code 121.22(c), the Open Meeting Law. The Ohio Supreme Court concluded that the Board of Revision’s meetings were quasi-judicial in nature and, therefore, in accordance with past Supreme Court precedent, were not subject to the Sunshine Law. The *TBC Westlake* case cited with approval, *Westerville v. Hahn* (1988), 52 Ohio App.3d 8 (hearings on annexation before Board of Commissioners); *Matheny v. Frontier Local Bd. of Edn.* (1980), 62 Ohio St.2d 362 (Board of Education disciplinary hearing); and *Zangerle v. Evatt* (1942), 139 Ohio St. 563 (Board of Tax Appeals hearings).

The Ohio Attorney General stated in 2002 Ohio Op. Atty. Gen. 35:

“The public hearings conducted by a township board of zoning appeals to consider the matters described in R.C. 519.14(A)-(C) [variances] in accordance with R.C. 519.15 are not “meetings” of the board for purposes of R.C. 121.22, but, rather, are quasi-judicial proceedings. While, pursuant to R.C. 519.15, such hearings are public hearings, R.C. 121.22 does not require a township board of zoning appeals to conduct its deliberations on such matters in meetings that are open to the public.”

7. Enforcement.

Any person may bring an action to enforce the open meeting law. The action must be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation, the court of common pleas will issue an injunction to compel the members of the public body to comply with the open meeting law. R.C. 121.22(I)(1)

If an injunction is issued, the court shall order the public body to pay the party that sought the injunction \$500 and to pay all court costs and reasonable attorney's fees. R.C. 121.22(I)(2)(a)

If an injunction is not issued and the court determines that the bringing of the action for an injunction was frivolous conduct, the court shall award the public body court costs and reasonable attorney's fees. R.C. 121.22(I)(2)(b)

If a member of the public body knowingly violates an injunction issued by the court, the member may be removed from office by a separate action brought in the court of common pleas by the prosecuting attorney.

8. More on public meetings.

The term "meeting" requires (1) a prearranged discussion, (2) a discussion of the public business of the public body, and (3) the presence at the discussion of a majority of the members of the public body. *State ex rel. Long v. Council of Cardington* (2001), 92 Ohio St.3d 54.

a. A pre-arranged discussion.

The first element in determining whether a meeting subject to R.C. 121.22 took place is whether the gathering of a majority of members of a public body was pre-arranged.

State ex rel. Schuette v. Liberty Twp Bd. of Trustees, Delaware App. No. 03-CAH-11064, 2004-Ohio-4431: the Board of Trustees conducted a private meeting with selected residents and business representatives to discuss the potential merger of the township with a city. Notice of the meeting was sent in the form of a letter only to the selected parties. The general public and the press were excluded and no public notice was issued by the Board. Based on these facts, the court concluded that the meeting was pre-arranged. *See also, Haverkos v. Northwest Local School Dist. Bd. of Edn., et al.*, Hamilton App. No. C-040578, C-040589, 2005-Ohio-3489 ("* * * [I]n [*Schuette*], the pre-arrangement was clear.")

Any advanced planning and means of notification prior to the time the gathering takes place is a pre-arranged discussion.

b. Discussion of public business.

The second question in determining whether a gathering of public officials constitutes a “meeting”, is whether the members of the public body engage in a discussion of public business. The question of what constitutes a “discussion of public business” is “fact-specific” and requires a determination of whether a discussion took place and whether that discussion involved public business.

(i) Public Business.

Ohio law fails to define the term “public business.”⁷

The word “public” is defined in Black’s Law Dictionary (6th Edition) as:

Pertaining to a state, nation, or whole community; proceeding from, *relating to, or affecting the whole body or people or an entire community*. Open to all; notorious. Common to all or many; general; open to common use. Belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community. (Emphasis added)

The word “business” is defined in Black’s Law Dictionary (6th Edition) as:

Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood.

⁷ *WDBJ Television, Inc. v. Roanoke Cty. Bd. of Supervisors* (1985), 4 Va. Cir. 349, 351, citing *Orange Cty. Publications v. Council of City of Newburgh* (1978), 60 A.D.2d 409 (“ * * * ‘officially transacting public business,’ when read in conjunction with the Open Meeting Law legislative declaration, *contemplates a broad view extending not only to the taking of an official vote but also to the peripheral discussions surrounding the vote.*” (emphasis added)); *see also Kantack v. Kreuer* (1968), 280 Minn. 232, 236-238 (“The term ‘public business’ as used in this statutory provision may well defy precise definition. We have found no authority that covers all situations. * * * The act of the sheriff or deputy in conducting the [foreclosure] sale is purely ministerial. He has no interest in the matter whatsoever, nor is the public in any way interested in the sale. *To be public business there must be some aspect of the business in which the public is interested.*” (Emphasis added)).

Enterprise in which person engaged shows willingness to invest time and capital on future outcome. That which habitually busies or occupies or engages the time, attention, labor, and effort of persons as *a principal serious concern or interest* or for livelihood or profit. (Emphasis added)

Based on the foregoing definitions, “public business” may be defined as a “principal serious concern or interest” “relating to, or affecting * * * an entire community.”

(ii) Discussion.

In determining whether a “discussion” has taken place by members of a public body, Ohio courts have established that:

- The intent of the Sunshine law is to require governmental bodies to deliberate public issues in public. *Moraine v. Bd. of Cty. Commrs. (1981), 67 Ohio St. 2d 139, 145, 423 N.E.2d 184.*
- “Deliberations” involve more than information-gathering, investigation, or fact-finding. *Holeski v. Lawrence (1993), 85 Ohio App. 3d 824, 829, 621 N.E.2d 802.*
- “Deliberation” is “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.” Webster’s Third New International Dictionary (1961) 596.
- Question and answer sessions between board members and other persons who are not public officials do not constitute “deliberations” unless a majority of the board members also entertain a discussion of public business with one another. In this context, a “discussion” entails an “exchange of words, comments or ideas by the board.”
- Ohio’s courts have recognized that information-gathering and fact-finding are essential functions of any board, and that the gathering of facts and information for ministerial purposes does not constitute a violation of the Sunshine Law. *Steingass*

Mechanical, Inc. v. Warrensville Hts. Bd. of Edn. (2003), 151 Ohio App.3d 321.

Based on the foregoing, in order to constitute a discussion, the members of the public body must do more than gather information for a ministerial purpose. There must be an exchange of “words, comments or ideas” regarding public business.

(a) Gatherings constituting discussions of public business.

Ohio courts have found certain gatherings of members of a public body to constitute meetings at which the discussion of public business occurred.

McKin, et al. v. Bd. of Edn. of Buckeye Local School Dist., et al. (May 5, 1981), Jefferson App. No. 80-J-21, 1981 Ohio App. LEXIS 11308.

Piekutowski, et al. v. South Central Ohio Educational Service Ctr. Governing Bd., Adams App. No. 04CA791, 2005-Ohio-2868.

Wheeling Corp. v. Columbus & Ohio River Railroad Co., et al., 147 Ohio App.3d 460, 2001-Ohio-8751.

These cases show that the determination of whether a gathering of members of a public body involved discussions of public business is based on the particular facts and circumstances surrounding each case and that gatherings of members of a public body which involve interviews, discussions of hiring, and/or contracts for services do in fact constitute discussions of public business invoking the open meeting requirements.

(b) Gatherings not constituting discussions of public business.

Ohio courts have found that gatherings of members of a public body that solely involve information gathering and fact-finding do not constitute discussions of public business under R.C. 121.22.

DeVere, et al. v. Miami Univ. Bd. of Trustees (Jun. 10, 1986), Butler App. No. CA85-05-065, 1986 Ohio App. LEXIS 7171.

McIntyre, et al. v. Bd. of Cty. Commrs. of Ashtabula Cty., et al. (Sept. 12, 1986), Ashtabula App. No. 1269, 1986 Ohio App. LEXIS 8267.

Holeski v. Lawrence, et al. (1993), 85 Ohio App.3d 824.

Haverkos v. Northwest Local School Dist. Bd. of Edn, et al., Hamilton App. No. C-040578, C-040589, 2005-Ohio-3489.

Cases in which courts have found public officials to be “passive observers in a ministerial, fact-gathering capacity” involve the presentation of previously known factual information, as in *DeVere*, informal communications, as in *Haverkos*, and gatherings not related to the public business, as in *Holeski*.

(c) Presence of a majority of members of the public body.

The final element in determining whether a gathering constitutes a “meeting” is whether a majority of the members of the public body attended the gathering.

Serial Meetings. The Open Meeting Law may not be circumvented by holding back to back meetings on the same topic where, in total, a majority of the public body’s members have attended. *State ex rel. Cincinnati Post v. City of Cincinnati* (1996), 76 Ohio St.3d 540.

Retreats/Workshops. *State ex rel. The Fairfield Leader v. Ricketts, et al.* (1990), 56 Ohio St.3d 97.

One-on-one conversations. *State ex rel. Floyd v. Rock Hill Local School Bd.* (Feb. 10, 1988), Lawrence App. No. 1862, 1988 Ohio App. LEXIS 471.

C. Public Records Law.

1. Courts interpret the provisions of Ohio’s public records law in favor of broad access and narrowly construe the exceptions. A public office has the burden

of showing that an exception applies. Any doubts are to be resolved in favor of disclosure. *State ex rel. Beacon Journal Publishing Co. v. Bond* (2002), 98 Ohio St.3d 146.

2. Record. “Any document, device, or item, regardless of physical form or characteristic, including an electronic record..., created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” R.C. 149.011(G)
3. Public office. “Any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” R.C. 149.011(A)
4. Public record. “Records kept by any public office, including but not limited to, state, county, city, village, township, and school district units....” R.C. 149.43(A)
5. Exceptions. There are 27 exceptions set forth in R.C. 149.43(A)(1), some of which are:

- a. Medical records;

NOTE: Certain medical records can be disclosed under the Health Insurance Portability and Accountability Act (HIPAA) – i.e., Transfer of medial records or information from an EMS squad to a hospital; EMS run sheets are public record, but any medical information must be redacted.

- b. Trial preparation records;

- c. Confidential law enforcement investigatory records;

NOTE: May withhold information pertaining to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature and where the disclosure of the information has a high likelihood of disclosing: (1) identity of an uncharged suspect; (2) the identity of a source or witness who has been promised confidentiality; (3) specific confidential investigatory techniques; (4) specific investigatory work product; or (5) information that would endanger the life or physical safety of law enforcement personnel, a victim of crime, a witness or a confidential information source.

This exception does not apply to routine incident reports (even if juvenile offenders), but identifying information of uncharged suspects and witnesses who have been promised confidentiality must be redacted. This exception does apply to supplemental investigatory materials, such as statements by witnesses or law enforcement officers, unless expressly incorporated into the incident report. It also applies to an entire record of the arrest of a juvenile offender (photographs, fingerprints and other records) and a child abuse report.

- d. Intellectual property records;
- e. Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;
- f. Information pertaining to the recreational activities of a person under the age of 18;

NOTE: *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365: request for personal information (names and addresses of children and their parents/guardians) retained by a city regarding children who used the city's recreational facilities. The Court held that this information was not public record because it did not document the functions of the public office and had no relation to the public interest of government accountability.

- g. Records the release of which are prohibited by state or federal law (e.g., Social security numbers; attorney-client privilege);

6. Public Record Requests. R.C. 149.43(B)

- a. Requester. May ask requester to make the request in writing, to identify himself/herself, and inquire about the intended use of the public records, but only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal his or her identity or intended use of the records. R.C. 149.43(B)(4)&(5)
- b. Prompt. Upon receipt of request, responsive records must be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. R.C. 149.43(B)(1)
- c. Redact. If a public record contains information that is exempt from disclosure, the public office must make available all information within the public record that is not exempt. The public office must

advise the requester of any redactions or the redactions must be plainly visible. R.C. 149.43(B)(1)

- d. Overbroad. If a request is ambiguous or overly broad or the requester cannot reasonably identify the public records being requested, the public office may deny the request, but must give the requester an opportunity to revise the request after advising the requester of the manner in which the records are maintained and accessed in the ordinary course of the public office's or person's duties. R.C. 149.43(B)(2)
- e. Denial. If a request is denied in whole or in part, the public office must provide the requester with an explanation, including legal authority, setting forth why the request was denied. The explanation must be in writing if the request was received in writing. R.C. 149.43(B)(3)
- f. Medium. If the requester wants copies of the records, the public office may charge the person the cost of copying the records and request that the copy costs be paid in advance. The public office must permit the requester to choose to have the records copied on paper or in any other medium upon which the public office keeps the records (i.e., CD, pdf). R.C. 149.43(B)(6)
- g. Postage. If a requester wants the records mailed to him or her, the public office may require the requester to pay the cost of postage in advance. The public office may adopt a policy regarding the mailing of public records and limit the number of records the public office will send by U.S. Mail to 10 per month. R.C. 149.43(B)(7)

7. Records Retention. R.C. 149.43(B)(2)

- a. Public records must be organized and maintained in a manner that they can be made available in the manner discussed above.
- b. The public office's current retention schedule must be readily available to the public.
- c. Records retention schedules should be reviewed and amended as necessary on a regular basis.

8. Public Records Policy. R.C. 149.43(E)(1)

- a. A public office must have a public records policy for responding to public records requests. R.C. 149.43(E)(1)

- b. The public office must be create a poster describing the policy and post the poster in a conspicuous place in the public office.

9. Enforcement.

- a. A person who believes a public office has failed promptly make available public records may file a lawsuit (mandamus action) asking the court to order the records custodian to produce the records or otherwise comply with the public records law and to require the public office to pay courts costs and reasonable attorney's fees. R.C. 149.43(C)(1)

10. Examples.

- a. E-mails – are public record if they document the functions of the public office, even if received or sent on personal computer of public official or employee.

NOTE: Records can transform – i.e., two employees on city time transfer inappropriate e-mails (not public record). Thereafter, the employees are disciplined and the e-mails become evidence in support of a disciplinary action (public record).

- b. Voicemail messages – are public record if they document the functions of the public office, but only need to be kept by the office for the time period set forth in the record retention policy or for as long as needed for administrative purposes.
- c. Records that do not exist – A public office has no duty to create a document in response to a public records request. *State ex. rel. White v. Goldsberry* (1999), 85 Ohio St.3d 153. Similarly, a public office has no duty to create a new document by searching for and compiling information from existing records. *State ex rel. Kerner v. State Teachers Retirement Bd.* (1998), 82 Ohio St.3d 273.
- d. Overbroad requests – Try to negotiate with requester in an attempt to narrow the request; advise the requester of the manner in which the records are maintained; public office is not required to produce complete duplication of an entire database. *State ex rel. Glasgow v. Jones* (2008), 119 Ohio St.3d 391.
- e. LEADS report – is not a public record, because disclosure prohibited by state law (LEADS information may only be used by authorized law enforcement or criminal justice agencies for the administration of criminal justice.) Ohio Admin. Code 4501:2-10-06(B); Ohio Attorney General Op. No. 94-046.

- f. Settlement agreements – even if contain a confidentiality clause. *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.* (1997), 80 Ohio St.3d 134.
- g. A “standing” public records request – Not a request for public records, because requesting records that do not exist (i.e., next month’s council meeting minutes).

11. Online Resources.

- a. Ohio Attorney General 2009 Sunshine Laws Manual (www.ohioattorneygeneral.gov)
- b. Ohio Historical Society (www.ohiohistory.gov)

Publications/Listserv through Yahoo Groups

VII. DATA SECURITY

A. Duty to disclose.

Any state agency or agency of a political subdivision that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system, following its discovery or notification of the breach, to any resident of this state whose personal information was, or reasonably is believed to have been, accessed and acquired by an unauthorized person if the access and acquisition causes or reasonably is believed will cause a material risk of identity theft or other fraud. R.C. 1347.12(B)(1)

“Agency of a political subdivision” means each organized body, office, agency established by a political subdivision for the exercise of any function of the political subdivision. R.C. 1347.12(A)(1)

“Personal information” means an individual’s name, consisting of the individual’s first name or first initial and last name, in combination with and linked to any one or more of the following data elements (when the data elements are not encrypted, redacted, or altered by any method or technology in such a manner that the data elements are unreadable):

1. Social security number.
2. Driver’s license number or state identification card number.

3. Account number or credit or debit card number, in combination with and linked to any required security code, access code, or password that would permit access to an individual's financial account. R.C. 1347.12(A)(6)(a)

B. Timing of disclosure.

The disclosure must be made in the most expedient time possible but not later than 45 days following its discovery or notification of the breach in the security of the system. R.C. 1347.12(B)(2)

The disclosure may be delayed if a law enforcement agency determines that the disclosure will impede a criminal investigation or jeopardize homeland or national security. In this case, the disclosure shall be made after the law enforcement agency determines that disclosure or notification will not compromise the investigation or jeopardize homeland or national security. R.C. 1347.12(D)

C. Method of disclosure.

1. Written notice.
2. Electronic notice, if the agency's primary method of communication with the resident to whom the disclosure must be made is by electronic means.
3. Telephone notice.
4. Substitute notice (if the agency does not have sufficient contact information to provide notice by the foregoing means, or the cost of providing disclosure or notification to residents would exceed \$500,000, or the affected class of subject residents exceeds 500,000):
 - a. E-mail, if the agency has an e-mail address for the resident to whom the disclosure must be made;
 - b. Conspicuous posting of the disclosure or notice on the agency's website, if one exists and is maintained;
 - c. Notification to major media outlets, to the extent that the cumulative total of the audiences for all of the media outlets notified equals or exceeds 75% of the population of the state of Ohio. R.C. 1347.12(E)

NOTE: The substitute notice requirements for an agency with 10 or fewer employees include notification through a paid advertisement in a local newspaper, conspicuous posting on agency's website, and notification to major media outlets. *See*, R.C. 1347.12 (E)(5).

- d. If disclosure must be made to more than 1,000 residents of the state of Ohio, the agency is required to also notify all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis of the disclosure given by the agency to the residents. R.C. 1347.14(F)

D. Penalties for Noncompliance.

The Ohio Attorney General can conduct an investigation and bring a civil action upon an alleged failure of a political subdivision to comply with the foregoing requirements. R.C. 1349.191

Investigations may be conducted if the Attorney General, based on complaints or the Attorney General's own inquiries, has reason to believe that an agency has failed to comply with R.C. 1347.12.

Best Practice: An agency should have a policy in place requiring employees to immediately notify a supervisor or other designated person if they become aware of a security system breach. The policy should also include the required notification procedures and requirements.

VIII. OHIO'S ETHICS LAW

A. General provisions.

No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. R.C. 102.03(D)

No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. R.C. 102.03(E)

"Public official or employee" means any person who is elected or appointed to an office or is an employee of a public agency. R.C. 102.01(B)

"Public agency" means the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity. R.C. 102.01(C)

B. Anything of value.

- 1. R.C. 102.03/R.C. 1.03:

- a. Money, bank bills or notes, United States treasury notes, and other bills, bonds, or notes issued by lawful authority and intended to pass and circulate as money;
 - b. Goods and chattels;
 - c. Promissory notes, bills of exchange, orders, drafts, warrants, checks, or bonds given for the payment of money;
 - d. Receipts given for the payment of money or other property;
 - e. Rights in action;
 - f. Things which savor of the realty and are, at the time they are taken, a part of the freehold, whether they are of the substance or produce thereof or affixed thereto, although there may be no interval between the severing and taking away;
 - g. Any interest in realty, including fee simple and partial interests, present and future, contingent or vested interest, beneficial interests, leasehold interests, and any other interest in realty;
 - h. Any promise of future employment;
 - i. Every other thing of value. R.C. 102.01(G), R.C. 1.03
2. Something that would not ordinarily accrue to the public official or employee in the performance of his or her official duties. Adv. Op. 76-005.
 3. Something that provides a definite, pecuniary (monetary) benefit to a public official or employee. Adv. Op. 88-004.
 4. “An increase or enhancement in the value of property, an opportunity or ability to sell property at a profit or for a commission, or any other benefit to property....” Adv. Op. 92-019
 5. “[T]he beneficial or detrimental financial impact upon the value of real property, created by a public agency’s land-use decision, is a thing of value for the purposes of R.C. 102.03(D).” Adv. Op. 98-002 at 2; *see also* Adv. Op. 97-002 at 2.

C. Confidential information.

A public official or employee may not, without authorization, disclose any information acquired in the course of his or her official duties that is confidential

because of a statutory provision or that has been clearly designated to the official or employee as confidential because of the status of the proceedings or other circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business. R.C. 102.03(B).

NOTE: This is important to remember when you are dealing with someone who is not associated with your public agency.

D. Appearance of impropriety.

Even though certain conduct may be permitted under R.C. 102.03, a public official or employee may still choose to refrain from participating in a matter so as to avoid creating an appearance of impropriety. Adv. Op. 93-001.

E. Examples.

Ohio Ethics Commission – Advisory Opinions

1. A township trustee and a township clerk who are married to one another are prohibited from voting, deliberating, participating in discussions, or otherwise using the influence of their positions to secure a benefit for their spouse where their objectivity and independence of judgment in the performance of their official duties would be impaired. For example, the township trustee would be prohibited from participating in and voting on matters concerning the township clerk's compensation. Adv. Op. 91-101.
2. Members of a village council are prohibited from enacting an ordinance granting in-term increases in compensation for the current members of council, but a village treasurer, clerk or clerk-treasurer is not prohibited from accepting an in-term increase in compensation approved by the village council (unless a local ordinance authorizes the clerk to exercise discretionary authority with respect to the enactment of legislation, the appropriation of village funds or the establishment of compensation for the clerk's position). Adv. Op. 93-006.
3. A public official or employee is prohibited from accepting, soliciting or using the authority or influence of their position to secure, for personal travel, a discounted or "frequent flyer" airline ticket or other benefit from the purchase of airline tickets for use in official travel for the public entity with which he or she serves or by which he or she is employed. Adv. Op. 91-010.
4. A public official or employee is prohibited from soliciting, accepting, or using his or her position to secure a substantial thing of value, including a golf outing at which the official or employee would receive a round of golf, golf cart rental, and food and beverages from a party that is interested in

matters before, regulated by, or doing or seeking to do business with the official's or employee's public agency. Adv. Op. 2001-03.

5. A city police department is prohibited from accepting a discount offered by a local retailer as a community service acknowledgement and recognition for performing the duties of their public employment. Adv. Op. 92-015.
6. A public official or employee is not prohibited from accepting a gift or other thing of value from his or her spouse, which the spouse received from his or her employer, provided that the employer did not give the item to the official's or employee's spouse for the purpose of providing it to the official or employee. Adv. Op. 2009-01.
7. A public employee is prohibited from soliciting, accepting, or using the authority or influence of his or her position to secure a substantial amount of money or any other thing of value from a subordinate, as an incentive to retire, where the retirement will enable the subordinate to be promoted to the position that is vacated. Adv. Op. 97-001.
8. A public official or employee is prohibited from participating, as a public official or employee, formally or informally, with respect to land-use decisions affecting property bordering or near the public official's or employee's property because the land-use decision could have a definite and direct beneficial or detrimental financial impact upon the value of the official's or employee's property. Adv. Op. 98-002, citing Adv. Ops. 88-004, 92-013, and 92-019. A council member is prohibited from voting on matters involving a proposed commercial development that borders residential property owned by the council member's brother. Adv. Op. 98-002. Similarly, a council member is prohibited from voting on matters regarding a zoning change affecting property owned by the council member's wife. Adv. Op. 79-008. The council member would derive a definite, pecuniary benefit as a result of his vote to approve the zoning change.
9. A city fire chief is prohibited from soliciting or receiving a commission on the purchase of fire equipment by the city. Adv. Op. 84-014.
10. A county engineer is prohibited from reviewing a survey prepared by him or other members of his firm that has been filed with an office of the county with which he serves. Adv. Op. 83-001; *see also*, Adv. Op. 82-001 (similar facts, but involving a city engineer).
11. A member of a public body who is a partner or associate in a law firm is prohibited from voting, discussing, participating in deliberations, or otherwise using his official position with regard to matters pending before his public body on which a member of his law firm is representing a client. Adv. Op. 89-016; Adv. Op. 86-004.

12. A member of a township zoning commission is prohibited from voting to approve a zoning change or variance for property in which he has a commission interest as a real estate agent. Adv. Op. 79-003.
13. A city council member is not prohibited from establishing a private consulting firm to render services for clients seeking to do business with public agencies, provided that he uses his own time, facilities, and resources to conduct his private business and that the clients are not regulated by, interested in matters before, or doing or seeking to do business with the city with which he is connected. Adv. Op. 86-008.

G. Unlawful interest in a public contract (only applies to public officials).

1. General rule.

No public official shall knowingly do any of the following:

- a. **Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest (R.C. 2921.42(A)(1));**
- b. Authorize, or employ the authority or influence of the public official's office to secure the investment of public funds in any share, bond, mortgage, or other security, with respect to which the public official, a member of the public official's family, or any of the public official's business associates either has an interest, is an underwriter, or receives any brokerage, origination, or servicing fees (R.C. 2921.42(A)(2));
- c. During the public official's term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder (R.C. 2921.42(A)(3));
- d. **Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision with which the public official is connected (R.C. 2921.42(A)(4));**
- e. Have an interest in the profits or benefits of a public contract that is not let by competitive bidding if required by law and that involves more than one hundred fifty dollars. R.C. 2921.42(A)(5)

2. Exception:

All of the following must apply:

- a. When the subject of the public contract is necessary supplies or services for the political subdivision involved. R.C. 2921.42(C)(1)
- b. The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision involved. R.C. 2921.42(C)(2)
- c. The treatment accorded to the political subdivision is either preferential to or the same as that accorded other customers or clients in similar transactions. R.C. 2921.42(C)(3)
- d. The entire transaction is conducted with full knowledge by the political subdivision involved, of the interest of the public official, member of his or her family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision with respect to the public contract. R.C. 2921.42(C)(4)

3. Examples.

Ohio Ethics Commission – Advisory Opinions

- a. A public official or employee is prohibited from accepting, soliciting, or using his or her position to secure travel, meal, and lodging expenses from a company that is doing or seeking to do business with his or her public agency (even if the expenses were incurred in connection with the official's or employee's duty to inspect and observe the company's products in operation at the company's facilities). Adv. Op. 89-014; *see also*, Adv. Op. 90-001; Adv. Op. 86-011.

NOTE: A public agency is not prohibited from soliciting or accepting from a regulated party travel, lodging, and meal expenses which the public agency is authorized by law to charge for the cost of inspecting and examining such party. Adv. Op. 87-005; A public official or employee is not prohibited from soliciting, accepting or using the authority or influence of his or her position to secure travel expenses from a company which is doing business with his or her public agency where the requirement that travel expenses be provided by that company to officers and employees is included in the public

agency's bid specifications and, ultimately, the contract entered into between the company and the public agency. Adv. Op. 87-007.

- b. A city council member, who is an officer and shareholder in an insurance company, is prohibited from authorizing, voting or otherwise using the authority or influence of his position to secure approval of a public contract in which his firm provides a bid or performance bond or other interest. The council member is further prohibited from having an interest in the profits or benefits of a public contract with the city with which he serves unless the criteria of R.C. 2921.42(C) are satisfied. Adv. Op. 86-002.
- c. A city fire chief is prohibited from: (1) knowingly authorizing or using his position to secure approval of a contract between the city and a fire equipment firm with which he is associated; and (2) knowingly having an interest in the profits or benefits of a contract between the city and a fire equipment firm with which he is associate. Adv. Op. 84-014.
- d. A member of a public body who is a partner in a law firm is prohibited from: (1) voting, authorizing, or using position to secure approval of a contract between the public agency and his law firm; and (2) having an interest in the profits or benefits of a contract between the public agency and his firm. Adv. Op. 86-004.
- e. The prohibition of R.C. 2921.42(A)(1) applies to a city treasurer's appointment of her sister to the position of city income tax director because while the city treasurer's duties involve "the exercise of an independent, continuing political and governmental function," the duties of the income tax director are administrative in nature, and subject to the oversight and review of the treasurer. Adv. Op. 86-010.
- f. A county sheriff is prohibited under R.C. 2921.42(A)(1) from appointing his spouse or a member of his family to the position of deputy, matron, cook, assistant, clerk, bookkeeper or other employee in the county sheriff's office because the individuals holding these positions are employees and not officers as their duties are administrative in nature. "[T]hey are providing services to the county by which they are employed, which is a public contract." Adv. Op. 85-015.

G. Penalties.

- 1. Violation of R.C. 102.03(D) is a first degree misdemeanor. R.C. 102.99(B)

2. Violation of R.C. 2921.42(A)(1) or (2) is a fourth degree felony. R.C. 2921.42(E)
3. Violation of R.C. 2921.42(A)(3), (4) or (5) is a first degree misdemeanor. R.C. 2921.42(E)

H. Holding more than one public position.

1. R.C. 102.04(C): No public official or employee of a county, township, municipal corporation or any governmental entity, excluding courts, shall receive compensation other than from the agency with which he or she serves for services rendered by him or her personally in any case, application or proceeding which is before a board, commission, agency, department, etc. of the entity of which he or she is an official or employee.

R.C. 102.04(D): A public official appointed to a non-elective office or a public employee is exempt from R.C. 102.04(C) if the following apply:

- a. The agency to which the official or employee wants to sell good or services, or before which the matter involving the personal services rendered is an agency other than the one which he or she serves; and
- b. Prior to rendering the personal services, he or she files a statement with the ethics commission, with the agency he or she serves, and with the agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

2. Examples.

a. Same entity.

- (1) A city council member is not prohibited from serving as an unpaid volunteer paramedic with the fire department of the city, provided he receives no definite and direct personal pecuniary benefit from such service. Adv. Op. 91-002
- (2) R.C. 102.04 does not prohibit receipt of compensation from more than one agency of a governmental entity. For example, an architect who is a member of the Ohio Board of Building Standards is not prohibited from receiving compensation for services rendered by him personally as an employee or independent contractor of another state agency. Adv. Op. 75-010

b. Different entity.

- (1) A city engineer is not prohibited from also serving as a member of the Board of Building Appeals of the Department of Industrial Relations. Adv. Op. 75-002
- (2) It is not a violation of R.C. 102.04 for a person to serve simultaneously as county recorder and, through membership in a law firm, as legal counsel to a township. Adv. Op. 74-005

3. Incompatibility.

4. Local ordinance.

I. Financial Disclosures.

1. Certain public officials and employees.

- a. Certain public officials and employees, including state, city and county elected officials and candidates, and high-ranking state employees. R.C. 102.02(A)
- b. The Ohio Ethics Commission may require any class of public officials or employees...whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts” to file an annual disclosure statement. The Ohio Ethics Commission notifies the public official or employee in writing if a filing is required. R.C. 102.02(B)
- c. Does not apply to village or township officials and employees. R.C. 102.02(H)

2. Disclosure Statement.

- a. The disclosure statement must include:
 - (1) Name. The name of the person filing the statement and each member of the person’s immediate family and all names under which the person or members of the person’s immediate family do business.
 - (2) Income. Every source of income received during the preceding calendar year by the person filing the statement and a brief description of the nature of the services for which the income was received. Must disclose the identity of and the amount of income received from a person who the public

official or employee knows or has reason to know is doing or seeking to do business of any kind with the public official's or employee's agency.

- (3) Investment/Office in corporation. The name of every corporation, trust, business trust, partnership, or association that transacts business in this state in which the person filing the statement or any other person for the person's use and benefit had during the preceding calendar year an investment of over \$100,000, or the date of disposition, whichever is earlier, or in which the person holds any office or has a fiduciary relationship, and a description of the nature of the investment, office, or relationship. This does not require disclosure of the name of any bank, savings and loan association, credit union, or building and loan association with which the person filing the statement has a deposit or a withdrawable share account.
- (4) Real estate. All interests in real property located within the state, excluding the person's residence and property used primarily for personal recreation.
- (5) Debts. The names of all persons residing or transacting business in the state to whom the person filing the statement owes more than \$1,000.00.
- (6) Money owed. The names of all persons residing or transacting business in the state, other than a depository, who owe more than \$1,000.00 to the person filing the statement.
- (7) Gifts. The source of each gift over \$75.00, or each gift of over \$25.00 received by a member of the general assembly from a legislative agent (except gifts received by will or from certain family members; distribution from trust of spouse or ancestor).
- (8) Travel. Identification of the source and amount of every payment of expenses incurred for travel incurred in connection with the person's official duties (except for expenses for travel to meetings or conventions of a national or state organization to which any state agency pays membership dues, or any political subdivision or any office or agency of a political subdivision pays membership dues).
- (9) Meals/Lodging. Identification of the source of payment of expenses for meals, other food and beverages (other than for meals and other food and beverages provided at a meeting at

which the person participated in a panel, seminar, or speaking engagement or at a meeting or convention of a national or state organization to which any state agency pays membership dues, or any political subdivision or any office or agency of a political subdivision pays membership dues) that are incurred in connection with the person's official duties and that exceed \$100.00 aggregated per calendar year.

NOTE: Most financial disclosure filers must disclose the source of a gift valued at over \$75.00. However, officials and employees of political subdivisions who receive less than \$16,000 a year for serving in their public positions...must disclose the source of a gift valued over \$500.00. The "source" of a gift may be composed of one person or a group of persons. Adv. Op. 2002-01

A public official or employee required to file a disclosure statement is not required to disclose his or her spouse as the source of a gift, unless the gift was given to the spouse as a condition that he or she will provide it to the official or employee. Adv. Op. 2009-01

b. Purpose.

To ensure that public officials and employees do not solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to their duties. Adv. Op. 2009-01

c. Filing fee. Ranging from \$20-\$65. R.C. 102.02

d. Due date.

Varies: R.C. 102.02(A)

Late filing. Pay a late fee of \$10 a day, not to exceed \$250.00. R.C. 102.02(F)

e. Other.

R.C. 102.02(C) - prohibits someone from knowingly failing to file a timely disclosure statement.

R.C. 102.02(D) – prohibits someone from knowingly making a false statement in the disclosure statement.

R.C. 102.021 – certain former state elected officers and staff members must file for 24-month after their service or employment.

J. Online Resource.

Ohio Ethics Commission website (www.ethics.ohio.gov)

IX. INITIATIVE and REFERENDUM PETITIONS

A. Generally

1. The Ohio Constitution reserves to the people of each municipality the initiative and referendum powers on all questions that a municipality may be authorized by law to control through legislative action. (Ohio Const. Art. II Sect. 1(f)).
2. The power of initiative and referendum is the power to:
 - a. propose to the electors for their approval/disapproval an ordinance which the legislative authority is unwilling to pass;
 - b. submit to the electors the adoption of or amendment to a charter; and
 - c. suspend the taking of effect of an ordinance passed by the legislative authority until the electors approve/disapprove of it.
3. Failure to follow the statutory provisions will invalidate the petition. *However, Charter provisions for initiative and referendum procedures, adopted under Home Rule, will override the statutory process, unless the charter provision adopts state law.*

B. Scope of power

1. Referendum powers cannot be exercised over:
 - a. administrative actions (i.e., grant or denial zoning variance, authorization of public contract, appointments to public employment – police chief, law director);
 - b. emergency ordinances;
 - c. measures providing for appropriations for current expenses; and
 - d. street improvements petitioned for by the owners of a majority of the property benefited and assessed.
2. When more than one ordinance is required to be passed to achieve an action, only the first ordinance may be subject to a referendum. (i.e., ordinance declaring a necessity for public improvement.)

3. An ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the measure in such municipal corporation is not subject to the veto power of the mayor.

C. Municipal Process (exclusive of townships) (R.C. 731.28 et. seq.)

1. Basic Petition Process

- a. The petitioners of any initiative or referendum petition may designate a committee of at least three people who shall be regarded as filing the petition.
- b. A certified copy of the petition must be filed with the city auditor or village clerk before circulation. An initiative and referendum petition must contain the elector's signatures of not less than 10% of the number of electors who voted for the office of governor at the most recent general election in the municipality.

NOTE: If there is no officially named city auditor, the person performing the duties of the auditor must be served; if the clerk of council does not perform the duties of the auditor then the clerk is not the proper person to be served with the petition. See, *State ex rel. Donahue v. Bellbrook* (1975), 44 Ohio St.2d 36 (finding clerk of council properly refused to accept a referendum petition on the ground that it should be filed with the city's finance director).

- c. After the initiative and referendum petition is filed with the city auditor or village clerk, the petition must be made available for public inspection for 10 days.
- d. After 10 days, the auditor/clerk must transmit a certified copy of the text of the proposed ordinance or measure to the board of elections with the petition. "Certified copy" means a copy containing a written statement attesting that it is a true and exact reproduction of the original proposed ordinance or other measure.
- e. The board of elections examines all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition. The board must return the petition to the auditor/clerk within 10 days after receiving it, together with a statement attesting to the number of such electors who signed the petition.
- f. If the petition is deemed valid, the board must submit the proposed ordinance or measure for the approval or rejection of the electors at

the next general election occurring after 75 days from the auditor/clerk's certification of the initiative petition to the board of elections.

- g. Any initiative petition and referendums receiving an affirmative majority of the votes cast thereon, shall become effective on the fifth day after the day on which the board of elections certifies the official vote on such question.
- h. No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the measure in such municipal corporation shall be subject to the veto of the mayor.

2. Special Provisions for Referendum Petitions

- a. Under Ohio law, no ordinance or other measure may go into effect until 30 days after it is filed with the mayor of a city or passed by the legislative authority in a village.
- b. The referendum petition must be filed with the auditor/clerk within 30 days after any ordinance or other measure is filed with the mayor or passed by the legislative authority of a village. If the ordinance has been vetoed by the Mayor and returned it to council, the petition must be filed within 30 days after council passed the ordinance over the veto.
- c. **The auditor/clerk must, after the 10 day public inspection period but not later than 4:00 p.m. of the 75th day before the day of election, transmit a certified copy of the text of the proposed ordinance or measure to the board of elections with the petition.**
- d. The legislative ordinance or measure shall not go into effect unless approved by the majority of those voting upon it. However, referendum does not prevent a municipality from proceeding to give any notice or make any publication required by such ordinance or other measure.

3. Form of Petition

- a. A petition may be presented in separate parts, but:
 - (1) each part of any *initiative* petition must contain a full and correct copy of the title and text of the proposed ordinance or other measure; and

- (2) each part of any *referendum* petition shall contain the number and a full and correct copy of the title of the ordinance or other measure sought to be referred.
 - b. At the top of each part of the petition, the following words must be printed in red:

“Whoever knowingly signs this petition more than once, signs a name other than his own, or signs when not a legal voter is liable to prosecution.”
 - c. All signatures must be in ink. A signature, the printed name, the date and address of the signer’s voting residence must be included. Other requirements are listed in R.C. 3501.38. A signer may not remove his/her signature after the petition has been filed with the public office.
4. Statutory Municipal Corporations (R.C. Ch. 705)
- a. All laws pertaining to initiative and referendum in municipal corporations apply to statutory municipal corporations (commission plan, city manager plan, federal plan). R.C. 705.91
5. Charter Amendments
- a. Charter provisions which set forth a procedure for the amendment of a charter must be followed unless they are in conflict with those of the Ohio Constitution (Section 9, Art. XVIII). If a conflict exists, the Ohio Constitution prevails.
 - b. Charter amendments may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority, and, upon petitions signed by 10% of the electors of the municipality setting forth a proposed amendment.
 - c. An ordinance requiring the submission of the proposed amendment shall require that it be submitted to the electors at the next regular municipal election if one shall occur within *60 to 120 days after the ordinance’s passage*; otherwise it shall provide for the submission of the amendment at a special election to be called and held within the aforesaid time period.
 - d. Notice of the proposed amendment must be given by either:
 - (1) mailing a copy of the amendment to each elector; or

(2) publishing the full text of the amendment one a week for at least two consecutive weeks in a newspaper of general circulation. The first publication must be at least 15 days prior to the election.

e. Within 30 days after the adoption of the amendment, a copy must be certified to the secretary of state.

D. Township Process (R.C. 504.14)

1. In a township that adopts a limited home rule government, resolutions may be proposed by initiative petition by the electors and adopted by election. Resolutions adopted by the board of township trustees may be submitted to these electors for their approval or rejection by referendum. Both initiative and referendum petitions will take place under the same circumstances and in the same manner as provided by R.C. 731.28 et seq. for municipal corporations, except that both of the following apply:

a. Initiative and referendum petitions must be filed with the township fiscal officer, who shall perform the duties imposed upon the city auditor or village clerk.

b. Initiative and referendum petitions shall contain the signatures of not less than 10% of the total number of electors in the unincorporated area of the township who voted for the office of governor at the most recent general election

2. The power of referendum also applies to township zoning resolutions. The referendum petition must be presented to the board of township trustees within 30 days after the adoption of a zoning resolution. R.C. 519.12

X. CURRENT ISSUES REGARDING MAYOR'S COURT

A. Jurisdiction. Mayors have the authority to preside over prosecutions for violations of municipal ordinances. R.C. 1905.01

B. Magistrate. Mayor may appoint a magistrate to preside over mayor's court. R.C. 1505.05

C. Due Process. Does a mayor presiding over mayor's court violate a defendant's due process rights (notice and opportunity to be heard before a neutral and impartial judge)?

1. Prior cases.

- a. *Turner v. Ohio* (1927), 273 U.S. 510: Mayor's court violated defendant's due process rights where the mayor received money from certain types of cases as fees and costs in addition to his salary. The Court found that the mayor was not neutral in the criminal proceedings because he had a direct interest in finding defendants guilty.
- b. *Dugan v. Ohio* (1928), 277 U.S. 61: Upheld a conviction from a mayor's court where the mayor was not the chief executive officer (the city was run by a city manager) and the mayor's salary was fixed by the city's legislative authority.
- c. *Ward v. Village of Monroeville* (1972), 409 U.S. 57: Overturned conviction from mayor's court where mayor had broad executive powers (chief conservator of peace; president of council; presided over council meetings; voted on legislation in cases of ties; accounted to council regarding village finances; filled vacancies in office...) and 35% to 50% of the village's income came from fines and costs levied by the mayor in mayor's court. The Court held that the defendant's due process rights were violated because he was deprived of a neutral and detached magistrate.
- d. *State ex rel. Brockman v. Proctor* (1973), 35 Ohio St.2d 79: Finding that where a mayor has legislative and judicial powers, but a city manager has all executive power and administrative responsibility, the mayor's relation to finances and the financial policy of the city is too remote to create a presumption of bias toward convictions in prosecutions before him as a judge.
- e. *Covington v. Lyle* (1982), 69 Ohio St.2d 659: Upheld conviction in mayor's court upon the sole finding that the revenue produced by the mayor's court did not constitute a substantial portion of the village's revenues.
- f. *Rose v. Village of Peninsula* (N.D. Ohio 1995), 875 F. Supp. 442: The court recognized that while the "substantiality" of revenues generated by a mayor's court as a percentage of a municipality's overall revenues was an important factor in analyzing a criminal conviction, the main inquiry must be whether the mayor "occupies two practically and seriously inconsistent positions, one partisan and the other judicial." "...[T]he more executive authority vested in the mayor, the more reasonable it is to question the impartiality of a mayor who collected even a relatively minor amount of general revenues through a mayor's court."

2. *DePiero v. City of Macedonia* (6th Cir. 1999), 180 F.3d 770: The defendant was convicted in mayor's court, after a trial was held, for a traffic offense and contempt of court charges. The defendant sued the city and the mayor claiming that the Ohio Revised Code provision authorizing mayor's courts is facially unconstitutional and his trial deprived him of due process because the mayor was not a "neutral and detached" magistrate. The Court found that the Ohio Revised Code provision authorizing mayor's court was constitutional. But, the Court also concluded that due to the mayor's broad executive powers and administrative responsibilities, there existed a possibility that the mayor would be tempted to ignore the burden of proof and to defer to the officer's version of the facts. The Court found that the defendant's due process rights were violated.

The Court set forth the following test for determining whether a mayor violates due process by hearing and deciding contested cases in a mayor's court:

The test for whether the union of executive and judicial power violates due process is whether the mayor's situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.

3. Pending Mayor's Court case.
 - a. Issue: Whether a mayor presiding over a mayor's court can accept plea no contest (uncontested cases) on misdemeanor offenses and impose fines and court costs.
 - b. Due Process. Whether a mayor who is the chief executive officer and safety director of a city is a neutral and impartial judge with respect to accepting no contest pleas in a mayor's court.