

**LEGAL OPINION**

**TO: Loveland City Council  
Dave Kennedy, City Manager**

**FROM: Joseph J. Braun, Esq.**

**DATE: August 17, 2017**

**RE: August 14, 2017 Special Meeting**

On Saturday August 12, 2017, I was contacted by Mayor Mark Fitzgerald and advised that pursuant to Council Rule 3 of Section 117.01 of the Loveland Code of Ordinances, he was calling a special City Council meeting for Monday August 14, 2017 at 7:00 p.m. at Loveland City Hall.

The purpose of the special meeting was “to respond to matters related to the recently filed petition seeking his recall as a member of City Council, and to take up any other matters that may lawfully come before City Council.”

I prepared a Notice of Special Meeting (“Notice”) and e-mailed a copy to Mayor Fitzgerald, Councilwoman Gross, City Manager Dave Kennedy, the City’s Public Information Officer Joe Wessels, and Clerk of Council Misty Cheshire. A copy of the Notice is attached. I contacted Dave Kennedy by telephone thereafter to ensure he was aware of the e-mail I sent to him that attached the Notice. I was advised that Councilwoman Gross had agreed to personally deliver the Notice to the other members of City Council by personal service, or leaving it taped to the front door of their usual place of residence consistent with Council Rule 3 of Section 117.01.

It was my understanding that Mr. Wessels would notify the media of the Notice consistent with Section 109.05 of the Loveland Code of Ordinances and post the Notice on the City’s Facebook page and Twitter account as well as the online site Next Door. I have spoken with Joe Wessels and he confirmed that he did this.

The special City Council meeting was well attended as there was an overflow crowd of residents. Additionally, all seven members of City Council attended as well as the City Manager, the City Finance Director, the Solicitor, the Police Chief, the Public Information Officer and a representative from the Loveland-Symmes Fire Department.

At the special City Council meeting, Mayor Fitzgerald read a statement and then resigned his position as Mayor, but not his seat as a member of City Council. Thereafter, nominations were taken followed by the election of Angie Settell as Mayor and Pam Gross as Vice Mayor. The oath of office was administered to Ms. Settell and

Ms. Gross by then-former Mayor Mark Fitzgerald. The meeting was then adjourned after which the Clerk of Council was handed a letter by Mark Fitzgerald in which he resigned his seat as a member of Loveland City Council effective 11:59 p.m. on August 14, 2017.

The day after the August 14, 2017 special City Council meeting, I was advised by Councilwoman Kathy Bailey that a resident contacted her and alleged that the City had failed to properly advertise the special City Council meeting. Specifically, the resident indicated that the Clerk of Council had failed to comply with Section 109.04 of the Loveland Code of Ordinances.

Section 109.04 provides that:

**109.04 NOTICE OF SPECIAL MEETINGS.**

(a) Except in the case of a special meeting referred to in Section 109.05(e), the Clerk shall, not later than 12 hours before the time of a special meeting of a municipal body, post a statement of the time, place, and purposes of the special meeting.

(b) The statement under this section and the notifications under Section 109.05 shall state such specific or general purpose or purposes then known to the Clerk to be intended to be considered at such special meeting, and may state, as an additional general purpose, that any other business as may properly come before the municipal body at the meeting may be considered and acted on.

(Res. 1975-44. Passed 12-9-75.)

Section 109.04(a) provides that the Clerk of Council must “post” the Notice 12 hours before the time of the special meeting. Section 109.02(f) specifically defines the word “post” as used in this chapter of the Loveland Code of Ordinances as “to post in an area accessible to the public during the usual business hours on the bulletin board on which public notices are usually posted in the lobby of the Municipal Building.”

In response to these claims, I contacted the Clerk of Council and interviewed her as to what actions she undertook to “post” notice of the special meeting. Ms. Cheshire has been on vacation the week of August 7, 2017. Ms. Cheshire advised me that no one from the City had spoken to her about the special meeting before she arrived at work on Monday morning August 14, 2017 at 8:00 a.m. Ms. Cheshire advised me that she prepared an agenda which included the date and time of the special meeting and posted it on the bulletin board at City Hall at approximately 11:00 a.m. on the morning of August 14, 2017.

In order to comply with the requirements of Section 109.04(a) of the Loveland Code of Ordinances, the Clerk would have had to “post” notice on the bulletin board of

City Hall 12 hours before the special meeting, however, she only posted it 8 hours before the start of the special meeting.

Based on the facts present, the actions taken by the City of Loveland demonstrate *substantial compliance*<sup>1</sup> with the posting requirements of Section 109.04, but it does not strictly comply with the 12 hour posting requirement contained in the Loveland Code of Ordinances.

In *State ex. rel. Bates v. Smith*, 147 Ohio St. 3d 322 (2016), the Ohio Supreme Court addressed a matter involving a Board of Township Trustees that is analogous to the situation presented. The Court unanimously concluded in *Bates* that the scheduling of a meeting with less than 24 hours' notice to the public did not comply with the Open Meetings Act.

In *Bates*, the Court was faced with a situation whereby the County prosecutor, as the legal adviser to Spencer Township, initiated a *quo warranto* action to remove an individual chosen to fill a vacancy created on the Board of Trustees after another member was removed from their position by a vote of the remaining members. A *quo warranto* action is the exclusive remedy to litigate the right of a person to hold a public office.

In *Bates*, one of the three members of the Spencer Board of Township Trustees was deployed to active service as a member of the Ohio National Guard. He chose not to resign his elected position as a member of the Board of Trustees. The trustee was then absent at the next five trustee meetings because of his military deployment.

Ohio Revised Code Section 503.241 provides that when a township officer is absent from the township for 90 days, the office is seemed vacant, however, active military service is explicitly exempted from this provision.

A meeting of the board of trustees was held on December 30, 2015 where the absence of the trustee member was discussed by the other trustees and was adjourned at 11:15 a.m. Later that day, the Board of Trustees posted a paper notice on the

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<sup>1</sup> Several appellate Courts have found *substantial compliance* to satisfy the statutory notice requirements involving public hearings, however, these cases pertain to zoning matters which have different statutory requirements from those involving a council meeting. See *Swickrath & Sons, Inc. v. Village of Elida*, 2003-Ohio-6288 (3<sup>rd</sup> App. Dist. 2003) (initial public hearing for a proposed zoning ordinance was held and the wrong time was printed in the newspaper. Then, a second public hearing was held and no newspaper notice of the public hearing was printed, but the Village posted notice around the Village in five places and had notice of the public hearing printed on the water bills of Village residents); *Black v. Mecca Twp. Bd. of Trustees*, 91 OApp3d 351, 632 NE2d 923 (1993) (public hearing on a zoning matter is not invalid simply because a newspaper erroneously prints a later starting time). The difference is a public hearing is usually followed by a meeting where legislative action is taken and legislative action can be taken at a council meeting without the need for additional meetings.

township-hall door of an “emergency meeting” of the board of trustees to be held at 11:00 a.m. on December 31, 2015. Under R.C. 121.22(f), emergency meetings require posting of such meetings at least 24 hours before they are held. This resulted in a required time deficiency of 15 minutes.

The remaining two trustees held the emergency meeting on December 31, 2015 at 11:00 a.m. and declared a vacancy to exist in the seat of the deployed trustee member and voted to replace him as trustee with another individual. That individual was seated into office at that emergency meeting.

The Ohio Supreme Court ruled unanimously that the seat should not have been declared vacant and that the trustees violated the Ohio Meetings Act when it held an emergency meeting on December 31, 31, 2015 without complying with the requirements of R.C. 121.22. In doing so, the Court required strict compliance with the requirements of R.C. 121.22 and declined to apply a substantial compliance or any other relaxed standard of scrutiny.<sup>2</sup> Specifically, the Court found that it was not demonstrated in the minutes there was an emergency, let alone that would require another meeting in less than 24 hours as required by statute. The Court ordered that the removed trustee be reinstated and any action taken by the trustee designated to replace him be deemed invalid.

The Ohio Supreme Court’s decision in *State ex. rel. Bates v. Smith* cannot be ignored and must weigh heavily on any analysis of whether the notice requirements of Section 109.04 were adhered to in the calling of a special meeting of City Council.

In each of the cases I reviewed, the Court undertook to determine if the actions of the governmental body violated the meeting notice requirements of R.C. 121.22. Because Loveland is a home-rule Charter City, it is not bound to follow the requirements of 121.22 if its Charter and Ordinances give direction to the contrary.

Here, Loveland’s Code of Ordinances directs a “posting” requirement of 12 hours in advance of a special meeting in a specific place – on the bulletin board in the lobby of City Hall. Despite the fact the special City Council meeting was advertised online and was well attended by the public, the posting requirements of Section 109.04 were not met here making the required notice deficient.<sup>3</sup>

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<sup>2</sup> Similarly, Courts in the Commonwealth of Kentucky have adopted the same strict compliance standard for notice requirements related to special meetings of a legislative body particularly when they are not the result of an emergency situation. See *E. W. Scripps Co. v. City of Maysville*, 790 S.W.2d 450, 451 (Ky. Ct. App. 1990) (scheduling council meeting without 24 hours’ notice to news media was “inconsistent with the purpose of the Kentucky Open Meetings Act.”).

<sup>3</sup> Citing the Ohio Supreme Court’s decision in *Bates*, in *Transparency v. City of Port St. Lucie*, Case No. 4D16-3976, a Fourth District appellate case pending in Florida, the parties argued that allowing for notice requirements to be waived or relaxed based on factors such as turnout is problematic. Whether the notice given was proper despite not adhering to the strict statutory requirements should not be based on factors such as the turnout at the meeting or the number of other places it was advertised. The parties

Therefore, as Solicitor for the City of Loveland, based on the foregoing, I reach the following conclusions:

- (1) I cannot ignore the fact that the posting requirements of Section 109.04 of the Loveland Code of Ordinances were not adhered to by the Clerk of Council. As such, any action taken by Loveland City Council at its August 14, 2017 special meeting should be deemed without legal effect.
- (2) The election of Mayor and Vice Mayor at the special City Council meeting of August 14, 2017 was not proper. Ms. Settell should maintain her role as the Vice Mayor of Loveland and serve as the presiding officer of all City Council Meetings given the vacancy left by the resignation of the Mayor as a member of City Council.
- (3) The decision to fill the empty City Council seat left by the resignation of Mark Fitzgerald vests with the remaining six members of this City Council. Should those remaining six members not be able to reach a majority consensus before a new City Council is elected and seated in November 2017, then that City Council shall fill the vacancy created by the resignation of Mark Fitzgerald under Section 2.03 of the Loveland Charter.
- (4) The position of Mayor of Loveland shall remain vacant until a new election takes place by the remaining members of City Council, or until an organizational meeting is held and a new Mayor is elected by the newly elected City Council in November pursuant to Section 2.05 of the Loveland Code of Ordinances.
- (5) Because the resignation of Mark Fitzgerald as a member of City Council took place *after* the special meeting, and not during it, the resignation is still effective as of 11:59 p.m. on August 14, 2017.

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argued in that case that analyzing the matter this way would allow for manipulation based on who appears at a meeting rather than whether the notice itself was proper. This "results" approach to what constitutes proper notice improperly shifts the burden to citizens. Determining what constitutes proper notice depends not on turnout, but on how much advance notice is given, the nature of the meeting, any exigencies requiring short notice, and whether the public had a reasonable opportunity to appear. This analysis is persuasive.

## **NOTICE OF SPECIAL MEETING OF LOVELAND CITY COUNCIL**

Pursuant to Rule 3 of Section 117.01 of the Loveland Code of Ordinances, Mayor Mark Fitzgerald is calling a special meeting of Loveland City Council to take place on August 14, 2017 at 7:00 p.m. at Loveland City Hall, 120 West Loveland Avenue in Loveland, Ohio. The purpose of the special meeting is to respond to matters related to the recently filed petition seeking his recall as a member of City Council, and to take up any other matters that may lawfully come before City Council.