IN THE CHANCERY COURT OF TENNESSEE
FOR THE ELEVENTH JUDICIAL DISTRICT
AT CHATTANOOGA

Chattanooga Publishing Company, Plaintiff, v. City of Chattanooga, Chattanooga City Council, and Chip Henderson, Jenny Hill, Ken Smith, Darrin Ledford, Isiah Hester, Carol B. Berz, Raquetta Dotley, Marvene Noel, and Demetrus Coonrod, in their official capacity as members of the Chattanooga City Council, Defendants.	No.22-0902 Part I

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Chattanooga Publishing Co. ("Chattanooga Publishing") files this Memorandum of Law in Support of its Motion for Summary Judgment.

INTRODUCTION

This case involves the public's ability to observe one of the most consequential processes a public body can undertake on behalf of its constituents: drawing voting district boundaries. Every ten years, following publication of the United States Census, Defendant the City Council of Chattanooga is required to redraw the lines that define its districts. During that process, it must ensure that applicable legal requirements are met to achieve the overarching goal of fair elections—or, to use the

frequently invoked phrase, it must ensure that the policy of "one person, one vote" is met.

But redistricting is not a purely mechanistic process; there is discretion at the process level and discretion in the details. The City Council and its individual members, who are named as Defendants in their official capacity (collectively the "City Council"), not only decide *how* to go about redistricting, but also the contours of the district boundaries, down to a single city block. The choices the City Council makes during that process influence voting constituencies on a person-to-person basis and, at the macro level, the population, geography, and demographic composition of each City Council district.

Given the gravity of the stakes for democratically-elected government, it is no surprise that the City Council's deliberation and decision-making is presumptively public under Tennessee law—specifically, Tenn. Code Ann. § 8-44-101, *et seq.* (the "Open Meetings Act" or "OMA")—meaning, *inter alia*, the City Council must provide adequate public notice of its meetings, afford the public the ability to attend and observe them, and record meeting minutes and make those available to the public. Unfortunately, much of the City Council's deliberation and decision-making during the most recent redistricting process failed to comply with the law.

As such, in December 2022, Chattanooga Publishing filed a complaint alleging that Defendants had violated the Open Meetings Act (the "Complaint"). The Complaint contains two claims, and for each, Chattanooga Publishing primarily seeks injunctive relief and judicial supervision specifically provided for by statute.

Claim I alleges that the periodic meetings of a City Council committee, the "Redistricting Committee," violated the Open Meetings Act by engaging in decision-making and deliberation without the requisite public notice, openness, and recording of meeting minutes. Claim II alleges that a series of discussions held between individual City Council members and employees of the City (the "City Staff") constituted deliberation and decision-making on redistricting that should have been public, but was not, in circumvention of both the requirements and spirit of the Open Meetings Act. Chattanooga Publishing also seeks an award of their reasonable expenses and costs incurred in bringing this lawsuit.

The injunctive relief sought by Chattanooga Publishing would prohibit the City Council from convening *ad hoc* committees to make decisions or deliberate toward decisions in closed sessions without public notice and without recording minutes. Chattanooga Publishing also seeks to enjoin the City Council from using nonpublic individual meetings between the City Council and City staff that circumvent the Open Meetings Act. This is for good reason: the City Council's deliberations must be public. "Public knowledge of the manner in which governmental decisions are made is an essential part of the democratic process. The public 'must be able to "go beyond and behind" the decisions reached and be appraised of the "pros and cons" involved if they are to make sound judgments on questions of policy and to select their representatives intelligently.'"[1]

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1 *Metro. Air Rsch. Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992) (quoting Note, *Open Meeting*

Because there is no genuine issue of material fact that the City Council violated the Open Meetings Act, and Chattanooga Publishing is entitled to judgment as a matter of law, Chattanooga Publishing respectfully requests that the Court grant it summary judgment and order the relief sought in the Complaint.

STANDARD OF LAW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citation omitted). "The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Rye v. Women's Care Ctr. Of Memphis*, 477 S.W.3d 235, 265 (Tenn. 2015) (citation omitted). "The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." *Id.*

Statutes: The Press Fights for the "Right to Know", 74 Harv. L. Rev. 1199, 1200–01 (1962)).

STATUTORY FRAMEWORK

A. The Open Meetings Act imposes requirements, enforceable in equity, on the "meetings of any governing body."

In order to achieve the General Assembly's intent "that the formation of public policy and decisions is public business and shall not be conducted in secret," Tenn. Code Ann. § 8-44-101(a), the Open Meetings Act imposes certain requirements on "meetings of any governing body." Tenn. Code Ann. § 8-44-102(a); *see generally* Tenn. Code Ann. § 8-44-101, *et seq.* Among those requirements, the public must be given adequate notice of meetings, Tenn. Code Ann. § 8-44-103, meetings are to be "open to the public at all times," Tenn. Code Ann. § 8-44-102(a), and minutes of the meeting—which must include a roll-call, all motions, proposals, and resolutions offered, and the results of any votes taken— "shall be promptly and fully recorded" and "open to public inspection," Tenn. Code Ann. § 8-44-104(a).

The human capacity to find loopholes is boundless; thus, the "spirit" of the Open Meetings Act is violable as well. While "chance meetings" are permissible, "[n]o such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements" of the OMA. Tenn. Code Ann. § 8-44-102(c)–(d). The Court of Appeals has recognized that the General Assembly intended this provision as a "loophole closer." *State ex rel. Matthews v. Shelby Cnty. Bd. of Comm'rs*, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990).[2]

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[2] Pursuant to Local Rule 6.05, all cited non-Tennessee state court judicial decisions are attached as Exhibit A.

The statutory definition of "meeting" bears heavily on the outcome of this case and this Motion. "Meeting" is defined in relevant part as "the convening of a governing body of a public body to make a decision or to deliberate toward a decision on any matter." Tenn. Code Ann. § 8-44-102(b)(2). A "governing body," in turn, is "[t]he members of a public body which consists of two (2) or more members . . . with the authority to make decisions for or recommendations to a public body on policy or administration." *Id.* § 8-44-102(b)(1)(A).

"Each separate occurrence of [a] meeting[] not held in accordance with [the Open Meetings Act] constitutes a separate violation." Tenn. Code Ann. § 8-44-106(c). The statute is enforced in equity; if a violation occurs, "[t]he court shall permanently enjoin any person adjudged by it in violation . . . from further violation." *Id.* § 8-44-106(a). The court "retains jurisdiction over the parties and subject matter for a period of one (1) year . . . and the court shall order the defendants to report in writing semiannually to the court of their compliance." *Id.* § 8-44-106(d). In addition, "the court shall file written findings of fact and conclusions of law and final judgments, which shall also be recorded in the minutes of the body involved." *Id.* § 8-44-106(b).

B. The Open Meetings Act must be interpreted broadly and strictly to benefit the public.

The Open Meetings Act is designed to prohibit "[t]he evil of closed-door operation of government without permitting public scrutiny and participation." *Dorrier v. Dark*, 537 S.W.2d 888, 895 (Tenn. 1976) (citation omitted). To that end, it "prevents government bodies from conducting the public's business in secret," *Metro. Air Rsch. Testing Auth., Inc.*, 842 S.W.2d at 616, "implement[ing] the constitutional

requirement of open government" found in Article I, Section 19 of the Tennessee Constitution,[3] *Dorrier*, 537 S.W.2d at 892.

The statute is remedial in nature and "should, therefore, be construed broadly to promote openness and accountability in government and to protect the public against closed door meetings at every stage of a government body's deliberations." *Metro. Air Rsch. Testing Auth.*, 842 S.W.2d at 616 (citations omitted); *accord Johnston v. Metro. Gov't of Nashville & Davidson Cnty.*, 320 S.W.3d 299, 310 (Tenn. Ct. App. 2009); *see also State ex rel. Matthews*, 1990 WL 29276, at *5 (stating that the OMA "is to be construed so as to frustrate all evasive devices" (citation omitted)). Put another way, the OMA "is to be construed most favorably to the public and is all encompassing and applies to every meeting of a governing body except where the statute, on its face, excludes its application." *Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 145 (Tenn. Ct. App. 1998) (quoting *State ex rel. Matthews*, 1990 WL 29276, at *4).[4]

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[3] Article I, Section 19 of the Tennessee Constitution provides in part:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.

[4] No such exemptions are implicated here. The statute, on its face, exempts meetings in which there is a "disclosure of a trade secret or proprietary information held or used by an association or nonprofit corporation." Tenn. Code Ann. § 8-44-102(b)(E)(ii). "Proprietary information" is that which "if known to a person or entity outside the association or corporation would give such person or entity an advantage . . . when providing or bidding to provide the same or similar services to local governments." *Id.* § 8-44-102(b)(E)(iii)(a).

Finally, "strict compliance with the [OMA] is a necessity if it is to be effective." *Zseltvay v. Metro. Gov't of Nashville & Davidson Cnty.*, 986 S.W.2d 581, 585 (Tenn. Ct. App. 1998). The OMA "does not make a distinction between technical and substantive violations of its provisions." *Id.* at 584.

C. Chattanooga Publishing has standing to bring its Open Meetings Act claims.

"Any citizen of this state" has standing to sue for violation of the Open Meetings Act. Tenn. Code Ann. § 8-44-106(a). The Court of Appeals has held that where an entity is a Tennessee corporation with its principal place of business in Tennessee, the entity has standing to bring suit under the statute. *Metro. Air Research Testing Auth., Inc.*, 842 S.W.2d at 616. Here, Defendants have admitted that Chattanooga Publishing is a Tennessee corporation with its principal place of business in Chattanooga. Plaintiff's Statement of Undisputed Material Facts ("SUMF") ¶ 1. Therefore, Chattanooga Publishing has standing to bring its claims.

ARGUMENT

I. The Redistricting Committee violated the Open Meetings Act.

Summary judgment must be granted on Count I of Chattanooga Publishing's Complaint, which alleges that the City Council's Redistricting Committee violated the Open Meetings Act by holding "meetings," under the statutory definition of that term, that were not properly noticed, open to the public, or recorded in meeting minutes. Compl. ¶¶ 64–74. In the alternative, the Complaint alleges that the convenings were informal assemblages during which the Redistricting Committee

decided and deliberated upon public business in circumvention of both the express requirements of and the spirit of the OMA. *Id.*

A. The Redistricting Committee unlawfully held three "convening[s] of a governing body of a public body" that were not open to the public.

Every ten years, after the federal census is published, the City Council is tasked with redrawing the lines that divide the nine voting districts in the Chattanooga. SUMF ¶ 21. The Chattanooga City Charter requires the City Council to "reorganize and adjust by ordinance" the boundaries of the districts currently established." *Id.*

The U.S. Census Bureau published a "redistricting data toolkit" on September 16, 2021. SUMF ¶ 26. Five days later, then-Chair of the City Council Chip Henderson, publicly announced that he had "tasked" a "small, ad hoc committee" with "gather[ing] some data" and "look[ing] at some options for what a redistricting map should look like." SUMF ¶ 27. That four-person "Redistricting Committee" was chaired by Councilmember Carol Berz. SUMF ¶ 28. She was joined by Councilmembers Raquetta Dotley, Ken Smith, and Isiah Hester. *Id.*

This, in and of itself, was extraordinary, as the City Council does not usually appoint *ad hoc* committees, favoring instead committees consisting of all nine of its members. SUMF ¶ 29. Indeed, Councilmember Berz testified that in her lengthy experience on the City Council, she could not recall a similar committee *ever* convening:

> Q. Thank you. I believe you said that you have been on the council for about 14 years; is that right?

A. Yes.

Q. Have you ever been aware of or participated in another *ad hoc* committee of less than the whole?

A. I don't think so.

Q. Have you ever been on a committee that never met in public besides the Redistricting Committee?

A. I'm just trying to — I can't imagine I did, no.

SUMF ¶ 29.

The Redistricting Committee constituted a "governing body of a public body" as that term is defined in the Open Meetings Act. This is true in two ways. First, City Council members, Berz, Dotley, Smith, and Hester are "members of a public body which consists of two (2) or more members . . . with the authority to make decisions for" the City of Chattanooga on redistricting, pursuant to the City Charter. Tenn. Code Ann. § 8-44-102(b)(1)(A); SUMF ¶ 21. Second, in their capacity as the Redistricting Committee, they had been "tasked" by the Chair of the City Council with "look[ing] at some options for what a redistricting map could look like," so that the Council could "begin . . . the conversation of redistricting." SUMF ¶ 27. In other words, they had "the authority to make . . . recommendations to" the City Council. Tenn. Code Ann. § 8-44-102(b)(1)(A) ("'Governing body' means: . . . The members of a public body . . . with the authority to make decisions for *or recommendations to* a public body on policy or administration.") (emphasis added); *Dorrier*, 537 S.W.2d at 892 ("It is clear that for the purpose of this Act, the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative

action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector.").

Two or more members of the Redistricting Committee convened—to use the statutory term—three different times in 2021 and 2022.[5] On each occasion, they met with members of the City Administration Staff ("City Staff") regarding redistricting. SUMF ¶ 30. Specifically, the following convenings occurred:

> **September 30, 2021:**
> Councilmembers Berz and Dotley met with City Staff. SUMF ¶¶ 30, 36.
>
> **December 9, 2021:**
> Councilmembers Berz, Dotley, Hester, and Smith met with City Staff. SUMF ¶¶ 30, 48.
>
> **February 15, 2022:**
> Councilmembers Berz, Dotley, Hester and Smith met with City Staff. SUMF ¶¶ 30, 86.

These three convenings, each of which included two or more members of the Redistricting Committee, were not open to the public, SUMF ¶¶ 32, 87; *see* Tenn. Code Ann. § 8-44-102(a), nor was the public notified in advance of the meetings. SUMF ¶ 31; *see* Tenn. Code Ann. § 8-44-103. Minutes were not kept at any of these convenings. SUMF ¶¶ 31, 87; *see* Tenn Code Ann. § 8-44-104(a).

Because these three convenings were those "of a governing body of a public body," Tenn. Code Ann. § 8-44-102(b)(2), the failure during each to provide public

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5 Convene, Merriam-Webster, https://www.merriam-webster.com/dictionary/convene (last viewed Oct. 8, 2024) ("to come together in a body"); *Convene*, Black's Law Dictionary (12th ed. 2024) ("To call together, esp. for a formal meeting; to cause to assemble.")

notice, make them open to the public, and keep minutes constitute violations of the Open Meetings Act *if* the convenings were "meetings"—in other words, if the convenings took place "to make a decision or to deliberate toward a decision on any matter." *Id.* § 8-44-102(b)(2). The convenings *also* violated the Open Meetings Act if they were used to decide public business in circumvention of the spirit of that statute. *Id.* § 8-44-102(c). As discussed *infra*, there is no genuine issue of material fact that deliberation or decision-making occurred during each of the three convenings and, therefore, they each constituted a "meeting" within the meaning of the Act or, alternatively, violated the spirit of the statute.

B. Each of the Redistricting Committee's three convenings involved decision-making.

1. During its September 30, 2021 convening, the Redistricting Committee decided on a set of guidelines for redistricting.

On September 30, 2021, Councilmembers Berz and Dotley met with several members of City Staff. SUMF ¶ 36. At that meeting, the City Staff informed the councilmembers of legal and practical requirements that the City Council was required to follow during the redistricting process. SUMF ¶ 37. For instance, City staff discussed the "10% rule" for the distribution of population in each district. SUMF ¶ 39. City Staff also displayed a chart of then-current council districts that compared the population of each district—based on the 2020 census—against one-ninth of the total population of Chattanooga. SUMF ¶ 38. Some districts had populations that fell outside the 10% deviation mark, meaning that the district boundaries would need to be "reorganize[d] and adjust[ed]" by the City Council.

SUMF ¶¶ 21 (citing Chattanooga City Charter Section 8.9), 39. However, City Staff, rather than the Redistricting Committee, held the technological expertise required to work with the computer programs used to plot the new district boundaries. SUMF ¶ 40.

Thus, the question was: Since City Staff would hold the pen, so to speak, what instructions or guidelines would the Redistricting Committee give to City Staff on how City Staff should manipulate the district boundaries? A "decision" is "[a] . . . determination after consideration of the facts and the law." *Decision*, Black's Law Dictionary (12th ed. 2024). At the September 30, 2021 convening of the Redistricting Committee, it made the following determinations about how City Staff should proceed:

a. The Redistricting Committee decided that the existing district boundaries should be disrupted as little as possible.

In an email to Councilmembers Smith, Ledford, and Hester sent less than a week after the September 30, 2021 convening, Councilmember Berz wrote that the Redistricting Committee had decided during its September 30, 2021 convening to disrupt existing district boundaries as little as possible. SUMF ¶ 44. Specifically, Councilmember Berz wrote, "our Redistricting Committee has met once, has requested data and will be carefully considering a variety of models that (1) *will interrupt the present model as little as possible*; and (2) will legally meet the numbers requirements." SUMF ¶ 44 (emphasis added). She later confirmed that the Redistricting Committee made that decision in a March 17, 2022 email sent to a Chattanooga citizen who had asked about the redistricting process. SUMF ¶ 41. In

that email, Berz wrote, "*I asked that Mr. [Chris] Anderson* . . . [g]et the districts in compliance with the law, *with as little disruption as possible of existing boundaries.*" *Id.* (emphasis added).

Likewise, Councilmember Berz and two members of City Staff involved in the redistricting process—Chris Anderson and Andrew Sevigny—each confirmed during their depositions that the Redistricting Committee made that decision at the September 30, 2021 convening. *Id.* And both Anderson and Sevigny confirmed that they carried out that instruction. SUMF ¶ 43. Because the Redistricting Committee made this determination about how the City Staff should proceed to draw the new district lines, it engaged in decision-making behind closed doors in violation of sections 8-44-102(a), -103, and -104(a) of the Open Meetings Law.

b. The Redistricting Committee decided that neighborhoods should be kept intact and not split across districts and decided to adopt the recommendations of City Staff to follow arterial roadways and natural land features.

Councilmember Berz and City Staff member Chris Anderson each confirmed during their depositions that the Redistricting Committee decided that neighborhoods should not be split across districts at the September 30 convening. SUMF ¶¶ 41, 42. For instance, Berz testified, "I do remember saying, 'Well, you know what? Council has to make the final decision, but I think you probably should disrupt things as little as possible, *particularly neighborhood associations.*'" SUMF ¶ 41 (emphasis added).

Relatedly, the Redistricting Committee decided to adopt the recommendation of City Staff that district boundaries follow neighborhood boundaries, arterial

roadways, and natural land features as possible. This was confirmed through the depositions of Berz, Anderson, and Sevigny. SUMF ¶¶ 41–43. The decision was consequential—although that guideline did not appear in City Staff's September 30, 2021 presentation to the Redistricting Committee, after it was presented to the Redistricting Committee by City Staff on September 30, the Redistricting Committee adopted the recommendation and it appeared in every City Staff presentation thereafter. SUMF ¶¶ 52, 91, 103. And at the Redistricting Committee's March 1, 2022 public presentation of proposed district boundaries to the full City Council, that decision was described by Sevigny as a foregone conclusion—not one still open for discussion:

> We also used the neighborhood boundary file as guidelines. I think we really wanted to stress keeping neighborhoods together. I've heard and I'm sure you-all have heard some issues where neighborhoods felt like they were broken up among council districts. So we're going to keep neighborhoods together. We used major roadways and natural land features, like, you know, the river running through Chattanooga as kind of guidelines. And then we also used, as Chris stated, individual council input.

SUMF ¶ 103.

The decision-making undertaken at the September 30, 2021 convening of the Redistricting Committee constituted a "meeting" as defined by the OMA. Moreover, there is no genuine issue of material fact that these process-level decisions took place in settings that did not meet the openness requirements of the Open Meetings Act. As such, they were violations of the statute.

2. During its December 9, 2021 convening, the Redistricting Committee decided that each individual councilmember would meet with City Staff before the full City Council discussed proposed boundaries in open session.

On December 9, 2021, Councilmembers Berz, Dotley, Hester, and Smith met with members of City Staff for the Redistricting Committee's second convening. SUMF ¶¶ 30, 48. At that meeting, City Staff informed the Redistricting Committee that they had created a map for the Redistricting Committee's consideration (the "December 9, 2021 Proposed Map"). SUMF ¶ 50. City Staff explained that its process in creating the new map involved both (i) compliance with the legal and practical standards that it had previously discussed with the Redistricting Committee—for instance, complying with the 10% deviation rule, but also (ii) following the guidelines for redistricting on which Redistricting Committee had decided at the September 30, 2021 meeting, namely, causing as little disruption as possible to the previous set of boundaries, not splitting neighborhoods, and adopting City Staff's recommendation to use arterial roads and natural land features as district boundaries where possible. SUMF ¶¶ 50–52.

City Staff's December 9, 2021 presentation led to another decision by the Redistricting Committee. Specifically, the Redistricting Committee decided that City Staff should hold a series of meetings with each City Council member individually to discuss the December 9, 2021 Proposed Map. SUMF ¶ 55. There is no genuine issue of material fact on this point. In fact, later that day, Councilmember Berz emailed then-Council Chair Henderson stating that the Redistricting Committee had met and "as part of the process each of our Council members will have an individual session

with the data people [City Staff] to be educated about the latest iteration of the district map." SUMF ¶ 56. Councilmember Berz confirmed making that decision during her deposition. *Id.*[6]

Accordingly, the nonpublic December 9, 2021 convening, wherein the Redistricting Committee decided to proceed with City Staff's preliminary map for further deliberations with individual councilmembers was also a "meeting" in violation of the Open Meetings Act.

3. During its February 15, 2022 convening, the Redistricting Committee decided that the full City Council should consider the new redistricting map.

On February 15, 2022, following discussions held between individual City Council members and City Staff (*see, infra*, Section II), Councilmembers Berz, Dotley, Hester, and Smith, in their capacity as the Redistricting Committee, again met with City Staff. SUMF ¶¶ 30, 86. At that convening, City Staff informed the Redistricting Committee that they had created a second map for the Redistricting Committee's consideration (the "February 15, 2022 Proposed Map"). SUMF ¶ 90.[7] This led to a decision by the Redistricting Committee to place the February 15, 2022 Proposed Map

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[6] Concurrently, or resultingly, the Redistricting Committee decided not to present the December 9, 2021 Proposed Map to the full City Council. SUMF ¶ 54. In other words, in contrast to the February 15, 2022 Proposed Map, discussed *infra*, which the Redistricting Committee decided to send to the full City Council for consideration, the Redistricting Committee decided *not* to take that route with the December 9, 2021 Proposed Map.

[7] As discussed *infra* in Section II, that map was based on both the instructions that the Redistricting Committee had given City Staff and the feedback of individual City Council Members. SUMF ¶ 90.

on the City Council's March 1, 2022 Strategic Planning meeting agenda for consideration. There is no genuine issue of material fact that the Redistricting Committee made this decision. It is noted in the meeting minutes and transcript of the full City Council's Agenda Session later that same day. SUMF ¶ 94. The February 15, 2021 Proposed Map was, in fact, discussed at the March 1, 2022 Strategic Planning meeting. And both Councilmember Berz and City Staff member Sevigny confirmed that the Redistricting Committee decided to present that map during its February 15, 2022 meeting. SUMF ¶ 93. Accordingly, the February 15, 2022 convening was a nonpublic "meeting" in violation of the Open Meetings Act.

* * *

Should this matter proceed beyond the summary judgment stage, Chattanooga Publishing expects at trial to demonstrate yet additional decisions made by the Redistricting Committee during these three meetings. But each decision on how to engage in the redistricting process discussed herein demonstrates, as a matter of law, that each "convening" of the Redistricting Committee constituted a "meeting" under the OMA. Alternatively, they were used to decide public business in circumvention of the spirit of the statute. Tenn. Code Ann. § 8-44-102(c). Accordingly, any one of the Redistricting Committee's decisions requires judgment against Defendants on Claim I of the Complaint. *See id.* § 8-44-106(c) ("Each separate occurrence of [a] meeting[] not held in accordance with [the Open Meetings Act] constitutes a separate violation."). There is no genuine issue of material fact that these meetings failed to comply with the notice, openness, and minute-keeping requirements of the Open

Meetings Act. As such, summary judgment in favor of Chattanooga Publishing as to Count I of the Complaint is required.

C. The Redistricting Committee's convenings were deliberative.

In addition to the process-level decision-making undertaken by the Redistricting Committee, it also deliberated toward decisions during those convenings, in secret, in violation of the Open Meetings Act. "To deliberate is 'to examine and consult in order to form an opinion. . . . [T]o weigh arguments for and against a proposed course of action.'" *Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990) (quoting *Deliberate*, Black's Law Dictionary 384 (5th ed. 1979)). It "connotes not only collective discussion but collective acquisition and exchange of facts preliminary to the ultimate decision." *Grein v. Bd. of Educ. of Sch. Dist. of Fremont*, 343 N.W.2d 718, 722 (Neb. 1984).

As noted above, the redistricting committee was "tasked" with making recommendations to the full City Council. SUMF ¶ 27. "Deliberat[ing] toward a decision on any matter," Tenn. Code Ann. § 8-44-102(b)(2)—which must be open to the public under the OMA—does not require that a decision actually be reached. For example, in *Neese*, a subset of a school board convened to discuss a policy change in the Paris Special School District at a convening for which the public had insufficient notice. 813 S.W.2d at 435. That subset "discuss[ed]" and "weigh[ed]" the "advantages and disadvantages" of the proposed policy. *Id.* Thus, the Court of Appeals held, "regardless of whether any Board member made a decision at the meeting, we do not believe that the Board can successfully avoid the fact that it deliberated toward making a decision." *Id.* Similarly, in *Mayor & City Council & City of Columbus v.*

Commercial Dispatch, a City Council held several sub-quorum gatherings to discuss "the subject of economic development, specifically, retail development in Columbus." 234 So. 3d 1236, 1237 (Miss. 2017). Because these gatherings were "preplanned" and "for the express goal of discussing City business," the appellate court found that the meetings were "the deliberative stages of the decision-making process that lead to 'formation and determination of public policy'" and thus required to be open under Mississippi's open meetings law. *Id.* at 1240, 1241 (quoting *Bd. of Trs. of State Insts. of Higher Learning v. Miss. Publishers Corp.*, 478 So.2d 269, 278 (Miss. 1985)). As set forth below, irrespective of its decision-making, the Redistricting Committee was engaged in deliberation toward a decision during its three convenings in 2021 and 2022 in violation of the OMA.

1. The members of the Redistricting Committee examined two proposed maps in secret.

As previously demonstrated, the Redistricting Committee was presented with two proposed maps by City Staff—one on December 9, 2021, and another on February 15, 2021. SUMF ¶¶ 50, 90. These two maps were different. SUMF ¶ 90. And the Redistricting Committee reacted differently to each—it decided the December 9, 2021 Proposed Map *would not* be sent to the full City Council for discussion and that the February 15, 2022 Proposed Map *would* be sent to the Full City Council for discussion. SUMF ¶¶ 55, 93. In each instance, the Redistricting Committee "examine[d]" a proposed map "to weigh arguments for and against a proposed course of action," *Neese*, 813 S.W.2d at 435, *i.e.*, whether to seek the input of City Council members individually or bring the map to the City Council as a whole. The

Redistricting Committee's review of these maps brought its convenings into the statutory definition of "meeting," and its deliberations on each map behind closed doors constitute two separate violations of the Open Meetings Act.

2. The Redistricting Committee's receipt of information from City Staff was part of its deliberation process, not separate from it.

Additionally, as previously demonstrated, at each of the three Redistricting Committee meetings City Staff presented the Redistricting Committee with information for its deliberations. For instance, City Staff discussed the legal requirements for the population and demography of each district, SUMF ¶ 37–39, 49–50, 52, 92, as well as the extent to which the populations within each district, per the newly published census data, aligned with those requirements. SUMF ¶ 39, 52, 92. Convenings that involve the receipt of information as part of deliberation are still "meetings."[8] "Listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking." *Johnson v. Neb. Env't Control Council*, 509 N.W.2d 21, 32 (Neb. Ct. App. 1993) (citation omitted);

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[8] The "narrow exception" for that type of convening in Tennessee are "situations in which the public body is a named party in the lawsuit," or when there is "a pending controversy that [is] likely to result in litigation," and it receives advice of counsel on the pending litigation or controversy. *Smith Cnty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 335 (Tenn. 1984) (explaining narrow exception for pending litigation); *Van Hooser v. Warren Cnty. Bd. of Educ.*, 807 S.W.2d 230, 237 (Tenn. 1991) (discussing application to pending controversies). That exception is not implicated here. Moreover, "once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon advice from counsel, whether it be settlement or otherwise, such discussion shall be open to the public and failure to do so shall constitute a clear violation of the Open Meetings Act." *Smith Cnty. Educ. Ass'n*, 676 S.W.2d at 334.

State ex rel. Newspapers v. Showers, 398 N.W.2d 154, 161 (Wis. 1987) ("'When the members of a governmental body gather . . . and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other," "information gathering" constitutes deliberation) (quoting *State ex rel. Lynch v. Conta*, 239 N.W.2d 313, 330 (Wis. 1976)). And, indeed, the Redistricting Committee's receipt of this information was a critical component of its deliberation towards its decisions and recommendations.

This was not a situation in which the Redistricting Committee convened solely for the purpose of receiving information from City Staff. But even if the Redistricting Committee *had* convened solely to receive information, the line of cases on which Defendants attempted to rely in their Motion to Dismiss (which was denied) is not relevant here. In particular, this is not a case controlled by *Johnston*, 320 S.W.3d at 312. In that case, a member of the Nashville Metropolitan Council "ma[d]e available" to council members "survey data," petitions from members of the community, a member of a neighborhood association, a member of the Nashville Historic Zoning Commission, and a home designer. Significantly, these sources of information were made available "*immediately prior to and perhaps during*" a public meeting during which deliberation and voting took place in a room that *adjoined* the ongoing public meeting. *Id.* at 306 (emphasis added). That situation and this case are not similar; the Redistricting Committee's numerous convenings were planned in advance and held over a period of months, out of the public view. SUMF ¶¶ 30, 32. The facts of

Johnston, unlike the facts here, permitted the trial court to find that "nothing in the record showed that deliberations occurred in the Council conference room," and the Court of Appeals did not disturb the *Johnston* trial court's fact-finding. *Id.* at 312.

Flat Iron Partners, LP v. City of Covington, also cited in Defendant's Motion to Dismiss involved a similarly fact-intensive scenario not applicable here. No. W2013-02235-COA-R3-CV, 2015 WL 1952290 (Tenn. Ct. App. Apr. 30, 2015). In that case, the Board of Mayor and Aldermen convened the day before a public meeting and received *only* the information that a specific proposal would be made at a public meeting the following night. *Id.* at *7–8. Again, a decision based on those facts is inapposite to this case, in which of the Redistricting Committee meetings were planned and placed on its members' calendars specifically for the reasons described *supra*.[9]

Johnston and *Flat Iron Partners* are not relevant to this case where the Redistricting Committee deliberated toward and eventually made process-level decisions and considered two proposed redistricting maps before presenting a different map to the public on March 1, 2022. Here, the undisputed facts demonstrate that the Redistricting Committee received information from City Staff as part of its deliberations and, thus, its convenings were unlawfully closed meetings.

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[9] *Flat Iron Partners* also contains a clear misreading of the narrow holding of *Johnston*. The holding of *Johnston* is limited to the situation in which a public body has informational resources available for its members *concurrently with or immediately prior to* a properly noticed public meeting. *Johnston*, 320 S.W.3d at 312.

II. The series of meetings, calls, and emails between individual City Council members and City staff violated the Open Meetings Act.

Summary judgment must also be granted for Chattanooga Publishing on Count II of its Complaint, which alleges that the City Staff's meetings with individual members of the City Council at the Redistricting Committee's direction violated the Open Meetings Act because they circumvented the requirements and spirit of that statute. Compl. ¶¶ 75–78.

A. Individual City Council members participated in a series of non-public discussions about redistricting.

The Redistricting Committee decided on December 9, 2021 that each individual member of the City Council should be afforded the opportunity to discuss the boundaries of their district in the December 9, 2021 Proposed Map with City Staff and provide feedback on those boundaries. SUMF ¶ 55. Those discussions between individual City Council members and City Staff were held in quick succession:

December 14, 2021	Councilmember Ken Smith (Dist. 3). SUMF ¶ 58.
January 11 or 14, 2022	Councilmember Chip Henderson (Dist. 1). SUMF ¶ 60.
January 11, 2022	Councilmember Darrin Ledford (Dist. 4). SUMF ¶ 66.
January 18, 2022	Councilmember Jenny Hill (Dist. 2). SUMF ¶ 68.
February 3, 2022	Councilmember Demetrus Coonrod (Dist. 9). SUMF ¶ 72.
February 10, 2022	Councilmember Demetrus Coonrod (Dist. 9). SUMF ¶ 76.
January – February 2022, precise date not recalled	Councilmember Raquetta Dotley (Dist. 7). SUMF ¶ 81.
January – February 2022, precise date not recalled	Councilmember Carol Berz (Dist. 6). SUMF ¶ 83.

Following the February 15, 2022 convening of the Redistricting Committee, an additional individual discussion occurred:

February 17, 2022	Councilmember Demetrus Coonrod (Dist. 9). SUMF ¶ 95.

And following the City Council Strategic Planning meeting on March 1, 2022, the discussions between City Staff and individual City Council members continued:

March 28, 2022	Councilmember Marvene Noel (Dist. 8). SUMF ¶ 107.
April 13, 2022	Councilmember Marvene Noel (Dist. 8). SUMF ¶ 109.
April 19, 2022	Councilmember Demetrus Coonrod (Dist. 9). SUMF ¶ 113.

These discussions were not properly noticed, open to the public, or recorded in meeting minutes. SUMF ¶ 57; *see* Tenn. Code Ann. §§ 8-44-102(a), 103, 104(a).

As such, the question is whether these were "informal assemblages[] or electronic communication [that were] used to decide or deliberate public business in circumvention of the spirit or requirements" of the Open Meetings Act. Tenn. Code Ann. § 8-44-102. The undisputed facts make clear, as a matter of law, that they indeed constituted violations of the OMA.

B. The series of discussions about redistricting circumvented the spirit of the Open Meetings Act because they were used to decide or deliberate public business.

1. The City Council reached a consensus set of boundaries through private discussions held before March 1, 2022 that it presented to the public on that date.

The City Council circumvented the Open Meetings Act by holding a series of private discussions between individual Councilmembers and City Staff at the behest of the Redistricting Committee. The deliberation and decision-making that occurred

during those discussions was reflected in the February 15, 2022 Proposed Map and March 1, 2022 Proposed Map. The public was not apprised of the results of those deliberations and decision-making until March 1, 2022. SUMF ¶ 100. And even then, the public was never made aware of the decisions and discussions that led to the changes to the December 9, 2021 Proposed Map and the February 15, 2022 Proposed Map. *Id.*

There is no genuine issue of material fact on this point. During the City Council's March 1, 2022 Strategic Planning session, City Staff member Anderson introduced the March 1, 2022 Proposed Map by saying, "As you know, we've been working on this now for about six months, and I really appreciate all of the one-on-one quality time I've gotten to spend with all of you. . . . I think that what you're going to see today will offer no surprises—it will be what I think everyone is expecting." SUMF ¶ 101. Anderson informed the City Council that the district boundaries drawn on the March 1, 2022 Proposed Map "reflect hours and hours, really hundreds and hundreds of hours of staff time spent with the nine and now eight of you." *Id.*[10] "And I want to stress that this is the proposal based on [the City Council's] input." *Id.* Anderson also told the City Council, "I think I've spent a lot of time with each of you making the changes that you wanted to your districts. We're

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10 Anderson testified at his deposition that he now estimates the time spent in those meetings to be between 30 to 50 hours, rather than "hundreds of hours." McAdoo Decl. Ex. 8 [Anderson Dep. Tr. 105:21–106:9]. That revision does not create a genuine issue of material fact as to the underlying point, which is that the meetings resulted in a consensus set of boundaries.

happy to make more of them if you want them, but the last word I have from every member of the Council is that you're fine with this." *Id.*

Anderson's account of the nature of the closed individual meetings and their impact on the redistricting map was confirmed by the statements of Councilmember Henderson and City Staff member Sevigny at the same Strategic Planning session. SUMF ¶ 104 (Henderson: "Every council person has seen this particular map, correct . . . or at least their portion of the district?" Anderson: "Yes, sir. There are no changes to that map, to anyone's district, that that person hasn't seen."); SUMF ¶ 102 (Sevigny: ""We also used, as Chris [Anderson] said, individual council input . . . so we'd come to you individually and say, 'What are you interested in having in your district, and what works for you?""). It was confirmed through an email sent by Sevigny on March 29, 2022, stating that City Staff "[m]et individually between Dec 9th and Feb 15th for Council Input," and that the February 15th, 2022 Proposed Map was "based on Council input." SUMF ¶ 108. It was confirmed by the City of Chattanooga through its responses to Plaintiff's Interrogatories. SUMF ¶ 89 ("[S]ome individual council members met with Chris Anderson for the purpose of understanding the status and suggested changes to the map for their respective districts. *In some cases, the lines would be adjusted based on these meetings*, but not in a significant manner.") (emphasis added). And it was confirmed by Councilmember Berz during her deposition. SUMF ¶ 89.

The Open Meetings Act "'must apply when public officials meet in secret to deliberate and make decisions affecting the public's business with the intent to hold

an open meeting to announce their decision at a later time.'" *State ex rel. Matthews*, 1990 WL 29276, at *5 (citation omitted). In *Matthews*, the Shelby County Board of Commissioners was alleged to have "decided among themselves that none of the announced candidates were acceptable" to fill the vacant Board of Commission position "and that a 'consensus' candidate would have to be found." *Id.* at *5. Two members of the board proceeded to "phone and/or me[et] personally with most of the other commissioners to line up votes" for their chosen candidate prior to the next public meeting. *Id.* at *3. The question in *Matthews* was whether this set of allegations stated a claim under the Open Meetings Act; the Court of Appeals held that it did, because,

> whether or not the alleged conduct falls within the Act's definition of "meeting" . . . the alleged conduct constitutes informal assemblages of a governing body at which public business was privately deliberated and decided, without public notice, in contravention of the spirit and requirements of the Open Meetings Act.

Id. at *6.

So too here, where the City Council reached a consensus set of boundaries through individual meetings, reflected in the March 1, 2022 Proposed Map, which were then presented in a public meeting. Importantly, the OMA "does not make a distinction between technical and substantive violations of its provisions." *Zseltvay*, 986 S.W.2d at 584. A public body need not intend to circumvent the Open Meetings Act to violate its spirit. *Johnston*, 320 S.W.3d at 311.

The analysis in *Matthews* is not unique to Tennessee—it is common across jurisdictions with open meetings laws. For example, in *Blackford v. School Board of*

Orange County, a "school board's staff was faced with a major redistricting problem," and in order to "avoid the uproar which would unquestionably attend the public airing of each possible alternative," the school superintendent "devised a plan by which his board members would come visit his office in rapid-fire succession to discuss, exclusively, this major redistricting problem." 375 So. 2d 578, 579 (Fla. Dist. Ct. App. 1979). The court concluded that "in effect the board met in secret and used staff members as intermediaries in order to circumvent public meeting requirements" in a manner that contravened Florida's sunshine law. *Id.* at 580–81 (cleaned up).

In *Harris v. City of Fort Smith*, a deputy city administrator who sought approval of a City Board of Directors to make a bid at auction "contacted each Board member either in person or by phone to gain approval to bid, as well as to gain approval of bid amounts." 359 Ark. 355, 360 (2004). The Arkansas Supreme Court held that because "the purpose of the one-on-one meetings was to obtain a decision of the Board as a whole," the use of an intermediary "did not alter the actual character of the result of [the intermediary's] work, which was a decision of the Board." *Id.* at 365.

In *State ex rel. Cincinnati Post v. Cincinnati*, the Supreme Court of Ohio considered "whether a public body may circumvent the requirements of [Ohio's public meetings] statute by setting up back-to-back meetings of less than a majority of its members, with the same topics of public business discussed at each." 668 N.E.2d 903, 906 (Ohio 1996). The court held that "the statute prevents such maneuvering to avoid its clear intent," *id.*, and "[t]o find that Cincinnati's game of 'legislative musical

chairs' is allowable under the Sunshine Law would be to ignore the legislative intent of the statute, disregard its evident purpose, and allow an absurd result." *Id.*

There was no lack of public meetings of the City Council during the period between December 9, 2021, and March 1, 2022. Yet instead of deliberating and making decisions about changes to the district boundaries during those meetings, the City Council chose to play "legislative musical chairs." *State ex rel. Cincinnati Post*, 688 N.E.2d at 906. This process was in circumvention of the spirit of the Open Meetings Act and, as such, summary judgment should be granted in favor of Chattanooga Publishing on Count II of its Complaint.

2. The City Council engaged in decision-making through a series of discussions between individual City Council members and City Staff.

The above-listed series of discussions directly resulted in changes to the December 9, 2021 Proposed Map, the February 15, 2021 Proposed Map, and the March 1, 2021 Proposed Map. Those changes, discussed *infra*, evidence deliberation and decision-making by City Council members in circumvention of the spirit and requirements of the Open Meetings Act.

a. The December 9, 2021 Proposed Map was changed based on Councilmember Henderson's January 11 or January 14, 2022 discussion with City Staff.

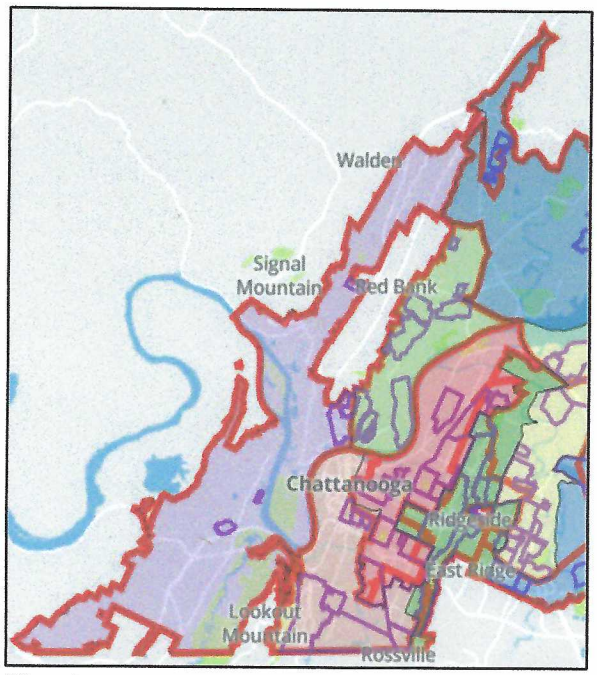

Fig. 1-a
December 9, 2021 Proposed Map shown to Redistricting Committee

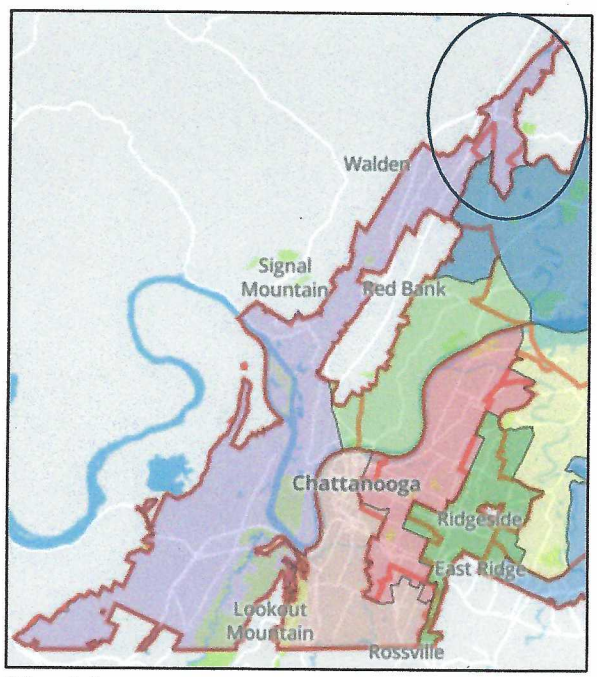

Fig. 1-b
March 1, 2022 Proposed Map shown to public with Hixson area circled

Councilmember Henderson (District 1, purple) discussed redistricting with City Staff on January 11 or 14, 2022. SUMF ¶ 60. As seen in *Fig. 1*, a district boundary that defined which district encompassed a northwestern area of Chattanooga called Hixson shifted between the December 9, 2021 Proposed Map and the March 1, 2022 Proposed Map. *See* SUMF ¶ 63. There is no genuine issue of material fact that this change took place due to Councilmember Henderson's non-public deliberation and decision-making.

At his January discussion with City Staff, Councilmember Henderson noted that "[p]art of my Hixson district that had . . . just came in to District 1 in 2013 was removed, and I felt like that was sort of battening [the residents of Hixson] around."

SUMF ¶ 63. Henderson told City Staff that he "didn't feel comfortable with that change," that he "had concerns about that," and he "couldn't support the map or at least had objections to the map as it was proposed." *Id.* City Staff member Sevigny confirmed that he was asked to make changes to Hixson based on Mr. Henderson's feedback:

> Q. Why that change between December 9th and February 15th?
>
> A. That may have been feedback from Council.
>
> Q. Feedback from Mr. Henderson?
>
> A. Yes.
>
> Q. What feedback?
>
> A. Mr. Henderson may have wanted to keep that neighborhood at the very top.
>
> Q. And who did he give that feedback to?
>
> A. Most likely to Chris Anderson, or, if I was there, myself.
>
> Q. And after you [or] after Mr. Anderson received that feedback were you the one that made the change to District 1 to add this new boundary back?
>
> A. Yes. I would be the one who would make the technical change.

SUMF ¶ 64. Councilmember Henderson affirmed this account in his responses to Chattanooga Publishing's interrogatories. *Id.* ("We discussed the boundary of my district, and I objected to the proposal as presented. The next map I saw addressed my concerns."). As a result of the feedback that Councilmember Henderson gave to City Staff in his individual meeting, the boundaries drawn in the March 1, 2022 Proposed Map returned the Hixson area to District 1. *Id.*

b. The December 9, 2021 Proposed Map was changed based on Councilmember Hill's January 18, 2022 discussion with City Staff.

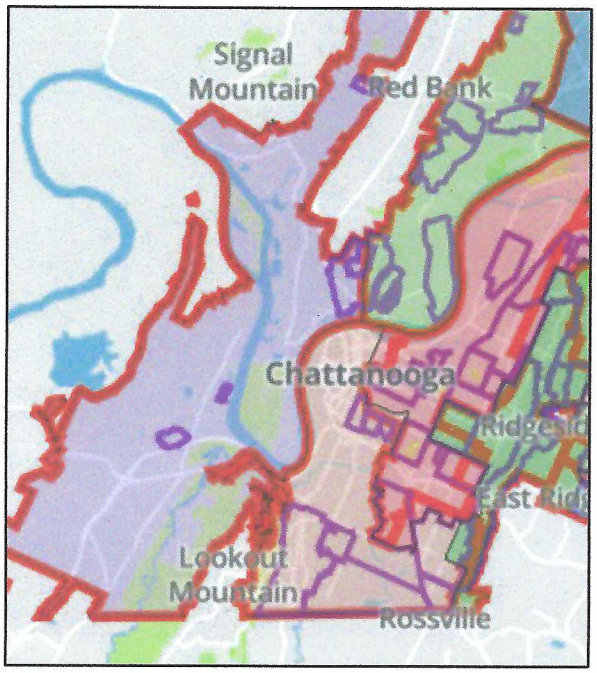

Fig. 2-a
December 9, 2021 Proposed Map shown to Redistricting Committee

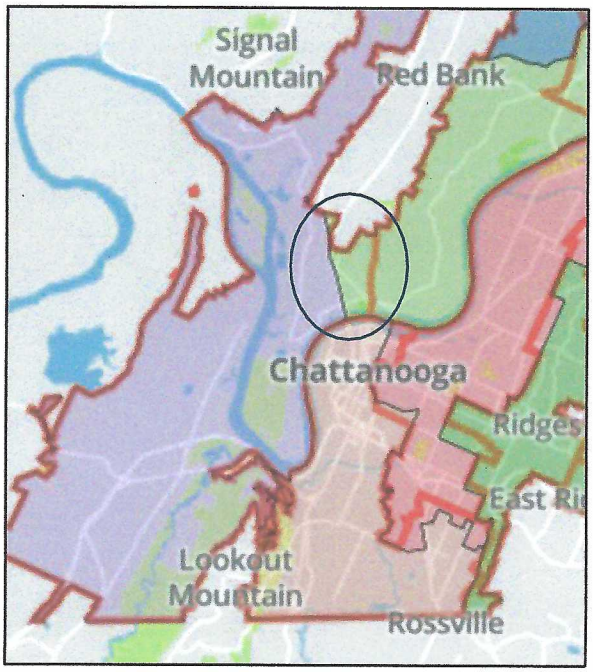

Fig. 2-b
March 1, 2022 Proposed Map shown to public with Hill City area circled

Councilmember Hill (District 2, light green) discussed redistricting with City Staff on January 18, 2022. SUMF ¶ 68. As seen in *Figs. 2-a* and *2-b*, a district boundary that defined which district encompassed a neighborhood called Hill City shifted between the December 9, 2021 Proposed Map and the March 1, 2022 Proposed Map. *See* SUMF ¶ 71. There is no genuine issue of material fact that this change took place due to Councilmember Hill's non-public deliberation and decision-making.

Hill's interrogatory responses reflect that she discussed "likely adjustments to District 2 because of City population changes, particularly relating to the line of Eli Road and Hill City" with Chris Anderson "and possibly Andrew Sevigny or Tim Moreland" on January 18, 2022. SUMF ¶ 68. An email from Sevigny, sent the next

day, states that a newly proposed change to the district boundaries "really messes some things up." SUMF ¶ 70. Sevigny recalled that he was reacting to a change Councilmember Hill requested for Hill City to remain in her district during their non-public meeting the day before. *Id.* As a result of Hill's decision and direction to City Staff, District 2 encompassed Hill City in the March 1, 2022 Proposed Map.

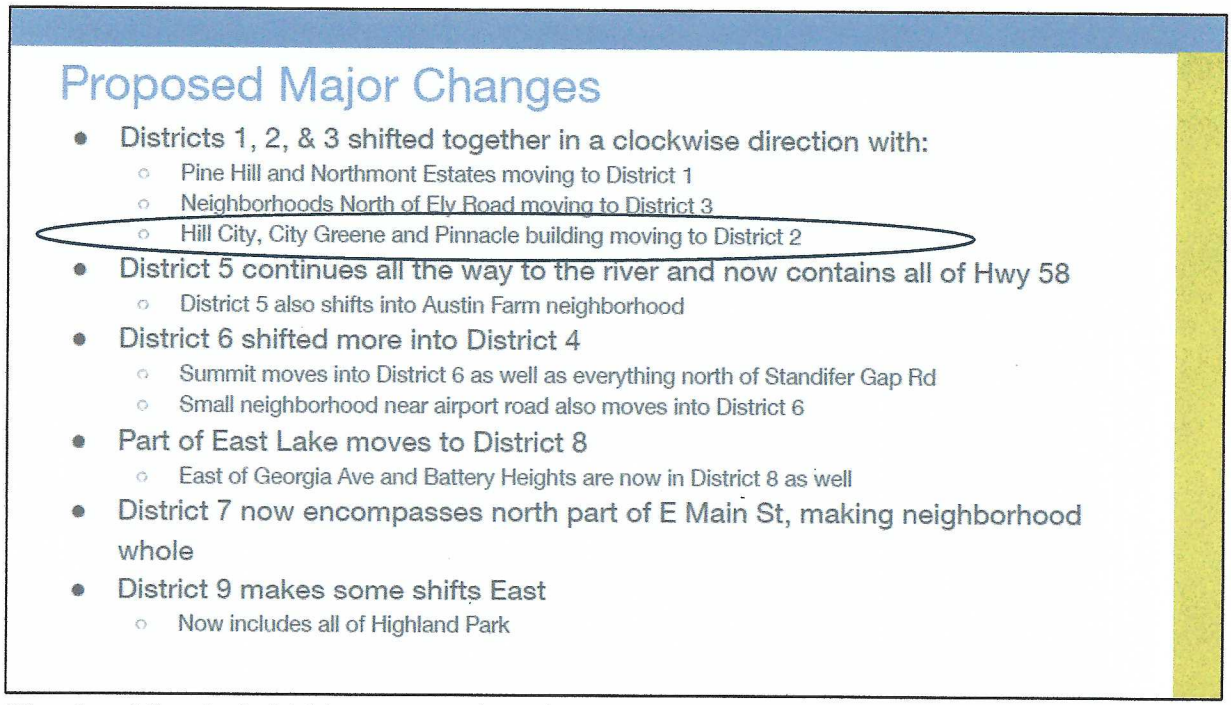

Fig. 2-c: March 1, 2022 presentation shown to public, with Hill City change circled

SUMF ¶ 71. Councilmember Hill's decision led directly to a change in district boundaries and typifies the individual meetings between City Council members and City Staff.

c. The December 9, 2021 Proposed Map was changed based on Councilmember Coonrod's February 3, February 10, 2022, and February 17 discussions with City Staff.

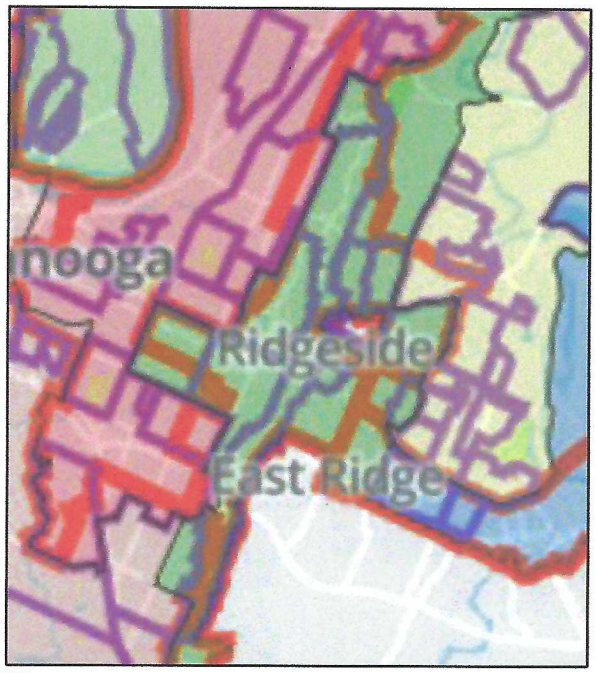

Fig. 3-a
December 9, 2021 Proposed Map shown to Redistricting Committee

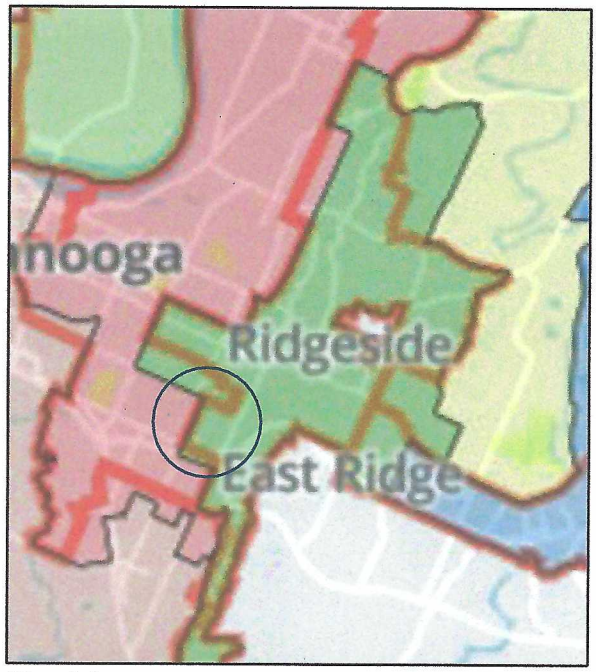

Fig. 3-b
March 1, 2022 Proposed Map shown to public, with Mill Town development circled

Councilmember Coonrod (District 9, medium green) had a number of individual discussions with City Staff, including three before March 1, 2022. SUMF ¶¶ 72, 76, 95.

As seen in *Fig. 3-a* and *3-b*, a district boundary that defined which district encompassed the Mill Town development shifted between the December 9, 2022 Proposed Map and the March 1, 2022 Proposed Map. SUMF ¶ 75. There is no genuine issue of material fact that this change took place due to Councilmember Coonrod's deliberation and decision-making during her individual, non-public meetings with City Staff. During her February meetings with City Staff,

Councilmember Coonrod stated her desire to have the entirety of the Mill Town development included in District 9. SUMF ¶ 74. This was particularly important to Councilmember Coonrod, as she had "worked hard on trying to get Mill Town developed . . . by asking developers to come in and fix [] distressed neighborhoods in my district." *Id.* Councilmember Coonrod's statement to this effect was confirmed through the depositions of City Staff members Anderson and Sevigny. SUMF ¶ 74–75. Both Anderson and Sevigny also confirmed that the boundary was changed so that District 9 would encompass Mill Town due to Councilmember Coonrod's directive. SUMF ¶ 75.

In addition, there is no genuine issue of material fact that Councilmember Coonrod decided that a grocery store named Save A Lot located on Glass Street should remain in her district. SUMF ¶ 79. As with Mill Town, Councilmember Coonrod had put in significant effort to ensure that store would open:

> Q. And what were your — what was your opinion on moving the Save A Lot to District 8?
>
> A. I said no.
>
> Q · Why did you say no?
>
> A · Because we didn't have a grocery store[.] . . . [I]t was closed at that time, but [the store owner] was in the process of trying to get another store at the location and we needed to keep it in our district.

SUMF ¶ 80. According to Anderson, "this necessitated a one block change in the line that didn't move any residents. It was merely a commercial block so . . . I complied with that." SUMF ¶ 80. This determination further demonstrates the decision-making authority that City Council members, including Coonrod, exercised over the

redistricting process in their individual meetings with City Staff at the request of the Redistricting Committee.

d. The March 1, 2022 Proposed Map was changed based on Councilmember Noel's decision in her April 14, 2022 discussion with City Staff.

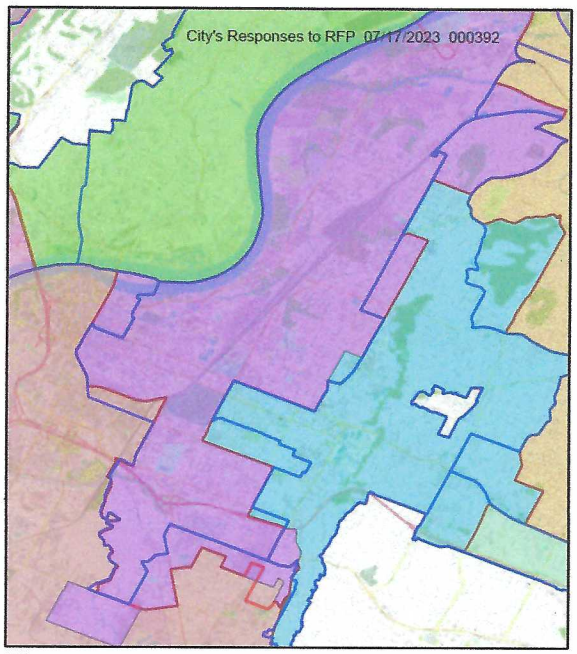

Figure 5-a
"Option 1" emailed to Noel

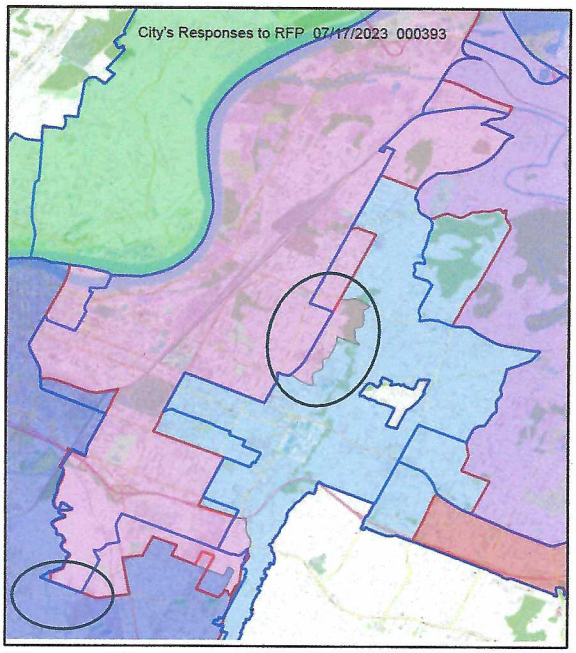

Figure 5-b
"Option 2" emailed to Noel with differences circled

Councilmember Noel (District 8) joined the City Council on an interim basis to fill a vacant seat on March 8, 2022. SUMF ¶ 18. She was elected to that position later the same year. *Id.* On April 13, 2022, Councilmember Noel met individually with Anderson and Sevigny regarding redistricting. SUMF ¶ 109. The next day, Sevigny emailed Councilmember Noel with two options for the boundaries of her district. SUMF ¶ 110. Councilmember Noel chose "Option 2," *Fig. 5-b*, above. SUMF ¶ 111.

Email, like an in-person discussion, a telephone call, or a videoconference, is a means of communication by which the Open Meetings Act can be circumvented. Indeed, it is specifically contemplated by the statute, which states that no "electronic communication shall be used to decide or deliberate public business in circumvention of [its] spirit or requirements." Tenn. Code Ann. § 8-44-102(c); *Johnston*, 320 S.W.3d at 310–11 (emails used to decide or deliberate public business violated spirit and requirements of Open Meetings Act). In *White v. King*, for instance, the plaintiff alleged that members of a school board collaborated, in a series of email exchanges, on a response to a newspaper editorial criticizing the board. 60 N.E.3d 1234 (Ohio 2016). The Ohio Supreme Court found that "[t]he distinction between serial in-person communications and serial electronic communications via e-mail . . . is a distinction without a difference" for the purposes of Ohio's open meetings law and as such, the plaintiff had adequately pled violation of that statute. *Id.* at 1238.

There was no discussion of Councilmember Noel's decision on her district boundaries during any public meeting of the City Council prior to April 14, 2022. SUMF ¶ 112. Instead, "Option 2" was reflected in a proposed map shown to the public on April 19, 2022. SUMF ¶ 111, 117. There is no genuine issue of material fact as to the sequence of events; it is confirmed through the email exchange between Councilmember Noel and City Staff, as well as through the depositions of Councilmember Noel and City Staff members Anderson and Sevigny. SUMF ¶¶ 110–111. In addition, the decision made by Noel was communicated by City Staff to Councilmember Coonrod, who was told "they had already made changes" to the

boundary between Districts 8 and 9 that reflected Councilmember Noel's directive to use "Option 2." SUMF ¶ 115.

* * *

Any one of the aforementioned non-public decisions, alone, requires judgment against Defendants on Claim II of the Complaint. As with the violative decisions made by the Redistricting Committee, Chattanooga Publishing expects that if this case continues beyond this Motion for Summary Judgment, a preponderance of the evidence will demonstrate yet additional unlawful decision-making and deliberation took place during the series of meetings between individual City Council members and City Staff. In sum, there is no genuine issue of material fact that the City Council violated the spirit of the law by circumventing the notice, openness, and minute-keeping requirements of the Open Meetings Act and, therefore, summary judgment in favor of Chattanooga Publishing on Count II of their Complaint is required.

CONCLUSION

For the reasons set forth herein and in Chattanooga Publishing's Motion for Summary Judgment, Chattanooga Publishing respectfully requests that the Court grant summary judgment in favor of Chattanooga Publishing and order the relief requested in its Complaint.

Dated: November 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 6, 2024, a true and correct copy of the foregoing was served by email, as agreed by the parties, on:

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Counsel for Chattanooga Publishing

Exhibit A

375 So.2d 578
District Court of Appeal of Florida, Fifth District.

Robert N. BLACKFORD and Margaret H. Harrison, Individually and for the Use and Benefit of CHEROKEE JUNIOR HIGH SCHOOL PARENT-TEACHER ASSOCIATION, Appellants,

v.

The SCHOOL BOARD OF ORANGE COUNTY, Florida, Appellee.

No. 78-1748/NT 4-6.
|
Aug. 15, 1979.

Synopsis

Members of parent-teacher association brought action against school board challenging closing of junior high school. The Circuit Court, Orange County, Thomas E. Kirkland, J., held that scheduled successive meetings between school superintendent and individual members of school board did not violate the Government in the Sunshine Act, and plaintiffs appealed. The District Court of Appeal, Letts, Gavin K., Associate Judge, held that: (1) meetings between superintendent and board members were in contravention of Sunshine Act, and (2) entire redistricting problem resulting in the school closing was required to be re-examined and re-discussed in open public meeting.

Reversed and remanded.

Moore, John H., II, Associate Judge, dissented.

Attorneys and Law Firms

***579** David B. King, of Peed & King, P.A., Orlando, for appellants.

William M. Rowland, Jr. of Rowland, Bowen & Thomas, Orlando, for appellee.

Opinion

LETTS, GAVIN K., Associate Judge.

This appeal stems from the circuit court's decision that scheduled successive meetings between a school superintendent and individual members of his school board did not violate the Government in the Sunshine Act. We reverse.

We are again asked to rule on the applicability of chapter 286.011 of the Florida Statutes (1977), the pertinent language of which is deceptively simple:

> "(1) All meetings of any board . . . at which official acts are to be taken are declared to be public meetings open to the public at all times . . . ."

The Orange County school board's staff was faced with a major redistricting problem involving the transfer of some 6000 students to other schools. The superintendent candidly admitted that he wanted to avoid the uproar which would unquestionably attend the public airing of each possible alternative, until his staff had a crystallized plan to offer for approval. In addition, he was equally forthright in confessing that he "was quite aware of the Sunshine Law and . . . very diligent in fulfilling (his) responsibility in meeting (its) requirements . . . ."

To solve the dilemma, information was adduced to the effect that conversation between staff and a single board member would Not be a "meeting" under decided ***580** case law. We agree there is law to this effect. See Mitchell v. School Board of Leon County, 335 So.2d 354 (Fla. 1st DCA 1976); Hough v. Stembridge, 278 So.2d 288 (Fla. 3d DCA 1973), and Florida Parole and Probation Commission v. Thomas, 364 So.2d 480 (Fla. 1st DCA 1978). We also agree that the board's staff (which, of course, includes the superintendent) is not subject to the provisions of the Sunshine Law. See Chapter 286.011(1), Florida Statutes (1977) and Bennett v. Warden, 333 So.2d 97 (Fla. 2d DCA 1976). Consequently we agree that scheduled discussions between staff and a single member of a board frequently are not "meetings" under the act. This conclusion is supported by, and has even been expanded by, our own Supreme Court in the recent decision of Occidental Chemical Co. v.

Mayo, 351 So.2d 336, 341 (Fla.1977) wherein the court stated:

> "(W)e reject (the) broad-brush argument that all meetings between the commissioners[1] and their staff must be open to the public."

1 We emphasize the plural.

The problem in the case now before us is that this superintendent did much more and devised a plan by which his board members would come visit his office in rapid-fire succession to discuss, exclusively, this major redistricting problem. Thus on January 30, 1978, the board proceeded in convoy, but out of sight of each other, to the superintendent's office, the first at 8:30 A.M., the second at 10:30 A.M. and the third at 12:30 P.M. Two days later three more members did the same.[2] Substantially the same procedure was repeated five times more, ending on April 26th. Public announcement of the final proposed resolutions, which included the reclassification of Cherokee Junior High (from whose ranks the appellants are drawn), was then made two days later, on April 28th. Simultaneously, the resolutions were placed on the agenda of the board for final action eleven days after that.

2 The remaining member of the board was strangely uninvited to many of these conversations. Appellant alleged this was because he was opposed to the plan. However no matter the reason, his absence is immaterial to our conclusion.

The superintendent is adamant that he did not act as a go-between during these discussions and denies that he told any one board member the opinions of any of the others. He insists that he only presented and discussed the various options with each member and generally obtained their feedback. He also denies that the board members directed him to make any changes to, or indicated which way they would vote on, the proposals.

Both the memos of the school board attorney and the candid testimony of the superintendent lead us to the conclusion that what transpired here was not so much a willful violation of the Sunshine Law, but rather an attempt Not to violate it, yet keep the various options secret. We can well believe that premature publication of what were only tentative solutions would have filled the air with vituperation from outraged parents, much of which would turn out in the end to be unjustified. However, that is not the point. School boards are not supposed to conduct their business in secret even though it may all be for the best at the end of the day and notwithstanding that the motives are as pure as driven snow. Moreover of the several tentative secret options, one certainly was Not discarded, namely the re-classification of Cherokee Junior High, a result totally unacceptable to those affected.

While we agree that one swallow a summer cannot make, we are convinced that the scheduling of six sessions of secret discussions, repetitive in content, in rapid-fire seriatim and of such obvious official portent, resulted in six de facto meetings by two or more members of the board at which official action was taken. As a consequence, the discussions were in contravention of the Sunshine Law. Further, the frank admission as to the reason for this modus operandi leads us to conclude that in effect "the (board) met in secret (and) used staff members as intermediaries in order to ***581** circumvent public meeting requirements." Occidental, supra, at p. 341. "Our duty is to interpret this law as it is written, and, if possible, do so in a manner to prevent its circumvention." City of Miami Beach v. Berns, 245 So.2d 38 (Fla.1971).

As for any argument that not all public business can be conducted center stage under the critical glare of the media's spotlights, lest on occasion the publicity reduce the item under discussion to absurdum or cause unnecessary public uproar, we would respond twofold.

First, such arguments should be addressed to the legislature not the courts, for we are "without power to enact law or to pass upon its wisdom or folly . . . our duty is to construe or interpret it . . . ." Wolf v. Commander, 137 Fla. 313, 188 So. 83, 85 (1939).

Second, deliberations by a school board on whether a school is to be closed, are very much a matter of public concern, never mind the Sunshine Law. Outcries by adversely affected special interest groups are commonplace whenever any form of legislation is proposed. There is no reason why school boards should be excluded simply because secrecy was

necessary to avoid, in the words of the superintendent, "disfunctional or disruptive . . . stress or distress in the community."

As we have suggested, the board, its attorney and the superintendent all appear to have had in mind, not willful violation so much as legal circumvention or, by analogy if you will, legal tax avoidance such as we all engage in. This, coupled with prior case law, causes us to discern no criminal culpability from the record now before us.

By this decision we do not require that Cherokee School be re-opened immediately as a junior high. Indeed we recognize the possibility that the board, upon reconsideration, may decide on the same course of action as before. However, what we Do require is that the entire redistricting problem, and all the supporting data and input leading up to the resolutions which are the subject matter of this cause, be re-examined and re-discussed in open public meetings. The brief eleven days previously allowed for the aggrieved parties to air their objections were totally insufficient to render the error of twelve weeks of secret negotiations, harmless.

REVERSED AND REMANDED IN ACCORDANCE HEREWITH.

DOWNEY, JAMES C., Associate Judge, concurs.

MOORE, JOHN H., II, Associate Judge, dissents without opinion.

All Citations

375 So.2d 578, 5 Media L. Rep. 2172

216 Neb. 158
Supreme Court of Nebraska.

Thomas W. GREIN, Appellee,
v.
BOARD OF EDUCATION OF the SCHOOL DISTRICT OF FREMONT, in the COUNTY OF DODGE, State of Nebraska, et al., Appellants.

No. 82–576.
|
Jan. 13, 1984.

Synopsis
Plaintiff brought action against the board of education to declare void a contract, between the school district and a contractor submitting the second-lowest bid on school boiler project, on ground that such contract resulted from a closed session of the board in violation of the public meetings laws. The District Court, Dodge County, Mark J. Fuhrman, J., held that the closed session violated such laws and that the resulting contract was void, and enjoined the board from further violation of such laws. The board appealed. The Supreme Court, Shanahan, J., held that: (1) board of education was not entitled to adjourn to closed session based upon either "protection of the public interest" or "prevention of needless injury to the reputation of an individual"; (2) public meetings laws contain no rehabilitative or curative provision for good-faith motivation for a closed session; (3) board's vote in reconvened open session immediately following closed session was invalid since it violated the public meetings laws and subjected the action to nullification; and (4) injunction enjoining board from further violations of public meetings laws was not warranted.

Affirmed in part, and reversed in part with directions.

****720** *Syllabus by the Court*

***158** 1. Public Meetings: Statutes. The Nebraska Public Meetings Laws are a statutory commitment to openness in government.

2. Public Meetings: Statutes. Public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed.

3. Public Meetings: Statutes: Words and Phrases. The public interest mentioned in Neb.Rev.Stat. § 84–1410 (Reissue 1981) is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities.

4. Public Meetings: Statutes. In civil actions good faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session.

***159** 5. Public Meetings: Statutes. The prohibition against decisions or formal action in a closed session also proscribes crystallization of secret decisions to a point just short of ceremonial acceptance, and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session.

6. Injunction. An injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. The threatened action must be based upon a real apprehension that the acts for which the injunction is sought are not only threatened but will in all probability be committed.

Attorneys and Law Firms

Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, Fremont, for appellants.

John F. Kerrigan and William G. Line of Kerrigan, Line & Martin, Fremont, for appellee.

Neal E. Stenberg, Lincoln, for amicus curiae Neb. Ass'n of School Boards.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, District Judge.

Opinion

SHANAHAN, Justice.

Thomas W. Grein sued the Board of Education of the School District of Fremont to declare void a contract between the school district and a contractor submitting the second-lowest bid. Grein claimed the contract resulted from a closed session of the board in violation of the "Public Meetings Laws," Neb.Rev.Stat. §§ 84–1408 et seq. (Reissue 1981). The district court, sustaining Grein's motion for summary judgment, held that the closed session violated the Public Meetings Laws and that the resulting contract was void. The district court then enjoined the board from further violation of the Public Meetings Laws. We affirm in part and reverse in part with directions.

The questioned meeting of the board took place on January 4, 1982. At an unspecified date before the ***160** meeting, a representative of Risor & Barney, Inc. (contractor), the low bidder on the school boiler project, met with one of the engineers of Clark Enersen Partners, the architectural firm employed by the school district. (Clark Enersen, its architects, engineers, and representatives, irrespective of professional nomenclature, will hereinafter be called the "architect.") The contractor informed the architect about the contractor's error in computing its bid, which resulted in underbidding the project by an amount up to $3,000. It was the impression of the architect that the contractor was soliciting support for a request to increase the amount of the bid in view of the error.

****721** As a result of the meeting with the contractor, the architect met with the board president and other representatives of the school district during the evening shortly before the regular meeting of the board on January 4, 1982. At this preliminary meeting the architect mentioned a possible problem in view of the low bid. The architect requested a closed session of the board to disclose reasons for recommending the second-lowest bid, and declined to elaborate on these reasons in an open session. The architect's reasons for requesting the closed session and for rejecting the contractor's low bid can be summarized as follows: (1) An absence of facts to substantiate the low bidder's inability to perform the contract; (2) A conclusion by the architect that there had been "suggestion and inference" that the low bidder was soliciting assistance from the architect to increase the amount of the bid; (3) An award of the contract to the contractor contrary to recommendations of the architect expressed in an open meeting would cause "difficulties in the [architect]-contractor relationship"; (4) Public disclosure of the error by the contractor would needlessly injure the reputation of the contractor, notwithstanding that the error in bidding may have been an honest mistake misinterpreted by the public; ***161** (5) On account of a deadline for federal funding, the architect did not delay bidding to investigate the experience and ability of the contractor; (6) The architect's opinion that the contractor would suffer injury to its reputation if there was public disclosure of the possible problem regarding the bidding; (7) It was unusual for an architectural firm to recommend a bid from other than the low bidder; (8) "[A] potential claim would exist by the low bidder" if the low bidder were not awarded the contract; and (9) There was "increased possibility of success" in the pursuit of a claim by the low bidder if "all facts on which [the architect] based [its] recommendation were not made known to the board ... [in] a closed session."

After the preliminary meeting between representatives of the school district and the architect, the regular meeting of the board of education was convened. In the course of the regular meeting the architect addressed the board and stated: "I believe we will address the boiler bids with a recommendation which is the first order of our business. We would bring a recommendation to this Board to accept the bid of [the second-lowest bidder]." In response, the president of the school board asked: "Is there a reason why you go with the second low bidder?" The architect answered: "Yes sir, there is, and in order to protect our clients [sic] concern we would request a closed meeting to address these claims." At that point the school attorney expressed: "I would suggest, Mr. Chairman, that this would be appropriate both for the purpose of protecting the persons involved and in the interest of the school district, generally, that this be discussed privately." The school board then affirmatively voted to withdraw

to the "closed session for these reasons." The exact contents of the closed session are not shown, but the architect's reasons for rejecting the low bid, as previously summarized, were disclosed to the board in the closed session. After the ***162** closed session and upon reconvening the open session, the board, without further discussion or deliberations about bids on the boiler project, immediately voted to accept the bid of the second-lowest bidder.

There is no indication that any representative of the low-bidding contractor attended the meeting on January 4, 1982. When asked for whose protection the meeting was closed, the president of the board of education responded: "Probably the School Board. I don't know."

Grein sued to nullify the action of the board in awarding the boiler contract to the second-lowest bidder. See § 84–1414. Grein claimed that the closed session of the board was not authorized by § 84–1410. The answer filed by the board alleges that a closed session was necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual.

The district court held that the closed session of the board and the contract to the ****722** second-lowest bidder were void on account of violation of the "Open Meetings Laws." The district court also enjoined the board from further violations of the Public Meetings Laws and ruled that the plaintiff was entitled to recover an attorney fee, but the record does not disclose any order awarding a specific attorney fee.

The board claims: (1) The closed session did not violate the Nebraska Public Meetings Laws, §§ 84–1408 to 84–1414; (2) The vote of the board, namely, accepting the second-lowest bid during the open meeting immediately after the closed session, was permissible and not contrary to the Public Meetings Laws; and (3) The injunction prohibiting the board's further violation of the Public Meetings Laws was not proper.

A declaration of the intent behind the public meetings laws is found in § 84–1408: "It is hereby declared to be the policy of this state that the formation ***163** of public policy is public business and may not be conducted in secret.

"Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies ...."

A closed session of a public body is authorized by § 84–1410: "(1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members *if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual* and if such individual has not requested a public meeting.... (2) The vote to hold a closed session shall be taken in open session. The vote of each member on the question of holding a closed session, the reason for the closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes...." (Emphasis supplied.)

The Nebraska Public Meetings Laws are a statutory commitment to openness in government. As a result of open meetings, there will be development and maintenance of confidence, as well as participation, in our form of government as a democracy. The public can observe and within proper limits participate in discussions and deliberations of a public body. "Deliberation" means the act of weighing or examining reasons for and against a choice or measure, and connotes not only collective discussion but collective acquisition and exchange of facts preliminary to the ultimate decision. Cf., *People ex rel. Hopf v. Barger,* 30 Ill.App.3d 525, 332 N.E.2d 649 (1975); *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.,* 263 Cal.App.2d 41, 69 Cal.Rptr. 480 (1968). Government's decision-making process, whether observed personally by the public or publicized by the media, can be examined and analyzed in terms of the effect on the lives of people. In this manner government may be accountable ***164** to the governed. Cf., *Hudson v. School Dist. of Kansas City,* 578 S.W.2d 301 (Mo.App.1979); *Krause v. Reno,* 366 So.2d 1244 (Fla.App.1979); *Miglionico v. Birmingham News Co.,* 378 So.2d 677 (Ala.1979); *Ridenour v. Dearborn Bd. of Ed.,* 111 Mich.App. 798, 314 N.W.2d 760 (1981).

"The basic argument for open meetings is that public knowledge of the considerations upon which governmental action is based is essential to the democratic process. The people must be able to 'go beyond and behind' the decisions reached and be apprised of the 'pros and cons' involved if they are to make sound judgments on questions of policy and to select their representatives intelligently. The presence of outside observers is an invaluable aid in making such information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action.... [T]he benefit of granting access to governmental meetings will inure to a far larger segment of the population, because those who do attend will pass on the information obtained. It is further argued that decisions which result in the expenditure of public funds ought to be made openly so that the people can see how their money is being spent; publicity of expenditures ****723** further serves to deter misappropriations, conflicts of interest, and all other forms of official misbehavior.... [O]pen meetings foster more accurate reporting of governmental activities. Even when meetings are closed, some hint of what occurs generally reaches [the media]; but such reports are often incomplete and slanted according to the views of the informant. To restrict [the media] to such sources of information is a disservice both to the public, which is misled, and to the officials, who may be judged on the basis of these distorted reports." Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 Harv.L.Rev. 1199, 1200–01 (1962).

Public meetings laws are broadly interpreted and ***165** liberally construed to obtain the objective of openness in favor of the public. *Rice v. Union Cty. Reg. High School Bd. of Ed.,* 155 N.J.Super. 64, 382 A.2d 386 (1977); *Wexford Prosecutor v. Pranger,* 83 Mich.App. 197, 268 N.W.2d 344 (1978); *Laman v. McCord,* 245 Ark. 401, 432 S.W.2d 753 (1968). Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed. *Rice v. Union Cty. Reg. High School Bd. of Ed., supra; Ill. News Broadcasters v. City of Springfield,* 22 Ill.App.3d 226, 317 N.E.2d 288 (1974); *Daily Gazette v. Town Bd., etc.,* 111 Misc.2d 303, 444 N.Y.S.2d 44 (1981); *Ridenour v. Dearborn Bd. of Ed., supra.*

Although the board's motion to adjourn to a closed session contained the phrase "protecting the persons involved and in the interest of the school district, generally," for our purposes we will assume that the motion had properly utilized the specific statutory language "for protection of the public interest." See § 84–1410.

The "public interest" mentioned in § 84–1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. Cf., *Russell, Jr. v. Wheeler,* 165 Colo. 296, 439 P.2d 43 (1968); *Goldberg v. Barger,* 37 Cal.App.3d 987, 112 Cal.Rptr. 827 (1974).

It is axiomatic that concerns of citizens and taxpayers of a school district include the fiscal policy and cost of operating the district. The district's expenses will ultimately be reflected in taxes borne by the taxpayers. Here, there was a decision to be made: Should the low bid be accepted? Any answer to the question would have an impact on the pocketbooks and wallets of the public. The question and answer did indeed involve the public interest, but protection of that public interest in this case demanded deliberations in a public meeting rather than resolution in the recesses of a closed session. Cf., ***166** *Miglionico v. Birmingham News Co.,* 378 So.2d 677 (Ala.1979); *Ridenour v. Dearborn Bd. of Ed.,* 111 Mich.App. 798, 314 N.W.2d 760 (1981); *Blackford, etc. v. School Bd. of Orange Cty.,* 375 So.2d 578 (Fla.App.1979). The board was not entitled to adjourn to a closed session based upon "protection of the public interest" contemplated by § 84–1410, in view of the circumstances presented in this case.

Going to the second claim for exemption from a public meeting, namely, "prevention of needless injury to the reputation of an individual," § 84–1410, one has to ask: Whose reputation was being protected? The reputation of the architect or of the board? There is no allegation or intimation critical of the integrity, loyalty, reliability, or honesty of the board or its representatives, individually or collectively. The lowest bidder's reputation seems to have become obscured in the shadow of the protective umbrella opened at the meeting. Nothing indicates that the low bid was other than the result of an honest but

erroneous computation. Yet, the board elected to adjourn to a closed session where the architect related the honest mistake of the low bidder and expressed some rather suspect, speculative conclusions. Steeped in the secrecy of the closed session, the board reconvened the open meeting and immediately voted to accept the second-lowest bid, thereby rejecting the low bid without ****724** any discussion or explanation. Anyone believing that it was more salutary to spare the low bidder embarrassment over an honest mistake ignores that some people often draw the most cruel conclusions from sinister silence. We believe the slight discomfort, if any, experienced by a low bidder in the arena of public lettings is far outweighed by the policy favoring openness in the meetings of a public body. Cf. *Brown v. East Baton Rouge Parish School Bd.,* 405 So.2d 1148 (La.App.1981). Prevention of needless injury to an individual's reputation as a basis for a closed session was not established under the circumstances, ***167** and this exemption from an open session was not available to the board.

The board suggests a good faith motivation for a closed session is a cure for noncompliance with the Public Meetings Laws. The Public Meetings Laws contain no such rehabilitative or curative provision. If we were to permit the board's action to stand on the basis of good intention, such a rule would become an invitation, perhaps a license, for a public body to circumvent the Public Meetings Laws' limited exemptions by an additional criterion of good faith or good intention in adjournment to a closed session. We hold that in civil actions good faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session. See, *Wolf v. Zoning Bd. of Adjust. of Park Ridge,* 79 N.J.Super. 546, 192 A.2d 305 (1963); *Times Publishing Company v. Williams,* 222 So.2d 470 (Fla.App.1969); *Blackford, etc. v. School Bd. of Orange Cty., supra; Kramer v. Bd. of Adjust., Sea Girt,* 80 N.J.Super. 454, 194 A.2d 26 (1963). Cf. *Town of Palm Beach v. Gradison,* 296 So.2d 473 (Fla.1974). The only question of fidelity involved is adherence to the requirements of the Public Meetings Laws.

The board believes its vote in the reconvened open session immediately after the closed session is valid. The minutes of the meeting reflect the board's vote to reconvene the open session and the immediate transaction of business: "[President of board]: All right, item A boiler bids, is there a motion? [Response]: I move that we accept the bid of [second-lowest bidder] for the boilers. [President]: Is there a second? [Response]: Second. [President]: Any discussion? Call the roll please." At that point there occurred five affirmative votes by which the motion carried. The necessary inference is that the vote during the reconvened open session was the extension, culmination, and product of the ***168** closed session. To deny that deduction would not be a tax but a surtax on credibility, and naivete to the nth degree.

The prohibition against decisions or formal action in a closed session also proscribes "crystallization of secret decisions to a point just short of ceremonial acceptance," and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session. *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.,* 263 Cal.App.2d 41, 50, 69 Cal.Rptr. 480, 487 (1968). See, *Littleton Educ. Ass'n v. Arapahoe Sch. Dist.,* 191 Colo. 411, 553 P.2d 793 (1976); *Brown v. East Baton Rouge Parish School Bd., supra; Peters v. Bowman Pub. Sch. Dist. No. 1,* 231 N.W.2d 817 (N.D.1975); *Kramer v. Bd. of Adjust., Sea Girt, supra.* Cf. *Town of Palm Beach v. Gradison, supra.* Consequently, the vote of the board in accepting the second-lowest bid violated the Nebraska Public Meetings Laws and subjected the action to nullification, namely, being declared void by a court as provided in § 84–1414.

We find the judgment of the district court is correct in declaring void the board's accepting the second-lowest bid.

From all this there evolves a guiding principle relatively simple and fundamental: If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.

****725** The injunction ordered by the district court enjoined "further violations of" the Public Meetings Laws. Such injunction cannot stand. An injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a

real and imminent danger of irreparable injury. See *Wexford Prosecutor v. Pranger,* 83 Mich.App. 197, 268 N.W.2d 344 (1978). "[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction ***169** broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *Labor Board v. Express Pub. Co.,* 312 U.S. 426, 435–36, 61 S.Ct. 693, 699, 85 L.Ed. 930 (1941). "[T]he threatened action must be based upon a real apprehension that the acts for which the injunction are [sic] sought are not only threatened but will in all probability be committed. Unless it can be shown that reasonable grounds exist for apprehending that absent the injunction the actions will be done, the injunction will be denied." *Hudson v. School Dist. of Kansas City,* 578 S.W.2d 301, 312 (Mo.App.1979). The facts of this case do not warrant the extraordinary remedy of injunctive relief. Therefore, the judgment of the district court granting the injunction is reversed, and the district court is directed to dissolve the injunction entered in the proceedings.

The matter of the attorney fee for proceedings in district court is apparently still pending before the trial court. Therefore, we make no ruling in view of the absence of a final order in the district court. For services in this court Grein is awarded an attorney fee of $500, which is taxed to the appellants as a part of the costs of the proceedings on appeal.

For the reasons given the judgment of the district court regarding the board's action in accepting the second-lowest bid is affirmed, but the order of the district court entering the injunction is reversed with directions as indicated herein.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS.

All Citations

216 Neb. 158, 343 N.W.2d 718, 15 Ed. Law Rep. 1291

359 Ark. 355
Supreme Court of Arkansas.

David HARRIS, Appellant,
v.
CITY OF FORT SMITH, Arkansas, Appellee.

No. 04–485
|
Nov. 4, 2004.

Synopsis

Background: Plaintiff brought action against city alleging that one-on-one meetings between city administrator and individual members of city board of directors violated the Freedom of Information Act (FOIA). The Circuit Court, Sebastian County, J. Michael Fitzhugh, J., granted city's motion for summary judgment. Plaintiff appealed. The Court of Appeals reversed. City petitioned for review.

The Supreme Court, Jim Hannah, J., held that one-on-one meetings between city administrator and individual members of city board of directors by which board approved submission of confidential bid in auction to purchase real property constituted a board meeting subject to FOIA.

Judgment of Circuit Court reversed and remanded.

Attorneys and Law Firms

****462** Hodson, Woods & Snively, LLP, by: Michael Hodson, Fayetteville, for appellant.

Friday, Eldredge & Clark, by: R. Christopher Lawson, Little Rock, for appellees.

Quattlebaum, Grooms, Tull & Burrow, by: John E. Tull, III and E.B. Chiles, IV, Little Rock, amicus curiae.

Opinion

JIM HANNAH, Associate Justice.

***358** David Harris appeals a decision of the Sebastian County Circuit Court granting ****463** the City of Fort Smith's motion for summary judgment. Harris asserts that the circuit court erred in finding that one-on-one discussions conducted by telephone or in person between the City Administrator Bill Harding and individual members of the City Board of Directors did not constitute Board action that falls under the Arkansas Freedom of Information Act (FOIA).[1] By contacting individual Board members, Harding obtained the approval of the entire Board to submit a bid in an auction to purchase real property. The circuit court found that under Arkansas law, the FOIA does not apply "to a chance meeting or even a planned meeting of any two members of the city council." The circuit court also noted that although the Board approved submission of the bid, the purchase could not be and was not finalized until it was publicly discussed and approved. We hold that under the facts of this case, contact of individual Board members by the City Administrator to obtain approval of action to be taken by the Board as a whole constituted an informal Board meeting subject to the FOIA.

1 Ark.Code Ann. §§ 25–19–10–25–19–109 (Repl.2002).

This case was appealed to the court of appeals, which reversed the circuit court. *Harris v. City of Fort Smith,* 86 Ark.App. 20, 158 S.W.3d 733 (2004). A petition for review was granted by this court, and our jurisdiction is pursuant to Ark. Sup.Ct. R. 1–2(e).

Facts

Deputy City Administrator Ray Gosack learned that Bank One was going to sell at auction property formerly owned by the Fort Biscuit Company. Because Gosack believed that the Fort Biscuit property could be used for street construction to alleviate noise and congestion in downtown Fort Smith, he told Harding ***359** about the auction. A memorandum from Gosack to Harding noted the possibility of using part of the Fort Biscuit property to improve

a downtown truck route. The memorandum also stated, "Acquiring this property through an auction creates unusual challenges for the city." Gosack then explained in his memorandum that normal procedure in seeking Board approval prior to acquisition meant that the information regarding the maximum bid the City could offer would be public information, making competitive bidding impossible.

The Fort Biscuit property was divided into tracts for purposes of the auction and was to be bid in two ways. Bids were to be taken on individual property tracts, and bids were to be taken on the property as a whole. If the bids on individual tracts added up to an amount higher than the highest bid on the entire property, the property would be sold by tracts.

Harding contacted each Board member either in person or by phone to gain approval to bid, as well as to gain approval of bid amounts. The Board approval required that the bids not exceed fifteen percent above the appraised value of the property. The City then had the property appraised. The City was successful in the April 18, 2003, auction in obtaining the tracts needed for the proposed road construction. The tracts were acquired at approximately two-thirds of the appraised value. On April 23, 2003, a "Special Meeting & Study Session" of the Board was held, and a resolution was passed approving the purchase.

Harris attended the "Special Meeting & Study Session" when the purchase of the land was approved. He then filed suit alleging that the one-on-one meetings between Harding and the Board members violated the FOIA. The circuit court found that the one-on-one meetings did not ****464** constitute a meeting subject to the FOIA, and further, that although the Board approved submission of the bid, the purchase was later publicly discussed before it was approved. The court of appeals reversed the circuit court holding that the serial conversations between Harding and the individual Board members about a matter involving a bid on the purchase of land constituted a "meeting" under the FOIA. The court of appeals remanded the case to the circuit court to enter an order that the FOIA was violated, to enter an injunction, and to award attorney's fees.

Both parties relied upon stipulated facts in their respective motions for summary judgment. According to the stipulation, Harding contacted Board members to determine "whether the ***360** Board would approve the purchase of the land at a subsequent meeting if Mr. Harding made a successful bid at the public auction." The parties also stipulated that the contact with Board members involved city business, that no notice was given to the public of these one-on-one meetings, and that the one-on-one meetings were held to avoid publicly disclosing the amount of the City's bids.

Standard of Review

When we grant a petition for review, we consider the matter as if the appeal had been originally filed in this court. *Neill v. Nationwide Mut. Fire Ins., Co.,* 355 Ark. 474, 139 S.W.3d 484 (2003); *BPS, Inc. v. Parker,* 345 Ark. 381, 47 S.W.3d 858 (2001). A trial court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Craighead Elec. Coop. Corp. v. Craighead County,* 352 Ark. 76, 98 S.W.3d 414 (2003); *Cole v. Laws,* 349 Ark. 177, 76 S.W.3d 878 (2002). Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Craighead Elec., supra; Adams v. Arthur,* 333 Ark. 53, 969 S.W.2d 598 (1998).

The FOIA

The FOIA is to be liberally interpreted to accomplish the purpose of promoting free access to public information. *Johninson v. Stodola,* 316 Ark. 423, 872 S.W.2d 374 (1994). Further, the FOIA is also to be liberally interpreted most favorably to the public interest of having public business performed in an open

and public manner. *Laman v. McCord,* 245 Ark. 401, 404–05, 432 S.W.2d 753 (1968). "Statutes enacted for the public benefit should be interpreted most favorably to the public." *Ark. Gazette Co. v. Pickens,* 258 Ark. 69, 78, 522 S.W.2d 350, 355 (1975) (quoting *Broward County v. Doran,* 224 So.2d 693, 699 (Fla.1969)).

***361** Arkansas Code Annotated Section 25–19–106(a)(Repl.2002) provides in pertinent part that "all meetings, formal or informal, special or regular, of the governing bodies of all municipalities ... shall be public meetings." The term "public meetings" is defined in the FOIA:

> "Public meetings" means the meetings of any bureau, commission, or agency of the state, or any political subdivision of the state, including municipalities and counties, boards of education, and all ****465** other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds....

Ark.Code Ann. § 25–19–103(4)(Repl.2002). The issue before this court is whether the one-on-one meetings between Harding and the individual Board members, by which the Board approved bidding on the property, as well as bid amounts, constituted a Board meeting subject to the FOIA. An April 5, 2002, memo from Gosack to Harding discussed the unique challenges the Board faced in acquiring the property:

> Acquisition of the Fort Biscuit property would be somewhat unusual. The property will be sold at an auction. We understand the bankruptcy trustee will take bids on each tract individually and on all tracts. The trustee will then determine which option produces the greatest amount of proceeds.
>
> Acquiring this property through an auction creates some unusual challenges for the city.
>
> • Normally, we seek formal board approval, including an offer price, before acquiring property. If we obtain formal board approval for acquisition of the Fort Biscuit property, the city won't be able to *competitively bid* for the property since our maximum offer would be public information.
>
> • If the city bids, we'll also need to be prepared to bid for the purchase of all _____ tracts. The tracts not needed for the truck route project could be sold or used for another public purpose.
>
> • If the city was the successful bidder on the project, the board would need to be prepared to publicly approve the acquisition shortly after the auction date. Backing out of the bid after the auction would be very difficult and unfair to the seller.

***362** Our purpose now is to gauge the board's interest in pursuing acquisition of the Fort Biscuit property for realignment of the truck route. Given the number of tracts involved, the board might find it useful to visit the site.

> If the board is interested, we'll need to have some appraisal work performed to determine how much the city should offer for the property. We would then informally review a maximum offer amount with the board. We'd want to have the board's concurrence on a maximum offer amount before participating in the auction.

The parties stipulated that the one-on-one meetings were held to conduct Board business. According to the Affidavit of Bill Harding attached as an exhibit to the City's motion for summary judgment:

> I asked each Board member if he or she was comfortable with me bidding within this range on the property. Each Board member responded positively. I had each of these conversations with the understanding that any approval for the purchase of the property could not take place until the Board formally convened for a meeting and voted to approve the purchase.

An April 16, 2002, memo from Harding to the mayor and the Board confirmed the decision of the Board:

> This Thursday morning, April 18th, the Fort Biscuit property will be auctioned off to the highest bidders. The real estate portion of the auction is due to start at 11:00 am. We were able to speak to each of you over the last several days and the unanimous response was to go forward with an attempt to purchase the property as a means to alleviate some of the major problems associated with the existing truck route.

> ****466** Since receiving the "go-ahead" from you we retained Calvin Moye to provide us an opinion as to the value of the real estate to be auctioned. Those values are reflected in the attachment in Tables 1 through 3.
>
> * * *
>
> As such we are asking for authority to bid up to the amount reflected in Appraisal + 15% column (tracts 3, 4, 5 and 6), in Table ***363** 3 of the attachment. As you can see the maximum exposure to the city is $1,099,688 or $1.1 million.
>
> After you have had an opportunity to review the information I will be in contact with you to determine your position on our recommendation.

Both parties rely primarily on *Rehab Hospital Services Corp. v. Delta–Hills Health Systems Agency Inc.,* 285 Ark. 397, 687 S.W.2d 840 (1985), and *El Dorado Mayor v. El Dorado Broad., Co.,* 260 Ark. 821, 544 S.W.2d 206 (1976). In *Rehab Hospital,* the plaintiff sought to void a decision of the Executive Committee of Delta Hills, the regional health planning agency, to file a motion for reconsideration of the decision of the Arkansas State Planning Agency to grant a certificate of need to construct a hospital in Jonesboro. This court stated that a telephone poll of the Executive Committee violated the FOIA where there was no emergency and no emergency notice to the press. However, this court also stated that "the most significant issue in this case is what remedies, if any, are appropriate...." *Rehab Hospital,* 285 Ark. at 400, 687 S.W.2d at 842. The plaintiff in *Rehab Hospital* sought "to use the Freedom of Information Act solely to mandate the result of the meeting." *Id.* This court held "that some actions taken in violation of the requirements of the act may be voidable. It will be necessary for us to develop this law on invalidation on a case-by-case basis." *Rehab Hospital,* 285 Ark. at 401, 687 S.W.2d at 843.

In *El Dorado, supra,* the issue was whether a meeting between the mayor and four of the city's eight aldermen constituted a meeting subject to the FOIA. This court stated:

> The Freedom of Information Act applies alike to formal and informal meetings and since we are required to give the Act a liberal interpretation, we cannot agree with appellants that it applies only to meetings of officially designated committees. We can think of no reason for the Act specifying its applicability to informal meetings of governmental bodies unless it was intended to cover informal but unofficial group meetings for the discussion of governmental business as distinguished from those contacts by the individual members that occur in the daily lives of every public official. Any other construction would obliterate the word "informal" as applied to meetings and make it simpler to evade the Act than to comply with it.

El Dorado, 260 Ark. at 823–24, 544 S.W.2d at 207. The court further stated:

> ***364** Furthermore, we do not interpret the trial court's judgment as applying the Freedom of Information Act to a chance meeting or even a planned meeting of any two members of the city council. By its very terms the trial court's order applies only to those group meetings such as the facts here showed—*i.e.* any group meeting called by the mayor or any member of the city council at which members of the city council, less in number than a quorum meet for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council.

El Dorado, 260 Ark. at 824, 544 S.W.2d at 208.

****467** *Meeting under the FOIA*

The issue in the present case is whether the one-on-one meetings constitute an informal meeting of the Board subject to the FOIA. In *Arkansas Gazette, supra,* a committee made up of University of Arkansas board members met with the University President and others to discuss allowing possession of alcohol in campus housing. The meeting was closed to the public, and the press was asked to leave. The committee then met and later conveyed information to the board that was used by the board to make a decision. This court in *Pickens* stated:

> Of course, pertinent to our discussion in the instant litigation is the question, "Did the decision reached by the committee affect proposed rules for the student body?" To ask the question is but to answer

> it, for the committee made its recommendations to the board on the basis of its own investigation, and the board adopted that recommendation with but little discussion. When a committee of a board meets for the transaction of business—this is a public meeting, and subject to the provisions of the Freedom of Information Act.

Pickens, 258 Ark. at 76–77, 522 S.W.2d at 354.

Harris argues that by polling the entire Board, an informal meeting of the Board was held. On that basis, Harris argues there is no need to consider whether the FOIA applies to a meeting of two board members. Harris argues that in the end what is involved is a knowing deception of the public to accomplish the purchase. He also argues that even though the public was able to attend the April 23, 2003, meeting, the minds of the Board members were already made up, and refusing to approve the purchase would have been difficult.

***365** Under the particular facts of the matter before us, we conclude that an informal meeting subject to the FOIA was held by way of the one-on-one meetings. The purpose of the one-on-one meetings was to obtain a decision of the Board as a whole on the purchase of the Fort Biscuit property. Counsel for the City at oral argument acknowledged that the issue in this case did not involve a meeting of two as discussed in *El Dorado, supra,* but rather involved conversations that took place with all seven Board members. The facts of this case are more analogous to *Rehab Hospital, supra,* where this court found that polling the Executive Committee to determine the Committee's decision was a meeting that was subject to the FOIA.

The use of Harding as an intermediary between the Board members did not alter the actual character of the result of Harding's work, which was a decision of the Board. The FOIA may not be circumvented by delegation of duties to others. *See, e.g., City of Fayetteville v. Edmark,* 304 Ark. 179, 801 S.W.2d 275 (1990). We note that the Board in this case had a laudable purpose in acquiring the Fort Biscuit property by confidential bid. The property was acquired for improving traffic conditions in the downtown area, and was acquired at a price that was favorable to the taxpayers. However, the FOIA as presently drafted will not permit approval of a confidential bid by the method used by the Board in this case. Whatever process might be needed to obtain public entity approval of the submission of confidential bids, and approval of the amounts of such bids, has not been exempted under the FOIA as currently drafted. Whether the process required to approve and submit confidential bids should be exempted from the FOIA is a public policy decision that must be made by the General Assembly and not by this court. ****468** *Rehab Hospital, supra,* was decided in 1985, and *El Dorado, supra,* was decided in 1976. The legislature could have acted in the intervening years to alter the FOIA, but has not done so to date. We must await legislative action before we can hold differently than in the present case. *See, e.g., Burkett v. PPG Indus., Inc.,* 294 Ark. 50, 740 S.W.2d 621 (1987).

We also note that Harris asks this court to reverse the denial of his motion for summary judgment. The denial of a motion for summary judgment is not appealable. *Murphy Oil USA, Inc. v. Unigard Sec.,* 347 Ark. 167, 61 S.W.3d 807 (2001). Finally, we note that Harris sought an injunction and attorney's fees in his ***366** complaint and sought similar relief in his motion for summary judgment. However, again, Harris's motion for summary judgment was denied, and the City's motion for summary judgment was granted. Therefore, the issues of the injunction and fees were neither considered nor ruled on by the circuit court. With certain exceptions not relevant to this discussion, this court has appellate jurisdiction only, which means that it has jurisdiction to review an order or decree of a circuit court. *Lewellen v. Sup.Ct. Comm. on Prof'l Conduct,* 353 Ark. 641, 110 S.W.3d 263 (2003). There is no order or decree to review on the issues of an injunction or attorney's fees. This case is reversed and remanded for action consistent with this opinion.

THORNTON, J., not participating.

Special Justice BRENT STANDRIDGE joins.

All Citations

359 Ark. 355, 197 S.W.3d 461, 32 Media L. Rep. 2551

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2 Neb.App. 263
Court of Appeals of Nebraska.

Kenneth JOHNSON, Appellant,
v.
NEBRASKA ENVIRONMENTAL CONTROL COUNCIL and Nebraska Department of Environmental Control, Appellees,
and
Waste–Tech Services, Inc., Intervenor–Appellee.

No. A–91–1174.
|
Nov. 30, 1993.

Synopsis

Declaratory judgment action was brought against the Nebraska Environmental Control Council, challenging validity of Council's amendment of waste standard. The District Court, Lancaster County, Bernard J. McGinn, J., granted separate motions for summary judgment filed by defendants and intervenor and dismissed action. Plaintiff appealed. The Court of Appeals, Hannon, J., held that evidence raised genuine issues of material fact as to whether amendment was adopted in compliance with statutory rulemaking and regulation-making procedures as well as Nebraska public meeting law, precluding summary judgment.

Reversed and remanded.

Attorneys and Law Firms

****23** ***264** Patricia A. Knapp of Bailey, Polsky, Cope, Wood & Knapp, Lincoln, for appellant.

Don Stenberg, Atty. Gen. and Linda L. Willard, Lincoln, for appellees.

Mark A. Christensen of Cline, Williams, Wright, Johnson & Oldfather, Lincoln, Marcus L. Squarrell and Robert F. Copple of Parcel, Mauro, Hultin & Spaanstra, P.C., and Ruth Brammer Johnson, Denver, CO, for intervenor-appellee.

CONNOLLY, HANNON, and MILLER–LERMAN, JJ.

Opinion

HANNON, Judge.

The plaintiff, Kenneth Johnson, brought this declaratory judgment action against the Nebraska Environmental Control Council (Council) under Neb.Rev.Stat. § 84–911 (Reissue 1987) to challenge the validity of an amendment to the Council's rules and regulations, which amendment was promulgated by the Council. The challenged amendment was adopted after the intervenor, Waste–Tech Services, Inc. (Waste–Tech), petitioned the Council for a rule change which would exclude waste produced by Waste–Tech's incinerator in Kimball, Nebraska, from the Council's list of hazardous wastes, which are set forth under title 128 of the Nebraska Administrative Code. The Nebraska Department of Environmental Control (Department) was made a party defendant after the court sustained a demurrer. The district court granted the separate motions for summary judgment filed by the defendants and the intervenor ***265** and dismissed the plaintiff's action. The plaintiff appeals to this court and assigns both procedural and substantive errors. We reverse the judgment and remand the cause for further proceedings because the Council did not follow the required procedures, and therefore, we do not reach the substantive issues.

****24** BACKGROUND INFORMATION

A summary of the statutory basis for the Department's and the Council's authority, as well as a summary of the pertinent rules and regulations, will help clarify the issues of this case. The Nebraska Environmental Protection Act (NEPA), Neb.Rev.Stat. §§ 81–1501 to 81–1533 (Reissue 1987 & Cum.Supp.1992), was adopted in 1971. This act was adopted at the behest of the U.S. government, and it provides that regulations adopted by the Council "shall in all respects comply with the Environmental Protection Act and the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 et seq." See § 81–1505(13)(a).

Section 81–1505 (Reissue 1987), which is applicable to the case at hand, provides in significant part: "(1) In order to carry out the purposes of the Environmental Protection Act, the council shall adopt rules and regulations which shall set standards of air, water, and land quality...." This lengthy statute then sets forth the matters the Council shall consider in adopting rules and regulations regarding water quality standards, various pollutants, mineral explorations, livestock waste, hazardous waste, and several other common sources of pollution. Pursuant to this statutory authority, the Council adopted title 128 of the Nebraska Administrative Code, which contains substantive rules governing pollution, including a listing of what shall be considered hazardous waste, and title 115 of the Nebraska Administrative Code, which provides the procedural rules under which the Council and the Department operate. Title 115 was amended by the Department in August 1993; however, the version of the rules applicable to the case at hand is the title 115 rules which went into effect in December 1985 and July 1987.

The controlling issue in this appeal is whether the Council ***266** followed the applicable statutes and regulations when it adopted an amendment to 128 Neb.Admin. Code, ch. 15 (1989), which authorized Waste–Tech to build the incinerator.

PLAINTIFF'S SECOND AMENDED PETITION

The trial court sustained a demurrer to the plaintiff's amended petition on the ground that the Department was a necessary party. The plaintiff filed a second amended petition and made the Department a party.

In his second amended petition, Johnson, who lives near Kimball, specifically alleged the date and place of each of the Council's meetings at which the amendment to title 128, chapter 15, which authorized Waste–Tech to build the incinerator was considered, as well as the date and place of each of the several hearings at which anything relating to the amendment was considered. Johnson also set forth the date and type of notice given for the meetings and hearings and the action taken. This information will be set forth below when the evidence on the proceeding is summarized and discussed.

In his first cause of action, Johnson alleged in his second amended petition that the adopted amendment, which excluded Waste–Tech's waste from the list of hazardous waste, violates the U.S. Constitution and the Constitution of Nebraska in the following respects: (1) The Council's exclusion of waste generated by Waste–Tech is arbitrary and capricious; (2) the amendment grants Waste–Tech exclusive privileges or immunities, in violation of article III, § 18, of the Constitution of Nebraska; (3) the amendment violates the Due Process Clause; and (4) the Council has no adequate mechanism for separating the legislative, executive, and judicial powers delegated to it by the Legislature.

Johnson also alleged that the Council had exceeded its statutory authority under NEPA and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (1988). He further alleged that the Council does not have the authority to define hazardous waste as nonhazardous and does not have the authority to exclude from regulation waste emitted from a particular facility. Johnson also alleged that the Council did not comply with the statutory requirements or the ***267** Council's own rules, as the Council did not conduct its hearings in the area to be affected by the proposed change in the standards and did not give proper notice to the area to be affected.

****25** In his second cause of action, Johnson alleged that on February 16 and May 17, 1989, the Council met with Waste–Tech in nonadvertised meetings. He asserted that the public was not allowed to attend these meetings and that no minutes were kept of these meetings. The plaintiff contended that these actions violated Nebraska public meeting law, Neb.Rev.Stat. § 84–1408 et seq. (Reissue 1987), which is applicable to the case at hand, particularly § 84–1413.

The transcript does not show whether the defendants filed an answer to the plaintiff's second amended petition. The court granted the defendants' and intervenor's separate motions for summary judgment and dismissed the plaintiff's second amended petition.

ASSIGNMENTS OF ERROR

Johnson alleges that the court erred (1) in sustaining the Council's demurrer to his amended petition on the basis that the Department had not been joined in the action as a necessary party and (2) in granting the motions for summary judgment, because the record discloses that there are genuine issues of material fact. In connection with the second assignment of error, Johnson argues that he is entitled to a declaratory judgment and that, therefore, the trial court erred in granting the motions for summary judgment and dismissing his second amended petition. Johnson asserts that (1) the amendment was arbitrary because the Council acted on insufficient information when it adopted the amendment; (2) the amendment exceeds the Council's statutory authority because the amendment does not comply with the federal RCRA; (3) "delisting" the Waste–Tech facility is a grant of a special privilege to Waste–Tech in violation of article III, § 18, of the Constitution of Nebraska; (4) the amendment exceeds the Council's statutory authority because the power to delist waste is distinct from the power to list waste; (5) the Council did not conduct a hearing in the area affected, as required by statute, and did not give notice, ***268** as required by statute and the Council's own regulations; and (6) the Council's February 16, 1989, meeting violated Nebraska public meeting law. Our decision is based upon the fifth and sixth assertions, which raise procedural questions, and we find that discussion of the other issues would not be helpful.

DEMURRER

We shall begin by considering the first error assigned by the plaintiff, that of the court's granting a demurrer on the ground that the Department was a necessary party. Upon granting the demurrer, the court allowed Johnson to modify his amended petition to make the Department a party defendant. " 'When a demurrer is sustained, and the pleader desires to amend, it has been held that he thereby waives his exception to the ruling of the court.' " *Papillion Times Printing Co. v. Sarpy County,* 85 Neb. 397, 400, 123 N.W. 452, 453 (1909). As the plaintiff has modified his amended petition upon demurrer, as opposed to standing on his amended petition and appealing the demurrer, he has waived his objection to the court's grant of a demurrer regarding the joinder of parties. See *id.* Therefore, we cannot review this issue.

STANDARD OF REVIEW

All of the other issues in this appeal arise under the question of whether the court should have granted the defendants' and intervenor's separate motions for summary judgment. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Turek v. St. Elizabeth Comm. Health Ctr.,* 241 Neb. 467, 488 N.W.2d 567 (1992); *Purbaugh v. Jurgensmeier,* 240 Neb. 679, 483 N.W.2d 757 (1992); *Murphy v. Spelts–Schultz Lumber Co.,* 240 Neb. 275, 481 N.W.2d 422 (1992). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. ***269** ****26** *Abboud v. Michals,* 241 Neb. 747, 491 N.W.2d 34 (1992); *State v. Union Pacific RR. Co.,* 241 Neb. 675, 490 N.W.2d 461 (1992); *Bowley v. Village of Bennington,* 241 Neb. 329, 488 N.W.2d 354 (1992). In the context of this case, the above-stated rule has the effect of requiring this court to reverse the judgment of the district court and remand the cause unless the record shows as a matter of law that the plaintiff is entitled to no relief.

THE EVIDENCE

At the hearing on the motions for summary judgment, the parties stipulated that Johnson had attended a January 12, 1989, hearing held in Kimball. The affidavit of Eliot Cooper, a vice president for Waste–Tech, was received in evidence. In this affidavit, Cooper stated that no representative of Waste–Tech had attended the Council's February 16 informational meeting. Cooper also stated that Waste–Tech had supplied the Council and the Department with all of the information required by the applicable rules and regulations as well as all additional information requested by the Council and the Department.

The affidavit of Dennis Grams, the director of the Department, was received. Grams' affidavit established the foundation for the introduction into evidence of the minutes from the various Council meetings at which the amendment was considered and the notice given for each of these meetings. This information will be summarized later in this opinion when it is relevant to the issue under consideration.

ANALYSIS

GENERAL DISCUSSION

This case is an appeal from a declaratory judgment action under § 84–911. In summary, that statute allows the district court to declare a rule or regulation invalid if the court finds that the rule or regulation (1) violates constitutional provisions, (2) exceeds the statutory authority of the agency, or (3) was adopted without compliance with the statutory rulemaking or regulation-making procedures. This procedure should be distinguished from the procedure outlined in Neb.Rev.Stat. §§ 84–917 and 84–918 (Cum.Supp.1992), which provides for judicial review of contested cases by appeal.

***270** The plaintiff raises the issues of whether the amendment, once adopted by the Council, was the result of arbitrary and capricious action on the part of the Council, was based on insufficient information, was special legislation, and did not comply with the federal RCRA. As we decide below that the amendment adopted appears void, on the record, because it was adopted without compliance with the statutory rulemaking procedures in that sufficient notice was not given and proper hearings were not held, there is no need to address the substantive arguments against the Council's decision.

NONCOMPLIANCE WITH STATUTORY RULEMAKING AND REGULATION–MAKING PROCEDURES

Title 128 of the Nebraska Administrative Code contains the rules and regulations governing hazardous waste management. Under chapter 15 of title 128, there is a list of identified hazardous wastes. This chapter is some 16 pages long, and the list, much of which is in fine print with 2 columns on each page, constitutes most of the chapter. The list is technical and is obviously not intended to be understood by the general public. Hazardous waste can be excluded from the list upon the petition of a generator of such waste. 128 Neb.Admin.Code, ch. 8, § 002.01 (1989). Title 128, chapter 8, § 002.05, states that the proceedings are to be conducted as rulemaking under title 115, chapters 80, 81, and 82.

The plaintiff argues that the method used by the Council to promulgate the amendment excluding waste to be produced by the Waste–Tech incinerator from the list of hazardous wastes found in title 128 did not comply with the statutory rulemaking and regulation-making procedures and that, therefore, the amendment is invalid under § 84–911. To decide whether there is no genuine issue of material fact regarding the promulgation of the amendment in question, we must examine the applicable statutory rulemaking procedures.

Under § 81–1505(1), the Council is authorized to adopt rules and regulations which ****27** set the standards of air, water, and land quality. Under § 81–1505(17), prior to adopting, amending, or repealing standards and classifications of air, water, and land quality, the Council is required to conduct public hearings in the ***271** general area to be affected by the standard. Notice of the public hearing must be published twice, and the first publication must occur not more than 30 days nor less than 20 days before the public hearing. § 81–1505(17)(a).

All state boards, commissions, departments, and administrative offices authorized to make rules and regulations are subject to the Administrative Procedure Act (APA), Neb.Rev.Stat. § 84–901 et seq. (Reissue 1987 & Cum.Supp.1992). The provisions of APA in effect at the time the amendment was adopted were "intended to constitute an independent act establishing minimum administrative procedure for all agencies," § 84–916, and were to "be considered as cumulative to existing laws," § 84–919. Under APA, no rule or regulation shall be adopted except after public hearing on the question of adoption, and notice of the public hearing must be given at least 30 days prior by publication in a newspaper having general circulation in the state. § 84–907. Read together, NEPA and APA

require that notice of a public hearing must first be published in a newspaper of general circulation, which also has regular circulation in the area to be affected, on the 30th day prior to the public hearing by the Council on a rule regarding air, water, or land quality standards and must then be published again in a newspaper which has regular circulation in the area to be affected.

According to the Council's own rules and regulations, any interested person may petition the Council to promulgate a standard, rule, or regulation. 115 Neb.Admin.Code, ch. 80, § 001. The Council then has the option of denying the petition or instituting rulemaking proceedings. *Id.* at § 004. The rules governing the Council require that a public hearing be held before the adoption of standards for air, water, or land quality and that the hearing be held in the area to be affected by the standards. 115 Neb.Admin.Code, ch. 83, § 003. Notice of the hearing is to be published at least twice in a newspaper regularly circulated in the area to which the proposed standards apply. *Id.* at § 003.02. The first date of publication must be not more than 30 days nor less than 20 days before the hearing. *Id.* at 003.03.

Under title 128, chapter 8, § 002.01, any person may petition for a regulatory amendment excluding waste at a particular ***272** generating facility from the hazardous waste list. Title 128, chapter 8, § 002.05, states that the petitioning process is to operate in accordance with title 115, chapters 80, 81, and 82. As title 115, chapter 80, requires the Council to use the general rulemaking procedures if it does not deny the petition, the rest of the rulemaking procedures found in title 115 apply to the promulgation of a rule excluding waste under title 128.

The plaintiff alleges that the Council did not hold a public hearing in the area affected by the amendment and did not give adequate notice of its public hearings and that, therefore, the amendment was not promulgated according to the statutory rulemaking procedures. The evidence in the record reveals the following: In his affidavit, Grams, director of the Department, attested that the Council had held an informal public hearing on Waste–Tech's petition for a rule change in Lincoln, Nebraska, on September 23, 1988. Public notice of the hearing was published on August 24 and September 2 in the Lincoln Journal–Star, Grand Island Daily Independent, Scottsbluff Star–Herald, Norfolk Daily News, and North Platte Telegraph.

Grams attested that on January 12, 1989, the Department held a public hearing in Kimball on the Waste–Tech petition. Public notice of the hearing was published once in the Scottsbluff Star–Herald, Sidney Telegraph, and Western Nebraska Observer on December 13, 14, and 15, 1988, respectively. The plaintiff attended the January 12 public hearing. Grams attested that a transcript of this hearing was prepared and provided to the Council at a later date. The minutes of a public hearing by the Council on February 17, 1989, reflect that "[a] public hearing was held in Kimball, Nebraska on January 12, 1989 to obtain public comment on the proposed rule change. A copy of the transcript from this meeting was offered as exhibit 3." ****28** No copy of the transcript was attached to the minutes of the meeting submitted into evidence, nor is there evidence of any minutes from the January 12 hearing.

Grams' affidavit contains conflicting evidence regarding a meeting held by the Council on February 16, 1989. On the one hand, Grams attests in one paragraph that "[o]n February 16, 1989, the Department held a public informational meeting in ***273** Lincoln, Nebraska." Grams attests that a press release was sent on February 10 to more than 200 interested persons on the Department's mailing list and that a copy of such press release is attached to the affidavit. There is no copy of such press release in the evidence. On the other hand, Grams states in another paragraph that the February 16 meeting "was an informational session where the Council heard reports from the staff of the Department. No minutes were recorded from this meeting because no action was contemplated or taken."

Grams attests that on February 17 the Council held a formal hearing on the Waste–Tech petition in Lincoln. Notice of the hearing was published on January 18 and 28 in the Lincoln Journal–Star, Scottsbluff Star–Herald, Grand Island Daily Independent, Norfolk Daily News, and North Platte Telegraph. In addition, a two-way audio hookup was provided between the hearing in Lincoln and a hall in Kimball.

Finally, Grams attests that on May 18, 1989, the Council held a public hearing on the Waste–Tech petition in Omaha, Nebraska. Notice of the public hearing was published on April 18 and 28 in the Lincoln Journal–Star, Grand Island Daily Independent, Scottsbluff Star–Herald, Norfolk Daily News, and North Platte Telegraph. Notice of the hearing was also published on April 20 and 27 in the Western Nebraska Observer. Again, a two-way audio hookup was provided between the hearing in Omaha and a hall in Kimball.

The Council argues in its brief that the January 12, 1989, hearing held in Kimball sufficed as a public hearing held in the area to be affected by the proposed amendment, because the hearing was called by the Council and was presided at by a Department employee acting as a hearing officer. There is no evidence in the record, however, of who presided at or attended the hearing on January 12 beyond Grams' attestation that the Department held the hearing.

In contrast, Waste–Tech does not make the same argument as the Council. Waste–Tech's argument is an attempt to have its cake and eat it too. On the one hand, Waste–Tech argues that the Council is empowered under the general statutory provisions of § 81–1505 to delist waste because the rules and regulations set the standards for waste by defining ***274** what amount is permissible in air, water, and land (using the criteria listed in § 81–1505(13)). On the other hand, Waste–Tech argues that the provisions of § 81–1505, which require that a hearing be held in the area to be affected, do not apply to a delisting, as delisting a waste is not setting a standard. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *State ex rel. Spire v. Stodola,* 228 Neb. 107, 421 N.W.2d 436 (1988); *County of Dodge v. Department of Health,* 218 Neb. 346, 355 N.W.2d 775 (1984). Procedural rules are binding upon the agency which enacts them, and the agency does not have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule. *Douglas County Welfare Administration v. Parks,* 204 Neb. 570, 284 N.W.2d 10 (1979). We find that in establishing a standard, the Council must abide by the applicable statutory provisions as well as the Council's own procedural requirements for promulgating a standard under § 81–1505.

There is no evidence in the record regarding who conducted the January 12, 1989, meeting for the Council. If, as the Council alleges in its brief, the January 12 hearing was conducted only by a Department employee, then the delisting may be subject to invalidation. Section 81–1503(7) states that the Council shall adopt standards, rules, and regulations and that "[a] majority of the members of the council shall constitute a quorum for the transaction of business." There is no Nebraska law regarding what the term "transaction of business" means. ****29** However, other states' courts have found that a statutorily required public hearing is the transaction of business, for which a quorum is necessary. See, *Croaff v. Evans,* 130 Ariz. 353, 636 P.2d 131 (Ariz.App.1981); *Vaughan v. Duke,* 232 Ga. 545, 207 S.E.2d 509 (1974); *City of Passaic v. Passaic County Bd. of Taxation,* 18 N.J. 371, 113 A.2d 753 (1955); *Clark v. Montgomery County,* 235 Md. 320, 201 A.2d 499 (1964). The newly created title 115 rules, promulgated in August 1993, make it even more clear that a hearing officer's role is simply to preside at the hearing but that the Council is expected to attend the hearing, as the rules provide that "[b]efore each hearing is closed, the hearing officer may allow ***275** the Council to ask questions of any witness." 115 Neb.Admin.Code, ch. 10, § 010. We find that there is a genuine issue of material fact regarding whether the January 12 hearing satisfied the statutory requirement that the Council hold a hearing in the area which would be affected by the amendment.

In addition, there appears to be a genuine issue of material fact regarding the adequacy of the published notice. Under § 81–1505(17), the Council is required to publish notice of a public hearing twice in a newspaper regularly published or circulated in the county or counties affected by the proposed standards. The first date of publication shall not be more than 30 days before the hearing. Under APA, notice is to be published at least 30 days prior to the hearing. Publication was had once in the Scottsbluff Star–Herald, 30 days before the hearing; once in the Sidney Telegraph, 29 days before the hearing; and once in the Western Nebraska Observer, 28 days before the hearing. These publications do not fulfill the statutory requirements and the Council's rules regarding publication, which require that publication be had twice.

Waste–Tech argues that as Johnson stipulated before the district court that he had attended the January 12, 1989, hearing, he has waived any objection to the form of notice. Waste–Tech cites *Witt v. School District No. 70,* 202 Neb. 63, 273 N.W.2d 669 (1979); *Alexander v. School Dist. No. 17,* 197 Neb. 251, 248 N.W.2d 335 (1976); and *County of Blaine v. State Board of Equalization & Assessment,* 180 Neb. 471, 143 N.W.2d 880 (1966), in support of this argument. However, an examination of these cases shows that they were contested cases and that they, therefore, involved adjudicative hearings in which the person who waived notice was the interested party. As stated above, the rules that apply to adjudicative hearings are different from those that apply to quasi-legislative hearings. The provision of title 115, chapter 25, which states that a party waives any notice requirement by participating in a hearing applies only to contested proceedings. As presented to this court, the proceeding before the Council was not a contested proceeding. Therefore, there are genuine issues of material fact regarding the adequacy of notice of the January 12, 1989, hearing.

***276** The next issue we must address is whether, in light of the apparent inadequacy of the hearing held in Kimball, the hearings in Lincoln and Omaha satisfied the statutory and rulemaking requirements. The record does not show that Lincoln and Omaha are in the area to be affected by the incinerator. However, we are not sufficiently certain that judicial notice can be taken of this fact, and there is no proof in the record which would establish exactly what "the area to be affected" is, particularly to the degree of certainty necessary for a summary judgment.

Therefore, there appears to be a genuine issue of material fact regarding the adequacy of the Lincoln and Omaha hearings to fulfill the requirement that a hearing be held in the area to be affected by the standard. The issue thus becomes whether a rule is invalid on the basis that the hearings held by the agency did not comply with the statutory requirements or the agency's own rules.

"Rule making is a legislative process as contrasted with an administrative, judicial, or quasi-judicial process...." 73 C.J.S. *Public Administrative Law and Procedure* § 87 at 576 (1983). We believe that the propriety of the procedure must be judged by the rules and cases dealing with rulemaking, rather than contested cases or adjudicatory matters. "[I]n the absence of a statutory requirement a hearing before the administrative body is not necessarily a sine qua non ****30** to the validity of rules and regulations...." 73 C.J.S., *supra,* § 106 at 646.

In *Nickel v. School Board of Axtell,* 157 Neb. 813, 61 N.W.2d 566 (1953), the Nebraska Supreme Court considered a school redistricting statute which allowed school reorganization committees to change school district boundaries. The court held that the delegation of power to change school district boundaries was a delegation of a legislative power and stated that "[u]nder the situation here the duties of the county committee do not fall within the category to which the due process clause of either the state Constitution or the federal Constitution has application." *Id.* at 826, 61 N.W.2d at 574. In the case at hand, the challenged action is the Council's amendment of regulations. As such, notice is not required under the Constitution, but nonetheless, the Legislature has ***277** seen fit to require notice under the statutes governing the Council.

We are then interested only in the effect of the Council's failure to hold a hearing in accordance with the state statutes and the Council's own rules. We have been unable to find any case where the Nebraska Supreme Court directly ruled upon the effect of an agency's failure to follow statutory directions concerning notice of a hearing when the administrative body acted quasi-legislatively. In *Syfie v. Tri–County Hospital Dist.,* 186 Neb. 478, 184 N.W.2d 398 (1971), the Nebraska Supreme Court concluded that the notice given was in compliance with the pertinent statute in a case held to involve a purely legislative function. Presumably, the court must have thought that a failure to give notice would have affected the validity of the proceedings, even though the court concluded that the required notice was given.

Failure to follow statutes which prescribe notice for a hearing before an agency that is exercising quasi-legislative powers, that is, conducting proceedings to find some fact in the course of exercising legislative powers, has resulted in that action being held

ineffective. See *School Dist. No. 8 v. State Board of Education,* 176 Neb. 722, 127 N.W.2d 458 (1964). That case is not strictly applicable to the present case because it involved a situation where notice was constitutionally and statutorily required. However, the reasons given in that case apply equally to all cases where the required notice was not given before the exercise of legislative powers, such as those where quasi-legislative powers are to be exercised.

> The delegation of authority and power does not ordinarily imply a parting with the powers of the Legislature, but points rather to the conferring of authority or power to do the things which otherwise the Legislature would have to do itself. The Legislature may therefore provide the conditions and limitations with which the agency must comply before the authority or power may be exercised.

Id. at 733, 127 N.W.2d at 464. "It is the province of the Legislature to determine the manner in which delegated powers shall be exercised and a failure to comply with the conditions ***278** and limitations imposed is an unlawful exercise of the powers purportedly granted." *Id.* at 732, 127 N.W.2d at 464.

> If notice and hearing are afforded as required by law or constitutional right, the power to act exists; if notice and hearing in such a case are not afforded, the power to act does not exist and the courts are available to redress against the unlawful exercise of power....
>
> ....
>
> ... Compliance with the mandate of the Legislature in the delegation of power and authority to an agency of government is in effect a condition precedent to the exercise of such power and authority.
>
> ....
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> ... "If a statute lays down general standards, the administrative agency may implement the statute by filling in the necessary details. But where, as in the case here, the statute in itself prescribes the exact procedure the administrative agency may not add to or subtract from such a provision." ...
>
> ... The authority of the state board and the commissioner to afford notice and hearing is not valid when it fails to comply ****31** with the conditions and limitations of the statute.

Id. at 731–34, 127 N.W.2d at 464–65.

In the case at hand, § 81–1505(17) prescribed the place of the hearing and the notice requirements. Title 115, chapter 83, contains the same directions. The Nebraska Supreme Court has stated that "[g]enerally, rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the Legislature. Likewise, procedural rules are binding upon the agency which enacts them." *Douglas County Welfare Administration v. Parks,* 204 Neb. 570, 572, 284 N.W.2d 10, 11 (1979). We conclude that there was a genuine issue of material fact as to whether the Council followed the applicable rulemaking procedures and that, therefore, there was a genuine issue of material fact as to whether the promulgated amendment is valid.

***279** VIOLATION OF NEBRASKA PUBLIC MEETING LAW

The plaintiff alleges that on February 16, 1989, the Council met for a briefing and that no public notice of the meeting was given and no minutes were kept. The evidence available on this issue is the affidavit of Grams, in which he makes conflicting statements regarding the events of February 16. He attests first that

> [o]n February 16, 1989, the Department held a public informational meeting in Lincoln, Nebraska, referenced in the Second Amended Petition, # 12. Prior to that meeting, a press release providing public notice of the meeting was issued on February 10, 1989 and mailed to more than 200 interested persons on the Department's mailing list. A true and correct copy of the press release is attached to this Affidavit as Exhibit D.

In the record, exhibit D announces a quarterly meeting to be held by the Council on *February 17, 1989*. There is no evidence in the record to reflect that the public was notified of the February 16 meeting. However, Grams goes on to attest that

> [m]inutes were recorded for each of the hearings and meetings by the Council or the Department referenced above, with the exception of the January

> 12, 1989 public hearing which was transcribed and the February 16, 1989 meeting. The February 16 meeting, referenced in the Second Amended Petition, # 12, was an informational session where the Council heard reports from the staff of the Department. No minutes were recorded from this meeting because no action was contemplated or taken.

Nebraska public meeting law requires that "[e]very meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies." § 84–1408. The purpose behind the open meeting law is that it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret." *Id.* The public meeting law applies to governing bodies of all agencies of the executive branch and, therefore, applies to the Council. § 84–1409. A meeting, under § 84–1409, is defined as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of ***280** briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." The public body is required to "give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes." § 84–1411. Finally, the public body is required to "keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed." § 84–1413. The Nebraska Supreme Court has held that

> [t]he Nebraska Public Meetings Laws are a statutory commitment to openness in government. As a result of open meetings, there will be development and maintenance of confidence, as well as participation, in our form of government as a democracy. The public can observe and within proper limits participate in discussions and deliberations of a public body. "Deliberation" means the act of weighing or examining reasons for and against a ****32** choice or measure, and connotes not only collective discussion but collective acquisition and exchange of facts preliminary to the ultimate decision....
>
> "...The people must be able to 'go beyond and behind' the decisions reached and be apprised of the 'pros and cons' involved if they are to make sound judgments on questions of policy and to select their representatives intelligently. The presence of outside observers is an invaluable aid in making such information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action...." *Grein v. Board of Education,* 216 Neb. 158, 163–64, 343 N.W.2d 718, 722 (1984) (quoting Note, *Open Meeting Statutes: The Press Fights for the "Right to Know",* 75 Harv.L.Rev. 1199 (1962)).

The public meeting law is to be broadly interpreted and liberally construed to obtain the goal of openness in favor of the public. *Grein v. Board of Education, supra.* "Listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking." ***281** *St. ex rel. Badke v. Greendale Village Bd.,* 173 Wis.2d 553, 572, 494 N.W.2d 408, 415 (1993). Whether the Department held "a public informational meeting," as Grams states in one breath, or whether it held "an informational session where the Council heard reports from the staff of the Department," as Grams states in another breath, the fact that the Council may have received information triggers coverage under the public meeting law. The public meeting law applies to meetings at which briefings or formation of tentative policy takes place. The law's application is not limited to meetings at which action is contemplated or taken. " 'The likelihood that the public ... may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be *influenced* dictates that compliance with the law be met.' " *Id.* at 573, 494 N.W.2d at 415. In addition, the law requires that minutes be taken of all meetings, not just those at which action is contemplated. § 84–1413. We find that informational sessions in which the Council hears reports are briefings and, therefore, are meetings covered under the statute. Grams attests that no minutes were taken at the February 16, 1989, meeting. Further, we find no evidence that the public received reasonable advance notice of the meeting on February 16. Action taken in violation of Nebraska public meeting law is subject to nullification by a district court under § 84–1414. *Leibbrandt v. Lomax,* 228 Neb. 552, 423 N.W.2d 453 (1988). "The prohibition against decisions or

formal action in a closed session also proscribes 'crystallization of secret decisions to a point just short of ceremonial acceptance,' and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." *Grein v. Board of Education,* 216 Neb. at 168, 343 N.W.2d at 724 (quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.,* 263 Cal.App.2d 41, 69 Cal.Rptr. 480 (1968)). We find that there is a genuine issue of material fact as to whether the meeting of the Council on February 16 violated the public meeting law.

CONCLUSION

We therefore conclude that the record shows there are ***282** genuine issues of material fact as to whether the amendment was adopted in compliance with the statutory rulemaking and regulation-making procedures as well as Nebraska public meeting law. The record specifically fails to show that the applicable notice and hearing provisions were followed. The trial court erred in granting the motions for summary judgment.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

All Citations

2 Neb.App. 263, 509 N.W.2d 21

234 So.3d 1236
Supreme Court of Mississippi.

MAYOR AND CITY COUNCIL AND CITY OF COLUMBUS
v.
The COMMERCIAL DISPATCH

NO. 2016–CC–00897–SCT
|
09/07/2017

Synopsis

Background: City and its mayor sought review of state ethics commission's finding that prearranged, nonsocial, and subquorum gatherings of the mayor and city council in the mayor's conference room violated the Open Meetings Act. The Chancery Court, Lowndes County, Kenneth M. Burns, J., affirmed. City and its mayor appealed.

The Supreme Court, Chamberlin, J., held that gatherings in question violated the Open Meetings Act.

Affirmed.

LOWNDES COUNTY CHANCERY COURT, KENNETH M. BURNS, J.

Attorneys and Law Firms

ATTORNEYS FOR APPELLANTS: MICHAEL D. CHASE, JEFFREY J. TURNAGE

ATTORNEYS FOR APPELLEE: D. MICHAEL HURST, JR., CLAY B. BALDWIN

BEFORE DICKINSON, P.J., KING AND CHAMBERLIN, JJ.

Opinion

CHAMBERLIN, JUSTICE, FOR THE COURT:

***1237** ¶ 1. The Mayor and the City Council members for the City of Columbus held four pairs of prearranged, nonsocial and subquorum gatherings over the course of two months. The gatherings were on the topics of economic development and maintenance of a public building. For each pair of gatherings, the Mayor first met with three Council members, and then later the same day, he met with the remaining three Council members on the same topic. Because all of the gatherings were just shy of a quorum—four Council members would have constituted a quorum—the gatherings were not open to the public.

¶ 2. A reporter for *The Commercial Dispatch* received notice of the meetings, and he filed an Open Meetings Act Complaint against the Mayor and the City of Columbus. The Ethics Commission found that the Mayor and the City of Columbus had violated the Open Meetings Act. The Mayor and the City of Columbus appealed to the chancery court. The chancery court affirmed the Commission's judgment on de novo review. The Mayor and the City of Columbus appealed to this Court. We affirm the judgment of the chancery court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶ 3. The City of Columbus's governing body consists of six City Council members and the Mayor. The Mayor does not always vote; he votes only when the quorum's vote results in a tie. The Mayor and the Council members held four pairs of gatherings over the course of two months that were not open to the public. All of the gatherings were prearranged and took place in the Mayor's conference room.

¶ 4. The first three pairs of gatherings occurred on January 23, 2014, February 3, 2014 and February 24, 2014. The gatherings covered the subject of economic development, specifically, retail development in Columbus. At each of the gatherings, the Council members met in two subquorum groups of three, and each subquorum group met with the Mayor and representatives from the Golden Triangle Development Link (the Link). After the gatherings, the Link announced that it had "decided to renew their retail development partnership" with the City of Columbus.

¶ 5. The last pair of gatherings occurred on February 27, 2014, covering the subject of renovations to a public building. Once again, the Council members split into two subquorum groups of three to meet with the Mayor. After the gatherings, City officials issued a press release announcing how the project would be managed.

¶ 6. A reporter for *The Commercial Dispatch* (*The Dispatch*), Robert Nathan Gregory, requested to "sit in on" the gatherings that took place on February 27, 2014. He was denied entry. After speaking to the chief operations officer for the City of Columbus, Gregory learned that similar gatherings had occurred on January 23, 2014, February 3, 2014 and February 24, 2014. Gregory filed an Open Meetings Act Complaint with the Mississippi Ethics Commission detailing the four pairs of gatherings.

¶ 7. The Ethics Commission issued its Final Order on December 5, 2014. The ***1238** Final Order found that the subject gatherings had circumvented the Open Meetings Act (the Act), and by circumventing the Act, the Mayor and City Council had violated it, specifically citing Mississippi Code Section 25–41–1, Mississippi Code Section 25–41–3 and Mississippi Code Section 25–41–5. The Commission ordered the Mayor and the City Council to "refrain from further violations" and "comply strictly with [the Act]."

¶ 8. The Mayor and the City Council appealed to the Chancery Court of Lowndes County. On appeal, *The Dispatch* stepped in as the petitioner in place of Gregory.[1] On May 24, 2016, after a de novo review, the trial court issued its Opinion and Judgment. The trial court upheld the Commission's ruling that the subject gatherings had violated the Act. The Mayor and the City Council (the City) appealed. We affirm.

1 Although *The Dispatch* picked up the case on the trial-court level, the trial court never ruled on the Motion to Substitute the Petitioners. However, a Motion was made before this Court, and this Court issued an Order allowing the substitution on October 25, 2016.

STATEMENT OF ISSUES

¶ 9. On appeal, the City raised one general issue in its statement of the issue: "Whether the chancery court erred in affirming the Final Order of the Mississippi Ethics Commission in MEC case M–14–002." In its brief, the City then restyled the issue into seven interrelated issues, and in response, *The Dispatch* argued three issues. The Court has consolidated the interrelated issues to one concise issue with two subparts. The Court holds that the one issue with two subparts is dispositive, and the additional arguments of the City are without merit.

Whether the Open Meetings Act requires prearranged, nonsocial and subquorum sized gatherings regarding economic development and maintenance of a public building to be open to the public.

(A) Section 25–41–1 of the Open Meetings Act is clear and unambiguous.

(B) Under the instant facts, the gatherings should have been open to the public.

STANDARD OF REVIEW

¶ 10. The Open Meetings Act states that the chancery court should consider an appeal from the Ethics Commission de novo. Miss. Code Ann. § 25–41–15 (Supp. 2016) ("Any party may petition the chancery court of the county in which the public body is located to enforce or appeal any order of the Ethics Commission issued pursuant to this chapter. In any such appeal[,] the chancery court shall conduct a de novo review."). However, contrary to the City's argument, the statute does not explicitly state the standard of review for the Supreme Court; therefore, the Court applies the customary standard of review. When reviewing findings of fact, the Court "will not disturb the factual findings of a chancellor when supported by substantial evidence unless the Court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." *Gannett River States Publ'g Corp. v. City of Jackson*, 866 So.2d 462, 465 (Miss. 2004) (citing *Morgan v. West*, 812 So.2d 987, 990 (Miss. 2002)). "When reviewing questions of law, this Court employs a de novo standard of review and will only reverse for

an erroneous interpretation or application of the law." *Gannett River States Publ'g Corp.*, 866 So.2d at 465.

ANALYSIS

Whether the Open Meetings Act prohibits subquorum sized gatherings *1239 that entail the discussion and deliberation of economic development and maintenance of a public building to be closed to the public.

¶ 11. The analysis of this issue begins with a de novo determination of whether Section 25–41–1 of the Act is plain and unambiguous. The Court holds that it is plain and unambiguous. Next, considering Section 25–41–1 as plain and unambiguous, the Court determines whether the findings of fact of the trial court were an abuse of discretion. Lastly, based on the findings of fact and legal analysis, the Court concludes that the gatherings held by the City should have been open to the public.

(A) Section 25–41–1 of the Open Meetings Act is clear and unambiguous.

¶ 12. In determining whether a statute is clear and unambiguous, the Court has stated:

> No principle is more firmly established, or rests on more secure foundations, than the rule which declares when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the Legislature shall be deemed to have intended to mean what they have plainly expressed, and, consequently, no room is left for construction in the application of such a law.

Conway v. Mississippi State Bd. of Health, 252 Miss. 315, 173 So.2d 412, 415 (1965) (internal quotation omitted) (quoting *Wilson v. Yazoo & M.V.R. Co.*, 192 Miss. 424, 6 So.2d 313, 314 (1942)). Further, the Court has stated that "courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution." *5K Farms, Inc. v. Mississippi Dep't of Revenue*, 94 So.3d 221, 227 (Miss. 2012).

¶ 13. In whole, Section 25–41–1 of the Mississippi Code states:

> It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

Miss. Code Ann. § 25–41–1 (Rev. 2010). The City takes the position that Section 25–41–1 "is a general statement of legislative policy and purpose." *The Dispatch* argues that "the Legislature specifically and unequivocally enacted clear language in the very first opening section of the Open Meetings Act[,] itself expressing the indisputable philosophy and spirit of the Act," and the Act should be construed considering the "Philosophy and Spirit of [the] Act."

¶ 14. As stated by *The Dispatch*, the Court has determined that Section 25–41–1 sets forth the spirit of the Act. *Hinds Cty. Bd. of Supervisors v. Common Cause of Mississippi*, 551 So.2d 107 (Miss. 1989). "The philosophy of the Open Meetings Act is that all deliberations, decisions and business of all governmental boards and commissions, unless specifically excluded by statute, shall be open to the public." *Id.* at 110 (citing Miss. Code Ann. § 25–41–1). Further,

> Every member of every public board and commission in this state should always bear in mind that the spirit of the Act is that a citizen spectator, including any representative of the press, has just as much right to attend the meeting and ***1240** see and hear everything that is going on as has any member of the board or commission.

Id. Although not requiring meetings to be open could allow for more frank conversation or be preferable for the Council, it is of "far greater importance ... that all public business be open to the public." *Id.*, *see also Gannett River States Publ'g Corp.*, 866 So.2d at 468. The Act also provides the specific reason why public business should be performed at public meeting; it states that it is "essential to the fundamental philosophy of the American constitutional form of representative

government and to the maintenance of a democratic society." Miss. Code Ann. § 25–41–1. Thus, where the Act states "the wisdom and policy of the [A]ct," the Court "must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution." *5K Farms, Inc.*, 94 So.3d at 227.

¶ 15. Aside from philosophy and spirit of the Act, Section 25–41–1 also explicitly details what constitutes public business. It lists "*deliberations and decisions that go into the making* of public policy" and then states, "[I]t is hereby declared to be the policy of the State of Mississippi that the *formation and determination of public policy is public business* and shall be conducted at open meetings except as otherwise provided herein ...." Miss. Code Ann. § 25–41–1 (emphasis added). Under the emphasized language above, "deliberations ... that go into the making of" public policy are to be open to the public. *Id.* Further, the Court has interpreted the emphasized sections of the statute, holding that "the deliberative stages of the decision-making process *that lead to* 'formation and determination of public policy' are required to be open to the public." *Bd. of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.*, 478 So.2d 269, 278 (Miss. 1985) (emphasis added).

¶ 16. Although the City argues that Section 25–41–1 is merely a "general statement of policy and purpose," to ignore Section 25–41–1 simply because the City claims it is a general policy would be to ignore the plain language of the Act. Section 25–41–1 avers the philosophy and spirit of the Act, and it defines what is required to be open to the public. *See Mississippi Publishers*, 478 So.2d at 278; *see also* Miss. Code Ann. § 25–41–1. If deliberations that "go into making" or "lead to" public policy occur at a gathering of board members, the Act unequivocally states that those gatherings are "public business and shall be conducted at open meetings." Miss. Code Ann. § 25–41–1. The Act carves out exceptions for only "chance meetings or social gatherings of members of a public body" or executive sessions. Miss. Code Ann. §§ 25–41–7, 25–41–17.

¶ 17. Thus, the Court holds under de novo review that Section 25–41–1 is clear and unambiguous. Section 25–41–1 asserts the philosophy and spirit of the Act. Additionally, Section 25–41–1 also addresses when a gathering must be open to the public, and determining when a gathering must be open to the public is a fact-intensive analysis focusing on the subject matter of the gathering and the circumstances surrounding the gathering.

(B) Under the instant facts, the gatherings should have been open to the public.

¶ 18. As stated above, the gatherings all were prearranged and took place in the Mayor's conference room. The City Council split into two subquorum groups of three people for each gathering. One group met in the morning, and the other group met in the afternoon on the same topic. The subject of the gatherings is not in dispute. The first three days of gatherings on January 22, 2014, February 3, 2014 and February 24, 2014, covered the topic ***1241** of economic development in Columbus, specifically retail development. After these gatherings, the Link announced that it had decided to renew its retail development partnership. The last pair of gatherings, on February 27, 2014, involved renovations of a public building. After these gatherings, City officials issued a press release announcing how the project would be managed.

¶ 19. The trial court correctly noted the nature of the gatherings in its Opinion and Judgment. It stated, "The meetings held by Columbus in this case were specifically held with a sub-quorum present to avoid the consequences of the Open Meetings Act." The trial court's finding is supported by the record, and it does not rise to the level of an abuse of discretion. The trial court also noted the importance of the philosophy and spirit of the Act. Further, the gatherings were not by chance or a product of a social gathering. Thus, as the trial court found, it is clear from the record that the gatherings were targeted at avoiding or circumventing the Act.

¶ 20. The trial court also found "[t]he discussions not open to the public led to official action by the Columbus quorum when they met." The record is clear that, although a quorum was never present in the same room at the same time, public business was discussed at all of the gatherings.[2] Thus, this factual conclusion also does not rise to the level of an abuse of discretion.

2 The City admits in its brief that "discussion between council members regarding ... the topic at hand" "possibly" occurred. In its reply brief, the City concludes that "there is no evidence that any council member discussed the matters at issue with more than two other members directly or by proxy." Thus, the City admits that public business was discussed, but it asserts that because a quorum was not present, the discussions did not fall under the Act.

¶ 21. The four pairs of subquorum gatherings, along with the fact that they were prearranged, nonsocial, and on the topic of public business, illustrated the City's *intent to circumvent or avoid* the requirements of the Act. The philosophy and spirit of the Act prohibit the City from intending and attempting to circumvent or avoid the requirements of the Act. Additionally, the plain language of Section 25–41–1 requires the subject gatherings to be open to the public. Thus, the City's failure to hold open gatherings violated the Act.

¶ 22. To be clear, this holding is fact-specific. In the case *sub judice*, the City acted with the express intent of circumventing the Act. The gatherings were preplanned. The attendees invited purposely constituted less than a quorum. The gatherings were for the express goal of discussing City business. Further, the facts support that City business was conducted and policy formulated at the gatherings. Finally, the gatherings did not fall under any of the exceptions specified in the Act. For these, and other reasons contained in the record, the holding of the trial court is supported by the evidence.

¶ 23. Further, the additional arguments brought by the City do not affect the requirement that the subject gatherings must be open to the public. Therefore, they are without merit, and we refrain from addressing them.

CONCLUSION

¶ 24. Prearranged, nonsocial gatherings on public business that are held in subquorum groups with the intent to circumvent the Act are required to be open to the public under Section 25–41–1 of the Open Meetings Act. Thus, the trial court correctly found that the City violated the Open Meetings Act.

¶ 25. **AFFIRMED.**

***1242** WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., KITCHENS, KING, COLEMAN, MAXWELL AND BEAM, JJ., CONCUR.

All Citations

234 So.3d 1236

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76 Ohio St.3d 540
Supreme Court of Ohio.

The STATE ex rel. CINCINNATI POST
v.
CITY OF CINCINNATI.

No. 95–1803
|
Submitted June 5, 1996.
|
Decided Sept. 4, 1996.

Synopsis
Newspaper brought action under the Sunshine Law to compel city to prepare and make available to the public minutes summarizing discussions in closed-door meetings in which members of city council discussed county's proposal to construct new facilities for professional sports teams. The Supreme Court, Pfeifer, J., held that: (1) Sunshine Law cannot be circumvented by scheduling back-to-back closed meetings each attended by less than a majority of public body, but which, taken together, are attended by a majority of that body; (2) city council's back-to-back closed meetings which, taken together, were attended by majority of city council members, violated the Sunshine Law; and (3) mandamus was appropriate remedy to compel preparation of minutes of closed meetings.

Writ allowed.

Moyer, C.J., concurred separately with opinion.

Douglas, J., concurred in part and dissented in part with separate opinion in which Resnick and Francis E. Sweeney, JJ., concurred.

****903** *Syllabus by the Court*

***540** The Ohio Sunshine Law cannot be circumvented by scheduling back-to-back meetings ****904** which, taken together, are attended by a majority of a public body.

In June 1995, the city of Cincinnati was given a figurative "two-minute warning" by the owner of the Cincinnati Bengals—if the city and Hamilton County did not agree by the end of June to build a new stadium for the team, the Bengals would move to Baltimore. The Cincinnati Reds' ownership was also putting the "squeeze play" on the city—the Reds wanted a stadium separate from the Bengals and were reportedly looking at sites in Kentucky. Neither team was satisfied with the county-owned Riverfront Stadium.

The city believed that the key to retaining both teams was to provide them with new facilities, and the city sought to enter into an agreement with the county to achieve that goal, prior to the expiration of the Bengals' deadline. Cincinnati's City Manager, John F. Shirey, met with the administrator for the county to discuss a proposal by the Hamilton County Commissioners for reaching an agreement. Any agreement would have to be approved by both city council and the county commissioners.

The meeting gave Shirey a general idea of what the county would require in an agreement. Shirey decided to huddle with council members regarding the county's proposal. As city manager, Shirey is the chief executive and administrative officer of the city. While he has a seat on council, he cannot vote. The city manager can propose legislative business for council to consider.

Regular council meetings are held every Wednesday at 2 p.m. in council chambers at City Hall. Council can convene special meetings upon the request of any two council members with twelve hours' notice to the other council members, and with an advertisement in a newspaper of general circulation in the city. In the past, council has convened special sessions at the request of the city manager.

***541** Council's regular and special meetings are open to the public, except during executive sessions, which council periodically convenes during regular or special sessions. Executive session is held in a different room. The city manager often convenes executive sessions by asking two members of the council to move for an executive session. Executive sessions are not tape-recorded or broadcast, unlike regular and special sessions.

Such was the system for council meetings when Shirey called his first series of nonpublic, back-to-back sessions with council members on the morning of June 21, 1995. In all, three sets of back-to-back meetings were held between the city manager and council members. The same procedure applied to each set. The city manager's administrative assistant scheduled the meetings so that at no session would there be a majority of council members. In depositions the city manager testified that "the reason for having fewer than a majority of members of council at a meeting is so that we wouldn't violate Ohio['s] Open Meetings Law." Shirey testified that he understood that if a majority of council met to discuss possible business, and the public was excluded, the meeting would violate Ohio's "Sunshine Law." All of the meetings were held in the city manager's office, and the county's proposal for building new stadiums was discussed at all the sessions.

A total of six council members attended the June 21, 1995 sessions. Together, the sessions lasted three hours. Even though council did not follow its procedure for convening executive sessions, the meetings were closed to the public. The county's proposal was not discussed at council's regular, public meeting that afternoon.

The county publicly announced the specific terms of its proposal the next day, June 22, 1995. On Friday, June 23, Shirey had another series of back-to-back sessions with council members. On Monday, June 26, the final sessions were held. All were closed to the public and none followed council's procedure for convening executive sessions. At least five of the nine council members attended Friday's and Monday's meetings.

The city manager met again with the county administrator on June 27 to discuss the county's proposal. On Thursday, June 29, council held a special session open to the ****905** public at which it approved by a five-to-four vote the specific terms of a memorandum of understanding between the city and county. The memorandum of understanding contained key differences from the county's original proposal.

In the closed-door meetings, council members expressed opinions about the county's proposal, criticized parts of it, and expressed approval over parts of it, but no votes were taken. Before the first series of meetings, one council member asked to attend the first session, but was told he could not unless one of the ***542** already confirmed attendees did not appear or agreed to attend a later session. Another member of council showed up for a session for which he had not been confirmed, causing a majority of council to be present, and was asked to attend another session instead.

The city did not notify the public of any of the back-to-back sessions or otherwise allow the public to attend. News reporters waiting outside were not allowed in.

After being excluded from the back-to-back sessions and after council approved the agreement with the county, the Cincinnati Post asked the city to prepare and make available minutes describing what had been discussed at the sessions. The city refused, without acknowledging that the back-to-back sessions had actually occurred. The Post brought this action to compel the city to prepare and make available to the public minutes summarizing the discussions at the back-to-back sessions.

Attorneys and Law Firms

Baker & Hostetler, David L. Marburger, Hilary W. Rule, Cleveland, Jeffrey T. Williams, Columbus, and Bruce W. Sanford, Washington, DC, for relator.

Fay D. Dupuis, City Solicitor, and Karl P. Kadon III, Deputy City Solicitor, for respondent.

Opinion

PFEIFER, Justice.

pfeifer, J. We hold that the Cincinnati City Council's back-to-back meetings, which, taken together, were attended by a majority of council members, violated the provisions of R.C. 121.22, that the dictates of R.C. 121.22 are applicable to Cincinnati City Council, and that the Cincinnati Post is entitled to its requested relief.

Ohio's "Sunshine Law," R.C. 121.22, requires that public officials, when meeting to consider official business, conduct those meetings in public. The statute reads:

"(A) 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."

The statute also requires public bodies to keep minutes of their meetings. R.C. 121.22(C) provides:

"All meetings of any public body are declared to be public meetings open to the public at all times. * * *

"The minutes of a regular or special meeting of any such public body shall be promptly prepared, filed, and maintained and shall be open to public inspection."

***543** In *State ex rel. Fairfield Leader v. Ricketts* (1990), 56 Ohio St.3d 97, 564 N.E.2d 486, this court applied the Sunshine Law to supposedly "informal" meetings where discussions of public interest were held. In *Fairfield Leader,* the Fairfield County Commissioners met at a hotel on a Saturday morning for a "workshop" or "retreat" with a majority of the trustees of Violet Township and a majority of the members of the council of the village of Pickerington. Topics for the meeting included water and sewer service, traffic patterns, and land use planning.

Construing an earlier, similar version of R.C. 121.22(C), this court issued a writ of mandamus compelling the commissioners and the trustees separately to prepare minutes describing their discussions. This court held:

"[W]here, as here, the members of a public body agree to attend, in their official capacity, a meeting where public business is to be discussed and a majority of the members do attend, R.C. 121.22(C) necessitates that minutes of the meeting be recorded." 56 Ohio St.3d at 102, 564 N.E.2d at 491.

****906** In this case, members of council agreed to attend a scheduled meeting to discuss public business. However, unlike in *Fairfield Leader,* a majority of council members were not present at any one session. R.C. 121.22(B)(2) defines a "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members."

The question becomes whether a public body may circumvent the requirements of the statute by setting up back-to-back-meetings of less than a majority of its members, with the same topics of public business discussed at each. We hold that the statute prevents such maneuvering to avoid its clear intent.

First, we note that the statute states that it "shall be liberally construed." R.C. 121.22(A). A liberal construction of the definition of "meeting" would include the back-to-back sessions held by council in this case. The elements of the statutory definition of a meeting are (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. The council meetings certainly fit within the first two elements. As to the third element, back-to-back sessions discussing exactly the same public issues can be liberally construed as two parts of the same meeting. A majority of council members thus did attend the "meeting."

Also, when construing a statute, this court's "paramount concern" is the statute's legislative intent. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319, 1323. This court avoids adopting a construction of a statute that would "result in circumventing the evident purpose of the enactment." *Daiquiri Club, Inc. v. Peck* (1953), 159 Ohio St. 52, 55, 50 O.O. 26, 28, 110 N.E.2d 705, 707. We must also construe statutes to avoid unreasonable or absurd results. See ***544** R.C. 1.47(C); *State ex rel. Brown v. Milton–Union Exempted Village Bd. of Edn.* (1988), 40 Ohio St.3d 21, 27, 531 N.E.2d 1297, 1303.

To find that Cincinnati's game of "legislative musical chairs" is allowable under the Sunshine Law would be to ignore the legislative intent of the statute, disregard its evident purpose, and allow an absurd result.

The statute requires that governmental bodies "conduct all deliberations upon official business only in open meetings." R.C. 121.22(A). Its very purpose is to prevent just the sort of activity that went on in this case—elected officials meeting secretly to deliberate on public issues without accountability to the public.

R.C. 121.22(G) does recognize that certain sensitive information is best discussed privately among

members of a public body. Thus, the statute allows for "executive sessions" of a public body, where the public may be barred. Subsection (G) requires that certain procedures be followed before an executive session may be called, conditions which were not met in this case. The statute does not prohibit impromptu hallway meetings between council members—the statute concerns itself with prearranged discussions. It does not prohibit member-to-member prearranged discussions. The statute concerns itself only with situations where a majority meets. Although a majority of council members were not in the same room at the same time, a majority of them did attend a prearranged meeting to deliberate on issues of great interest to the public.

To rule in Cincinnati's favor would be to endorse the behavior undertaken by city council and the city manager in this case and make it applicable to every city council meeting in Ohio. The statute that exists to shed light on deliberations of public bodies cannot be interpreted in a manner which would result in the public being left in the dark. The Ohio Sunshine Law cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body.

One of two remaining questions is whether the Sunshine Law applies to Cincinnati City Council. The city's charter provides:

"The laws of the state of Ohio not inconsistent with this charter, except those declared inoperative by ordinance of the council, shall have the force and effect of ordinances of the ****907** city of Cincinnati; but in the event of conflict between any such law and any municipal ordinance or resolution the provisions of the ordinance or resolution shall prevail and control." Section 1, Article II, Cincinnati City Charter.

The city's charter addresses the openness of council sessions by stating that "[t]he proceedings of the council shall be public." Section 5, Article II, Cincinnati ***545** City Charter. That is certainly not inconsistent with the Sunshine Law, and the Law therefore applies to Cincinnati City Council.

The only remaining question, then, is whether the Post's requested relief is appropriate. It is. This court has previously held in *Fairfield Leader* that mandamus is the appropriate remedy to compel the preparation of minutes of the meetings of a public body. 56 Ohio St.3d at 102–103, 564 N.E.2d at 491–492.

We therefore grant the requested writ and order the city of Cincinnati to prepare and make available to the public minutes of the series of back-to-back meetings held by members of city council between June 21 and June 26, 1995.

Writ allowed.

MOYER, C.J., and COOK and STRATTON, JJ., concur.

MOYER, C.J., concurs separately.

DOUGLAS, RESNICK and FRANCIS E. SWEENEY, Sr., JJ., concur in part and dissent in part.

MOYER, Chief Justice, concurring.
moyer, C.J., concurring. I concur in the grant of the requested writ. The majority does not, however, address relator's prayer for attorney fees asserted pursuant to R.C. 149.43(C). The majority's decision not to address the question will result in the denial of relator's request for an award of attorney fees. I believe this to be the correct decision and write to briefly explain my position on the issue.

Paragraph two of the syllabus of *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St.3d 108, 529 N.E.2d 443, states, "The award of attorney fees under R.C. 149.43(C) is not mandatory." The purpose of the attorney fee provision is to discourage state officials, agencies and their legal counsel from engaging in conscious circumvention of statutory mandates. In *Fox,* we held that relators "must demonstrate a sufficient benefit to the public to warrant the award of attorney fees. The court may also consider the reasonableness of respondents' refusal to comply, since attorney fees are regarded as punitive. Respondents argue that they acted in good faith and presented serious legal issues regarding [respondents' obligation to maintain open records]. We find no evidence of bad faith on the part of respondents. There was a reasonable legal basis for respondents' refusal to produce the requested documents and relators' prayer

for attorney fees is therefore denied." *Id.* at 112, 529 N.E.2d at 447.

The award of attorney fees to relator in this case would be the equivalent of a sanction against council and its legal advisors for actions which amount to conscious misdeeds. I am not convinced that the meetings at issue constitute the kind of conscious circumvention of the law that calls not only for correction, but for sanction as well. A reasonable (though ultimately unpersuasive) argument ***546** could be made for the legality of the actions of council in this case. The facts were unique and not previously reviewed by this court in other cases.

Under such circumstances it would be unreasonable to impose upon the Cincinnati City Council and its attorneys a sanction for the violation of laws which were not so clearly broken that a reasonable argument could not be made for the legality of the procedure. Moreover, the imposition of a sanction in this case would not serve the deterrent purpose of the statutory attorney fee provision of the Ohio Sunshine law.

Because I would not grant an award of attorney fees under R.C. 149.43(C) where there is a reasonable legal basis for respondents' actions and where such conduct has not previously been considered by this court, I concur in the denial of relator's request for attorney fees.

****908** DOUGLAS, Justice, concurring in part and dissenting in part.

douglas, J., concurring in part and dissenting in part. The majority grants the requested writ and I concur. The majority does not, however, discuss the allowance of attorney fees as prayed for by relator in its complaint and supported in its reply brief at Proposition of Law No. Five. I would grant the relator its costs and attorney fees.

It is nigh impossible to distinguish this case from our holding in *State ex rel. Fairfield Leader v. Ricketts* (1990), 56 Ohio St.3d 97, 564 N.E.2d 486. In that case, under very similar circumstances (but, arguably, less egregious), we allowed an award of over $36,000 in costs and attorney fees to a newspaper which sued, successfully, to require a municipal council to prepare minutes of a previously held closed session. See (1992), 63 Ohio St.3d 1414, 586 N.E.2d 122. The result here should be no different especially given that, I believe, attorney fees are mandatory pursuant to R.C. 149.43(C). Further, it is arguable that by logical extension, R.C. 121.22(I)(2)(a) might apply.

In any event, the majority does not award fees and I must respectfully, but vigorously, dissent from that part of the majority's judgment. I concur in the balance of the opinion and the judgment.

RESNICK and FRANCIS E. SWEENEY, Sr., JJ., concur in the foregoing opinion.

All Citations

76 Ohio St.3d 540, 668 N.E.2d 903, 1996-Ohio-372

71 Wis.2d 662
Supreme Court of Wisconsin,

STATE ex rel. Humphrey J. LYNCH, District Attorney of Dane County, Petitioner,
v.
Dennis J. CONTA et al., Respondents,
and
Henry Dorman et al. (Necessary Parties, but not denominated Respondents.)

No. 75—459
|
Oral Argument Jan. 7, 1976.
|
Decided March 2, 1976.

Synopsis
District attorney of Dane County brought original proceeding seeking declaration whether certain meetings conducted by members of the joint committee on finance violated the open meeting law. The Supreme Court, Hanley, J., held that although forfeiture provision is in nature of a penal law the case would be accepted as an exception to general rule that the prosecutor is to test a law by enforcement proceedings rather than by way of a declaratory judgment, that statute would be strictly construed, that in rendering declaratory relief the court would not violate the doctrine of separation of powers, that the law applied to the committee, that when circumstances of an informal gathering or conference are such that a quorum of a governmental body is present and business within the ambit of that body is to be discussed the law applies, that law also applies if the same activity takes place in a conference of exactly half the members of a governmental body, that an emergency may be a valid justification for a nonconforming conference, that the partisan caucus exception is not limited to caucuses having sole purpose of choosing party leadership but encompasses such gatherings even when the participants discussed governmental matters and that since the two meetings at issue were attended solely by committee members of one political party they were not an evasion of the law, notwithstanding that government matters were also discussed or that members of legislature finance bureau were also in attendance.

Rights declared.

Wilkie, C.J., filed concurring opinion in which Beilfuss, J., joined.

Robert W. Hansen, J., filed dissenting opinion.

****319** ***663** This is an original action for declaratory judgment, seeking a declaration that certain meetings conducted by the respondents violated the open meeting law, Sec. 66.77, Stats. The petition for leave to commence an original action was filed on October 3, ****320** 1975. On November 21, 1975, this court accepted jurisdiction and ordered that the petition stand for a complaint. The respondents requested that their original reply to the petition be accepted as a responsive pleading. A stipulation of facts was filed on November 17, 1975.

The Joint Committee on Finance of the Wisconsin Legislature, created by Sec. 13,09, Stats., consists of fourteen members. Seven of them, all Democratic Party members and represetatives in the Assembly, are the named respondents in this action. Four Committee members, state senators and also Democrats, have been denominated necessary parties to this proceeding. The Committee is ***664** completed by one senator and two representatives, all of whom are members of the Republican Party, the minority party in both the legislative houses and their standing committees.

It is agreed that the principal responsibility of the Committee was to recommend to the legislature a budget bill, governing the appropriations of funds to state departments and outlining the revenue sources for such funds. At the times material to this action the Committee was concerned with the 1975 budget, contained in Assembly Bill 222, introduced on January 23, 1975. During the consideration of this bill, nineteen public hearings were held for the purpose of receiving public testimony on funding and allocation. Members of state agencies, interested groups and the general public all informed the Committee of their views.

On fourteen occasions, the Committee met in executive session to consider the proposed budget and possible amendments. Notices of these sessions were furnished to all Committee members, to agencies whose budgets were to be considered, to the Legislative Audit Bureau, to the Department of Administration and to the Legislative Fiscal Bureau. This latter agency, authorized by Sec. 13.05, Stats., is specifically designated to provide expertise in financial planning and thus assist the Committee. Members of the press corps were also informed and notice was given to the general public by postings on the legislature's bulletin boards. Discussion of the budget proposals ensued at these meetings and decisions were made a matter of public record via roll call vote.

On May 6, 1975, a report of the Committee was submitted to the Assembly. By an eight-six vote, the Committee recommended passage of an amended version of the original bill. Voting in favor were the seven respondents and one Republican representative.

The recommended version was changed in both legislative houses. The Assembly accepted six amendments. ***665** The Senate undertook another version of the original bill, which in turn underwent a major amendment. When the Assembly refused to accept this proposal, Joint Committee of Conference endeavored to write a compromise bill. This form, ultimately passed by both houses, had twenty-one additional significant changes from the version recommended by the Committee. Numerous individual items in this final form were votoed by the Governor, only a few of which were returned by the requisite vote of each house. State ex rel. Sundby v. Adamany, 71 Wis.2d 118 (1976), 237 N.W.2d 910.

While the bill was still before the Committee, the respondents and the four Democratic senators held a private meeting on March 11, 1975. No notice was given to the minority party Committee membrers, nor was any compliance had with the notice requirements of the open meeting law, Sec. 66.77(2)(e), Stats. That statute requires that meetings of governmental bodies be held in a place reasonably accessible to members of the public and which is open to all citizens. Public notice is also required of the time, place and subject matter of the meeting, either pursuant to applicable statutory requirements or through general notices to the public and to either officially designated newspapers or members of the news media.

This meeting was held in a state office building and members of the Legislative ****321** Fiscal Bureau were in attendance. They reported on the finances of certain large state agencies, identifying key areas in the budget allocations of each. It is the recollection of some Committee members in attendance that the meeting involved only questioning of the reporting bureau members. Other legislators recall that information was exchanged as to the partisan attitude of members of each house and as to the processes within the two house Democratic caucuses. No record was kept of the activities.

***666** The occurrence of gatherings of this type was apparently known to other members of the legislature. In response to the request by a Senate member not on the Committee, the Attorney General issued an informal opinion on the application of the open meeting law to such situations on March 29, 1975. The Attorney General believed that the statute did apply, but he temporarily declined enforcement of its forfeiture provisions until the legislature had the opportunity to affirm or disavow such meetings as being within either the ‘partisan caucus' or ‘legislative rules' exceptions, Sec. 66.77(4)(g) and (h), Stats.

Another private meeting was held on April 24, 1975. Only the seven respondents were notified. The stipulated facts recite that the four Democratic Party senators were not notified and did not attend, and they represent to this court that they did not attend in reliance on the opinion of the Attorney General. The minority party members also were not notified and did not attend.

Members of the Legislative Finance Bureau and one employee of the Department of Administration were present at the meeting. They briefed the respondents on particular items of the budget bill and alternatives to such allocations. The parties to this action agree by stipulation

‘17. That these selected budgetary items were then discussed and reviewed by the members in attendance in order to arrive at an alternative acceptable to most of the members present. That the discussion and review involved factors which were essential for the members

present to determine the party policy and party strategy relevant to the items under discussion.

'18. That at this conference it was the purpose and intent of the members present to articulate their attitudes and the attitudes which they believed were those of other majority members not present or of the party itself so that the other members in attendance would know where each of the members at that time stood and what their ***667** thinking was on any particular matter at that point in time. The purpose and design of the conference was to attempt to reach an alternative that would be acceptable to the majority as a whole.'

The petitioner has alleged that the Department of Justice was made aware of this meeting, but that it did not bring an action under Sec. 66.77(9), Stats. Another section of the open meeting law, 66.77(10), Stats., allows a district attorney to institute an action to impose the monetary forfeiture for violation of the law, Sec. 66.77(8), Stats., upon the verified complaint of any person. Petitioner District Attorney of Dane County received such a complaint from a member of the legislature on August 25, 1975.

Rather than commence that forfeiture action, the petitioner requests this court to render a declaratory judgment on the question of whether the open meeting law was violated by the seven respondents. No judgment is requested, according to his pleadings, concerning the four Democratic Party senators on the Committee because they voluntarily ceased their participation in such meetings. Petitioner has denominated them as necessary parties but not respondents in this proceeding. The judgment requested, then, concerns only the named respondents and their participation in the two private meetings.

Petitioner requests the following declaration of rights: ****322** 1. That the respondents must conform their conduct to the provisions of Sec. 66.77, Stats.

2. That the respondents were in violation of said statute on March 11, 1975 and April 24, 1975.

Attorneys and Law Firms

Humphrey J. Lynch, Dist. Atty., Dane county, filed brief and argued for petitioner.

Richard L. Cates, John C. Carlson and Lawton & Cates, Madison, filed brief for respondents; Richard L. Cates, Madison, argued.

***668** H. Joseph Hildebrand and Flanagan, Steinhilber, Chaney & Hildebrand, Oshkosh, amicus curiae, for Gary R. Goyke.

Bronson C. La Follette, Atty. Gen., and John J. Glinski, Asst. Atty. Gen., amicus curiae, for the attorney general.

Opinion

HANLEY, Justice.

The following issues are presented for determination by this court:
1. Is this a proper case for declaratory judgment?

2. Should a rule of strict construction be followed in interpreting Sec. 66.77, Stats.?

3. Were the private gatherings of the respondents and interested parties 'meetings' of a 'governmental body' as described in the statute?

4. Were these meetings excepted from open session requirements?

5. In rendering a declaratory judgment, would this court violate the doctrine of separation of powers?

Declaratory Judgment

This court has already decided the question of original jurisdiction. Unquestionably the guidelines acknowledged in Petition of Heil (1939), 230 Wis. 428, 442—43, 284 N.W. 42, embrace this case, with its unique issues of interest to this state and its citizens.

Such action, however, was strictly confined to the question of which court should entertain this action, or phrased differently, should the Supreme Court exercise its original jurisdiction? Remaining to be determined

by the court of jurisdiction is the question of the propriety of rendering a declaratory judgment. The granting or denying of relief in a declaratory judgment action is a matter within the sound discretion of the court. Selective Ins. Co. v. Michigan Mut. Life Ins. Co. (1967), 36 Wis.2d 402, 408, 153 N.W.2d 523; ***669** Sec. 269.56(6), Stats. This discretionary power is most frequently invoked by the challenge of the adversary of the party seeking judgment, See Rudolph v. Indian Hills Estates, Inc. (1975), 68 Wis.2d 768, 771—72, 229 N.W.2d 671, who poses the question of whether the device is appropriately used. Miller v. Currie (1932), 208 Wis. 199, 203, 242 N.W. 570. The unusual roles of the parties here, coupled with statements from the petitioner that indicate an indifference to the very right he supposedly seeks to vindicate, make it quite proper for this court to review this action for compliance with announced standards for a declaratory judgment, even if no challenge is issued by the respondents.

A declaratory judgment may be issued only if the action measures up to the following requirements:

'(1) There must exist a justiciable controversy—that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it.

'(2) The controversy must be between persons whose interests are adverse.

'(3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.

'(4) The issue involved in the controversy must be ripe for judicial determination. Borchard, Declaratory Judgments, pp. 26—57.' State ex rel. La Follette v. Dammann (1936), 220 Wis. 17, 22, 264 N.W. 627, 629, quoted in ****323** Pension Management, Inc. v. Du Rose (1973), 58 Wis.2d 122, 127—28, 205 N.W.2d 553. See State v. WERC (1974), 65 Wis.2d 624, 633, 223 N.W.2d 543.

In his complaint, petitioner states
'(26) That the petitioner brings this action to obtain an authoritative ruling from this court on whether the meetings violate the open meeting law.'

The enforcement provisions of the open meeting law are as follows:
***670** '(8) Any member of a governmental body who knowingly attends a meeting of such body at which a violation of this section occurs shall forfeit without reimbursement not more than $200 for each such violation, provided that he shall not be liable if he calls for a vote on whether the body shall take that action constituting such violation, or if he is recorded in the minutes of the body as voting against the action constituting such violation.

'(9) The department of justice may bring an action under this section on its own motion. In such cases, the court shall award the recovery of the forfeiture together with reasonable costs to the state.

'(10) The district attorney may commence an action under the section upon the verified complaint of any person. In such cases, the court shall award the recovery of reasonable costs to the county. If no action is commenced within 20 days after verification such person may bring an action in his own name and, if the defendant is found guilty of violating this section, the court may award costs and reasonable attorney's fees to the plaintiff.' Sec. 66.77, Stats.

In this proceeding, the requested declaratory judgment concerns the applicability of the statute to a situation described in facts stipulated by the parties. This question is markedly different from the question of whether there was a knowing violation of the statute by the named respondents, which would be the focus of a prosecution action. The requested judgment is, however, arising in the penal context, as the petitioner District Attorney of Dane County has an interest only under such circumstances.

A review of the above-quoted forfeiture provision demonstrates that this is an act that has penal consequences. 3 Sutherland, Statutory Construction sec. 59.02 (3rd ed. 1974). We note that the originally enacted version of the open meeting law contained no enforcement provision. Ch. 289, Laws of 1959. As such it was merely a suggested mode of responsible governmental procedure. By Ch. 297, Laws of 1973, the legislature modified the ***671** law and added the forfeiture provision. The petitioner here seeks a construction of the law apparently for enforcement

purposes and thus consideration cannot be given to such additional aspects as the 'voidability' provision. Sec. 66.77(3), Stats.

There has been doubt in the past as to whether the declaratory judgment procedure was proper when penal legislation was involved. The general rule now is that rights, status or immunities under penal laws may be the subject of declaratory judgments in a proper case. This was acknowledged in Waukesha Memorial Hospital v. Baird (1970), 45 Wis.2d 629, 635, 173 N.W.2d 700. It is also generally accepted that a proper case for declaratory judgment is presented only by the request of the party threatened by the application of the penal law. Borchard, Challenging 'Penal' Statutes by Declaratory Action, 52 Yale L.J. 445 (1943). However, since the parties are in fact adversaries, and if the defendants could have brought this suit as the petitioners and have not protested the converse form, there is no inflexible requirement to dismiss the suit. We do admonish against further suits in this style. Those in the position of the petitioner have a ready and adequate forum for their proposed construction of a law in the normal enforcement action. Declaratory judgment is reserved for those without such available recourse.

****324** Prior cases indicate that this court has been willing to entertain such suits in the past. In re Petition of State ex rel. Attorney General (1936), 220 Wis. 25, 264 N.W. 633, this court accepted original jurisdiction for a declaratory judgment sought by the attorney general on the constitutional validity of the Wisconsin Recovery Act, which he was to enforce. An actual controversy was found between him and the tavern industry subject to the act, and judgment upholding the constitutionality was found. Likewise, in ***672** Department of Agriculture and Markets v. Laux (1936), 223 Wis. 287, 293, 270 N.W. 548, 551, the court approved what it deemed a 'declaratory judgment determining whether the questioned sections are constitutional,' again brought by the statute's enforcement officers.

These cases are precedent for the conclusion that this court, or any trial court, while not encouraging those charged with law enforcement to petition for declaratory judgments, will accept such cases in the exercise of discretion. Such exercise would be guided by the normal principles of declaratory judgment. In most situations, the action should be refused until the order of parties is reversed so that the party subject to the penal law is plaintiff.

Additionally, Wisconsin has adopted the Uniform Declaratory Judgment Act, which by its language labels itself remedial and explicitly calls for a liberal construction. Sec. 269.56(12), Stats. As such, it allows broad construction of 'any person . . . whose rights, status or other legal relations are affected by a statute . . ..' Sec. 269.56(2), Stats.

Implicit recognition of this limited outlet to prosecutors is demonstrated in Sec. 269.55, Stats., and comparable laws of other states which allow a declaratory judgment on whether an item is obscene. Notice is given to all parties of their potential rights before resort is had to the criminal prosecution. See State v. I, a Woman—Part II (1971), 53 Wis.2d 102, 191 N.W.2d 897; Gerstein v. 'Pleasure Was My Business' (Fla.App.1961), 136 So.2d 8.

In the present status of this action, the parties involved are certainly adverse. Just as clear is the respondents' interest in contesting this proceeding insofar as it seeks to label their past actions as a violation of the statute. Closer questions are presented as to whether the petitioner has a legally protectible interest in the ***673** controversy, whether the controversy is justiciable in that this right is being asserted against the respondents and whether the controversy is ripe for judicial determination.

Petitioner District Attorney has a right of enforcement when he has received a citizen complaint, receipt of which is alleged in his complaint. Is this right of enforcement, coupled with the overall duty of a district attorney under Sec. 59.47(1), Stats., such a right that enables him to seek declaratory judgment relief under our declaratory judgment act? City of Nevada v. Welty (1947), 356 Mo. 734, 203 S.W.2d 459 at 460 and State ex rel. Hopkins v. Grove (1921), 109 Kan. 619, 201 P. 82 at 84, both acknowledge this right for declaratory judgment purposes.

Is the controversy justiciable, in that the petitioner is asserting his enforcement right against the respondents? Some doubt has arisen on this point following the petitioner's acknowledgment that he would not seek a conviction upon a declaratory judgment finding a violation of the law.

The respondents urge that the controversy is still alive, in that the citizen complainant may start an enforcement suit if the district attorney declines to prosecute. Sec. 66.77(10), Stats. Furthermore, the language of the statute does not indicate that the Department of Justice is barred from suit merely because they declined action in the past. Sec. 66.77(9), Stats. Both those parties have submitted Amicus Curiae briefs urging that a violation be found.

It must again be stressed that the question before the court is whether the terms of the act were violated; the question of ****325** prosecution is not part of the requested judgment, as it involves the scienter element, a 'knowing' violation. The respondents' strong reliance on an exception to the law, one that is arguably imprecise, ***674** certainly impairs any claim that this was a known violation of clear provisions of law.

Doubt will continue until a construction of the statute resolves its meaning. Objections that the criminal prosecution is the only forum for that purpose are in error. Potential defendants may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution. Borden Co. v. McDowell (1959), 8 Wis.2d 246, 99 N.W.2d 146; Wisconsin Fertilizer Asso. v. Karns (1968), 39 Wis.2d 95, 158 N.W.2d 294; Soglin v. Kauffman (D.C. 1968), 295 F.Supp. 978, affirmed 7 Cir., 418 F.2d 163. Respondents certainly wish to know whether they can be prosecuted for similar gatherings in the future. The strongest rationale against dismissal of this action remains their interest in having the propriety of their proceedings clarified, irrespective of how this particular district attorney feels about prosecution for the last two in question. Justiciability is present.

Finally, is the controversy ripe for judicial determination? State ex rel. La Follette, supra, provides an example of this criterion. There the state governor sought a declaratory judgment on his power to fill vacancies on boards and commissions, caused by deaths and resignations, until the legislature reconvened. He sought the judgment because he had been advised by the secretary of state that the latter would neither honor the appointments nor pay the salaries of such appointees. In refusing to decide the action on this contingent fact, the court required the governor to actually make such appointments to see if the threat would be carried out. This case presented an example of the key question summarized in the above 'ripeness' requirement:

'When are the facts sufficiently developed to admit of a conclusive adjudication, and when are they so contingent and uncertain as to justify a refusal to decide?' Borchard, Declaratory Judgments, supra, at 56.

***675** Factual uncertainty was the barrier to an adjudication in the Waukesha Memorial Case. The 'ripeness' requirement does not demand that one 'act on his own view of his rights and perhaps irretrievably shatter the status quo,' Id. at 58, yet if another act can be taken to remove contingencies and doubt, it should be taken to make the action proper. Factual circumstances determine whether this factor is satisfied.

By their factual stipulation, the parties have presented a case that is not uncertain. Acts have been taken, and the only contingency is prosecution, which waits upon the requested judgment or perhaps upon future repetition of the decried meetings. The 'ripeness' criterion is fulfilled. Miller v. Currie, supra, offered a further elaboration on this timeliness aspect of a request for a declaratory judgment. Admonitions that all interested parties be determined and be present, that a determination of solely future rights be avoided, and that decisions not be made on merely contingent interests, all are satisfied here. The stipulated facts also insure that a decision here will terminate the controversy as to the application of the law to those circumstances. This finality requirement exists under Sec. 269.56(5), Stats.

Standard of Construction

Because a declaratory judgment action may involve a reversal of the roles of the usual plaintiff and defendant, care must be taken in determining where the burdens of proof and persuasion lie. Note, 1941 Wis.L.Rev. 513. Additional care must be exercised in discerning the real nature of the action and the standard of construction to be employed in interpreting the statute. The most persuasive rationale for allowing a declaratory judgment is the interests of the respondents in having a fair warning as to their penal liability.

Likewise, the interest ****326** of the petitioner lies only in the enforcement of the law, ***676** in which aspect he must also accept the strict construction that is given to laws being penally applied. State ex rel. Gaynon v. Krueger (1966), 31 Wis.2d 609, 143 N.W.2d 437.

If the respondents here were involved in a direct forfeiture action, they would be entitled to have a strict construction. The same rule would be appropriate if they commenced the declaratory judgment action. See Frank v. Kluchesky (1941), 237 Wis. 510, 297 N.W. 399. Strict construction of forfeiture laws has been followed even if enforcement is not involved. Capt. Soma Boat Line, Inc. v. Wisconsin Dells (1973), 56 Wis.2d 838, 845, 203 N.W.2d 369. In State ex rel. Dept. of Agriculture v. Land O'Lakes Ice Cream Co. (1945), 247 Wis. 26, 18 N.W.2d 325, a police power statute regulated the size of containers to be used for the sale of milk and cream. A $500 penalty was to be recovered by the attorney general for violations by manufacturers, as in the present case, while dealers who used nonconforming containers were declared to be guilty of using false measures, which act carried a fine or imprisonment under another statute. The court recognized that the statute as applied to the defendants was, after all, a criminal statute and must be strictly construed such that the failure expressly to permit an act could not be construed as a prohibition. Id. at 29, 18 N.W.2d 325. Thus the actual nature of the underlying proceedings dictated this standard even though the enforcement officer was the one who raised the issue as petitioner in a declaratory judgment.

Reference is made to the liberal attitude of the Florida courts in interpreting that state's open meeting law. Fla. Stats. sec. 286.011(1973). In Board of Public Instruction of Broward County v. Doran (Fla.1969), 224 So.2d 693, it was held that the law was enacted for the public benefit and should be interpreted most favorably to the public despite its penal nature. In reaching this result, ***677** the Florida court reasoned that the presence of penalties for certain specific violations of the Workmen's Compensation Act did not require that the whole of that act be strictly construed. For an exactly similar analogy, see Laman v. McCord (1968), 245 Ark. 401, 432 S.W.2d 753. When an act requires many different performances, only some of which are coupled with sanctions for noncompliance, it is obvious that a strict construction is not to be extended to those provisions not carrying a penalty. The analogies applied by Florida and Arkansas are not persuasive when the forfeiture provision, as here, applies to any violation of the entire law and the proceeding involving interpretation are concerned with the punitive aspect. The act places the duty to prosecute any violation on the Wisconsin Department of Justice and the district attorney.

We acknowledge that authority can be found which seems to repudiate a strict construction. Sutherland reviews both the older and more modern justification for strict interpretation rule for punitive legislation, including forfeiture laws. Id. at sec. 59.02. He also observes that
'Where public or social interests in penal legislation is especially great the policy of giving penal laws a very strict construction may be relaxed.' Id. at sec. 59.05.

The authority produced by Sutherland for the above quoted proposition, Caminetti v. U.S. (1917), 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, did not pronounce such theory verbatim. The case is in fact not inconsistent with strict construction.

In construing a statute we attempt to find the common sense meaning and purpose of the words employed, and therefore review the intent of the legislature. State v. Vlahos (1971), 50 Wis.2d 609, 616—17, 184 N.W.2d 817; See State ex rel. Gutbrod v. Wolke (1971), 49 Wis.2d 736, 749, 183 N.W.2d 161. Sutherland's quoted ***678** proposition above is a more narrow example of this broader rule, recognized by Sutherland ****327** in sec. 59.06, that the purposes of the legislature are appropriately to be considered in a review of punitive legislation. Heidersdorf v. State (1958), 5 Wis.2d 120, 123, 92 N.W.2d 217.

The legislature did provide some indication of its intent in the enactment of this statute, and it is to be given great weight. State ex rel. Harvey v. Morgan (1966), 30 Wis.2d 1, 10, 139 N.W.2d 585.

'66.77 Open meetings of governmental bodies. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of

governmental business. The intent of this section is that the term 'meeting' or 'session' as used in this section shall not apply to any social or chance gathering or conference not designed to avoid this section.'

Although the initial wording indicates that a broad application is intended, a qualification appears by the language that the adherence will be only such 'as is compatible with the conduct of governmental affairs and the transaction of governmental business.' Apparently if open session requirements prevent the fair process of democratic government, the specific requirements are relaxed. Specific exceptions to the law, typically necessary and justifiable occasions for privacy, have been listed in Sec. 66.77(4), Stats., and they both qualify for the intended exception and also illustrate its meaning. Mere government inconvenience is obviously no bar to the requirements of the law.

Our statute does contain the scienter requirement of 'knowing.' This declaratory judgment, as requested, is ***679** supposedly concerned not with whether the respondents are candidates for the penalty of a 'knowing' violation, but rather merely with whether there was a violation. A review of the statute convinces a reader that its meaning is not so plain that a 'knowing' allegation can be sustained on every violation that may be developed in its interpretation. The lack of uniformity among petitioner and the two amici curiae as to how a violation occurred under the law reiterate that the language is not clear. But in arguing that a liberal rather than strict interpretation should be followed when ambiguities appear, especially when the question of a violation is raised in a penal context, the petitioner would transform this action into an advisory opinion unrelated to its factual contents, contrary to the rules of declaratory judgment. State v. WERC, supra.

Not only would the liberal construction be in disregard of the actual controversy, it would also cause the court to enlarge the reach of enacted crimes or alter the incriminating components as prescribed and proscribed by the legislature. See Morissette v. United States (1952), 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288. This prohibited practice amounts to legislation by the court. Frank, supra, 237 Wis. at 517—18, 297 N.W. 399. Attempts to address broader issues through a liberal construction, when a strict scrutiny is given ambiguous statutes in a normal prosecution, would provide a more tangible basis for future prosecutions than is afforded by the law itself. The petitioner, in perhaps seeking a construction such that due process 'fair notice' problems are minimized, see Frank, supra, cannot avoid this maxim of interpretation.

We conclude that a liberal construction is contrary to the procedure of a declaratory judgment and poses constitutional problems as well. Due deference should be given to the balance of interests reflected in the statute's stated purpose with resort to a strict interpretation when ambiguity arises from the wording of the statute.

***680** Open Meeting Law

The broadest provision of the open meeting law is contained in Sec. 66.77(3), Stats.

****328** '(3) Except as provided in sub. (4), all meetings of governmental bodies shall be open sessions. No discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session, except as provided in sub. (4). Any action taken at a meeting held in violation of this section shall be voidable.'

It states the duty imposed on members of government, in both positive and negative admonitions of the rule. Except under certain specified circumstances, all governmental bodies must conduct their meetings in open sessions; if the meeting of the governmental body occurs under circumstances that do not meet the standards of an open session, then that body is forbidden both from having any discussion and from introducing, deliberating upon or adopting any formal or informal action. Actions taken contrary to this admonition are declared voidable. Although this aspect is unclear, perhaps meaning that tangible actions can be thus voided while intangible thought processes from discussion cannot be reached by such a labelling as 'void,' the construction of that item is not necessary to this action.

The meaning of 'governmental body' is crucial for this proceeding, just as it is the key term to this statutory plan. Besides being used to define 'meeting,'

the term is used with and without 'meeting' in the broad statements of coverage and exclusion in Secs. 66.77(3) and (4), Stats., and in the other regulatory admonitions of Secs. 66.77(5), (6), (7) and (8), Stats.

In the definition section of the legislation, it is provided that
'(c) 'Governmental body' means a state or local agency, board, commission, committee, council or department ***681** created by constitution, statute, ordinance, rule or order; a municipal or quasi-municipal corporation; or a formally constituted subunit of any of the foregoing.' Sec. 66.77(2), Stats.

The open meeting law thus defers the determination of the existence or composition of a particular governmental body to the enactment which creates the body. Stated another way, the question of whether a particular group of members of the government actually compose a governmental body is answered affirmatively only if there is a 'constitution, statute, ordinance, rule or order' conferring collective power and defining when it exists. The creating enactment or the created body in turn might define 'formally constituted subunits.'

As stipulated in this case, the governmental body whose members allegedly were involved in violating the law was the Joint Committee on Finance. That Committee consists of fourteen members of the legislature, drawn from both houses. The Committee obviously can be categorized as a 'committee . . . created by . . . statute.' Sec. 66.77(2)(c), Stats.

The members of the Committee are also members of the legislature, in sessions of which they exercise that power which is conferred upon that body as a whole. Whether the members of the Committee are in fact acting as the Committee in any given time depends upon the rules governing it that are applicable from the source which created it. Although the actual statute that provides continual authority for the Committee does not detail its mode of operation, it is presumably governed by the same structure followed by the legislature. The houses of that body, as well as their committees, lack all power and authority, and thus lack existence as a body, until a quorum, defined as a majority of members, is assembled. Wis. Constitution, art. IV, sec. 7; 1975 Assembly Rules 15, 22(1); 59 Am.Jur.2d Parliamentary Law sec. 4, p. 320 and sec. 6, p. 322 (1971). The ***682** process of composing a body competent to act officially commences upon a required notice to all members that the organic body is to meet. 59 Am.Jur.2d, supra. Its existence, and therefore its legal meeting, start with a roll ****329** call to determine the presence of a quorum. Jefferson's Manual of Parliamentary Practice, art. VI.

Reiterating the above proposal as the proper method for interpreting 'governmental body' is the definition of 'meeting' which incorporates the other term:

'(b) 'Meeting' means the convening of a governmental body in a session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members.' Sec. 66.77(2), Stats.

The rather formal language employed—the 'convening. . . in a session,' and not just any session, but rather a 'session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members'—compels a conclusion that those sessions where the members compose a legally competent governmental body are 'meetings' under the statute.

At the point of bringing the governmental body to its collective existence, the members are faced with compliance with the open session requirement. If those responsible for calling the meeting have done their duty, a proper site and advance public notice would be procured. Should a deficiency be noted, the body is forbidden to proceed, even informally, with its business. There may, of course, exist grounds as specified in Sec. 66.77(4) for which a closed session would be had, but Sec. 66.77(5) apparently compels that the decision for a closed session and the nature of the business to be privately discussed must be announced in an open session. This could either occur at an earlier open session which announces that the body will convene in a future closed session, or else could occur at a meeting already commenced under the open session requirements, ***683** subject to the restraint against reconvening in open session again within a twelve hour period. It is obvious that a governmental body cannot convene in a session that does not satisfy the 'open' requirements and then try to remedy the deficiency by announcing in such

inadequate circumstances that a closed session will then be undertaken.

The petitioner and the amici curiae all would object to any interpretation of the above language that restricts its meaning purely to the formal sense that is intended by the plain language. Urging liberal construction and an alleged intent of the legislature that a different meaning is involved, these parties seek some method to reach those members of a governmental body who would fail to follow the formalities of convening a competent body.

The arguments proposed to reach such end involve a torturous reading of the law's provision. A common tactic is circuitous reasoning, i.e., when any member of a governmental body meets with another member they are thus meeting and are thus a governmental body. The goal sought to be attained by such parties may be reached without doing violence to the plain wording. The problem is adequately addressed in the preamble to the law:
'The intent of this section is that the term 'meeting' or 'session' as used in this section shall not apply to any social or chance gathering or conference not designed to avoid this section.' (emphasis supplied)

Reading this language with the preceding statements that the public is entitled to the fullest information 'as is compatible with the conduct of governmental affairs and the transaction of governmental business,' the drafters acknowledged that members of government organizations frequently interact and socialize with their fellow workers. Comment, ***684** 45 Miss.L.J. 1151, 1167—70 (1974). Conversations on actual or potential government business are bound to occur. To declare that such discussions must proceed only after public notice and in a publicly accessible place would be not only impossible of enforcement but ludicrous if attempted. A serious question of deprivation of privacy would also be potential.

****330** An exception from the defined gatherings to which the law must apply was therefore enacted for social or chance gatherings. Since it is stipulated that such were not involved here, no attention may be directed to whether the language—'was designed to avoid this section'—modifies those situations. It is clear, however, that such language does pertain to 'conferences.'

If members of a governmental body intentionally gather to discuss business without undertaking a formal meeting, they can be described as in a conference. It may occur that the entire membership of a body gather and 'confer' before proceeding to hold their meeting. The same may happen to a majority and thus a quorum of the membership. Finally any group less than a quorum, down to only two members, may confer.

The statute does not let such possible gatherings exist as an evasion of the law. A conference may be analyzed to see if it is designed to avoid an open meeting requirement. If such intention is discerned, it may thereupon be designated a 'meeting' under the statute for analysis of its exact noncompliance with open session requirements.

Obviously whenever such intent is admitted, little problem is presented to the enforcement officer. More often, however, circumstances will be presented where sound discretion will be required of the prosecutor and courts; this will be especially required when the conference is charged as the crucial point in decision-making, with the formal meeting being a mere 're-run.' Wickham, Let the Sun Shine In! Open Meeting Legislation ***685** Can Be Our Key to Closed Doors in State and Local Government, 68 N.W.U.L.Rev. 480, 490—95 (1973). The revision of our open meeting law when forfeiture was added as a sanction also included the addition of conferences 'designed to evade the law.' The establishment that such occurred, for prosecution purposes, is obviously a question of fact. Circumstances themselves, however, may dictate that evasion is being designed. If every member of a governmental body is present at a conference and any of the broad activity that composes governmental activity as defined in Sec. 66.77(3), Stats., is undertaken, a question of evasion is posed; the members are exposing themselves to the jeopardy of a prosecution. A chance gathering would not justify governmental activity being intentionally conducted, unless an emergency or other difficulties (other than that engendered by open session compliance) made such action necessary. A planned conference of the whole offers no such exigent excuse. Likewise, when a majority and thus a quorum gather, it is a rare occasion

which can justify any action without open session compliance and therefore not be considered an evasion of the law. Quorum gatherings should be presumed to be in violation of the law, due to a quorum's ability to thereafter call, compose and control by vote a formal meeting of a governmental body.

As to the March 11, 1975 gathering, petitioner and both amici curiae agreed that a majority, a quorum of the Committee, participated in a private conference. Their purpose was to receive expert advisory opinions, which action would fall into the informal government activity described in Sec. 66.77(3), Stats.

When the members of a governmental body gather in sufficient numbers to compose a quorum, and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other—an ***686** evasion of the law is evidenced. Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded ****331** from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be influenced dictates that compliance with the law be met.

Only seven of the fourteen members of the Committee were present at the April 24, 1975 meeting. This is less than a quorum. Amicus Curiae Attorney General would find no violation here. Petitioner and citizen complainant Gary R. Goyke urge that this private conference was in violation of the law.

The arguments of Goyke on the circumstances presented in the April 24th meeting are clear and persuasive. Because the Committee has an even number of members, all action can be effectively stymied if seven members, one-half of the whole body, vote and act in concert, a unit vote that may occur because the seven have engaged in private, group investigation of the matters before their parent body. It is a short step from the initial and predictable ability to frustrate all action to thereafter control it, through the shift of one member of the unorganized other half. In committees with an even number of members, this ‘negative quorum’ has the automatic potential of control that, like quorums elsewhere, dictates that it publicly engage in the public's business.

In the authority cited to bolster his argument on the ‘negative quorum,‘ Goyke refers to the decisional law ***687** of Florida. By drawing a precise line of distinction as to why the open session requirements should apply under the circumstances, he was able to avoid the dubious results that have occurred under that law.

In Bigelow v. Howze (Fla.App.1974), 291 So.2d 645, 647, it was held that the decision making processes of a duly appointed subcommittee of a public body, if composed of more than one member, must be held in public, even though such subcommittee members constitute less than a quorum of the public body who must act on their recommendation. It is clear that the same court would have applied the law to any informal group of members of a governmental body, less than a quorum, who discuss pending business. Supporting authority was a concurring opinion in another case which decried attempts to hide a conference decision of a quorum by breaking into separate but communicating subgroups. The end result of Bigelow was the finding that two members of the group, assigned to investigate an out-of-state project, had violated the open meeting law by discussing their impressions during the return journey.

The sham used to conceal the existence of a privately-meeting quorum does not require that the open meeting requirements be applied to all private conferences involving less than a quorum. It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule.

An absolute rule requiring an open session, simply when only two members of a body confer, clearly is not ***688** within the statute. Such a rule would prohibit conferences even if the number of members were less than the appropriate quorum or 'negative quorum' test (according to the parent body's composition) and were not otherwise evasions of the law, such as concealed quorums.

Proponents of such coverage would argue that minority groups are capable of fashioning government action in secret, although to a lesser degree than quorum groups. When the membership of a governmental body is small, only a few members can ****332** control it; when the body is large and the conference group is also large but just short of a quorum or 'negative quorum', effective control is also possible. This is so because absences, abstentions and the random votes of unaffiliated members may propel their private decisions into acceptance.

Without precise guidelines, this proposed construction apparently extends to any conference between two governmental body members. Even a liberal interpretation of the statute hardly supports this conclusion.

Initially, the meetings of a minority lack the efficacy that commands that quorum or 'negative quorum' conferences be held in open session. In a quorum decision in private, the conference participants have the later power to call and establish a competent official body, and then immediately vote their pre-decided position into existence. This is known beforehand and can be automatic, subject to the possible change of heart of a participant. When the group in conference is a minority, their opportunity to take such ultimate action depends on chance factors. There is no guarantee of success. Both the innocent and the schemer have the same chance that unpredictable factors will put them in a position to dictate a result. This limitation separates them from conferences which can dictate a binding result, a strength that allows the presumption that an evasion of the laws occurs in a quorum or 'negative quorum' private gathering. ***689** Lack of this strength compels the conclusion that minority group gatherings are no evasion, even if there is a possibility of their attaining a chosen goal.

Besides lacking that efficacy that determines whether a conference is a 'meeting,' minority group gatherings appear to be beyond the coverage intended by the legislature. To impose open session requirements on all government business discussions between at least two members of the same body, merely on the basis that such discussion somewhat enhances the possibility that mutual interests will be furthered and possibly carried out in the form of some future official action, would virtually impede much of the preliminary labor involved in any government action and thus be incompatible with the necessary 'conduct of governmental affairs and the transaction of governmental business.'

A law embracing such private discussions would raise many constitutional objections. Given a choice of possible interpretations, this court must select the construction that results in constitutionality rather than invalidity, Madison Metropolitan Sewerage Dist. v. Department of Natural Resources (1974), 63 Wis.2d 175, 185, 216 N.W.2d 533, just as we will choose a reasonable construction rather than one that leads to unreasonable or absurd results, Browne v. State (1964), 24 Wis.2d 491, 131 N.W.2d 169. The strict rule of construction would also dictate that the law be so applied, if it could be contended that the legislative intent is indeterminative, because the proposed construction reaching two-member meetings is an outgrowth of statutory ambiguity at best.

This imprecision initially opens the law to the charge that it is too vague to be enforced consonant with due process. Jones v. State (1972), 55 Wis.2d 742, 745—46, 200 N.W.2d 587. Additionally, and even if the law could be viewed to clearly cover two-member discussions, problems ***690** of overbreadth would occur. This constitutional doctrine decries government penal intrusion into areas protected by the individual's First Amendment freedoms, such as of speech and of association. State v. Mahaney (1972), 55 Wis.2d 443, 447—48, 198 N.W.2d 373. Equally abhorred is the sweep of the law that comes so close as to have a discouraging or 'chilling' effect on the exercise of these rights. Jones, supra, 55 Wis.2d at 747, 200 N.W.2d 587. This problem was apparently recognized and resulted in the exclusion of chance and social gatherings from the reach of the statute. A construction

of the law that covers minority gatherings down to two members would resurrect such a problem.

****333** The argument in petitioner's brief does not explicitly acknowledge a 'negative quorum test,' so some attention should be directed as to whether he has proposed a viable alternative basis for finding a violation. By the stress laid on certain facts, it appears that he is arguing that some particular circumstances involved in these meetings are perhaps such a basis.

Initially, most of his argument, as indicated by the topic headings in his brief, concerns the eleven member meeting of March 11, 1975. The fact that the members involved were all of the same political party, one that has a majority control in the legislature, is cited. This has no particular significance when the more important factor of 'quorum' or 'negative quorum' in numbers is involved. Perhaps the implication is raised that the seven member meeting of April 24, 1975 should be afforded special coverage because those members could exercise partisan influence on their nonattending colleagues. That argument is totally refuted by the facts. The Senate members refused to attend the meeting in the apparent belief that it was improper. In the official action of the whole Committee, none joined with the seven respondents in approving a budget proposal; a ***691** majority was obtained only with the vote of a member of the opposition political party.

Mention is also made of the presence of Legislative Finance Bureau members at these conferences. Although the argument is directed mainly to the 'partisan caucus' exception, discussed infra, there may perhaps be the implication that the use of the talents of these government employees transformed the conference into a governmental body meeting. Government activity in general, as it is so broadly defined in sec. 66.77(3), Stats., to include even discussion of government business, is a necessary element in any gathering that qualifies for the open session requirement, but the occurrence of such an activity as discussion does not by circuitous reasoning somehow transform an otherwise unqualified gathering into a 'meeting' of a 'governmental body.' Neither would the presence of Bureau members. The statutory authorization directing its activity allows the Bureau to advise members of the legislature, not just its parent body and committees. Sec. 13.95(1)(e), Stats. Presence of these members is indicative of the conduct of governmental business, which in turn is relevant in determining whether a conference in evasion of the law is occurring, but this presence does not transform an informal conference into the strictly-defined official governmental body meeting.

Statutory Exceptions

The conferences under scrutiny here must be tested for open session compliance unless otherwise excepted from that requirement.

A governmental body is allowed to convene in closed session for purposes of:

'Partisan caucuses of members of the state legislature;' sec. 66.77(4)(g), Stats.

***692** Respondents claim reliance on this exception. It is stipulated that Committee members who were also members of the Democratic Party were the only governmental body members involved in the conferences. Another stipulation acknowledges that the Committee Chairman assigned specific areas of the budget to the party members for their study and recommendation to their partisan comrades.

Petitioner initially objects to the depiction of these conferences as mere partisan caucuses. One curious argument is that they cannot be such if government business is being discussed. The statutory exception does not so qualify its application. Partisan caucuses have little purpose other than to choose party leadership and thereafter discuss governmental business for the purpose of attaining a unified party position on the subject. To hold that legislative members can have partisan caucuses but cannot discuss governmental matters would render the statutory language superfluous, which is to be avoided. Associated Hospital Service, Inc. v. City of Milwaukee (1961), 13 Wis.2d 447, 109 N.W.2d 271.

****334** Objection is also raised that the conference cannot be called a partisan caucus because of the presence of the Bureau members. The status of the governmental body members, not that of the resource people called in to assist them, is determinative of whether the caucus is partisan. Members of the various

legislative bureaus, at any rate, are to be strictly nonpartisan, apparently for just such a purpose. Secs. 13.92, 13.93 and 13.94, Stats.

The key argument against the application of the exception under these circumstances is the assertion that it was intended only for the traditional institutionalized partisan caucuses of the whole of the houses.

This contention was announced by the Attorney General in his informal opinion concerning these meetings. In the context of that writing, it appears to be a conclusion ***693** that follows his earlier assumption that the reach of the law is to be liberally construed and its exceptions strictly interpreted against those seeking avoidance. As indicated before, imprecision in the law is to be interpreted in favor of claimants threatened with forfeitures.

Obviously the exception does apply to such whole house partisan caucuses. No persuasive argument is forwarded as to why it does not also apply to partisan caucuses of the committees. Even apart from its source in liberal interpretation, the Attorney General's conclusion would be supportable if the exception were simply for 'partisan caucuses of the state legislature' rather than 'partisan caucuses of members of the state legislature.' Sec. 66.77(4) (g), Stats. It is no secret that the legislature has resorted to the committee system to administratively cope with the press of business before it. In his informal opinion, the Attorney General acknowledged the 'custom' of partisan caucuses on the particular committee involved here. Counsel for the respondents confirmed that legislative committee members do have partisan conferences. There is no basis to conclude that such caucuses are prohibited by language that plainly includes them. We note that within a 'formal, institutionalized' caucus of the whole house, committee members could be instructed to confer and discuss pending business in their committees for a progress report and recommendation to the whole body, thus achieving the same result sought to be avoided by the unsupported and restrictive interpretation offered against the respondents here.

It should also be noted that 'partisan caucuses' are inherently conferences and not 'meetings of a governmental body.' Thus the prior notice requirement of a closed session of a governmental body meeting is also not applicable.

It may appear that committee partisan caucuses unduly inhibit the open meeting law and are unnecessary ***694** for the 'conduct of governmental affairs and the transaction of governmental business.' Sec. 66.77(1), Stats. However, that contention is equally applicable to partisan caucuses of the whole. Yet it was the legislature, not this court, which determined to provide exceptions to the law and drafted them to its own purposes. Not every state that has an open meeting law includes its state legislature within the coverage. The legislature may redraw or abandon the 'caucus' exception if this construction is not in accord with its intent, and would be the proper forum for citizen dissatisfaction with a partisan caucus exception. Since the voters of this state apparently give some weight to party labels, there may in fact be a silent but overwhelming majority who believe that their party should be able to privately caucus in the legislature and its committees.

Issue of Separation of Powers

The respondents contend that the constitutional guidelines of separation of powers precludes this court from entering a declaratory judgment.

Various cases are analyzed and abstract principles are thereupon distilled by the respondents. It is argued that the legislature ****335** has broad powers, which it may use at its discretion, which may include 'arbitrary and improper' judgment, In re Falvey (1858), 7 Wis. 630, 638 or questionable motives, State ex rel. Reuss v. Giessel (1952), 260 Wis. 524, 51 N.W.2d 547. Further, it is noted that the legislature can act contrary to its own rules of procedure. McDonald v. State (1891), 80 Wis. 407, 412, 50 N.W. 185, and, it is claimed, '. . . contrary to statutes which purport to regulate procedure, more particularly, the anti-secrecy statute. Outagamie County v. Smith (1968), 38 Wis.2d 24, 155 N.W.2d 639' Respondent's Brief, p. 15. Finally, courts will intervene only if the legislative procedure or end result constitutes ***695** a deprivation of a constitutional right. See State ex rel. Elfers v. Olson (1965), 26 Wis.2d 422, 426, 132 N.W.2d 526.

This last pronouncement must be corrected by the qualification, obvious in the context of the cases and specific in Elfers, supra, that the court will

not overturn the decisions of the legislature. As previously stated, a requested declaratory judgment cannot address hypothetical questions, especially that of the validity of the actions of the Committee after a violation of the open meeting law occurred in its procedings. The question posed here is whether certain facts compose a violation of a law enacted by the legislature. The possibility that some legislators may tend to be inhibited in their future proceedings, due to the chance of a forfeiture action, does not equate with legislative decisions being questioned by the judicial branch of government. This application of the law is only to individuals.

A more persuasive rationale for this same result, one which may incidentally offer guidance on the jurisdiction of the courts in reviewing legislative decisions, does exist.

Respondents correctly assert that mere violations of parliamentary rules of procedure are no grounds for voiding legislation. McDonald, supra; 59 Am.Jur.2d Parliamentary Law secs. 1—2. The obvious rationale is that they may be suspended by the body and have no binding force on subsequent terms of the body. Id. Respondents undoubtedly have no quarrel with the opposite time-honored precept, established in Marbury v. Madison (1803), 1 Cranch 137, 2 L.Ed. 60 that the judiciary may review the acts of the legislature for any conflict with the Constitution. Elfers repeated this duty. An area of uncertainty may exist as to the jurisdiction of a court to review the activity of a legislature for a violation of a statute duly enacted by it. Respondent ***696** questions such power on the basis of the Outagamie County Case.

This issue has application to both the jurisdiction of a court to challenge the validity of the ultimate decisional act that is produced through such activity, as well as the jurisdiction to impose any statutory sanctions that would be applicable. Implicit in this later question is the apparent belief of the respondents that a legislature could not delegate such forfeiture authority, even if the statute plainly applies to them, as here. The doctrine of separation of powers presumably prevents what would otherwise constitute an intentional waiver.

A violation of a statute in the enactment process of regulations, by bodies of lesser status than the highest legislature of a jurisdiction, renders such regulations void even if passed in conformance to the lesser body's internal rules of procedure. Anderson v. Grossenbacher (Tex.Civ.App.1964), 381 S.W.2d 72; Heiskell v. Baltimore (1886), 65 Md. 125, 4 A. 116. These decisions indicate that statutory law is to equate with the organic constitutional law, but since they are made in the context of bodies subordinate to the source of the statute, they are of limited application to the particular question involved here.

Of more importance is Ex parte McCarthy (1866), 29 Cal. 395. The California legislature had ordered a newspaper publisher to give testimony before the body on his knowledge of bribery among its members. Upon his refusal, he was jailed for contempt, ****336** a power vested in that legislature by its constitution. McCarthy petitioned the court for his release on grounds that included denial of counsel by the legislature. The court there cited In re Falvey, supra, in refusing to act, a case which is relied on by the respondents for their contention that the judiciary may not review the discretionary judgments of the legislature. However, both Falvey and McCarthy ***697** reiterate that the court may review the action to see whether the body had exceeded its jurisdiction. Falvey, supra, at 635; McCarthy, supra, at 403. The California court went further:

'Had the Senate the power or jurisdiction to investigate the charges of bribery in question for any purpose?

'We shall first consider this question by the light of the common parliamentary law, independent of any restrictions placed thereon by the Constitution or any laws made in pursuance thereof.

'A legislative assembly, when established, becomes a vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self preservation. The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. A legislative assembly has, therefore, all the powers and privileges which are necessary to enable it to exercise

in all respects, in a free, intelligent and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of the Constitution, or by some express law made unto itself, regulating and limiting the same.' (emphasis added; citation omitted). Id.

In expressing the legislature's power, there is a perception by the court that statutes are more equatable with the constitution than with mere internal rules and must be adhered to by their makers.

It is not all that clear that Outagamie County contradicts this position. By an act of the legislature, the lawmakers directed the governor to appoint a special committee, whose composition was defined, which would establish criteria and evaluate proposals meeting such ***698** criteria relating to a site for a new state university. The committee was to recommend sites to the governor and other officials who, with the assistance of the legislature, would choose a site. A citizen complainant brought suit for a declaratory judgment that would declare woid the recommendation and choice. The petitioner there claimed that the committee's recommendation violated its publicly announced criteria and that the committee had established new criteria in a session violating the then existing open meeting law, Sec. 14.90, Stats., 1967.

This court refused to enter a declaratory judgment on the general basis that since no conceivable remedy could be afforded the petitioner to vindicate such a declaration, the judgment would not terminate the controversy. The perception that no remedy could be afforded because of violations of a statute's requirement that criteria be followed and because of a violation of a separate open meeting requirement may be attributed to the fact that neither statute had any provision for rendering the result of acts in violation void. Voidability and forfeiture were later added to the open meeting law. Outagamie County did not announce that the statutory law does not bind the legislature in its law-making procedures.

Sec. 66.77, Stats., itself authorizes actions to be brought against members of any governmental body who knowingly violate that section and represents the expressed will of the legislature in this respect. This court is being asked to construe ****337** a statute, not to interfere with the functions or the separate power of the legislative branch of government. In construing the statutes as a whole, it is necessary to hold that the legislature intended 66.77 to apply to legislators and legislative committees, subject to expressed statutory exceptions. The creation of sec. 66.77(4)(g) and (h) would be superfluous if the legislators were not bound by the ***699** open meeting law. Rules of construction dictate against such interpretation.

This rationale is not contradictory of the recent decision of this court in State ex rel. Lynch v. Dancey (1976), 71 Wis.2d 287, 238 N.W.2d 81. In that case, the open meeting law was found inapplicable because of its conflict with the superintending power of this court as expressed in art. VII, sec. 3 of the Wisconsin Constitution. Although duly enacted legislation is ordinarily effective as a constraint or guide on all branches of government, it cannot overpower the express or implied applications of that more fundamental law, the state constitution.

In summation, sec. 66.77, Stats., was clearly applicable to the Joint Finance Committee. The Committee is required to conduct its meetings under the open session requirements, including public notice and advance announcement of closed sessions, when it is formally constituted and thereby possesses the vitality to act effectually on governmental business. As members of a governmental body, the Committee members are potentially subject to the law when they meet and engage in the broad range of activity that can be termed the conduct of governmental affairs. When the circumstances of an informal gathering are such that a quorum of a governmental body is present and business within the ambit of this body is discussed, as in the March 11, 1975 conference of the Committee Democrats, then the law applies. When the same activity takes place in a conference of exactly half the members of a governmental body, as in the April 24, 1975 gathering of the Committee Assembly Democrats, the law also applies. Failure to meet open session requirements results in the presumption that conferences such as these were intended or designed to avoid the law that is applicable to the formal meetings of the governmental body. Forfeitures ***700** could result. Participants at these conferences may in fact demonstrate that no evasion of sec. 66.77 Stats., was intended. Emergency circumstances may be a

valid justification. The law itself provides for private 'partisan caucuses' of members of the state legislature. Since that body is frankly political, this exception apparently was allowed to accommodate the partisan function even when circumstances otherwise dictate that the law is being evaded; the distinction between the conduct of governmental affairs and partisan views of the same is impossible of definition in participatory, political government. The stipulation by the parties admits that the two meetings involved here were attended solely by Committee members of one political party. It also impliedly acknowledges the interrelation of politics and government. Since no restriction was placed on the realm of matters that the private partisan caucuses could address, the two conferences cannot be found to be in evasion of the law.

We conclude that a declaratory judgment may be entered, but caution against such use of the device by prosecutors. We construe the open meeting law and its exception to apply, through use of legislative intent and strict construction. The case is accepted, as not contrary to separation of powers, in that it concerns application of the forfeiture penalty to members of a body, not to the branch of government itself.

It is declared and adjudged that sec. 66.77, Stats., is applicable to legislative proceedings subject to certain expressed statutory exceptions. It is further adjudged that the respondents and necessary parties respectively were not in violation of said statute on March 11, 1975 and April 24, 1975.

DAY, J., not participating.

****338** WILKIE, Chief Justice (concurring).

The open meetings law expressly declares that it is the public policy of Wisconsin ***701** that 'the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.'[1] The prevention of secrecy in government is thus a matter of basic public interest in Wisconsin. Under these circumstances I think that the open meetings law should be liberally construed so as to effectuate this broad public policy. This is the position taken by the Florida courts, which have held that that state's 'Sunshine Law' was enacted for the benefit of the public and should be construed most favorably to the public despite its penal nature.[2] This is also the position taken by Sutherland, who recommends that the rule of strict construction should be relaxed when the public and social interests in penal legislation are very great, as they are here. A more liberal construction is especially appropriate where, as here, the maximum possible penalty does not threaten the personal liberty of offenders, but at most exposes them to a forfeiture of $200.[3]

1 Sec. 66.77(1), Stats.

2 Board of Public Instruction of Broward County v. Doran (Fla.1969), 224 So.2d 693.

3 Sutherland, Statutes and Statutory Construction (4th ed. 1972), sec. 59.05.

Nevertheless, even construing this statute liberally, I agree with the majority that, on the basis of the facts stipulated by both the respondents and the district attorney, the conclusion must be that the open meetings law in its present form did not require these two meetings to be open. This court cannot create open government by fiat, however desirable a public policy open givernment may be. This court is limited to interpreting and declaring the intent of the legislature when it enacted the open meetings law. It is clear from the stipulated facts that the legislature, in enacting the present open meetings law, with its various exceptions and ***702** qualifications, intended to permit conferences like the two in question here.

I have been authorized to state that Mr. Justice BEILFUSS joins in this concurrence.

ROBERT W. HANSEN, Justice (dissenting).

This original action for declaratory relief challenges the legality of two closed-to-the-public meetings held by members of the joint committee on finance of the state legislature. At the first such meeting, a full quorum of the committee was present. At the second, one-half of the committee members were present, a 'negative quorum' sufficient to block committee action. At both meetings, all committee members who were invited and attended were members of one political party. Both closed meetings were called to discuss matters that were to come before the full committee in its public sessions.

Where those participating in a closed-to-the-public session of a committee of the legislature are not members of a single political party, the court majority holds such secret sessions to violate the open meeting statute.[1] The secret meetings convened to discuss or decide matters to come before the committee or body in a public session are, the majority holds, 'conferences,'[2] which, if 'designed to avoid' the open meeting law, are illegal under sec. 66.77.[3] The majority holds such closed session or conference to be a violation of the ****339** open meeting law if (1) the full membership is present; (2) a quorum is ***703** present; or (3) one-half the membership, a 'negative quorum,' is present. In each of the situations listed, the majority holds that the issue becomes whether or not the secret meeting was 'designed to avoid' the requirements of the open meeting law. The writer agrees with these conclusions of the court majority, but would add that a secret session or conference of less than one-half of the members of a legislative committee or governmental body ought also be held to be illegal where there is present an intent to avoid the statute, plus the ability to control or determine a decision to be made at the public session of the committee or body.[4] The conference of less than half of the members or of a minority group in the body may not qualify as a 'meeting' of the body,[5] but it can constitute a deliberate conspiring to violate the open meeting requirement, and that of itself is a violation of law.[6] Given an 'intent to avoid' and ability to influence or control decision-making, the writer would include in the proscription meetings of less-than-half of the membership of a governmental body.

1 Sec. 66.77, Stats.

2 The majority states: 'If members of a governmental body intentionally gather to discuss business without undertaking a formal meeting, they can be described as in a conference.'

3 The majority continues: 'The statute does not let such possible gatherings exist as an evasion of the law. . . . If such intention (to avoid) is discerned, it may thereupon be designated a 'meeting' under the statute for analysis of its exact noncompliance with open session requirements.' See: Sec. 66.77(1), Stats.

4 The majority concedes: 'It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum.'

5 See: Sec. 66.77(2)(b), Stats., providing: "Meeting' means the convening of a governmental body in a session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members.'

6 See: Sec. 939.31, Stats.

However, the majority holds that, as to committees of the legislature, where those invited to and participating in a closed committee meeting belong to one political party, their secret session becomes a 'partisan caucus,' exempted from the antisecrecy requirements by the open meeting law.[7] The state legislature has set forth exceptions, ***704** eight of them, to its general mandate that: 'No discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session . . ..'[8] The exception relied upon to validate the two secret sessions, here challenged, is sub. (g) exempting 'Partisan caucuses of members of the state legislature.' The majority opinion finds the two secret or closed meetings, here challenged, to have been such 'partisan caucuses,' and as such exempted from the requirements of the state open meeting law. The writer disagrees.

7 See: Sec. 66.77(4)(g), Stats.

8 Sec. 66.77(3), Stats.

The majority holds that party members on a committee of the legislature may meet in advance and in secret to decide what is to be done at a subsequent public meeting of such legislative committee. At the same time, it holds that such a quorum of such committee, if involving members of both political parties, may not meet to discuss or decide in secret what the committee is to do, at least not 'with intent to avoid the (open meeting) section.' Thus the caveat is limited

to insisting that no one from another party or an independent be invited to the closed meeting. In reaching this somewhat startling result, the majority limits itself to construing the open meeting law itself. The writer would go further to include the constitutional mandate in this state against secrecy in the carrying out of its legislative function by the state legislature, to wit:

'SECTION 10. Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than three days.'[9] (Emphasis supplied.)

9 Art. IV, sec. 10, Wis.Const.

****340** ***705** Keeping the doors open does not mean leaving them ajar only when roll calls are taken and votes are recorded. Keeping the doors open requires their not being locked at any stage of the lawmaking process 'except when the public welfare shall require secrecy.' Keeping the doors open refers to committee sessions, as well as sessions of the full senate or assembly, and includes the debating and deciding on legislation as well as the voting and recording of votes. The majority opinion notes that some states do not include the legislature in their open meeting law. The state constitution in our state makes such self-exclusion from an antisecrecy law meaningless. The majority states that our legislature has made the exceptions and '. . . drafted them to its own purposes.' The state constitution does provide that: 'Each house may determine the rules of its own proceedings,'[10] but that right is subject to and limited in our state by the constitutional mandate that doors of the legislature be kept open during the lawmaking process. It is not correct to assume or imply that, if our state legislature had exempted itself from the provisions of its open meeting law, it could conduct its lawmaking function in secret. A constitutional mandate does not need legislative reenactment to remain operable.

10 Art. IV, sec. 8, Wis.Const.

As to proceedings of the legislature, in this state, public proceedings are constitutionally required '. . . except when the public welfare shall require secrecy.'[11] Exemptions from such constitutional insistence upon openness cannot be legislatively created or judicially upheld except when and where required by the public welfare. This applies to legislative deliberations as well as actions of the legislature, for both are integral parts of the legislative process.[12]

11 Art. IV, sec. 10, Wis.Const.

12 See: 56 Am.Jur.2d, Municipal Corporations, sec. 161, page 215, stating: '. . . (U)nder a statute providing that actions of local legislative bodies be taken openly and that their deliberations be conducted openly, it has been held that meetings of a county board of supervisors must be held openly, both for deliberation as well as action, since deliberation and action are recognized as dual components of the collective decision-making process and the meeting cannot be split off and confined to one component only so far as the right of the public to attend is concerned.'

***706** As the writer views the matter, the answer as to a possible constitutional infirmity as to the entire exemption of 'partisan caucuses' from the requirement of openness depends upon the definition given to the word 'caucus.' An accepted and wisely used dictionary defines the word thusly: '(A) closed meeting of a group of persons belonging to the same political party or faction usu. to select candidates or to decide on policy.[13] Even this broad definition would not seem to fit the situation of the two challenged meetings here before us. Here the parties have stipulated that the co-chairman of the joint committee on finance 'assigned subject areas of the budget' to individual members and 'made them responsible for studying such areas,' with the secret sessions held for such individual members to report 'their findings and recommendations.' Unless form is to replace substance, whatever the purpose stated or the label given such delegation, it appears clear that the action of the particular committee is the target, not any matter of party organization or general party policy. Seven or eleven members of one party on a committee could not be determining the party policy for their party colleagues in the senate or assembly. They would be discussing and deciding only what a particular committee would do. Committee action, not general party policy or organization, is involved.

13 Webster's, Seventh New Collegiate Dictionary, based on Webster's Third New International

Dictionary (1967), published by G. & C. Merriam Company.

***707** The question of construction becomes one of the legislative intent in creating this exemption for 'partisan caucuses of members of the state legislature.' The intent of ****341** the legislature is a controlling factor in the interpretation of a statute.[14] The writer would find the legislative intent and construe the statutory exemption to refer solely to the traditional and institutionalized party caucuses composed of all members of a political party in the assembly, in the state senate or, on occasion, in the two houses. The rules of senate and assembly refer to no other type of caucus. Even under the dictionary definition, it is only such caucuses of all party members in one branch of the legislature that can 'select candidates or . . . decide on policy,' meaning the policy of the party members in senate or assembly as to a matter pending before the legislature. The basis for preferring and adopting such strict construction of the word 'caucus' is that it alone furthers the general purpose of the open meeting statute and best stays within the constitutional limit. If three members of a five person legislative committee can, assuming they belong to the same party, meet in secret to determine what the committee is to do when it meets in public, the exemption as to a 'partisan caucus' is broadened to where public business can be transacted in secrecy. This is contrary to the constitutional mandate and purpose of the statute. In determining legislative intent, consideration is to be given to the object sought to be established by the enactment.[15]

14 See: Safe Way Motor Coach Co. v. Two Rivers (1949), 256 Wis. 35, 39 N.W.2d 847.

15 Loof v. Rural Mut. Casualty Ins. Co. (1961), 14 Wis.2d 512, 111 N.W.2d 583.

The majority applies the rule of strict construction to the statute requiring open meetings. The writer would apply the rule of strict construction to the exemption. ***708** Strict construction ought here be applied against secrecy, not for it. Such strict construction of the word 'caucus' is here suggested by the declaration of policy in the open meeting law that is an aid and guide to construction of the rest of the statute.[16] It is indicated by the declaration of policy that our representative form of government is 'dependent upon an informed electorate.'[17] It is further indicated by the legislative declaration of the public policy as entitling the public 'to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs.'[18] It is indicated by the constitutional mandate that doors of the legislature be kept open 'except when the public welfare shall require secrecy.'[19] The writer would construe the reference to 'partisan caucuses' in the open meeting law to apply only to caucuses of all party members in either the assembly or state senate or both.

16 Sec. 66.77(1), Stats., providing: '(1) In recognition of the fact that a representative government of the American type if dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business. . . .'

17 Id.

18 Id.

19 Art. IV, sec. 10, Wis.Const.

The writer would conclude that both the meetings of members of the legislature's joint committee on finances here challenged were not within the exemption of sec. 66.77(4)(g), Stats., relating to 'partisan caucuses,' and were illegal under the requirement of open meetings of sec. 66.77(3), but only if it were established that the two conferences were 'designed to avoid this section.' Whether the two meetings here challenged were thus 'designed to avoid' the requirements of the open meeting law cannot easily be discerned or determined on this ***709** record. The record before us consists of affidavits which do not clearly establish a 'design to avoid' the provisions of sec. 66.77. That issue as to design or intent here is largely a matter of drawing inferences from facts alleged or stipulated to. The record here appears to permit the drawing of different or conflicting inferences. This court, on this record at least ****342** without the taking of additional testimony as to material facts, ought not, and, as the writer sees it, cannot here determine the issue of design or intent. Therefore, I would dismiss this complaint

without prejudice, leaving the parties to their options and remedies at the trial court level.

All Citations

71 Wis.2d 662, 239 N.W.2d 313

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135 Wis.2d 77
Supreme Court of Wisconsin.

STATE of Wisconsin ex rel. NEWSPAPERS INC., a Wisconsin corporation, and Karen S. Rothe, Plaintiffs-Appellants-Petitioners,
v.
Dean A. SHOWERS, Edwin J. Laszewski, Jr., Mary M. Wilkinson and Theodore J. Fadrow, Defendants-Respondents.

No. 85–471
|
Argued Oct. 28, 1986.
|
Decided Jan. 15, 1987.

Synopsis

Declaratory judgment action was brought alleging that meeting of four of eleven commissioners after regular meeting of metropolitan sewerage commission violated open meeting law. The Circuit Court, Milwaukee County, Robert W. Landry, J., entered summary judgment for Commission, and appeal was brought. The Court of Appeals, 128 Wis.2d 152, 382 N.W.2d 60, affirmed. On appeal, the Supreme Court, Bablitch, J., held that: (1) to trigger open meeting law, there must be purpose to engage in governmental business, be it discussion, decision or information gathering, and number of members present must be sufficient to determine parent body's course of action regarding proposal discussed, and (2) four commissioners had power to reject any budget proposal, and thus, meeting was subject to open meeting law.

Decision of Court of Appeals reversed and rights declared.

Attorneys and Law Firms

****155** ***79** Dennis L. Fisher (argued) and Meissner, Tierney, Ehlinger & Whipp, S.C., Milwaukee, for the plaintiffs-appellants-petitioners.

Patrick Halligan, Sr. Staff Atty. (argued), for the defendants-respondents; Michael J. McCabe, Director of Legal Services, for Milwaukee Metropolitan Sewerage Dist., on brief.

Linda M. Clifford and La Follette & Sinykin, Madison, for amicus curiae the Wisconsin Newspaper Ass'n.

Opinion

BABLITCH, Justice.

Does Wisconsin's Open Meeting Law apply when the number of members of a governmental body present at a meeting constitute less than half the membership of the full body? We are asked to interpret a statute that does not specifically answer "yes" or "no" to that question. Some statutes of other states expressly apply only to meetings of a quorum of the membership of a governmental body[1]; statutes of other states expressly apply whenever two or more or three or more members of a governmental body meet.[2] Wisconsin's Open Meeting Law is silent on this ***80** point, thereby leaving the interpretation of legislative intent to this court.

1 *See, e.g.,* Alaska Stat. sec. 44.62.310 (Cum.Supp.1986), Del.Code Ann. tit. 29, sec. 10002(e) (1981) and Hawaii Rev.Stat. sec. 92–2(3) (1976).

2 *See, e.g.,* Col.Rev.Stat. sec. 24–6–402 (Cum.Supp.1985), Va.Code Ann. sec. 2.1–341(a) (Cum.Supp.1986).

Newspapers Inc. and Karen S. Rothe (Newspapers Inc.) appeal, arguing that the ****156** Open Meeting Law applies to a meeting held by four Milwaukee Metropolitan Sewerage District Commissioners (Commissioners) to discuss the operating budget and the capital budget of the Milwaukee Metropolitan Sewerage Commission (Commission). Passage of these measures required a two-thirds vote. Although the four members present at the meeting did not constitute a majority of the eleven member

Commission, these four did have the power if they so chose to determine the parent body's course of action regarding the budget because they could, by voting together, block the adoption of any proposed budget of the Commission.

We hold that whenever members of a governmental body meet to engage in government business, be it discussion, decision or information gathering, the Open Meeting Law applies if the number of members present are sufficient to determine the parent body's course of action regarding the proposal discussed at the meeting. Because the purpose of the meeting was to engage in government business, i.e. the discussion of the capital and operating budgets, and because the number of commissioners at the meeting were sufficient in number to block any proposed budgets, the Open Meeting Law applied.

At the outset, it is important to briefly discuss the fundamental issue involved here. The fundamental issue is the right of the public to be fully informed regarding the conduct of government business. It is not the right of the media in general, or a specific newspaper or a particular reporter; it is the right of the public to access. ***81** The Commissioners' brief unfortunately labels the appeal by Newspapers Inc. a "form of business litigation in aid of its enterprise ... [which] claims a privileged position." We do not view this case in that manner, and we trust the public does not either. The public has by far the largest stake in the litigation of these issues. An informed public is essential to representative government. Practical realities dictate that very few of our citizens have the ability to be personally present during the conduct of government business. If we are to have an informed public, the media must serve as the eyes and ears of that public. Although the media does not have a privileged position, if the media is denied access to the affairs of government, the public for all practical purposes is denied access as well. A democratic government cannot long survive that burden.

The relevant facts are not in dispute. Defendants are members of the Milwaukee Metropolitan Sewerage Commission. The Commission is the governing body of the Milwaukee Metropolitan Sewerage District, and is a governmental body under sec. 19.82(1), Stats., of the Open Meeting Law. The Commission consists of eleven members, seven from Milwaukee and four from the surrounding suburbs.

One of the duties of the Commission is to adopt an operating budget and a capital budget. A two-thirds vote of the total membership of the Commission is required for passage of financing measures. *See* sec. 66.886(2)(a)(1), Stats. Because of this two-thirds majority voting requirement, four commissioners can block passage of a resolution on financing measures.

In the fall of 1983, a dispute arose between the city and suburban commissioners regarding the method of funding to be used for the 1984 budget. Neither city nor ***82** suburban commissioners were able to obtain the required two-thirds majority to pass funding measures because the city commissioners rejected the suburban commissioners' proposals and vice versa. No proposal had garnered the required eight votes. However, tax bills were scheduled to be mailed out beginning in early December and the Commission was under pressure to pass a tax levy in time to include a charge for sewerage service in those bills.

In an attempt to break the deadlock, the Commission met several times during the week of November 28 —December 2. On December 1, 1983, there was a meeting at which the stalemate continued. Following the meeting, the four defendants met privately to discuss the impasse. Two of the defendants occupied city seats, while the ****157** other two defendants were suburban commissioners. It is this meeting that is the subject of this appeal.

No announcement was made of the closed December 1 meeting. The purpose of the private meeting, conceded by the defendants, was to conduct a "sincere discussion" of differences on the funding question, to move issues along, and to discuss the funding issue "without political posturing." A reporter for the Milwaukee Sentinel present at the open meeting on December 1, petitioner Karen S. Rothe, was not allowed to attend the closed meeting.

The next day, the Commission met again. A tax levy resolution offered by defendant Showers and seconded by defendant Wilkinson passed by a vote of nine to one. On January 19, 1984, Newspapers Inc. initiated this action in Milwaukee County Circuit Court. Alleging

that the December 1 closed meeting violated the Open Meeting Law, Newspapers Inc. sought a declaratory judgment ***83** that the Commissioners had violated that law. In addition, Newspapers Inc. requested the court to void any action taken at the meeting, to impose a fine on each Commissioner, and to award Newspapers Inc. their costs and attorneys' fees. Newspapers Inc. moved for summary judgment on August 16, 1984. They alleged that no genuine issue of material fact remained as to the circumstances surrounding the meeting, and argued that they were entitled to judgment as a matter of law, based on the pleadings and excerpts from depositions. On September 26, 1984, the Commissioners also moved for summary judgment on the basis of the undisputed facts. The parties were in agreement as to the time and place of the meeting, the number attending, the subject discussed, and the fact that the meeting was closed. The only issue remaining—whether such a meeting was a violation of the Open Meeting Law—required interpretation of secs. 19.81 and 19.82, Stats., and was therefore a question of law. *E.g., Bingenheimer v. DHSS,* 129 Wis.2d 100, 106, 383 N.W.2d 898 (1986).

The trial court concluded that the Commissioner's meeting was not a "meeting" as defined by the Open Meeting Law. The trial court's decision was based on the fact that a quorum was not present, that the four Commissioners who met lacked the capacity to conduct business, spend money, or establish policy, and that in this case, the right of government officials to speak and confer privately outweighed the public's right to know how government decisions are reached. Newspapers Inc. appealed.

The court of appeals affirmed the trial court's decision. *State ex rel. Newspapers v. Showers,* 128 Wis.2d 152, 382 N.W.2d 60 (1985). In its opinion, the court concluded that sec. 19.82(2), Stats. was ambiguous and interpreted it to ***84** cover those meetings at which a negative quorum, i.e. a number of members sufficient to block action, was present. However, continued the court, as "the capacity to discharge corporate responsibility must exist either directly or indirectly," *Id.* at 174, 382 N.W.2d 60, only those negative quorums with "more than mere potential ... to operate" posed a violation of the Open Meeting Law. *Id.* at 179, 382 N.W.2d 60. Because the December 1 meeting involved two Commissioners from each side or coalition, the court of appeals concluded that there was nothing in the record to show that the Commissioners could unite to determine a course of action or inaction by the entire Commission. The court of appeals noted that the record contained no evidence that the Commissioners had been delegated any proxy authority. The court of appeals concluded that because Newspapers Inc. had failed to show that an actual negative quorum had existed, the trial court had correctly granted the Commissioners' motion for summary judgment.

At oral argument, Newspapers Inc. also conceded the four Commissioners did not have the proxies of any other member of the Commission. Newspapers Inc. further conceded that forfeiture is not appropriate here. The relief they request is a declaration by this court that the closed meeting ****158** of the four Commissioners on December 1 was in violation of Wisconsin's Open Meeting Law.

The issues presented are 1) whether the Open Meeting Law applies to meetings of members of a governmental body at which less than one-half are in attendance; 2) if so, does the Open Meeting Law apply to this particular meeting?

***85** Resolution of the issues before this court—whether the particular facts constitute a violation of the Open Meeting Law—requires interpretation of secs. 19.81 and 19.82, Stats. A question of statutory construction is a question of law. *Sacotte v. Ideal-Werk Krug & Priester,* 121 Wis.2d 401, 405, 359 N.W.2d 393 (1984). Questions of law such as statutory construction are reviewable *ab initio* by this court. *Revenue Dept. v. Milwaukee Brewers,* 111 Wis.2d 571, 577, 331 N.W.2d 383 (1983). Thus, this court owes no deference to the lower courts' resolution of the issue.

In resolving the issue of whether the Open Meeting Law applies to meetings of less than one-half of the members of a governmental body we first look to the statute itself, specifically the meaning of the word "meeting." Although that word is defined in the statute, it has been given one interpretation by the trial court, a different interpretation by the court of appeals, yet another interpretation by Newspapers Inc., and still yet another interpretation by the Commissioners.

We agree with the court of appeals that secs. 19.81 and 19.82, Stats., of the Open Meeting Law are ambiguous. The statutes read:

> "19.81 Declaration of policy. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.
>
> "(2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places ***86** reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.
>
> "(3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.
>
> "(4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.
>
> "19.82 Definitions. As used in this subchapter:
>
> "(1) 'Governmental body' means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasigovernmental corporation; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111.
>
> "(2) 'Meeting' means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or ***87** conference which is not intended to avoid this subchapter.
>
> ****159** "(3) 'Open session' means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13(1)."

A statute, or a portion of a statute, is ambiguous if it is capable of being understood by a reasonably well informed person in more than one way. *Department of Revenue v. Nagle-Hart, Inc.,* 70 Wis.2d 224, 227, 234 N.W.2d 350 (1975). An ambiguity can be created by the interaction of two statutes or by the interaction of the words and structure of the statute itself. *Morrissette v. DeZonia,* 63 Wis.2d 429, 436, 217 N.W.2d 377 (1974). The statute is ambiguous because a reasonably well informed person could interpret "meeting" to cover the convening of as few as two members of a governmental body to discuss issues before the body, a meeting of one-half or more of the body's membership, a meeting of a quorum, or a meeting limited to a gathering where those present have the ability to exercise corporate power. Because the Open Meeting Law is ambiguous regarding which types of meetings are covered, this court must examine the legislative history, purpose, and broader context of the Open Meeting law to interpret the statute.

The legislative history of the present Open Meeting Law traces its roots to January 29, 1975. It was on that date that Assembly Bill 222, otherwise known as the 1975–77 Budget Bill, was introduced in the assembly. The bill was immediately referred to the legislature's ***88** Joint Committee on Finance (Committee) as provided by rule. The Committee was comprised of fourteen members, nine from the assembly and five from the senate. Of the assembly members, 7 were Democrats and 2 were Republicans. Of the five senate members, four were Democrats and one was Republican. The budget bill remained in the Committee until May 6, 1975.

On March 11, 1975, the eleven Democratic members held a private meeting. On April 24, 1975, the seven Democratic members from the assembly held another private meeting. The purpose of those meetings was to discuss the budget bill which was still in their Committee. It was conceded there was no compliance with the Open Meeting Law.

The Open Meeting Law then in effect, sec. 66.77, Stats.1973, the predecessor to secs. 19.81–87, provided in part:

> "Open meetings of governmental bodies. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business. The intent of this section is that the term 'meeting' or 'session' as used in this section shall not apply to any social or chance gathering or conference not designed to avoid this section.
>
> "(2) In this section:
>
> "...
>
> "(b) 'Meeting' means the convening of a governmental body in a session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members.
>
> "...
>
> ***89** "(d) 'Open session' means a meeting which is held in a place reasonably accessible to members of the public, which is open to all citizens at all times, and which has received public notice.
>
> "...
>
> "(3) Except as provided in sub. (4), all meetings of governmental bodies shall be open sessions. No discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session, except as provided in sub. (4). Any action ****160** taken at a meeting held in violation of this section shall be voidable."

On August 25, 1975, the district attorney of Dane county received a complaint from Senator Gary Goyke regarding those meetings. He requested the district attorney to file suit. Goyke was a Democratic member of the senate but was not a member of the Joint Finance Committee.

The Dane county district attorney petitioned this court to render a declaratory judgment on the question of whether the Open Meeting Law was violated by the seven Democratic assembly members of the Committee at these meetings. No judgment was requested, according to his pleadings, concerning the four Democratic senators on the Committee because they had voluntarily ceased their participation in the meetings after the Attorney General, Bronson LaFollette, in an informal opinion issued on March 29, 1975, opined that the statute applied to the March 11 meeting.[3]

3 The above historical facts, unless otherwise noted, are derived from *State ex rel. Lynch v. Conta,* 71 Wis.2d 662, 239 N.W.2d 313 (1976) and a stipulation of facts filed in that case on November 17, 1975.

***90** In a decision dated March 2, 1976, *State ex rel. Lynch v. Conta,* 71 Wis.2d 662, 239 N.W.2d 313 (1976), this court reached a number of conclusions regarding the Open Meeting Law, sec. 66.77, Stats., including the following:

First, it concluded that strict interpretation, as opposed to liberal interpretation, was the appropriate standard to apply.

Second, the court concluded the obvious: that when a quorum gathers, and its purpose is to engage in formal or informal governmental activity, the law applied:

> "When the members of a governmental body gather in sufficient numbers to compose a quorum, and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other—an evasion

> of the law is evidenced. Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be *influenced* dictates that compliance with the law be met." *Id.* at 685–86, 239 N.W.2d 313.

Third, the court addressed the more difficult problem posed when the number of members present constitute a sufficient number to block passage of an impending ***91** bill. Again, the court concluded that the Open Meeting Law applied:

> "Only seven of the fourteen members of the committee were present at the April 24, 1975 meeting. This is less than a quorum. *Amicus Curiae* attorney general would find no violation here. Petitioner and citizen complainant Gary R. Goyke urge that this private conference was in violation of the law.
>
> "The arguments of Goyke on the circumstances presented in the April 24th meeting are clear and persuasive. Because the committee has an even number of members, all action can be effectively stymied if seven members, one-half of the whole body, vote and act in concert, a unit vote that may occur because the seven have engaged in private, group investigation of the matters before their parent body. It is a short step from the initial and predictable ability to frustrate all action to thereafter control it, through the shift of one member of the unorganized other half. In committees with an even number of members, this 'negative quorum' has the automatic potential of control that, like quorums elsewhere, dictates that it publicly engage in the public's ****161** business." *Id.* at 686, 239 N.W.2d 313.

Fourth, the court addressed at length the question of whether the law applied to a gathering of only two members of a governmental body who have neither the power to pass nor the power to block proposals. With a lengthy discussion, the court summarily concluded that the law did not apply: "An absolute rule requiring an open session, simply when only two members of a body confer, clearly is not within the statute." *Id.* at 687–88, 239 N.W.2d 313. This point, discussed at great length in *Conta, Id.* at 687–88, 239 N.W.2d 313, is critical to our interpretation of the present law.

***92** Fifth, to the extent any confusion existed regarding the types of meetings covered by sec. 66.77, Stats., *Conta* made it clear that the law covered formal as well as informal action, i.e. discussion, decision, and information gathering:

> "When the members of a governmental body gather ... and then intentionally expose themselves to the decision-making process on *business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other* —an evasion of the law is evidenced." *Id.* at 685–86, 239 N.W.2d 313. (Emphasis added.)

Lastly, the court addressed the problems that arise with the so-called "walking quorums," i.e. a series of meetings of groups less than a quorum. Again, the court concluded that under the appropriate circumstances, the Open Meeting Law would apply:

> "It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule." *Id.* at 687, 239 N.W.2d 313.

Notwithstanding the above conclusions, the *Conta* court held that because of the then existing exception for "partisan caucuses *of members* of the state legislature;" sec. 66.77(4)(g), Stats., (emphasis added), the meetings were not within the ambit of the Open Meeting Law. *Id.* at 692–93, 239 N.W.2d 313. (In contrast, sec. 19.87(3) provides "No provision of this subchapter shall apply to ***93** any partisan caucus

of the senate or any partisan caucus of the assembly, except as provided by legislative rule.")

Then Chief Justice Wilkie concurred, stating his view that the statute should be interpreted liberally. Justice Robert W. Hansen dissented, arguing to a point neither reached nor decided by the majority. He argued that when less than half the members of a governmental body gather with the intent to avoid the law and they have the ability to control the outcome of a decision to be made by the parent body, the law should apply:

> "The writer agrees with these conclusions of the court majority, but would add that a secret session or conference of less than one-half of the members of a legislative committee or governmental body ought also be held to be illegal where there is present an intent to avoid the statute, plus the ability to control or determine a decision to be made at the public session of the committee or body." *Id.* at 703, 239 N.W.2d 313.

Such were the circumstances less than four months later when the legislature met in Special Session and considered a new and different Open Meeting Law. They repealed sec. 66.77, Stats. 1973, and secs. 19.81–87, were created.

For our purposes, there were three significant changes between the repealed law and the present law, secs. 19.81 and 19.82, Stats. First, sec. 19.81(4) directed that the law be liberally construed to achieve the purposes set forth in the chapter.

Next, the definition of the word "meeting" was changed. Under the old law, ****162** sec. 66.77, Stats., "meeting" was defined as "the convening of a governmental body...." The new law, sec. 19.82(2) defined "meeting" as a "convening of *members of a* governmental body...." (Emphasis added.)

***94** Last, sec. 19.82(2), Stats., added the "purpose" language; "convening of members of a governmental body *for the purpose* of exercising the responsibilities, authority, power or duties delegated to or vested in the body." These four terms had appeared in sec. 66.77(2)(b): "(b) 'Meeting' means the convening of an governmental body in a session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members."

The changes from the old law to the new did not occur without significant interaction between the houses. Repeal of sec. 66.77, Stats.1973, was first proposed in 1975 Senate Bill 630, on September 18, 1975, one-half month before the petition for leave to commence the original action in *Conta* was filed in this court. This bill contained a modified definition of the term "meeting," limiting its application to meetings of a quorum or more: " 'Meeting' means the convening of a governmental body in any session at which a quorum is present. The term does not apply to any social or chance gathering or conference which is not intended to avoid this section." This modified definition was not received with equanimity, and the League of Women Voters complained that "[D]efining 'meeting' in terms of whether a quorum is present leaves an unfortunate loophole that might invite circumvention based on a narrow legal line instead of emphasizing the broad meaning of the law." Legislative Reference Bureau Drafting Record, ch. 426, Laws of 1975. In reaction, the assembly introduced Assembly Substitute Amendment 3 to Senate Bill 630.

The Assembly Substitute Amendment defined "meeting" as follows: " 'Meeting' means the convening of members of a governmental body for the purpose of ***95** exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter."

The bill passed back and forth between the senate and the assembly, but they failed to agree. A Committee on Conference composed of three members of each house was formed on March 26, 1976, in an attempt to reach agreement, but they failed to do so. Senate Bill 630 died with adjournment on March 31, 1976. However, the members of the Committee on Conference continued to meet and negotiate as an informal committee during the months of April and May, 1976. Senator Goyke was a member of both Committees. The informal Committee on Conference eventually agreed upon a bill which Governor Patrick J. Lucey agreed to place on the agenda of the June, 1976, Special Session.[4]

4 *See* Wis. State J. (Madison, Wis.), March 27, April 23, April 28, May 8 and May 14, (1976).

On June 11, 1976, the product of the Committee's deliberations, Special Session Senate Bill 1 was introduced. It included the definition of a "meeting" as proposed by the Assembly Substitute Amendment. The bill passed as introduced. Hence the definition of "meeting" as it exists in sec. 19.82(2), Stats., today.

The Assembly Substitute Amendment also deleted two provisions from the senate version. These were:

> "To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless expressly provided by law."

***96** and

> "This subchapter shall be liberally construed to achieve these purposes and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof."

****163** The attorney general's comments on the assembly version are informative. He criticized the deletions, arguing that the deletions would create a presumption for closed government meetings. He urged these two provisions be put back into the bill:

> "Taken together, these provisions put the Legislature squarely behind openness in government and provide the courts with a clear statement of the Legislature's intent. By eliminating these provisions, the Assembly version opens the door to an interpretation which favors a presumption that governmental meetings can be closed. Obviously, the policy of the state should be the other way around. The second provision cited above is particularly important in light of the State Supreme Court's recent decision which was based upon a strict interpretation of the entire statute because it contains a penalty clause. The Senate version clearly provides for a liberal construction except in forfeiture actions." Legislative Reference Bureau Drafting Record, ch. 426, Laws of 1975.

Both provisions were reinserted in Special Session Senate Bill 1 and are found in secs. 19.81(3) and (4), Stats.

Thus, from January 1975 to September 1976, we see, from our vantage point ten years after the fact, ***97** significant events that aid us in our interpretive efforts: the budget is introduced; private meetings by Democrats are held, including one that had exactly one-half the membership of the Committee in attendance; a Democratic senator sues his fellow Democrats by filing a complaint with the district attorney; the *Conta* court while exempting these particular meetings, concludes that even though existing law does not apply to *every* gathering of governmental officials regardless of number, the law does apply to meetings of one-half the members of a governmental body because of their potential to frustrate all action; within four months of the *Conta* court decision, a new law is passed but not without a great deal of interaction between the houses. Today we are asked to interpret the heart of that law, sec. 19.82(2), Stats.

What can we glean from all of the above? Certain conclusions are inescapable.

First: The legislature, in creating sec. 19.82(2), Stats., intened to broaden the scope of the Open Meeting Law. The majority in *Conta* applied strict interpretation. The new law directed that except for forfeiture actions it be interpreted liberally. The old law covered only those meetings which were a convening of the governmental body; the new law covered meetings of members of the governmental body. The legislature rejected an assembly amendment which would have created a presumption of closed meetings, and opted for language that created a presumption of open public meetings of governmental bodies.

Second: The legislature, in determining the "trigger" of the Open Meeting Law, rejected "numbers" as the trigger for application. It is important to note here that there were three courses of action that this legislature ***98** most certainly did not take. They did not choose to trigger the statute by automatically

applying the law to any deliberate meetings involving governmental business between two or more officials. This point is most critical. Were this their intention, the legislature had only to phrase the statute to read: "Gathering of any two or more members of a governmental body...." This they did not do. The failure to do so had to be a deliberate choice. Given the political implications inherent in the *Conta* case, and the fact that some of the members were being sued by one of their own, the legislature had to be paying close attention to the case. These factors combined with the ramifications the decision would have on its own internal procedures, mean that it had to be extremely aware of *Conta,* its language, and all its implications. The *Conta* decision with its extensive discussion of this "any 2 member" approach was too fresh and too important for the legislature to have overlooked the issue. Although petitioners invite us to conclude otherwise, we must decline this ****164** invitation to judicial legislating. The legislature without doubt did not intend such a result. Given the history, given the impact on the enunciated policy of openness compatible with the conduct of government business, and given the ease with which the legislature could have accomplished applying the law to any gathering of two members or more, we cannot reach such a conclusion. Petitioner's invitation must be addressed to the legislature. If the Open Meeting Law with its notice requirements is to apply to any gathering of two or more public officials convened for the deliberate purpose of participating in formal or informal government business, the legislature must so state.

***99** Neither did they choose triggering the statute by the presence of one-half of the group. That the legislature was aware of the power of one-half of a body is evident by the language of sec. 19.82, Stats., which creates a presumption of government business being conducted when one-half or more are present. It would have been an easy step to have simply said that the law is triggered by a "gathering of one-half or more members of a governmental body...." They did not do so. Other states had. The *Conta* court spoke at length to the power of one-half of the group. It was a major point in the brief of Goyke—a member of the two Conference Committees which shaped the language. Their failure to trigger the statute by such language could not have been an oversight. It had to be deliberate.

Neither did they choose, and in fact specifically rejected, triggering the statute by the presence of a quorum. This was the approach in the original senate version, Senate Bill 630, and it was rejected.

Third: That although the focus of the legislature was on the purpose of the gathering ["for the purpose of exercising the responsibilities authority, power or duties...."] it is clear that the legislature did not intend that "purpose," standing alone, could trigger the statute. If the purpose was the only trigger, then secs. 19.81–87, Stats., would apply to any gathering of even two members of a ninety-nine member body if the purpose of their meeting was to discuss governmental business. As discussed above, this is an approach the legislature intended to avoid.

Fourth: The legislature in enacting secs. 19.81–87, Stats., intended the law to apply, at least under some circumstances, to gatherings of less than one-half of the members of a governmental body. The legislative history, ***100** the language of the *Conta* decision, as well as common sense tells us this has to be the case. Legislative history reveals that one of the concerns, as expressed in the Legislative Reference Bureau Drafting Record, was evasion. As discussed above, the original Senate draft provided for triggering of the statute only when a quorum was present. It was rejected because it was felt that the quorum language "leaves an unfortunate loophole that might invite circumvention based on a narrow legal line instead of emphasizing the broad meaning of the law." The reasoning found in that objection is equally applicable to language that would have made the law apply only to gatherings of one-half the members or more.

In addition, the language in *Conta* regarding groups consisting of less than a quorum was before them:

> "It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually

discovered, are an available target for the prosecutor under the simple quorum rule." *Id.* at 687, 239 N.W.2d 313.

The legislature did nothing to step back from that conclusion found in *Conta.*

Common sense also tells us, and the Commissioners here agree, that if proxies ****165** are present so as to realistically make-up a majority, the Open Meeting Law applies.

Fifth: The legislature was concerned with the ability of a gathering to block passage of pending legislation. ***101** Senator Goyke had pressed this point in his amicus brief to the *Conta* court. The court agreed with him. *Id.* at 687–88, 239 N.W.2d 313. Goyke was on the Conference Committee which drafted the bill, the language from which became secs. 19.81–87, Stats. A tie vote on a matter of pending legislation is a defeat of that proposal. It cannot become law. The recognition of that power could not and did not escape the legislature's attention: even the language giving rise to a presumption of governmental business uses the words "one-half or more," a clear recognition of the intent to reach the power to block.

The question remains as to how these conclusions affect determination of the "triggers" of the Open Meeting Law. To sum up, the legislature intended to broaden the scope of the Open Meeting Law from previous law, including *Conta.* In determining the trigger of the Open Meeting Law, the legislature rejected the "numbers" approach. In addition, purpose alone was insufficient to trigger the statute. Further, the legislature intended that under some circumstances the law would apply to gatherings of one-half or less. And last, the legislature's concern was not only with the power to pass proposals but also with the power to defeat them.

It is inescapable, given all the above, that the legislature intended *something* in addition to "purpose" in order to trigger the statute. If purpose alone were sufficient, the statute would apply any time two or more members gathered to discuss government business, a result the legislature clearly did not intend. What is this "something?" It cannot be some other number such as a quorum or one-half: the legislature rejected those approaches. It cannot be, as discussed above, the potential only to *pass* proposals. The only remaining "something" is the potential of a group to determine the outcome ***102** of a proposal, whether that potential be the affirmative power to pass, or the negative power to defeat.

From this, we conclude that the trigger is twofold. First, there must be a purpose to engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed.

The burden of proving that a meeting of this nature occurred involving less than one-half of the total members rests with the party asserting the violation. Section 19.82(2), Stats., states in part: "If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Given this statutory assertion, and the statutory silence with respect to meetings of less than one-half, it follows that the burden of proof involving meetings of less than one-half of the membership rests with the party asserting the violation.

We turn now to applying secs. 19.81–87, Stats., and our interpretation of that law, to the facts of this case. It is conceded that the purpose of the meeting of the four Commissioners was to discuss the pending capital budget. It was therefore a meeting "for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Section 19.82(2). It is conceded that passage of that proposal required a two-thirds vote. It is conceded that four members were ***103** sufficient to defeat any proposal regarding the capital budget. Because the convening of these four members was for the purpose of exercising the responsibility, authority, power or duties of the body, i.e. the discussion of the capital budget, and because these four members had the potential to determine the outcome of any proposal regarding the capital budget, we hold that ****166** this meeting was subject in all respects to Wisconsin's Open Meeting Law.

The Commissioners argue that because they were from two opposite factions (two of them represented the city and two represented the suburbs), they were not in fact a "negative quorum." Their argument rests on the premise that these two factions would not in reality ever join together, and therefore would never be in a position to determine the outcome by voting together to defeat the proposal. We reject this argument in total. Whether a group of divergent forces would ever join together is simply not the issue. The fact is that there is always the potential, no matter how divergent the forces, to join together. The Open Meeting Law is concerned with the potential to determine the outcome, not with the likelihood that an alliance may or may not be formed. The legislature knew, as do these Commissioners, that politics makes strange bedfellows. Today's enemy may become tomorrow's ally. Shifting agendas and shifting alliances can and often do lead to unpredictable results and unlikely alliances. When a group of governmental officials gather to engage in formal or informal government business and that group has the potential to determine the outcome of the proposal or proposals being discussed, the public, absent an exception found within the law has the right to know—fully—the deliberations of that group. The public is entitled to no less.

***104** Newspapers Inc. conceded at oral argument that this was not an appropriate case to impose a forfeiture. There is no allegation that these Commissioners committed a knowing or intentional violation of the law. From a review of the record we can discern none. The record reveals a hardworking, industrious Commission increasingly frustrated by its inability to pass a capital budget. A deadline loomed. The meeting was a good faith effort by Chairperson Showers to resolve the impasse. Notwithstanding these concerns, the public had rights of full access to that meeting. The relief requested by Newspapers Inc. is a declaration by this court that the closed meeting of the four Commissioners on December 1 violated Wisconsin's Open Meeting Law. It did. We reverse and direct that a declaratory judgment alone be entered in favor of the petitioners.

Decision of the court of appeals is reversed. Rights declared.

All Citations

135 Wis.2d 77, 398 N.W.2d 154, 14 Media L. Rep. 1170

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147 Ohio St.3d 74
Supreme Court of Ohio.

WHITE, Appellant,
v.
KING et al., Appellees.

No. 2014–1796.
|
Submitted Nov. 17, 2015.
|
Decided May 3, 2016.

Synopsis

Background: Member of school district board brought action against board, alleging violation of Open Meetings Act. The Court of Common Pleas, No. 13CVH040352, Everett H. Krueger, 2014 WL 5113716, granted board's motion for judgment on the pleadings. Member appealed. The Court of Appeals, Fifth District, 2014 WL 4415396, affirmed. Member appealed.

The Supreme Court, O'Donnell, J., held that e-mail discussions between members of board qualified as a discussion of "public business."

Reversed and remanded.

Lanzinger, J., filed dissenting opinion in which O'Connor, C.J., joined.

****1235 Syllabus of the Court**

R.C. 121.22 prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication.

Attorneys and Law Firms

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Opinion

O'DONNELL, J.

***75** {¶ 1} Adam White, a member of the Olentangy Local School District Board of Education, appeals from a judgment of the Fifth District Court of Appeals affirming an order granting judgment on the pleadings in favor of the board in an action involving Ohio's Open Meetings Act, R.C. 121.22. The issue presented on this appeal is whether a series of e-mails between and among a majority of the members of a public body relating to a response to a newspaper editorial, which culminated in the publication of a response that the board later ratified at a public meeting, qualifies as a "meeting" for purposes of R.C. 121.22.

Facts and Procedural History

{¶ 2} At the time pertinent to this matter, the school board consisted of White, Julie Feasel, Kevin O'Brien, Stacy Dunbar, and president David King. The amended complaint alleges that White independently conducted an investigation into alleged improper expenditures by two athletic directors employed by the Olentangy Local School District that resulted in one resigning and both being required to reimburse ****1236** the district. Thereafter, on September 25, 2012, King, Feasel, O'Brien, and Dunbar amended a board policy to require that all communications between board members and staff first pass through the district superintendent or the district treasurer. White voted against the policy change, and on October 11, 2012, the Columbus *Dispatch* published an editorial entitled "Role Reversal" in which it praised White for his vote and implicitly criticized the other board members for

adopting a restrictive policy designed to thwart White from conducting further investigations into suspected illegal spending by district employees.

***76** {¶ 3} King then sought to have Feasel, O'Brien, and Dunbar publicly respond to the editorial and directed that they and Superintendent Wade Lucas and district staff members Teresa Niehaus, Linda Martin, and Karen Truett collaborate and issue a response to the editorial on behalf of the board. The board members and district employees did so in a series of e-mail exchanges. O'Brien submitted a proposed response signed by all board members except for White to the *Dispatch.* King then submitted a final response to the *Dispatch* that he signed in his capacity as board president indicating that Feasel, O'Brien, and Dunbar consented to its publication. The *Dispatch* published that response on October 27, 2012.

{¶ 4} Approximately six months later, White filed this lawsuit against King, Feasel, O'Brien, and Dunbar, alleging that they had violated the Open Meetings Act. That same day, at a regular board meeting, White advised the board of the lawsuit and moved that "no public monies be spent defending the 4 board members, or in the alternative, if any public monies are spent defending the 4 board members, those members agree to reimburse the district for any monies spent." The motion died for lack of a second. King, Feasel, O'Brien, and Dunbar then voted to publicly ratify the response and deny that the board "violated the Sunshine Law." White abstained from these votes.

{¶ 5} The board members answered the complaint and moved for judgment on the pleadings. White then moved for leave to amend his complaint and add the board itself as a defendant. The trial court granted White's motion, ordered the clerk to file the amended complaint instanter, and denied the motion for judgment on the pleadings as moot. In the amended complaint, White sought a declaratory judgment that the board and other board members violated the Open Meetings Act, statutory damages, a temporary restraining order, and injunctive relief. The respondents answered and jointly moved for judgment on the pleadings pursuant to Civ.R. 12(C).

{¶ 6} The trial court determined that King, Feasel, O'Brien, and Dunbar had immunity and were entitled to judgment on the pleadings in their individual capacities. The court also granted the board's motion for judgment on the pleadings for three reasons: no prearranged discussion of public business had occurred because the communications among the board members originated with an unsolicited e-mail from King, R.C. 121.22 does not apply to e-mails, and at the time of the e-mail exchange, there was no pending rule or resolution before the board.

{¶ 7} On appeal, White challenged the court's ruling only with respect to the board. In affirming, the appellate court held that the definition of "meeting" in R.C. 121.22 does not include sporadic e-mails and that the e-mails did not discuss public business, because at the time they were exchanged, there was no pending ***77** rule or resolution before the board. And, despite the fact that the board later ratified the response to the editorial, ratification did not retroactively create a prearranged ****1237** discussion of public business via e-mails. Finally, the appellate court stated that "mere discussion of an issue of public concern does not mean there were deliberations under the statute." 2014-Ohio-3896, 2014 WL 4415396, ¶ 26.

{¶ 8} White has presented two propositions of law, which we accepted:

> Under the Ohio Open Meetings Statute, Ohio Rev.Code § 121.22, liberally construed, private deliberations concerning official business are prohibited, whether such deliberations are conducted in person at an actual face-to-face meeting or by way of a virtual meeting using any other form of electronic communication such as telephone, e-mail, voicemail, or text messages.
>
> Under the Ohio Open Meetings Statute, Ohio Rev.Code § 121.22, when a board of education formally votes to ratify a prior action, the ratified action constitutes "official business" under the Statute.

Positions of the Parties

{¶ 9} White maintains that he has established an Open Meetings Act violation in that King prearranged a private discussion regarding a response to a Columbus *Dispatch* editorial, a majority of the board members and district staff participated in that discussion in their official capacities, and that discussion resulted in a policy statement that the board later ratified. He also argues that sanctioning public bodies' avoidance of R.C. 121.22 by discussing public business electronically subverts the purpose of the law and that incremental electronic communications violate the law, relying on *State ex rel. Cincinnati Post v. Cincinnati,* 76 Ohio St.3d 540, 668 N.E.2d 903 (1996).

{¶ 10} The board responds that the amended complaint fails to establish that a meeting occurred for purposes of the Open Meetings Act, asserting that the law does not apply to e-mails because it does not mention electronic communications, even though the General Assembly has amended it several times since 2005, when a court of appeals held that it did not apply to e-mail. In addition, the board argues that discussions about a response to a newspaper editorial do not involve public business. Only private deliberations on a pending rule or resolution can violate R.C. 121.22, and in this case, the policy vote occurred before the publication of the editorial, and the board's decision to later ratify its response to the editorial to defend against a lawsuit did not retroactively convert the prior e-mails into a discussion of public business.

***78 Issue**

{¶ 11} The issue here is whether an e-mail discussion by a majority of the members of a public body for the purpose of drafting a response to an editorial that is subsequently ratified at a public meeting qualifies as a meeting for purposes of R.C. 121.22.

Law and Analysis

Standard of Review

{¶ 12} In *State ex rel. Midwest Pride IV, Inc. v. Pontious,* 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996), we explained:

> Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. Thus, ****1238** Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.

(Citation omitted.)

{¶ 13} "Because the review of a decision to dismiss a complaint pursuant to Civ.R. 12(C) presents only questions of law, our review is de novo." (Citation omitted.) *Rayess v. Educational Comm. for Foreign Med. Graduates,* 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶ 18.

R.C. 121.22

{¶ 14} R.C. 121.22(C) provides that "[a]ll meetings of any public body are declared to be public meetings open to the public at all times." A "public body" includes a board of a school district. R.C. 121.22(B)(1)(a). The term "meeting" means "any prearranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2).

{¶ 15} Nothing in the plain language of R.C. 121.22(B)(2) expressly mandates that a "meeting" occur face to face. To the contrary, it provides that *any* prearranged discussion can qualify as a meeting. Accordingly, R.C. 121.22 prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication.

***79** {¶ 16} The fact that the discussion in this case occurred through a series of e-mail communications does not remove that discussion from the purview of R.C. 121.22. In *Cincinnati Post,* Cincinnati's city manager, John Shirey, scheduled three series of nonpublic, back to back meetings with members of the Cincinnati City Council regarding the construction of new stadiums for the Cincinnati Bengals and Cincinnati Reds. Less than a majority of council members attended the individual meetings, but a majority of members attended each series of meetings. The *Cincinnati Post* brought a mandamus action in this court to compel the city to prepare and make available to the public minutes summarizing the discussions at the meetings pursuant to R.C. 121.22.

{¶ 17} In granting the writ, we explained that "[t]he statute that exists to shed light on deliberations of public bodies cannot be interpreted in a manner which would result in the public being left in the dark." *Cincinnati Post,* 76 Ohio St.3d at 544, 668 N.E.2d 903. Back to back meetings discussing the same issues of public business could be liberally construed as parts of the same meeting for purposes of R.C. 121.22. Therefore, we held that a majority of council members attended a nonpublic meeting in violation of the statute.

{¶ 18} The distinction between serial in-person communications and serial electronic communications via e-mail for purposes of R.C. 121.22 is a distinction without a difference because discussions of public bodies are to be conducted in a public forum, and thus, we conclude that in this instance, a prearranged discussion of the public business of a public body by a majority of its members through a series of private e-mail communications is subject to R.C. 121.22. This conclusion is consistent with the mandate of R.C. 121.22(A) that the statute "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." Allowing public bodies to avoid the requirements of the Open Meetings Act by discussing public business via ****1239** serial electronic communications subverts the purpose of the act. *Compare Del Papa v. Bd. of Regents of Univ. & Community College Sys. of Nevada,* 114 Nev. 388, 392, 397, 400, 956 P.2d 770 (1998) (interpreting definition of "meeting" in Nevada's Open Meeting Law, i.e., a gathering of members of a public body at which a quorum is present to deliberate toward or make a decision on certain matters, to encompass serial electronic communications, consistent with statute stating electronic communication must not be used to circumvent spirit or letter of that law); *Wood v. Battle Ground School Dist.,* 107 Wash.App. 550, 564, 27 P.3d 1208 (2001) (holding exchange of e-mails could constitute a meeting for purposes of Washington's Open Public Meetings Act in light of the act's broad definition of a "meeting," the act's purpose, and the statutory mandate that the act be liberally construed).

***80** {¶ 19} The dissent maintains that our interpretation of the Open Meetings Act amounts to a judicial rewrite of the statute because "[m]eetings differ from other types of communication because they are events or gatherings at which real-time communication can occur." Dissenting opinion at ¶ 30. The dissent states that "[b]ecause a meeting is an event that requires parties to participate at the same time, the requirement is that it be 'prearranged.' R.C. 121.22(B)(2)." *Id.* According to the dissent, here there is "no allegation that discussions were either prearranged or that they occurred in real time," *id.* at ¶ 37, so the e-mails at issue do not qualify as a meeting.

{¶ 20} Tellingly, the dissent points to no language in R.C. 121.22(B)(2) requiring real-time communication and instead relies on language in unrelated statutory provisions to support its argument that such a requirement exists. Thus, the dissent's position is not well taken because it necessitates adding language to the General Assembly's definition of a meeting. Additionally, White alleged that King instructed other board members and district staff to collaborate and issue a response to the editorial and that they did so via e-mail on or about October 11, 2012. Thus, White may be able to prove a set of facts to support his claim that the e-mail discussion in this case was prearranged.

{¶ 21} Regarding the "public business" requirement of R.C. 121.22(B)(2), that phrase is " 'commonly understood to mean the business of the government.' " *Associated Press v. Canterbury,* 224 W.Va. 708, 716, 688 S.E.2d 317 (2009), quoting *O'Melia v. Lake Forest Symphony Assn., Inc.,* 303 Ill.App.3d 825, 828, 237 Ill.Dec. 223, 708 N.E.2d 1263 (1999).

"That is, 'the words "public business" * * * relate only to matters within the purview of [a public body's] duties, functions and jurisdiction.' " *Id.,* quoting *Lucarelli v. Freedom of Information Comm.,* Conn.Super. No. CV 91–0063707S, 1992 WL 209848, *3 (Aug. 18, 1992), and citing *Kansas City Star Co. v. Fulson,* 859 S.W.2d 934, 940 (Mo.App.1993) ("Public business encompasses those matters over which the public governmental body has supervision, control, jurisdiction or advisory power").

{¶ 22} In *Del Papa,* Nancy Price, a member of the Board of Regents for the University and Community College System of Nevada, made comments to the press criticizing the conduct of her fellow regents in selecting the presidents of a university and a community college and an external auditor. At least seven board members expressed concerns about her comments to board chairman James Eardley, and Eardley, in turn, asked Constance Howard, the university's interim director of public information, to draft a response to the comments. Howard drafted a media advisory expressing the board members' concern that Price's comments were ****1240** unsubstantiated, incorrect, and damaging to the board and to the university as a whole and stating that the members felt it was important to publicly protest the statements to protect the board's integrity and ***81** policy making role. Eardley reviewed the draft and disseminated it by facsimile transmission to all board members except Price, along with a memorandum Howard wrote requesting feedback and advice and stating that the advisory would not be released without board approval. The board members responded by way of telephone calls to Eardley, Howard, or both, charged to university calling cards. Some members disagreed with the use of their names and, in varying degrees, the language of the advisory itself, so Eardley did not issue it.

{¶ 23} In that case, the Nevada Supreme Court held that the board violated the state's Open Meeting Law, which at that time defined a meeting as involving deliberation toward a decision or a decision " 'on any matter over which the public body has supervision, control, jurisdiction, or advisory power.' " *Del Papa,* 114 Nev. at 392, 956 P.2d 770, quoting former Nev.Rev.Stat.Ann. 241.015(2), now (3)(a)(1). The court determined that the board violated a statutory prohibition against closed meetings because it acted in its "official capacity as a public body" in deciding not to take action with respect to the media advisory, emphasizing the board's use of university resources and the fact that the advisory "was drafted as an attempted statement of University policy." *Id.* at 401, 956 P.2d 770.

{¶ 24} Similarly, in this case, King allegedly instructed district staff members to assist a majority of board members in preparing a board response to an editorial that criticized one of its decisions. Subsequently, a majority of the board members voted to ratify the board's response at a public meeting, further indicating that the response fell within the purview of the board's duties, functions, and jurisdiction because under the Open Meetings Act, when a board of education formally votes to ratify a prior action, the ratified action constitutes "public business" under the statute. We conclude, in accord with the analysis in *Del Papa,* that the facts alleged in the amended complaint filed in this case support the conclusion that the e-mail discussion here qualified as a discussion of public business by the board.

Conclusion

{¶ 25} Taking the material allegations in the amended complaint as true and construing all reasonable inferences in favor of White, in accord with *State ex rel. Midwest Pride IV,* 75 Ohio St.3d at 570, 664 N.E.2d 931, we conclude that White may be able to prove a set of facts to support his claim that may entitle him to relief. As demonstrated in this case, serial e-mail communications by a majority of board members regarding a response to public criticism of the board may constitute a private, prearranged discussion of public business in violation of R.C. 121.22 if they meet the requirements of the statute. Accordingly, the judgment of the appellate court affirming the trial court's dismissal of White's complaint ***82** pursuant to Civ.R. 12(C) is reversed, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

PFEIFER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

LANZINGER, J., dissents, with an opinion joined by O'CONNOR, C.J.

LANZINGER, J., dissenting.

{¶ 26} Even when liberally interpreted, R.C. 121.22 has been limited in scope to the meetings of public bodies. I respectfully ****1241** dissent from the majority's judicial rewrite of what is commonly known as Ohio's Sunshine Law or Open Meetings Act. While it may be a good idea to limit the use of e-mail to avoid statutorily required public meetings, that is the task of the General Assembly and not this court. I would affirm the judgment of the court of appeals, which, in my view, properly held that the e-mails in this case are not encompassed within the current statutory definition of "meeting."

{¶ 27} The definition of the term "meeting" is found at R.C. 121.22(B)(2) and is relatively simple: " 'Meeting' means any prearranged discussion of the public business of the public body by a majority of its members." In spite of this plain declaration, the majority declares:

> Nothing in the plain language of R.C. 121.22(B)(2) expressly mandates that a "meeting" occur face to face. To the contrary, it provides that *any* prearranged discussion can qualify as a meeting. Accordingly, R.C. 121.22 prohibits any private prearranged discussion of public business by a majority of the members of a public body *regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication.*

(Emphasis added in part.) Majority opinion at ¶ 15.

{¶ 28} In other words, the majority rewrites R.C. 121.22(B)(2) to redefine "meeting" to include all forms of communication, even though the statute does not refer to e-mail correspondence or anything like it. The Fifth District and two other appellate courts have refused to apply the statute to cover e-mails. *See Haverkos v. Northwest Local School Dist. Bd. of Edn.,* 2005-Ohio-3489, 995 N.E.2d 862, ¶ 9 (1st Dist.) ("Ohio's Sunshine Law does not cover e-mails"); *Radtke v. Chester Twp.,* 2015-Ohio-4016, 44 N.E.3d 295, ¶ 31 (11th Dist.) ("the Open Meetings Act does not apply to e-mails").

***83** {¶ 29} In expanding this case to include all forms of "communication" in its interpretation of "meeting," the majority reaches into areas well beyond those covered by R.C. 121.22.

{¶ 30} It is critical to remember that Ohio's Sunshine Law relates to open meetings. Meetings differ from other types of communication because they are events or gatherings at which real-time communication can occur. *See, e.g.,* R.C. 1745.21(C) (meeting involves contemporaneous communication); R.C. 5312.04(D) (essential component of meeting is ability to communicate in real time). Because a meeting is an event that requires parties to participate at the same time, the requirement is that it be "prearranged." R.C. 121.22(B)(2).

{¶ 31} We focused on the essential concept of a "meeting" as it applies to the Sunshine Law in *State ex rel. Cincinnati Post v. Cincinnati,* 76 Ohio St.3d 540, 668 N.E.2d 903 (1996). And we considered the three parts of the statutory definition:

> A liberal construction of the definition of "meeting" would include the back-to-back sessions held by [city] council in this case. The elements of the statutory definition of a meeting are (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. The council meetings certainly fit within the first two elements. As to the third element, back-to-back sessions discussing exactly ****1242** the same public issues can be liberally construed as two parts of the same meeting. A majority of council members thus did attend the "meeting."

Id. at 543, 668 N.E.2d 903.

{¶ 32} In *Cincinnati Post,* we held that the city council's private back-to-back meetings, which, taken together, were attended by a majority of council members, violated R.C. 121.22. We noted the importance of meeting attendance rather than mere discussions between members:

> The statute does not prohibit impromptu hallway meetings between council members —the statute concerns itself with prearranged discussions. It does not prohibit member-to-member prearranged discussions. *The statute concerns itself only with situations where a majority meets.* Although a majority of council members were not in the same room at the same time, *a majority of them did attend a prearranged meeting* to deliberate on issues of great interest to the public.

***84** (Emphasis added.) *Id.* at 544, 668 N.E.2d 903.

{¶ 33} The majority cites statutes and public policy found in other jurisdictions, but they of course have different statutes. And the policy of liberal interpretation does not stretch so far as to purge all the meaning from a statutory term. The purpose of the Sunshine Law is to "require public officials to take official action and to conduct all deliberations upon official business only in open meetings," as R.C. 121.22(A) explains. We have considered the liberal application of R.C. 121.22 in a case in which it was argued that informal meetings were not subject to the Open Meetings Act or its requirement for minutes. *State ex rel. Fairfield Leader v. Ricketts,* 56 Ohio St.3d 97, 102, 564 N.E.2d 486 (1990).

{¶ 34} There we held that the act covers "more than just meetings authorized by a public body," but that it "also refers to any meeting that the public body causes to take place." *Id.* The key is that "the members of a public body agree to attend, in their official capacity, a meeting where public business is to be discussed and a majority of the members do attend." *Id.*

{¶ 35} This is not to say that discussions through e-mails could *never* constitute a meeting. For instance, a board member could communicate independently with a majority of his or her fellow board members and prearrange for each of them to be available to send and receive e-mails at a specific day and time. The other board members could be anywhere—on a plane, at work, or at a child's soccer practice—at the prearranged moment, but they all could still access their e-mails. The initiating board member would need to send only one e-mail jointly addressed to all of the awaiting board members, who, by replying to all addressees, could then engage in what is essentially a prearranged and real-time discussion with a majority of their fellow board members about a matter of public business. I believe that such a situation could constitute a "meeting" within the definition of that term in R.C. 121.22(B)(2).

{¶ 36} Given the General Assembly's exhortation that the Open Meetings Act "shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings," R.C. 121.22(A), we must be wary of any attempt to avoid the transparency that the public ****1243** deserves. As one commentator recently noted:

> As technological advances revolutionize communication patterns in the private and public sectors, government actors must consider their reactions carefully. Public representatives may take advantage of modern technology to improve communications with constituents and to operate more efficiently. However, this progress must be made with an eye to complying with certain statutory restrictions placed on public bodies.

***85** (Footnote omitted.) Roeder, *Transparency Trumps Technology: Reconciling Open Meeting Laws with Modern Technology,* 55 Wm. & Mary L.Rev. 2287, 2288 (2014).

{¶ 37} However, in this case there is no allegation that discussions were either prearranged or that they occurred in real time. Therefore, the subject e-mails do not qualify as a "meeting" as the term is currently defined.

{¶ 38} It may well be a good idea for the General Assembly to consider expanding the reach of the law to prohibit a majority of members of a public body from e-mailing each other to avoid the Sunshine

Law. It should reexamine the law and take action to ensure that the Sunshine Law will continue to promote transparency in government as technology changes.

{¶ 39} But a majority of this court should not add language that has not been fully considered by the public's legislative representatives. The unintended consequences of broadening the word "meeting" beyond its current definition could affect adversely how members of public bodies do their business.

{¶ 40} I would affirm the judgment of the court of appeals.

O'CONNOR, C.J., concurs in the foregoing opinion.

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