IN THE COURT OF APPEALS OF IOWA

No. 8-583 / 08-0195
Filed December 17, 2008

MICHAEL DOOLEY, SHARON DOOLEY, LAURIE TULCHIN, JAMES GLASGOW, HARVEY HENRY, MARY ELLEN HILL, JAMES SEDLACEK, GREG PICKETT, and THOMAS CARSNER,
Plaintiffs-Appellants,

vs.

JOHNSON COUNTY BOARD OF SUPERVISORS, MICHAEL LEHMAN, PATRICK HARNEY, SALLY STUTSMAN, TERRENCE NEUZIL, CAROL THOMPSON, and ROD SULLIVAN,
Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Plaintiffs appeal from the district court's ruling dismissing their claim and finding defendants did not violate the Iowa open meetings law. **AFFIRMED.**

Wallace L. Taylor, Cedar Rapids, for appellants.

Janet Lyness, County Attorney, and Andrew B. Chappell, Assistant County Attorney, for appellees.

Heard by Eisenhauer, P.J., and Doyle, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, S.J.

Plaintiffs, a group of concerned Johnson County residents, appeal from the district court's ruling dismissing their claim and finding that defendants, the Johnson County Board of Supervisors, did not violate the Iowa open meetings law. The district court found the law was not violated because no "meeting," as it is defined in Iowa Code section 21.2(2) (2005), occurred during the gathering at issue. We affirm.

BACKGROUND. This case concerns an area referred to as The North Corridor. The land is located in Johnson County and situated north of Iowa City, south of Linn County, east of highway 965, and west of highway 1. This area has been designated as a growth area in Johnson County's comprehensive land use plan. In November 2003, the Johnson County Secondary Road Department recommended developing a new road through The North Corridor to accommodate for this planned growth. The department determined that existing roads, including Newport Road and Prairie du Chien Road, could not accommodate new growth without being upgraded. The proposed new road would bypass an existing route, Newport Road, and cut through several properties. Some board members and citizens expressed concern about developing a new route. Some felt more attention should be paid to retaining the scenic character of the area while others were concerned about accommodations for pedestrians and bicycle traffic. Still others were concerned about potential speed levels on a new road.

In order to get an additional and independent perspective on transportation options available in the area, the Johnson County Board of Supervisors (the board) contracted with Howard R. Green Company (H.R. Green) to study the issue and provide a recommendation. A preliminary draft of their report was given to members of the board sometime in early December 2004. The draft report contained the following recommendations:

> The [c]ounty should improve the surface of Prairie du Chien Road and Newport Road within the existing right-of-way and road grade as much as possible, implementing one of several methods currently being used by other county engineers in Iowa.
>
> The county should provide a separate trail facility for pedestrian and bicycle traffic. This facility would ideally be located on the outside edge of the existing right-of-way. This requires the acquisition of additional right-of-way.
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> The county should also pursue the assignment and development of a connecting roadway from the north end of Prairie du Chien Road and Newport Road as recommended by the November 2003 report. In addition, a connection further east between Newport Road and IA Hwy 1 should be considered for long term growth.

The board's executive assistant emailed the board on December 13, 2004, and stated that someone from H.R. Green wanted to meet with two supervisors and some county staff on January 4, 2005, at 10 a.m. to present the report and discuss it. The email noted, "The meeting is not designed to deliberate the draft report but to seek input." It asked the board to respond with which members would like to attend. Two board members, Michael Lehman and Patrick Harney, agreed to attend this meeting. In an email reminder the day before the scheduled meeting, the executive assistant reminded Lehman and Harney that no more than two of them could attend the meeting.

On December 15, 2004, Carol Thompson, a board member whose term was expiring at the close of 2004, emailed comments to the board and the board's executive assistant stating her dissatisfaction with the report. One complaint was that she believed H.R. Green had not followed their instructions, including that H.R. Green was to recommend one of the design alternatives offered in the November 2003 study by the department of secondary roads. Thompson believed H.R. Green's recommendation was unclear and not one provided for in the 2003 study.

The board's executive assistant inquired whether the other board members agreed with Thompson and stated that H.R. Green would be willing to meet with the members to discuss the board's expectations. On January 4, 2005, Lehman and Harney met with the H.R. Green representatives as planned. After Lehman and Harney left, two other members entered and discussed the report with H.R. Green. Then, after those two members left, the remaining board member entered and met with H.R. Green.

H.R. Green revised the draft report and presented a project summary of the report publicly on January 19, 2005. The final report issued in February 2005 contained the following recommendations:

> It is recommended that Prairie du Chien Road be improved to current standards from its current intersection with Newport Road, north to the US Army Corp property with a design speed that will provide a speed limit of 35 MPH or greater along the corridor.
>
> It is recommended that the connection proposed in the November 2003 report and shown on Figure 2 in this study be completed to provide a new connection between Prairie du Chien Road and Newport Road.

> It is recommended that Newport Road, between Prairie du Chien Road and the new connection not be improved. If development pressure requires, a hard surface may be required as a long-term solution.
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> It is recommended that Newport Road, from the new connection north and east, be improved to current design standards with a design speed that will allow a speed limit of 35 MPH or greater.
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> It is recommended that a long-term connection between IA Hwy 1 and Newport Road be identified at the planning level and a corridor maintained to provide additional future transportation connections.

Plaintiffs filed suit in November 2005 alleging, among other things, the gathering on January 4, 2005, was a violation of Iowa's open meetings law. On September 26, 2007, a bench trial on a stipulated record was held. The judge's ruling, issued on December 12, 2007, concluded there was no violation of the open meetings law. It found the discussion among board members and H.R. Green on January 4, 2005, was not a violation because it was not a "meeting" since there was not a majority present and there was no "deliberation." Plaintiffs appeal.

SCOPE OF REVIEW. Actions to enforce Iowa's open meetings law are ordinary actions at law. *Schumacher v. Lisbon Sch. Bd.*, 582 N.W.2d 183, 185 (Iowa 1998). Our review of such actions is for correction of errors at law. Iowa R. App. P. 6.4; *Polk County Bd. of Supervisors v. Polk Commonwealth Charter Comm'n*, 522 N.W.2d 783, 785 (Iowa 1994). We are bound by the district court's fact findings if they are supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*); *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 533 (Iowa 1980). Those seeking enforcement of the law bear the initial burden to demonstrate that the governing body is subject to the open meeting requirements

and that the body has held a closed session. Iowa Code § 21.6(2). If this burden is met, then the governing body must show it has complied with the act. *Id.* Any ambiguity in the construction or application of the open meetings law is to be resolved in favor of openness. Iowa Code § 21.1.

ANALYSIS. Iowa's open meetings law is designed to assure "that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people." Iowa Code § 21.1. The purpose is to require meetings of government bodies to be open and allow the public to attend. *KCOB/KLVN, Inc. v. Jasper County Bd. of Supervisors*, 473 N.W.2d 171, 173 (Iowa 1991). To achieve this purpose, our law requires that "[m]eetings of governmental bodies shall be preceded by public notice . . . and shall be held in open session unless closed sessions are expressly permitted by law." Iowa Code § 21.3. The legislature has given the term "meeting" under the law a specific definition and not all gatherings or conversations between members of a governing body are included. At issue in this case is whether the board members had a "meeting," as it is understood by the open meetings law, by discussing the transportation study with H.R. Green in pairs or individually, right after one another. Under the law,

> *"Meeting"* means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

Iowa Code § 21.2(2). The points of contention in this case are whether "a majority" of members gathered and whether the discussions that transpired amounted to "deliberation." There is also some concern as to whether the board had an intent to avoid the purposes of the law.

The legislature has expressly limited the law to apply only to gatherings of a majority of the members of a governmental body. *Wedergren v. Bd. of Dirs.*, 307 N.W.2d 12, 18 (Iowa 1981). Plaintiffs argue that the exchange between members and H.R. Green on January 4, 2005, was a "walking quorum." They note these types of meetings have been found to be a violation of open meetings laws in other states and are contemplated to be covered by Iowa's law. For support, they cite an attorney general's opinion[1] and note efforts to amend the definition of "meeting" to expressly include these types of gatherings.[2]

Assuming a majority was present, next we must determine if deliberation or policy-making activities took place and whether there was an intent to avoid the purposes of our open meetings laws. *Gavin v. City of Cascade*, 500 N.W.2d 729, 732 (Iowa Ct. App. 1993). The requirements of the open meetings law apply when a majority of the governing body engages in "deliberation or action upon any matter within the scope of the governmental body's policy-making

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[1] In one attorney general opinion, it was noted that it was doubtful "that the [open meetings law] provisions could be avoided through any bifurcation mechanism employed by a majority of the members to conduct the public's business." 1979 Iowa Op. Att'y Gen. 164.

[2] Plaintiffs presented evidence that a bill was presented in 2005 to amend the definition of meeting "to include serial gatherings of members of a governmental body who constitute less than a majority of the members at each gathering, but who collectively constitute a majority of the members . . . ." H.R. 372 81st General Assembly (2005). However, the amendment was not passed by the legislature.

duties." Iowa Code § 21.2(2). Deliberation includes "discussion and evaluative processes in arriving at a decision or policy." *Hettinga v. Dallas County Bd. of Adjustment*, 375 N.W.2d 293, 295 (Iowa 1985). Gatherings held strictly for "ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter" are not meetings under the law. Iowa Code § 21.2(2); *KCOB/KLVN, Inc.*, 473 N.W.2d at 175.

The distinction between ministerial gatherings and policy-making gatherings is subtle.

> A gathering for "purely ministerial" purposes may include a situation in which members of a governmental body gather *simply to receive information upon a matter within the scope of the body's policy-making duties*. During the course of such a gathering, individual members may, *by asking questions, elicit clarification about the information presented*. We emphasize, however, that the nature of any such gathering may change if either "deliberation" or "action" [as defined earlier in the opinion] occurs. *A meeting may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they exercise judgment or discretion*.

Hettinga, 375 N.W.2d at 295 (quoting Iowa Op. Att'y Gen. 81-7-4(L) at 10) (emphasis supplied). The difference between a ministerial gathering and one that involves deliberation appears to be whether members are gathering information or are discussing opinions. "Activities of a governmental body's individual members to secure information to be reported and acted upon at an open meeting ordinarily do not violate [open meetings] statutes." *Telegraph Herald*, 297 N.W.2d at 534; *Gavin*, 500 N.W.2d at 732. Yet the distinction quoted above suggests that such activity could transform into a meeting under section

21.2(2) if the information gathering evolves into discussion of member opinions and the reasoning behind those opinions.

The question of intent is also relevant in determining whether a meeting occurred. *KCOB/KLVN, Inc.*, 473 N.W.2d at 175. The topic of the conversations and the intent behind the gathering are important because, as the supreme court has said, "[t]he public is entitled to openness in the making of public policy by governmental bodies." *Hettinga*, 375 N.W.2d at 295. It has also warned that "[p]ersons serving on governmental bodies should be constantly aware that their activities are subject to public scrutiny and should avoid even the appearance of engaging in unauthorized closed sessions." *Id*. at 295-96.

The district court found the members did not engage in deliberation or policy-making while meeting with H.R. Green on January 4, 2005. It found the depositions of the board members showed they merely "asked questions and elicited clarification" about the draft report. The district court did not make a specific finding as to whether the board had an intent to avoid the purposes of the open meetings laws by not having a quorum present at any time during the gathering. Although this is a close case, we find substantial evidence supports the court's finding.

The board members and H.R. Green testified that questions were asked about the plan. The record shows there was confusion among members as to what H.R. Green's recommendations were in the draft report. There were complaints of the draft report's vagueness and members sought explanations from H.R. Green to understand better the report's recommendations, but there is

no evidence showing debate or discussion of the recommendations among members. The revised recommendations made in the final report were more detailed specifications rather than a total change due to supervisor complaints as argued by the plaintiffs. The record is conflicting as to whether the serial gathering was arranged to avoid the purpose of the open meetings law requirements or carefully structured to avoid a violation of the law.

We do note the record shows H.R. Green sought feedback, opinions, and input from the members on the draft. Given that this project was to be voted on at a public meeting, gathering for this purpose appears dangerously close to "deliberation." Even absent any intention to deliberate, such discussions could arise effortlessly. We believe that the board's decision to review the draft in this fashion was a poor one and remind them the code advises that

> [a] governmental body which is in doubt about the legality of closing a particular meeting is authorized to bring suit at the expense of that governmental body in the district court of the county of the governmental body's principal place of business to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney for the governmental body.

Iowa Code § 21.6(4). Nonetheless, substantial evidence does support the court's finding that no deliberation occurred at the gathering and we therefore must affirm. Plaintiffs simply have not shown that the conversation between board members and H.R. Green involved discussion about board decisions or policy.

CONCLUSION. The district court properly dismissed plaintiffs' claim against the members of the Johnson County Board of Supervisors. There is substantial evidence to support the court's finding that the members did not

engage in "deliberation" during the January 4, 2005, gathering. Given that there was no deliberation during the gathering, we need not decide whether a majority was present. We affirm the district court.

AFFIRMED.