

Nos. A05-2340, A05-2341, A05-2342 and A05-2343

State of Minnesota
In Court of Appeals

Kenneth Brown and Robert Banks, individually and on behalf
of the State of Minnesota,

Respondents,

vs.

Cannon Falls Township, a political subdivision of the State of
Minnesota; Gary Hovel, an individual;
Lawrence D. Johnson, an individual; and
Keith Mahoney, an individual,

Appellants.

**BRIEF AND APPENDIX OF AMICUS CURIAE
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¹ In accordance with Rule 4 of the Special Rules of Practice for the Minnesota Court of Appeals, all cited unpublished opinions are provided in the Appendix to the Brief of *Amicus Curiae* Association of Minnesota Counties.

INTRODUCTION

The Association of Minnesota Counties (“AMC”) is a statewide organization that assists Minnesota’s 87 counties through its provision of educational programs, training, and communications to county officials. The mission of AMC is to provide counties with support so that the counties may effectively perform the duties and responsibilities delegated to them by law. AMC works closely with the legislative and administrative branches of government on issues involving adoption, enforcement, and modification of laws that affect counties. AMC has a public interest in the district court’s decision in this case since counties are subject to the requirements of the Open Meeting Law (“Law”).¹

AMC is most concerned with the public policy implications created by the district court’s decision. The district court’s decision creates poor public policy for the following reasons:

- (1) It may discourage people from participating on boards, councils, and commissions subject to the Open Meeting Law;
- (2) It deprives public officers of the ability to rely on the advice of attorneys in interpreting laws pertinent to government bodies, and in particular, the Open Meeting Law;
- (3) It may have the effect of disenfranchising the vote of public officers who fear the consequences of an Open Meeting Law violation; and

¹ Pursuant to Minn. R. Civ. App. P. 129.03, AMC certifies this brief was not authored in whole or in part by counsel for either the Appellants or the Respondents to this appeal and no other person or entity made a monetary contribution to its preparation or submission.

- (4) It may have the effect of disrupting the necessary transaction of public business.

The Open Meeting Law provides for forfeiture of office only in the instance of multiple “intentional violations” of the Law. In this case, the Cannon Falls Town Board of Supervisors (“Board”) relied on the advice of its attorney in the interpretation of the Open Meeting Law. Given the complexity of laws that government bodies must adhere to, reliance on a municipal attorneys’ advice is a common day occurrence throughout Minnesota. Since county boards and commissions depend on attorney advice in interpreting the requirements of the Open Meeting Law, the district court’s holding in this case causes great concern for counties.

STATEMENT OF LEGAL ISSUES, CASE, AND FACTS

AMC agrees with the Statement of Legal Issues, Statement of the Case, and Statement of Facts contained in the Appellants’ brief. AMC would characterize the key issue in this case as follows:

Can a public official have specific intent to violate the Open Meeting Law, and thus be found to have committed malfeasance in office sufficient to justify removal, where the public official has sought the advice of counsel, and been told the official’s actions do not violate the Open Meeting Law?

ARGUMENT

I. THE TOWN BOARD OF SUPERVISORS' RELIANCE ON THE ADVICE OF THE TOWNSHIP ATTORNEY NEGATES A FINDING OF AN INTENTIONAL VIOLATION OF THE OPEN MEETING LAW.

In their brief, Appellants explain how the district court's interpretation of the Open Meeting Law was erroneous. AMC agrees with Appellants' legal arguments and conclusions articulated in their brief. Those arguments will not be reiterated here. The focus of this Amicus Brief will be the Open Meeting Law's requirement of intentional violations as a condition precedent to removal from office.

A. Standard of Review.

The district court's decision interpreted the intentionality requirement of the Open Meeting Law, and applied it to testimony from trial. A review of the district court's statutory interpretation is a question of law and therefore reviewed by this Court de novo. *Bol v. Cole*, 561 N.W.2d 143, 146 (Minn. 1997); *Schumacher v. Ihrke*, 469 N.W.2d 329, 332 (Minn. App. 1991); *Wegman v. Olmstead Soil Water Conservation Dist.*, 2002 WL 31926223, *3 (Minn. App. 2002) (unpublished)(stating de novo review is appropriate to review the statutory interpretation of the intentionality requirement under the Open Meeting Law). A reviewing court is not bound by and need not give deference to the district court's determinations concerning statutory construction. *See Bortnem v. Commissioner of Public Safety*, 610 N.W.2d 703, 705 (Minn. App. 2000).

B. The District Court's Interpretation of the Statutory Intentionality Requirement was in Error.

The text of the Open Meeting Law indicates three times that a public official must have intentionally violated the Law's requirements to impose civil fines or forfeiture of office: "[a]ny person who **intentionally violates** this chapter shall be subject to personal liability in the form of a civil penalty"; "[i]f a person is found to have **intentionally violated** this chapter ... such person shall forfeit any further right to serve on such governing body"; and "[n]o monetary penalties or attorney fees may be awarded against a member of a public body unless the court finds that there was a **specific intent** to violate this chapter." Minn. Stat. § 13D.06, subs. 1, 3(a), 4(d) (2005).

No word, phrase, or sentence of a statute should be deemed superfluous, void, or insignificant. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005); *In re Estate of Palmer*, 658 N.W.2d 197, 199 (Minn. 2003); *State v. Larivee*, 656 N.W.2d 226, 229 (Minn. 2003); Minn. Stat. § 645.08(3) (2005). Each word of a statute must be given meaning. *Bortnem*, 610 N.W.2d at 706; *see also In Re Haskvitz*, 104 F. Supp. 173, 181 (D. Minn. 1952)(stating the legislature must be presumed to use words in a statute thoughtfully, meaningfully, and not uselessly). Yet, in this case, the district court's holding has effectively eliminated the "intent" requirement from Section 13D.06, by ignoring the fact that the verb "violate," as used in the section, is modified by the adverb "intentionally."

Intent is defined as the state of mind accompanying an act. Black's Law Dictionary (8th ed. 2004). "Specific intent" means "the intent to accomplish the precise

criminal act one is later charged with.” *Id.* In contrast, “general intent” only contemplates an intent to perform the act, even though the actor does not desire the consequences that result. *Id.* The Open Meeting Law authorizes civil penalties and removal from office only when a person “intentionally violates” the Law and only if a court finds a “specific intent” to violate the Law. Minn. Stat. § 13D.06, subs. 1, 4(d) (2005).

Thus, it is clear the punitive sanctions in the Open Meeting Law apply only if a public officer acts with the objective and purpose of violating the Open Meeting Law. It is this area where the district court’s decision is in greatest error. When a board relies on its municipal attorney’s advice regarding the interpretation of the Law, a board may ultimately be found to have violated the Law, but it could not have had the necessary state of mind or specific intent to violate the Law. In this case, the district court’s interpretation that the Board’s violation of the Law was intentional essentially negates the “intent” modifier of the term “violation,” by seemingly making all violations of the Open Meeting Law “intentional.” When analyzed more closely, the district court’s decision in essence applied a general intent concept to a specific intent law.

The Open Meeting Law provides that if a person is found to have “intentionally violated” the Law in three or more actions that person shall forfeit any further right to serve on the governing body. Minn. Stat. § 13D.06, subd. 3(a) (2005). Again, the modification of the verb “violated” by the adverb “intentionally” makes removal of public officers permissible only if the officers possessed the state of mind, or specific intent, to violate the Open Meeting Law. In this case, the trial testimony irrefutably

established that the Board relied on the advice of its attorney that it was complying with the Open Meeting Law in its actions.

Q: [Appellants' attorney] **Did you rely** on the opinions of your attorney and Town Clerk in deciding not to give any further notice?

A: [Gene Hovel, Cannon Falls Township Board Member] **Yes, I did.**

Q: And you are not a lawyer, are you?

A: No, I am not.

...

Trial Trans., pp. 179-180 (emphasis added); *see also* Trial Trans., pp. 235-237 (Appellant Mahoney stating that he relied on the advice of the Board's attorney); Trial Trans., pp. 285-287 (Appellant Johnson stating that the Board relied on the advice of its attorney). In reliance on its attorney's advice, the Board members did not believe that they were violating the Law and therefore, as a matter of law, lacked the state of mind, or intent, required under the statute.

C. The District Court Also Ignored Case Law Regarding the Effect of Reliance on an Attorney's Advice on an Intent Requirement.

There is no factual dispute in this case that the attorney gave the Board advice regarding Respondents' request, and the Board relied on this advice. *See e.g.* Tr. Trans., pp. 342-345, 405-407. After receiving Respondents' request to receive notice of meetings discussing the issuance of feedlot permits, the Board sought out the advice of its attorney on how to comply with this request. *Id.* The attorney reviewed the Open Meeting Law and advised the Board that providing notice to Respondents was unnecessary because the Board did not issue feedlot permits. *Id.* The district court held

that the Board's reliance was not in good faith because of the attorney's "obvious conflict of interest." Amended Findings of Fact, ¶ 18 (November 23, 2005). On this basis, the court concluded the Board members had specific intent to violate the Open Meeting Law. *Id.* at ¶ 34.

Two Minnesota cases have anticipated the events giving rise to Respondents' claims: a municipal board's reliance on its attorney's advice followed by an allegation of violation of the Open Meeting Law. In the first case, *Claude v. Collins*², while the court rejected the argument that the defendants' good faith was a defense to the Open Meeting Law, the court specifically stated:

Ignorance [of the Open Meeting Law] due to inexperience may constitute good faith and amount to sufficient excuse where the elected official neither knows [n]or has reason to know that he or she is violating the Open Meeting Law. To be sure, the excuse of inexperience very quickly wears thin. Public officials cannot long hide behind purported ignorance where that ignorance results in harm to the public. Public officials should not be permitted to frustrate the purposes of the Open Meeting Law, particularly when, as here, **advice was available from the city administrator and city attorney** which would have prevented the violations.

Claude v. Collins, 518 N.W.2d 836, 843 (Minn. 1994)(emphasis added).

In this case, the Board received Respondents' request for notice of meetings, did not know the proper response given the complexity of the Open Meeting Law, and did just as the Supreme Court suggested a government body do in *Collins*: it obtained advice from its attorney. Instead of applauding its efforts to comply with the Law, the district court gives the Board a further mandate. The Board must discern if the attorney's advice

² The facts of *Claude v. Collins* are provided in Appellants' brief and will not be reiterated here. App. Brief, pp. 18-20.

is good advice, bad advice, accurate, inaccurate, or tainted by an ethical conflict of interest. These differentiations are beyond the expertise of any board. *See, e.g., Marderosian v. Shamshak*, 170 F.D.R. 335, 341-342 (D. Ma. 1997)(a layperson cannot be expected to recognize an attorney's conflict of interest).

The court in the second case, *Mankato Free Press Co. v. City of North Mankato*, encouraged reliance on an attorney's advice, stating the city's reliance on its attorney's advice indicated "care to conform with the dictates of the statute." *Mankato Free Press*, 1998 WL 865714, *3 (Minn. App. 1998)(unpublished). In *Mankato Free Press*, the city consulted with its attorney regarding whether a proposed interview process complied with the Open Meeting Law. *Id.* at *1. The city attorney opined that the proposed interview process complied with the Open Meeting Law. *Id.* The city conducted the interviews in reliance on that attorney's advice, and Mankato Free Press claimed that the process violated the Open Meeting Law. The district court held that the interview process was not conducted with the purpose of avoiding public hearings and therefore the city did not violate the Open Meeting Law. *Id.* Affirming the district court's decision, the appellate court analyzed whether the facts showed that the city intended to subvert the Open Meeting Law. *Mankato Free Press*, 1998 WL 865714 at *3. In its analysis, the court considered the city's reliance on the erroneous advice of its attorney, and its attempt to comply with the Law, indicative of an absence of intent to violate the Open Meeting Law.

In this case, the district court condemned the Board for the very action the appellate court praised the city for in *Mankato Free Press*. In this case, the Cannon Falls

Town Board, unsure of its obligations regarding Respondents' request, sought the advice of its attorney. The attorney stated the Board need not give notice to the Respondents because the Board did not issue feedlot permits. Although the Board relied on the advice, the district court held that the Board intentionally violated the Open Meeting Law. The district court's holding in this case contradicts the appellate court's decision in *Mankato Free Press*.

Federal courts have also considered the effect of defendants' reliance on their attorneys' advice on defendants' intent in both civil and criminal cases. Courts have specifically recognized the mitigating effect attorney's advice can have on specific intent. *See, e.g., Covey v. U. S.*, 377 F.3d 903, 908 (8th Cir. 2004)(explaining the requirements of the advice-of-counsel defense); *U. S. v. Petrie*, 302 F.3d 1280, 1287 n.6 (11th Cir. 2002)(stating reliance on counsel "constitutes a complete defense" because it eliminates the mens rea); *U. S. v. McClatchey*, 217 F.3d 823, 832 (10th Cir. 2000)(opining that as long as the defendant sought the attorney's advice and made full disclosure of necessary information to attorney, the defendant would be entitled to acquittal due to lack of intent); *Rea v. Wichita Mortgage Corp.*, 747 F.2d 567, 576 (10th Cir. 1984)(stating that reliance on the advice of counsel is a valid defense in both civil and criminal cases and is relevant to determining a defendant's willfulness or illegal intent); *Bier v. Fleming*, 717 F.2d 308, 312-14 (6th Cir. 1983)(holding state officials had immunity when they relied in good faith on the advice of counsel in a action brought under 42 U.S.C. § 1983); *Vulcan Materials Co. v. Atofina Chemicals Inc.*, 355 F. Supp. 2d 1214, 1244 (D. Kan. 2005)(allowing evidence of defendant's reliance on attorney's advice to demonstrate lack

of fraudulent intent in civil contract case); *Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club*, 210 F.R.D. 673, 676 (D. Minn. 2002)(stating advice-of-counsel evidence impacts an infringer's intent in a trademark case).

Many state courts have also recognized that the advice of counsel constitutes a defense to a requirement of intent. *See, e.g., State v. Franchi*, 746 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 1999)(stating reliance on advice of counsel can negate intent); *see also Cosio v. State*, 793 P.2d 836, 838 (Nev. 1990)(opining the district court's error in excluding evidence of reliance on advice of counsel was reversible error; reliance on advice of counsel may be relevant to show defendant's intent, or lack thereof); *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350, 351 n.2 (Ark. 1975)(noting that the board held a closed session upon advice of its attorney and acted in good faith believing its action to be legal); *Booker v. U. S.*, 283 A.2d 446, 447 (D.C. 1971)(suggesting that mistake of law can create a defense when specific intent is at issue).

In a state case most on point, an appellate court held that a government board violated the Michigan Open Meeting Act when the board did not permit the plaintiffs to submit comments at the board's hearings. *Truel v. Otsego County Zoning Board of Appeals*, 2002 WL 31082159, *2 (Mich. App. 2002)(unpublished opinion). The Court found the board violated the OMA, but an award of damages to the plaintiff was not appropriate because there was not "an intentional violation of the OMA by a public official." *Id.* The board had relied on the advice from its attorney. *Id.*

II. PUBLIC POLICY DICTATES THE DISTRICT COURT DECISION SHOULD NOT STAND.

Those persons who run for and serve in “inferior public offices” are not professional politicians. These officers lack sufficient training and experience to discern the correctness or incorrectness of statutory interpretations by the government entity’s attorney. Those persons who run for or serve in local offices are farmers, mechanics, teachers, local business owners, and others who most often want only to provide service to the community.

As reflected by the amicus briefs in this case, at every level of government, elected and appointed officers seek out and rely on the advice of attorneys on legal matters. In fact, they must be able to rely on the advice of their attorney. This should be the case whether the advice is good or bad, correct or incorrect³.

The plethora of case law under the Open Meeting Law is evidence of the Law’s intricacies and the difficulties in its interpretation. The case law also demonstrates the differing legal opinions that exist in a given factual context. Consequently, a public officer’s ability to rely on the advice of the entity’s attorney is particularly important to preserve when the entity’s concern relates to compliance with the Open Meeting Law.

Given the consequences of violations of the Open Meeting Law, the stakes in an Open Meeting Law claim are already high. Exposing local officers to removal, fines, and attorneys’ fees in circumstances like those that exist in this case will only serve to

³ What attorney can truthfully say he or she has given correct legal advice to clients 100% of the time?

discourage participation in government. Would a citizen, aware of the district court's holding, wish to expose himself or herself to the possibility of economic consequences and community stigma due to the removal from office, even in circumstances where the attorney's advice was sought?

Even if a citizen were to accept the risk of serving in a public office, the district court's decision may impact the proper operation of government. Imagine a particularly contentious issue where allegations of potential Open Meeting Law violations are made. Without the safe harbor of the attorney's advice, the local officer is presented with a Hobson's choice: follow the attorney's advice and risk sanctions, or reject the advice and withdraw from participation in what may be an important decision.

Left to his or her own devices, the fear of civil sanctions, attorneys' fees, and removal may cause a local officer to pull out of discussions, meetings, and perhaps a decision requiring a vote, even where a local entity's attorney had advised the body the discussion, meeting, or vote is proper. The choice between possible sanctions and full democratic participation is bad policy – the safe harbor of attorney's advice provides the solution. Full and unfettered participation in democratic processes is good public policy.

Recognition of a safe harbor in reliance on attorney advice in the Open Meeting Law context will not defeat the purpose of the Law. The goal and objective of the Open Meeting Law is, simply, openness in and access to government. Local officials will not be able to use reliance on attorney advice as a means of defeating openness. All attorneys, including public attorneys, are obligated to provide good and sound advice to their clients. No attorney can ethically advise a public client that the client's actions

comport with the Open Meeting Law where that attorney does not have a good faith belief in that conclusion.

In short, participation in local government should not be discouraged. Local officials should be able to rely on the advice of counsel in interpreting the Open Meeting Law. Officers should not be forced to analyze the correctness of the advice. Officers should not be exposed to significant economic and stigmatizing consequences of bad legal advice. Officers should not be discouraged from full participation in government by fear of individual liability.

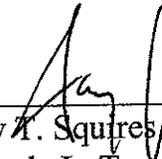
CONCLUSION

To impose civil fines or require the forfeiture of office, the Open Meeting Law requires that the officer intentionally violates its mandates. When a government officer relies on its attorney's advice, the officer cannot intentionally violate the mandate, nor can the officer's reliance be considered malfeasance of duties as required under the Minnesota Constitution. The district court's decision is plain and simple bad policy.

For all of the reasons articulated above, and those articulated in the Appellants' brief, the Association of Minnesota Counties respectfully urges that the district court's decision be reversed.

Respectfully submitted,

Dated: February 1, 2006

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**COURT OF APPEALS CASE
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A05-2342, A05-2343**

I hereby certify that this Amicus Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font, Times New Roman, 13 point font. The length of this Brief is 3385 words. This Brief was prepared using Microsoft Word 2002.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).