

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 RESPONDENTS**

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STATE OF MINNESOTA  
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Kenneth Brown and Robert Banks,  
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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,

Defendants-Appellants.

**CERTIFICATION OF**  
**BRIEF**  
**LENGTH**

**Consolidated**

**Court of Appeals Numbers:**

**A05-2340**

**A05-2341**

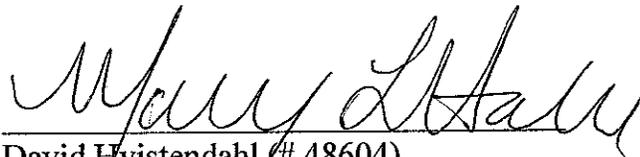
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**A05-2343**

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I hereby certify that this brief conforms to the requirements of Minn. R.  
Civ. App. P. 132.01, Subds. 1 and 3, for a brief produced with a proportional font.  
The length of this brief is 13,140 words. This brief was prepared using Corel  
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**RESPONDENTS' LEGAL ISSUES**

**ISSUE 1** **THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT APPELLANT SUPERVISORS WERE SUBJECT TO REMOVAL FROM OFFICE UNDER MINN. STAT. §13D.06, SUBDIVISION 3.**

*Apposite Authority:*

Minn. Stat. §13D.06, Subd. 3.

**ISSUE II** **APPELLANTS' RELIANCE UPON ADVICE OF ATTORNEY OJILE DOES NOT "NEGATE" A FINDING OF AN INTENTIONAL VIOLATION OF THE OPEN MEETING LAW**

*Apposite Authority:*

State v. AAMCO Automatic Transmissions, 199 N.W.2d 444 (Minn. 1972).

**ISSUE III** **RESPONDENTS' NOTICE OF REVIEW:**

**MINN. STAT. §13D.06, SUBD. 4, PERMITS A CAP OF ATTORNEY FEES OF \$13,000 PER PARTY PER ACTION.**

*Apposite Authority:*

Minn. Stat. §13D.06, Subd. 4.

## STATEMENT OF THE CASE

This case arises out of Goodhue County District Court, Civil Division, First Judicial District. The Honorable Thomas W. Bibus, Judge of District Court, presided at a bench trial on September 12 through 14, 2005. Respondents Ken Brown and Robert Banks filed four separate complaints against Appellants in their capacity as members of the Cannon Falls Township board. In their original complaint and by amended complaint, Brown and Banks alleged a total of eight separate violations of the Minnesota Open Meeting Law.

Brown and Banks both own property in Cannon Falls Township (“the Township”). They own property adjacent to Appellant Hovel. Hovel was a supervisor on the Township board. In 2002, Brown and Banks became aware that Hovel had registered a feed lot next to Banks’ property, which consisted of a shed and a small portion of accompanying pasture with about 8-10 head of cattle at the outset. The feed lot was non-conforming under the applicable Goodhue County zoning ordinance because it was too close to existing residences. Nonetheless, the Township board revoked Banks’ building permit for Banks’ residential construction, alleging that his residence did not meet certain set back requirements between feed lots and residential construction,

under the Township ordinance.

Not only was Hovel's feed lot non-conforming, but the Township was trying to impose upon Banks a township set-back ordinance that was pre-empted by the county set back ordinance. The Township board did this knowingly, in concert, and for the purpose of advancing Hovel's personal financial interests.

Also in 2002, Brown and Banks learned additional facts which led them to the conclusion that Appellants were acting in concert together to prevent or otherwise control residential construction in the Township. This was done to advance the personal gain who Hovel, who owned two feed lots in the Township. Appellants were acting in concert with the Township's attorney, who was also Hovel's personal attorney.

In March 2002, Brown and Banks sent to the Township board a written request under the Open Meeting Act, requesting notice of special meetings that addressed (1) feedlot permits and set-backs from residential properties; and (2) feedlot permits issued within Cannon Falls' urban expansion district or within two miles of the city limit of Cannon Falls. The Township's attorney, Ojile, advised the Township board that it did not need to provide any sort of notices to Respondents because the Township did not technically "register" feed lots or issue feed lot permits. Rather, that was a county function. The Township board never notified Brown or Banks of its narrow reading of the notice

request letter. Nor did the Township board ever ask for clarification from Brown and Banks.

In 2002, the Township board proceeded to hold eight special or regular meetings where Appellants discussed feed lot permits and set backs. At one of these meetings, the Township board revoked Banks' building permit for residential construction, asserting that Banks' construction site was too close to Hovel's non-conforming feed lot (the shed).

The Township board chairman, Appellant Johnson, personally went to Hovel's property and set a boundary marker stake away from the corner of Hovel's shed, so that the stake was substantially closer to Banks' building site. He did so, with full awareness of the tension between Hovel and Banks concerning set backs from feed lots, and months after receiving the March, 2002, request for notice letter from Respondents. Subsequently, the Township board pressured Banks to apply for a variance (which Banks did not need), and the Township board threatened to sue Banks if he did not cease construction on his residence.

Significantly, Attorney Ojile was representing both the Township board and Supervisor Hovel and Town clerk Harvey Glaess personally, relating to their feed lots and farming operations. Ojile advised the Township board to *not* provide notice of special meetings to Brown and Banks. The district court found that the Appellants' purported reliance on Ojile's advice was "not

reasonable or in good faith,” in light of the unique circumstances of this case. The district court found that Appellants Hovel, Johnson and Mahoney had “specific intent” to violate the Open Meeting Law on eight (8) separate occasions. The district court’s findings on the issue of reliance on legal counsel’s advice is a narrow one. Its findings are tailored specifically to the unique facts of this case.

Appellants were ordered to forfeit their right to serve on the Township Board of Supervisors for a period of time equal to the term of office they were then serving, under Minn. Stat. §13D.06, subd.3(a).

Finally, the district court ordered the Appellants to pay attorneys’ fees in the total amount of \$26,000.00. The district court concluded that \$13,000 “per party” was reasonable under Minn. Stat. §13D.06, Subd. 4(a). On this single issue, Respondents Brown and Banks have filed a Notice of Review. Respondents assert that the statute permits a cap of \$13,000 per party per action, and that a higher amount was justified and reasonable. Respondents are asking for remand of only this issue, with direction to the district court to reconsider the amount of fees awarded. Further, Respondents are requesting an award of attorneys’ fees incurred in this appeal and will timely file in this Court a separate motion for attorneys’ fees incurred on appeal, pursuant to Minn. Stat. §13D.06, Subd. 4(a).

## STATEMENT OF FACTS

Respondent Kenneth Brown is a resident of Cannon Falls Township (“the Township”). (T-85). Respondent Robert Banks is a property owner in the Township. (Finding of Fact No. 1, A-76) (T-14). Their properties are adjacent, and are located in Section 28 of the Township. Appellant Gary Hovel was a Township Supervisor, who served on the Township board for 15 years prior to being removed from office in this action. (T-144). Hovel owns property in Section 28 of the Township, immediately adjacent to and north of Banks’ property. (T-14).<sup>1</sup>

Banks purchased his property in the Township with the intention of building a personal residence on it. (T-14). His property in Section 28 is zoned A-2. (T-16). In Township property zoned A-2, there can only be twelve residential units built per section. (T-17). Given the restriction on number of residential units per section, building rights are in demand and highly valued. As the attorney for the Township (Michael Ojile) testified, the Township is a desirable location, close to Rochester and the Twin Cities, so there is a “fair amount of competition for building space and also this competition between agriculture and residential and all of that.” (T-411).

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Trial Exhibits 1 and 2 are maps reflecting the Township sections. Banks, Brown and Hovel own property in Section 28 of the Township.

Appellants Gary Hovel, Lawrence Johnson and Keith Mahoney made up the entire membership of the Township Board of Supervisors at all times relevant herein. (Finding of Fact No. 2, Appellants' Appendix, A-77).<sup>2</sup> They were the only three members on the board. (T-148).

Hovel operates two feed lots in the Township, and, as stated above, owns property adjacent to both Respondents. (Finding of Fact No. 3, A-77). One of Hovel's feed lots is in Section 28, next to Banks' property, and was the subject of the controversy in the case at bar. Hovel also has a 3000 unit hog feed lot in Section 33 of the Township. Mahoney also operates a feed lot in the Township.

As will be described below, in 2002 a combination of the alarming actions on the part of the Township board motivated Brown and Banks to retain an attorney, and send a letter under the Open Meeting Law requesting notice of all special meetings where feed lot permits and set backs from residential construction were discussed. Brown and Banks were rightly concerned about their property values in light of what appeared to be a rash of registration of "phantom" or non-conforming feed lots, done with the

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Appellants include in their appendix a copy of the District Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment dated October 28, 2005, and the *Amended* Findings of Fact, Conclusions of Law, Order for Judgment and Judgment dated November 23, 2005. Accordingly, all appendix cites in the fact portion of this brief will refer to Appellants' appendix, unless otherwise noted.

express intention of preventing residential building in the area, while preserving the building rights for feed lot owners and registrants.

Starting in late 2001, Banks had several meetings with the zoning administrator for Goodhue County. Banks advised her that he intended to apply for a building permit to construct a residence on his property. (T-16). Banks was required to apply for a building permit from first the Township, then Goodhue County. (T-16). Banks did so, and was granted a building permit from both the County and Township. (T-17).

What is significant for purposes of this appeal is that, in A-2 zones, there are set back restrictions on the distance between feed lots and residential houses in both the Township and in Goodhue County ordinances. (T-17). Goodhue County's ordinance prohibited a residential building within 2000 feet (the set back distance) of a registered feedlot, and *vice versa*. The Township ordinance required that the set back distance be only 1320 feet between residential construction and feed lots with less than 200 animal units. Because the set back distances went both ways, it was first come-first serve as between a feed lot registrant and a building permit applicant, meaning one could knock out the rights of the other (as will be addressed further below).

As to which ordinance controlled, Minn. Stat. §394.33 provides that no township can "enforce official controls inconsistent with or less restrictive than

the [county's].”<sup>3</sup> In 2002, Goodhue County’s 2000-foot setback between feed lots and residential construction was more restrictive. Therefore, the Township’s 1320-foot setback was pre-empted by the County’s more restrictive set back requirement.

In late November, 2001, a neighbor approached Banks, and advised him that Hovel was “trying to do something” with his land that would restrict Banks’ ability to build on his own property. (T-87). Brown was concerned also, because his property was equally close to Hovel’s property. (T-87). This neighbor was the Township planning commission chair.

In early 2002, Banks and Brown were shocked to learn that Hovel, their immediate neighbor, had registered his property as a feed lot. The feed lot did not comply with existing county zoning regulations. (T-19 and 92). Hovel’s newest “feed lot” was actually just a shed and some accompanying pasture on Hovel’s property which housed about 8 to 10 cattle at the outset.<sup>4</sup> Despite the fact that it was non-conforming, Hovel commenced expanding it almost immediately.

That Hovel had actually registered this shed as a “feed lot,” and

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This statute was acknowledged in a resolution passed by the Township board on October 10, 2001. (Trial Exhibit 82, T-316).

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This newly registered “feed lot” was in marked contrast to Hovel’s other feed lot near by, which housed approximately 3000 animal unites.

expanded it, caused Banks grave concern due the proximity of Banks' property to Hovel's property. Banks was concerned enough that he requested a meeting with the Goodhue County attorney and county zoning administrator. Brown attended the meeting with Banks in **February, 2002**. (T-20). Brown and Banks raised the concern that Hovel had improperly registered a feed lot on his property. (T-20). The Goodhue County Attorney recommended that Brown and Banks submit a complaint on the issue to the County, which they did at this same meeting.

At this same meeting, Brown and Banks also learned that their other neighbor, Albers, had registered for a feed lot in Section 28. (T-21 and 96). Albers was severely disabled and confined to a wheel chair (T-96), and owned only five horses. Respondents discovered that Hovel and his wife had assisted Albers in filling out a feed lot registration form just weeks before Respondents' above meeting with the Goodhue county attorney. (T-96). Hovel admitted assisting the Albers in this regard. (T-170). This feed lot was non-conforming for the same reason that Hovel's feed lot was non-conforming. The Albers' property was within 2000 feet of Banks' property. (T-21, 96).<sup>5</sup> The ultimate effect was that one could not build a residence within 2000 feet of Albers' feed lot. (T-171). Hovel was aware of this. (T-

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Albers later rescinded his feed lot registration. Hovel did not.

171).

Respondents also learned that the Township attorney, Michael Ojile (who also served as Appellant Hovel's personal attorney) had registered a feed lot, despite the fact that Ojile only owned two horses. (T-23). Ojile had registered a feed lot for fifty animals. (T-23). The result of Ojile's feed lot registration was to "condemn" any residential construction on properties in a 4000 foot diameter. (T-23). Hovel knew this. (T-172).

In 2002, as the district court expressly noted, feed lots and set backs were a "hotly contested topic" in the township. (Finding No. 43, A-82). Even Attorney Ojile, attorney for both the Township and Hovel individually, acknowledged that the issue of feed lots and set backs were becoming a "rather emotional" issue in the press. (T-365).

Respondents had an additional cause for concern. They were aware of pending litigation involving another township resident, Mark Olson ("the Olson litigation"). Olson had obtained a building permit from both Goodhue County and the Township. However, the Township revoked Olson's permit in 1999, because of the existence of Hovel's other feed lot located southeast of Banks' property in Section 33. (T-22, T-346-347). Olson commenced litigation against the County. The Olson litigation did not appear to directly involve the Township. Nonetheless, the Township board held a special meeting on **July 8, 2002**, to discuss whether the Township should file an amicus brief in the

Olson litigation, which was either on appeal or going to be on appeal. (T-373) The Board (Hovel, Mahoney and Johnson) chose to hire outside counsel, Peter Tiede, to present the Township's position. (Trial Exhibit 29, Agenda of meeting dated 7/8/02, and Trial Exhibit 30). The Township board's position was the same as that of Hovel's personal position – that is, Olson should not be granted a building permit due to the existence of Hovel's feed lot.

**Respondents' March 12, 2002 Request for Notice**  
**under the Minnesota Open Meeting Law**

On March 12, 2002, Respondents, through their attorney, sent a letter to the Township clerk, Harvey Glaess, requesting notice of certain meetings under the Minnesota Open Meeting Law. (Finding of Fact No. 5, A-77). At the time this letter was sent, Brown testified that he had no evidence of Open Meeting Law violations. (T-96). Brown testified that he wanted to send the letter because something “smelled fishy.” (T-96) Brown was concerned about getting “sandbagged” by Hovel, the Township board supervisor and his neighbor. (T-95).

The Respondents' March 12, 2002, letter stated as follows:

“Our firm has been retained by a number of township residents, who wish to be notified of any special and regular township meetings that address the following topics:

1. Feedlot permits and set backs from residential properties;

2. Feedlot permits issued with Cannon Falls' urban expansion district or within two miles of city limits.

This demand is made pursuant to Section 13D.04, Subd. 2(d) of the Minnesota Open Meeting Law. This letter is directed to you as the responsible official under the Open Meeting Law.

Please provide notice to the following individuals: [Respondents Brown and Banks].”<sup>6</sup>

Respondents sent a copy of this letter to Michael Ojile, the attorney for the Township. (Finding of Fact No. 12, A-78). Ojile received the letter. (T-341). The Township board received the letter. (Finding of Fact No. 10, A-78). Glaess, the Township clerk, discussed the letter with the Township board. (T-247). However, no minutes exist documenting when the Township board discussed the notice letter. None of the Appellants had a clear recollection of when the letter was discussed. (Finding of Fact No. 11, A-78). The district court found that the Township board discussed the March 12<sup>th</sup> letter at either a **June 12, 2002** meeting, or a **June 17, 2002** meeting, or both. (Finding of Fact No. 15, A-78). All three Appellants, Hovel, Johnson and Mahoney, were present at these meetings.

Attorney Ojile has been attorney for the Township since 1999. (T-340). Ojile was acting as attorney for the Township at the time Appellants received

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<sup>6</sup> Letter, Appellants' Appendix at A-2.

Respondent's letter requesting notice of meetings. (Finding of Fact No. 12, A-78; T-340). Ojile's billing records were introduced into evidence at trial. Ojile's billing records reflect that Ojile reviewed Respondents' March 12<sup>th</sup> letter on March 14, 2002. Ojile did statutory research of the Open Meeting Law on April 1, 2002. (Finding of Fact No. 13, A-78). Ojile did not review case law concerning the statute. (T-341). Ojile reviewed the Open Meeting Law again on June 14, 2002. This date was two days after a **June 12, 2002**, Township board meeting, and three days before Ojile prepared for the next Township board meeting on **June 17, 2002**.<sup>7</sup> (Finding of Fact No. 14, A-78).

Despite the clear language contained in the **March 12, 2002**, letter, Ojile advised the Township board that it did not have to provide *any* notices to Brown and Banks concerning discussions of feed lot permits and set back requirements from residential properties. (T-112). His view was that because the Township did not technically issue feed lot permits, the Township board need not give Brown and Banks notice of any discussions about feed lots and set back requirements.<sup>8</sup> (Finding of Fact No. 16, A-79). (T-287).

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The **June 17, 2002**, board meeting was in violation of the Open Meeting Law, as will be addressed further below.

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However, the Township issues building permits for agricultural buildings, and determines setbacks from feed lots before issuing a building permit. (T-248). Ojile testified the Town board reviews each potential building site as to whether it conforms to set backs, including set backs from feed lots. (T-411). Hovel's shed, which constituted a "feed lot," was an agricultural

Appellants admitted that they did not inform Brown or Banks of their very narrow reading of the letter, or of their intent *not* to provide any notice. (Finding of Fact No. 16, A-79) (T-152). Ojile never asked for any clarification from Brown or Banks regarding the March 12<sup>th</sup> letter. (T-342). Hovel was asked during trial if he, in fact, ignored half of what the letter said in reaching such a narrow interpretation of the letter. He responded, “evidently I did.” (T-151).

The district court found that even a “plain reading” of the letter indicated that Brown and Banks were requesting notice of meetings where feed lot permits and set backs from residential properties were discussed. The letter was “not reasonably subject to the narrow interpretation ascribed to it by the [Appellants],” and the request was not overly broad. (Finding of Fact No. 17, A-79). Appellants do not contest this finding.

The Respondents’ March 12, 2002 letter was a “valid and proper request” for notice of special meetings under the Minnesota Open Meeting Law. (Finding of Fact No. 6, A-78). Appellants do not contest this finding.

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building, for which the Township issued a permit. Hovel testified that the Township measures set-back distances from feed lots. (T-196). Hovel does these measurements himself. This duty is required under the Township ordinances. (T-197).

**Time line of Township Meetings and Events Relative to Banks’  
Property and Hovel’s Feed lot**

The district court issued separate findings of fact with respect to each and every meeting of the Township board where feed lot permits and set backs were discussed without any notice to Respondents. Those findings will be summarized briefly herein. A summary time line reflects the repeated and intentional nature of the Appellants’ numerous violations of the Open Meeting Law, despite many red flags, notices, and warnings to the Appellants.

Following receipt of the notice request letter, the Township board met for a special meeting on **June 17, 2002** to discuss Ojile’s representation of both Hovel personally and the Township board in relation to the Olson litigation. The district court found that the Olson litigation involved feed lot permits and set backs from residential properties. Therefore, the meeting fell within the scope of Respondent’s request for notice. Respondents did not receive notice of this meeting. (Finding of Fact No. 20, A-79). Appellants violated the Open Meeting Law on this date. (Finding Number 34, A-81).

Appellants assert that the district court’s finding concerning the **June 17, 2002**, meeting is “clearly erroneous” on the purported ground that the board’s discussion at the meeting on **June 17, 2002**, was only “tangentially related” to Respondents’ request for notice. (Appellants’ brief, page 41).

Appellants cite no law in support of this assertion. Appellants' argument is not persuasive. Appellants fail to point to a specific part of the record which would suggest that the district court's particular finding was "clearly erroneous." The district court's finding in this regard is granted deference, and respectfully, should be affirmed.<sup>9</sup>

The Township board held a special meeting on **June 18, 2002**, to discuss the Olson litigation again. This meeting involved feed lot permits and set backs from residential properties. Respondents did not receive notice of this meeting. (Finding of Fact No. 21, A-79). Appellants violated the Open Meeting Law on this date. (Finding Number 34, A-81). This finding is not contested.

The Township board held a special meeting on **June 19, 2002**. This meeting involved feed lot permits and set backs from residential properties. Respondents did not receive notice of this meeting. (Finding of Fact No. 22, A-79). Appellants violated the Open Meeting Law on this date. (Finding Number 34, A-81). Appellants assert that the district court's finding regarding the **June 19, 2002**, meeting is "contrary to law" on the purported ground that

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Undersigned counsel realizes that this she is putting forth legal argument in the fact portion of this brief. However, some of the issues raised by Appellants are less central than others. (Issues IV-VIII). Due to strict page number limitations, Respondents will briefly address these less central issues in the fact portion of this brief, because they do not require lengthy legal analysis.

the Open Meeting Law does not apply to a gathering of board members performing on-site inspections. (Appellants' brief, page 42).<sup>10</sup> Appellants misconstrue the district court's finding by reading it too narrowly. The district court found that the board actually met for a "special meeting," at which time set backs and feed lots were an issue. That the meeting may also have served a dual purpose of an on-site inspection, at the same time as the special meeting, does not negate the court's finding that a violation of the Open Meeting Law occurred. Appellants have not shown that the district court's finding concerning this special meeting is "clearly erroneous," and therefore, it should be affirmed.

On **June 22, 2002**, Banks and Brown met personally with Attorney Ojile. Banks and Brown advised Ojile that they thought he had a conflict. He was representing Hovel personally, including Hovel's interests in his existing feed lots, and Ojile was giving advice to the Township board in response to Brown and Banks' notice letter. It seemed highly at odds to Brown and Banks. Ojile did not provide any substantive response to Brown and Banks on that date, but it is important in that it should have put the Town board on high alert that it needed to be giving notice of special meetings to Brown and Banks.

On **June 24, 2002**, the Goodhue County zoning administrator sent a

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<sup>10</sup> **Issue V** in Appellants' brief at page 42.

letter to Hovel, advising him that his feed lot, located next to Bank's property, was not in compliance with the Goodhue County zoning ordinance because it was situated within 2000 feet of existing dwellings on adjacent properties. (Trial Exhibit 25). Hovel was given the choice to remove the feed lot within thirty days, or apply for a variance.

Also on **June 24, 2002**, the Goodhue County zoning administrator sent a letter to Banks, advising him that Goodhue County had denied his application for a building permit. The County advised Banks that a feed lot existed within 2000 feet of his proposed dwelling site. This "feed lot" was Hovel's shed, which was non-conforming. The County advised Banks that he could apply for a variance with the County, if he so chose. (Trial Exhibit 69).

Attorney Ojile's billing records indicate that on **June 26, 2002**, following a conversation with Township clerk Glaess, Ojile called Johnson, Hovel and Mahoney in succession, billing the Township for a portion of this time. Ojile's records also indicate that on June 27, 2002, he made "[m]iscellaneous calls to Town Board." (Trial Exhibit 15). On **June 27, 2002**, Ojile composed a letter to the County on behalf of Hovel personally, requesting an extension for consideration of Hovel's non-compliant feedlot. (Trial Exhibit 27).

The Township board held a special meeting on **July 8, 2002**. The Township board discussed legal representation by Ojile and the Olson

litigation. This meeting involved feed lot permits and set backs from residential properties, specifically, Hovel's feed lot and the Olson litigation. Respondents did not receive notice of this meeting. (Finding of Fact No. 23, A-79-80). The district court found that the Appellants violated the Open Meeting Law on this date. (Finding of Fact No. 34, A-81). This finding is not contested.

It is instructive that Edward Bailey, a feedlot operator in the Township, was notified of this **July 8, 2002** meeting. Appellant Mahoney gave testimony indicating that the reason Bailey was invited to this meeting was because he was a feedlot owner. (T-230-231). In fact, Bailey testified in an affidavit that Hovel had personally given him notice of the special meeting. (Trial Exhibit 33). In sharp contrast, citizens seeking building permits were not invited to the relevant meetings in 2002. The actions of the Township board in this regard indicate selective notification of its citizenry, depending on whether citizen interests aligned with the Township board members' agenda.

In **July, 2002**, Banks received a variance from Goodhue county to build, with no set backs. In **late July, 2002**, Banks commenced excavating work for his residential building site. Also in **late July, 2002**, Appellant Johnson, the *chairman* of the Township board, personally went to Hovel's property with the Goodhue County feedlot officer. Johnson set a boundary marker stake in the ground on Hovel's property so that the stake was

substantially closer to Banks' excavation site than the edge of the shed.<sup>11</sup> (T-287 and 296). The purpose of stake was to determine the distance between the edge of Hovel's feed lot and Banks' excavation site. (T-312). Johnson never contacted Banks about this visit. (T-312). When asked at trial who arranged for the meeting to set the stake, Johnson testified that Hovel may have arranged it, or the Township board. (T-334). Notably, there were no minutes on this topic. (T-334-335). Originally, when the Township had granted Banks' building permit, the distance between Banks' building site and Hovel's shed was estimated. (T-336). As will be seen below, the Township later used the location of this stake to demand that Banks cease all construction on his building site, and even threatened him with a law suit.

The Township board held a special meeting on **July 31, 2002**, to discuss the Olson matter with the Goodhue County Attorney.<sup>12</sup> This meeting involved feed lot permits and set backs from residential properties. Respondents did not receive notice of this meeting. (Finding of Fact No. 24, A-80). Appellants violated the Open Meeting Law on this date. (Finding of Fact No. 34, A-81). This finding is not contested.

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An aerial photograph introduced as Trial Exhibit 79 reflects the location of the stake in relation to Banks' excavation site.

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Ojile was present at the meeting on Hovel's behalf, but his billing records reflect that charged his time for attending this meeting to the Township. (T-374-365).

The Township board met for a *regular* meeting on **August 7, 2002**. According to the minutes, Ojile was present to discuss set backs. This meeting involved feed lot permits and set backs from residential properties. In fact, Banks' excavation was specifically discussed. Because the date and time of this regular meeting had been changed, publication was required under the Minnesota Open Meeting Law. However, the public notice of the change in time and date was published in the newspaper the day *after* the meeting. The district court found that Appellants "were not forthright in their explanation as to why the meeting date was changed from the regular date of August 14 to August 7, 2002. (Finding of Fact No. 25 and 26, A-80).<sup>13</sup>

The district court went on to find that, based on all evidence adduced at trial, that the Township board intentionally changed the regular meeting date from August 14, 2002, to **August 7, 2002**, in order to give the Township board an opportunity to discuss Hovel's feedlot in relation to the set back from Banks' property prior to an upcoming August 12, 2002, County Board of Adjustment meeting, where Goodhue County was to consider Banks' variance

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<sup>13</sup>

The minutes of the August 7<sup>th</sup> meeting indicated that Ojile made a presentation concerning a procedure ensuring setbacks were met. However, an article dated August 15, 2002, in the local newspaper indicated that, at the August 7 meeting, the Township board actually, "discussed the distance of Gary Hovel's feedlot from [Respondent] Banks' excavation cite. . . and the difference between the county and township zoning ordinances pertaining to feedlot spacing." (Trial Exhibits 37, 40)

request. (Finding of Fact No. 26, A-80). (The purpose of the August 12 meeting at the County was to clarify and correct an administrative error, and to affirm the granting of Banks' variance).

With respect to the **August 7, 2002**, meeting, Appellants contest the district court's finding of fact with respect to Hovel. Appellants argue that because Hovel was not actually present at the **August 7, 2002**, meeting, Hovel could not have intentionally violated the Open Meeting Law on that date. (Appellants Brief, page 43). This assertion is unsupported by law and by the facts found by the district court. The district court issued a separate finding of fact on this precise point. (Finding of Fact No. 38, A-81-82). The district court found that Hovel was not present at the meeting because he was at a county fair. The district court found further as follows:

“According to Attorney Mr. Ojile’s billing records, Mr. Ojile had a telephone conference with Nancy Hovel, Defendant Supervisor Hovel’s wife, concerning ‘Banks/County/survey’ on the same day as the Township board meeting. Given all the facts and circumstances, Defendant Supervisor Hovel was aware of the meeting change and intentionally agreed to the holding of the meeting without the proper notice to the public or to [Respondents]. His attendance was not mandatory at the meeting to constitute a violation, as he actively participated in the rescheduling [of the meeting] and the failure to give notice.”[A-82]

Appellants have not shown, and cannot show, that the district court's finding of fact on the issue of Hovel's violation of the Open Meeting Law on

**August 7, 2002**, was “clearly erroneous.”

Notably, Brown had a phone conversation with Attorney Ojile on **August 19, 2002**.<sup>14</sup> It became heated. (T-101). During this conversation, Brown expressed concern that he and Banks were not receiving the notice they were due, per their March 12, 2002 letter. (T-102). Brown accused the Township of having “secret meetings.” (T-104, 107). Brown had just read an article in the township local newspaper dated August 15, 2002, which summarized the **August 7, 2002**, town board meeting.<sup>15</sup> (T-111). The newspaper article stated that the board had discussed Banks’ property. (T-106). Even after this conversation between Brown and Ojile, the town board *still* failed to send to Brown and Banks any notices.

It deserves emphasis here that Brown had no indication of town board violations of the Open Meeting Law until *after* he read the newspaper article. (T-93-94). He immediately notified the Township attorney of his concerns of

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Ojile’s billing records confirm that this conversation did occur. (Trial Exhibit 40).

15

(Trial Exhibit 32). The local newspaper was aware of the change of date of the regular meeting on **August 7, 2002**, just in time to send a reporter to the meeting, because the Township had sent notice to the paper on the date of the meeting. However, the notice was not published in the newspaper until the day after the meeting on **August 8, 2002**. (T-259-260). Appellants have asserted at various points in the litigation that “even the press knew about this meeting.” Appellants are disingenuous in this regard.

secret meetings. Appellants and *Amici* assert that Brown and Banks should not have been able to “stockpile” Open Meeting Law violations, and “blind side” Appellants by filing four actions at one time. This assertion could not be further from the truth. To quote the district court on this very issue, “[t]he facts of the matter at hand do not implicate notice concerns. [Appellants] received notice several times of the need to comply with the law – first from the March 12, 2002, letter; second in early August 2002 when the township attorney was confronted after failure to notice the change in the regular meeting date; and third in August 2002 when a very full meeting demonstrated the will of [Respondents] to attend meetings.”<sup>16</sup>

On **August 12, 2002**, as stated above, the County confirmed the grant of Banks’ variance to build.<sup>17</sup> The County at this meeting added a set back requirement to the variance. This prompted a letter from Ojile to Banks dated **August 20, 2002**. Ojile stated in this letter that it was the Township’s position that Banks must comply with the Township’s set back ordinance, despite the fact that the County had already granted Banks a variance to 1,160 feet. (Trial

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<sup>16</sup>

District Court Memorandum dated November 23, 2005, Appellants’ Appendix, A-98.

<sup>17</sup>

It is important to note that Banks applied for his variance with the County under protest, because Hovel’s shed next door (the “feed lot”) was still non-conforming under County zoning ordinances. Hovel had not bothered to apply for a variance, despite the County advising Hovel that he needed to do so.

Exhibit 41). Ojile wrote that “the actions by the Goodhue County Board of Adjustment granting you a variance from the Hovel feedlot down to 1,160 feet creates a problem for the Cannon Falls Township zoning code. As you know, the [township] zoning code requires that your residence be situated on the building site at least 1,320 feet from the Hovel feedlot.” Ojile noted further that the stake (moved by Johnson) was only 1,160 feet from Banks’ dwelling excavation site, and therefore, Banks’ dwelling would be 160 feet too close to Hovel’s feedlot.

Ojile’s assertions in this letter were blatantly incorrect, because the County’s ordinances took precedence over the Township ordinances. Also, as of this date, Hovel’s feed lot was still non-conforming under County zoning ordinances, and Hovel had not yet applied for a variance with the County, as the County told him to do. The Township, through Ojile, was trying its hardest to shut down Banks’ building site, which would have preserved building sites on Hovel’s property. It must be recalled that only twelve residences were permitted per section in the Township. (A-17). Therefore, property with building rights had significantly more value than property without building rights. Residential building sites were in demand. Ojile knew this. (T-411). This is the crux of the problem giving rise to this case. A feed lot owner such as Hovel could send a certificate of closure of a feed lot the State at any time, and build. This could be done without any notice to

neighboring property owners. As such, Hovel was freezing the building rights of the neighbors around him. This was particularly egregious, in light of Hovel's position as an elected official in charge of zoning decisions in the Township.

On **August 27, 2002**, the Town board passed a motion providing that Banks' building site was not in compliance with the Township zoning ordinance. (Trial Exhibit 48). The Township advised Banks that he must apply for a variance if he wished to continue building.

The Town board held a special meeting on **September 16, 2002**. At this meeting, the Township board revoked Banks' building permit. (T-116 and 266). This meeting also involved feed lot permits and set backs from residential properties. Respondents did not receive notice of this special meeting, even though it directly affected Banks' property. (Finding of Fact No. 32, A-81) (T-116). Appellants violated the Open Meeting Law on this date. (Finding of Fact No. 34, A-81). This finding is not contested. The board and Ojile never bothered to inform Brown or Banks in advance of the meeting that Banks' building permit might be revoked. (T-389 and 116).

Also at the **September 16, 2002**, special meeting, Ojile testified that he withdrew from representing the Township board concerning Banks and the Township's revocation of Banks' building permit. (T-388). However, there is no reference in the minutes to Ojile's withdrawal as counsel for the Township.

(T-389). Nor is there any indication in his billing statements that he withdrew.

By **October, 2002**, Hovel still had not complied with Goodhue County's request, and still had not filed for a variance for his feed lot next to Banks' property. (T-391). Despite this, the Township commenced pressuring Banks to apply for a variance for his building site. On **October 8, 2002**, Attorney Peter Tiede, acting as new counsel for the Township board, sent a letter to Banks' counsel, advising him that if Banks was not willing to apply for a variance with the Township, the Township board "may be forced to commence an action against him to have him stop construction on his house which I understand continues in violation of the [Township's] resolutions." (Trial Exhibit 73). The Township board was threatening Banks with a lawsuit, even though Banks' building site was permitted under the county zoning ordinance.

Banks' counsel immediately responded to this threat of a lawsuit by letter dated **October 9, 2002** (Trial Exhibit 77), advising Tiede that Johnson (the *chairman* of the Township board), had set the stake away from the corner of Hovel's shed so that it would appear that Banks' building site was within the Township set back distances. Further, Banks' counsel advised Tiede that Hovel's feed lot was non-conforming, because it was too close to existing residences. Because Hovel's feed lot was non-conforming, there was no *need* for Banks to apply for a variance with the Township.

On **November 2, 2002**, the Goodhue County Attorney sent Ojile a letter (in Ojile's capacity as attorney for Hovel). The County attorney advised Ojile (again) that Hovel's feed lot was not in compliance with Goodhue County zoning ordinances because it was too close to existing residences, and that Hovel needed to apply for a variance for his feed lot. (Trial Exhibit 56).

The Township board met for a special meeting on **December 5, 2002**. Appellants asserted that they were "brainstorming" about ordinances in general. However, the minutes for the meeting indicate that the board had discussed feed lot permits and set backs from residential properties. Brown and Banks did not receive notice of this special meeting. (Finding of Fact No. 33, A-81). The district court found an intentional violation of the Open Meeting Law at this meeting. (Finding of Fact No. 34, A-81).

Appellants assert that the district court's finding of a violation on **December 5, 2002**, is "clearly erroneous" on the purported ground that the district court interpreted the Respondents' notice request too broadly. (Appellants brief, p. 44). Appellants' assertion is not supported by fact or by law. The meeting minutes state that, "[t]he board discussed updating the township ordinances regarding requirements for the building permit process such as requiring surveys and information from the Goodhue County feedlot officer." (Appellants' Appendix, A-14). The district court property found that the **December 5, 2002**, meeting fell within the scope of Respondent's request

for special notice, particularly given the totality of the circumstances. For example, the district court found that Appellants admitted that they did not send Respondents *any* notices until after the Minnesota Department of Administration issued an advisory opinion about the Township's violations of the Open Meeting Law. (Brown and Banks requested this opinion, not Appellants). The Department issued its opinion on August 31, 2004, more than two years *after* Respondents sent their request for special notice. (Finding of Fact No. 40, A-82).

Further, the district court found that the Respondent's original notice letter should have put Appellants "on alert" because the issue of feed lots was a "hotly contested" issue in the Township in 2002. (Finding of Fact No. 43, A-82). In fact, the district court specifically referenced a newspaper article published in the Cannon Falls Beacon (7/18/02), entitled "Town Board denies permit; cites ordinance," in recognition of the public perception that whomever got a permit first, a feed lot owner or builder of a house, "would knock out the other one." (Finding of Fact No. 43, A-82). That is precisely what Hovel, Ojile, and the other board members were doing to Respondents and neighboring landowners – "knocking out" their right to build by registering "phantom" or otherwise non-permitted feed lots, and thereby preserving the limited number of building sites per section for their own properties.

**The Common Financial Interests and Maneuvering between and among Hovel, Attorney Ojile, Township Clerk Glaess, and the other Appellants**

There were common financial interests and under-the-table maneuvering between Hovel, Ojile and the other Appellants regarding feed lot registrations in the Township. Because of this, the district court determined that Appellants could not “shield” themselves from a finding of intentional violations under the Open Meeting Law by stating that they had relied upon Ojile’s advice. As will be addressed further in the argument portion of this brief, it is black letter law that anyone who engages in a fraudulent scheme forfeits all rights to protection, either at law or in equity. State v. AAMCO Automatic Transmissions, Inc., 199 N.W.2d 444 (Minn. 1972) (doctrine of *in pari delicto*).

The facts of the case are unique. Accordingly, this case is entirely distinguishable from the body of case law cited by the *amici curiae* concerning reliance on advice of counsel. The district court’s opinion is narrowly tailored to the specific facts. The district court’s judgment is fully supported by and consistent with the body of case law pertaining to reliance on advice of counsel. The “Armageddon” predicted by the *amici curiae* will certainly *not* come to pass if this Court affirms’ the district court. Another distinct reason that the decision should be permitted to stand is that there is now a statutory procedure in place which permits a public official to request an advisory

opinion from the Department (as Brown and Banks did), and if the official follows the recommendation of the opinion, he is immune from liability under the Open Meeting Law. Although this statute was not in effect in 2002, it defeats the public policy arguments put forth by the *amici*. (This argument will be addressed further below.)

The inter-relationships between the Appellants, Glaess and Ojile is incestuous relative to their property interests. For example, Glaess, the Township clerk, is a feed lot registrant and operator. (T-258). Glaess' land is adjacent to Banks to the south. Glaess owns approximately 130 acres of property jointly with Hovel. (T-172 and 257). Hovel farms Glaess' land for rent. (T-172 and 257). Hovel has a permit to spread manure from his feed lots on Glaess' property (T-172). Part of Glaess' property adjoins Banks' property in Section 28. (T-257-258). Hovel rents farm land from Attorney Ojile. (T-172). Appellant Mahoney also is feed lot operator. (T-225).

Ojile represented both the Township and Appellant Hovel, individually, during much of the relevant time with which this suit is concerned. All Township board members were aware of this dual representation, because Ojile sent a letter to Goodhue county on June 17, 2002, on behalf of both the Township and Hovel's family farm. (Trial Exhibit 21). Ojile billed the Township for a portion of Ojile's research on behalf of both the Township and Hovel. In 2002, 69% of the Township's legal fees, over \$17,600.00, were

spent on matters in which Hovel had an interest.<sup>18</sup>

Chairman Johnson knew that Hovel was a neighbor to Brown and Banks. (T-291). Johnson knew that Banks had been approved for a building permit in the summer of 2002. (T-291). Chairman Johnson was aware of the Respondents' special notice request. However, in July, 2002, Johnson personally went to Hovel's property and moved a stake so that it was situated closer to Banks' building site. (T-287 and 296).

Hovel, Glaess and Mahoney all had financial interests in registering feed lots, because each feed lot preserved building rights for the feed lot owners. As elected officials, the Town board members had the responsibility and the public trust to Township residents to carry out their duties in good faith. They did not do so. Hovel was not impartial in carrying out his duties as Township supervisor. Johnson was not impartial when he personally moved the stake closer to Banks' property, knowing what he knew. Ojile was not impartial when advising the board to not give Respondents notice of special meetings. The other Appellants also knew this. The Township board permitted Ojile to continue to represent both the Township and Hovel. The board followed Ojile's advice, which directly advanced Hovel's financial interests. All Appellants knew of the personal attorney-client relationship

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Trial Exhibit 59, itemizing Ojile's time spent on matters relating to Respondent Banks and the Olson litigation.

between Ojile and Hovel. Appellants authorized the payment of Ojile's legal expenses for legal services rendered on behalf of Hovel, not the Township. This was done at the expense of the residents of the Township.

Despite Appellants' and *amici curiae* repeated protestations to the contrary, the district court did not base its findings and conclusions on the mere existence of an attorney conflict of interest, which Hovel may have asserted, or which the Township should and could have asserted. Rather, the district court based its findings and conclusions on the fact that Appellants and Ojile were engaging in such concerted improper behavior that Appellants cannot assert as a defense reliance on counsel's advice.

#### **Procedural History of the Underlying Litigation**

As stated, Brown and Banks asked the Minnesota Department of Administration to issue an opinion concerning this matter. The Department issued a written opinion dated August 31, 2004 (Respondents' Appendix, A-7), finding that the Township board had indeed violated the Minnesota Open Meeting Law in 2002 on the following dates: June 15, July 8, July 31, August 7, August 27, September 16 and December 5, 2002. Minn. Stat. §13.072, Subd. 2, applicable to the Open Meeting Law, provides that opinions of the commissioner, while not binding, must be given deference by a court.<sup>19</sup>

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<sup>19</sup>

However, the district court stated that it made no reliance on the

The Department opined further that the Township board did not keep accurate and complete records of their postings or of their minutes in 2002. Under the Minnesota Official Records Act, Minn. Stat. §15.17, notices of special meetings and postings demonstrating that the requirements of the Open Meeting Law have been met should be preserved by municipal entities.

Even after issuance of this advisory opinion, the Township board never indicated to Brown or Banks that they would commence providing notices of special meetings. (T-112). Instead, Ojile, writing for the board, accused Brown and Banks in the local newspaper of wasting tax payer money, and wondered why Brown and Banks continued to “object to town government.” This letter was the proverbial “last straw” for Brown and Banks.<sup>20</sup>

In **December, 2004**, Brown and Banks commenced four separate actions against the same parties.<sup>21</sup> All were filed on December 29, 2004.<sup>22</sup> The

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advisory opinion for the district court’s findings of facts. (Appellants’ Appendix, A-99)

<sup>20</sup>

Ojile letter to Township board dated September 7, 2004. (Trial Exhibit 65, Respondents’ Appendix, A-19).

<sup>21</sup>

The Township was dismissed from the action because Respondents were not seeking injunctive relief. (Finding No. 49, A-83).

<sup>22</sup>

CX-05-181; CX-05-181; CX-05-183; CX-05-184. The four complaints, and four amended complaints dated June 30, 2005, are included in Appellants’ Appendix, starting at A-127).

complaints listed the same defendants (Hovel, Mahoney and Johnson), but alleged violations on different dates.<sup>23</sup>

Appellants agreed to consolidate the trials. Appellants never requested that the matters be tried separately, or sequentially. Appellants did not raise any objection to the procedure of the prosecution of the underlying litigation, until after trial in their post-trial motion for amended findings or for new trial.

The district court found that each of the eight violations were “separate and unrelated.” (A-82). The actions of Hovel, Mahoney and Johnson constituted nonfeasance of office, and ultimately misfeasance of office on September 16, 2002. (A-82). The district court found that the fact that this was the first Open Meeting Law notice received by the board did not alleviate its statutory duty. (A-82). (Recall that Hovel had served on the board for 15 years and had taken courses on the Open Meeting Law). The district court took into account Mahoney’s inexperience in office in imposing a lesser statutory penalty on him. However, the court held that by July, 2002, his excuse of

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<sup>23</sup>

Respondents alleged that the intentional violations occurred on the following dates:

- June 15-17, 2002 (on or about) – special meeting
- July 8, 2002 – special meeting
- July 31, 2002– special meeting
- August 7, 2002 – regular meeting
- August 27, 2002 – special meeting
- September 16, 2002 – special meeting
- December 5, 2002. – special meeting

inexperience “wears thin.” (A-83). The court stated that the timing of Johnson’s and Mahoney’s knowledge of the full parameters of the conflict between Banks and Hovel “relates to their level of good faith.” (A-83). All eight violations were done with “specific intent by all three [Appellants], with the purpose of limiting public comment and access to information.” (A-83).

The court ordered Hovel to pay \$300 for each violation (\$2400), Johnson and Mahoney each to pay \$100 for each violation (\$1600). (A-84). The court ordered that Appellants were to forfeit their offices immediately, under Minn. Stat. §13D.06, Subd. 3(a). (A-84). The court awarded to Respondents a total of \$26,000 in attorneys’ fees. (A-95, amended findings).

## ARGUMENT

**ISSUE 1    THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT APPELLANT SUPERVISORS WERE SUBJECT TO REMOVAL FROM OFFICE UNDER MINN. STAT. §13D.06, SUBDIVISION 3.**

**Standard of Review:**

The district court ordered that Appellants be removed from office because they had intentionally violated the Open Meeting Law “in three or more actions brought under this chapter involving the same governing body.” In so doing, the district court engaged in statutory interpretation or application, which it is reviewed *de novo*. Heine v. Simon, 702 N.W.2d 752, 764 (Minn. 2005).

**Argument:**

As stated, Respondents filed four separate complaints against all of the Appellants at the same time. Each complaint alleged that the Appellants had intentionally violated the Open Meeting Law on a different meeting date.<sup>24</sup>

The relevant statute, Minn. Stat. §13D.06, Subd. 3, provides as follows:

**Subd. 3.** Forfeit office if three violations. (a) If a person has been found to have intentionally violated this chapter in three or more actions brought under this chapter involving the same governing

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<sup>24</sup>

The complaints were amended by agreement to include four additional dates.

body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving.

(b) The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations, issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body.

Appellants assert that the underlying actions did not represent “three or more actions” for purposes of triggering the removal provision in the statute. (Brief, p. 27). If one strips away Appellants’ lengthy recitation of purported legislative history (addressed further below), Appellants’ argument in support of their theory nearly impossible to pinpoint. Appellants do not propose a procedure which they assert would trigger the removal provision in the statute.

Appellants seem to summarize their point at page 31 of their brief, stating that “in order to remove a public official ...the official must have been found to have intentionally violated the law in three successive proceedings.” (Emphasis added). Not only is this term not present in the statute itself, but this argument is contrary to what Appellants’ counsel argued on the record at the post-trial hearing on Appellants’ motion for amended findings, when Appellants raised this issue for the first time.<sup>25</sup> Appellants’ counsel presented

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<sup>25</sup>

Transcript of hearing dated November 18, 2005, ordered by

the following argument:

“This idea of sequentially. Our position is not, as has been suggested, that we should have tried that lawsuit, the June lawsuit, then come back and tried the August lawsuit .... So it’s not a situation where we say, well, we should have tried these lawsuits, one, two, three, four. Our position is even if they would have done that, that’s not – that’s contrary to what the legislature intended.” [11/18/05 T-16-17].

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“We certainly did agree to consolidate these for trial. We wouldn’t suggest under any circumstances that we go through one trial and second, third, fourth. But that begs the question, can you still do it that way? Can you just file four and, you know, kind of get everybody removed in one proceeding, is what happened here.” [11/18/05 T-19].

The question is, what exactly is the procedure that Appellants suggest must be followed? Appellants are unclear on this point.

The obvious flaw in Appellants’ argument is that the statute does not use the term “successive.” Nor does the statute use the term “sequentially,” as in, for example, adjudications must be determined “sequentially.” Despite the clear statutory language, Appellants are asserting that three “successive proceedings” are required under the Open Meeting Law to remove an official from office. If this were indeed the case, and assuming Appellants mean one trial at a time for each meeting, it would take at least five to six years to litigate the above violations, assuming an appeal on each violation.

At no time before or during trial did Appellants argue the above

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Respondents and submitted as part of the record.

interpretation of the Statute. At no time did Appellants insist that the actions be prosecuted and adjudicated sequentially or successively. Appellants consented to consolidation of the actions for purposes of trial. Had they objected, Appellants would have had the right to request four separate trials. It is entirely appropriate to combine four related actions among the same parties for trial in the interest of judicial economy. Appellants asserted a procedural objection for the first time post-trial, and as such, waived it.

It is important to note that the district court very carefully scrutinized Appellants' argument on this precise point. The district court included a separate four-page Memorandum with its amended order and judgment dated November 23, 2005, following the post-trial hearing. (Appellants' A-97). In its Memorandum, the district court stated that it had carefully reviewed the 1994 Amendment to the statute. The court determined that the Amendment did not indicate a legislative intent to "eviscerate" the statute, but rather, a restructuring to highlight that a finding of intentionality is necessary before removal is an issue. (A-97). The district court stated that it was important to recognize what the 1994 amendment did *not* do. The 1994 amendment does not require four separate adjudications, an issue explicitly raised in Claude v. Collins, 518 N.W.2d 836 (Minn. 1994). Instead, the 1994 amendment focused on the intentionality of the action, and only permits removal if a person has been found to have intentionally violated the Open Meeting Law

in three or more actions brought under the Law. The 1994 amendment does not require separate adjudications, successive actions, sequential actions, or that a third violation must occur after two rounds of judicial notification of two previous violations. (A-98). Further, the district court indicated in its Memorandum that it had reviewed the “legislative history” submitted by Appellants, and found that it was “inconclusive.”

The district court distinguished the case at bar from Claude v. Collins, 518 N.W.2d 836 (Minn. 1994), where the mayor and city council members were engaged in a series of negotiations with employee unions. In Claude, the defendants were conducting labor negotiations, and repeatedly making the same mistake over a period of time. In contrast, in this case, the district court found an “ongoing scheme and pattern of denying public notice, public access, and an opportunity for public input, all done intentionally and for private gain.” (A-97).

#### **The “Legislative History” included in Appellants’ Appendix**

Appellants cite extensively to the “legislative history” included in Appellants’ appendix. By way of brief procedural background, Respondents objected to Appellants’ attempt to introduce into the record the documents which Appellants deemed legislative history at the post-trial motion hearing on November 18, 2005. First, Respondents argued that the court should not

review legislative history where the statute is clear on its face. Heine v. Simon, 702 N.W. 2<sup>nd</sup> 752, 764 (Minn. 2005) (when interpreting a statute, the Court will first look to see whether the statute is clear or unambiguous on its face....when the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”)

Further, Appellants had provided only partial transcripts. It was not clear what the transcripts represented. The transcripts are not official transcriptions, taken down by an official court reporter. Rather, they were transcribed by an assistant in appellants’ counsel’s office. Appellants’ transcriber, Rebecca Eitreim, stated in an affidavit that she only listened to a portion of the audiotape recordings. (See Eitreim affidavit dated 11/15/05, Appellants Appendix, A-251). The transcripts were at times inaudible.<sup>26</sup> The district court denied Respondents’ motion to strike the legislative history. Instead, the district court reviewed it carefully and determined that it was “inconclusive.” (A-97).

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Appellants also quote verbatim apparent “testimony” of legal counsel for the Minnesota School Board Association, one of the *amici* in this case). (Appellants’ brief at page 24). This is entirely inappropriate. Not only is the testimony not the discussion of legislators, but it was presented by an *amici* in this case.

### **Response to Arguments of League of Minnesota Cities (“the League”)**

Like Appellants, the League asserts that it is “good public policy” to interpret Minn. Stat. § 13D.06, Subd. 3, to require that a resident of a township, or other public body, must bring three or more “successive” court proceedings before the forfeiture-of-office provision is triggered. (League brief, page 3). The League asserts that its suggested interpretation of the statute will, among other things, protect the right of citizens to be represented by the officials that they have elected. (League Brief, page 3, 6). In response to this assertion, Respondents rely on the clear purpose behind the Open Meeting Law, which is to assure the public’s right to be informed. That purpose is “deeply rooted in the fundamental proposition that a well-informed populace is essential to the vitality of our democratic form of government.” Prior Lake American v. Mader, 642 N.W.2d 729, 735 (Minn. 2002). The Supreme Court of Minnesota favors a broad interpretation of Open Meeting Law in order to effectuate the purpose of the Law. The League cites no contrary law for the proposition that the Open Meeting Law should be construed in favor of elected officials.

Next, the League asserts, without any evidence to support its assertion, that the purported purpose of the 1994 Amendment to the Open Meeting Law was to prevent aggrieved parties from “suddenly” bringing multiple claims of Open Meeting Law violations without giving officials notice of alleged

violations, or an opportunity to correct their behavior. (League brief, page 5). This rationale, even if correct, does not hold up. The district court found that Appellants had ample warnings, numerous red flags, and ample opportunities to correct their behavior. As the district court stated in its Memorandum issued with its amended order for judgment, “[t]he separateness of the violations was very troublesome, demonstrating a blatant disregard for the Open Meeting Law. To claim insufficient notice of a possible violation of the Open Meeting Law in each of these instances is not consistent with the facts adduced at trial.” (A-98).

Finally, the League asserts that the Appellants “should not be punished for relying on the advice of their attorneys when interpreting the Open Meeting Law.” (League brief, page 7). This statement misrepresents the district court’s findings. The district court did not remove the appellants from office *because* Appellants purportedly relied upon Ojile’s advice. Rather, the district court ordered Appellants’ removal because Appellants intentionally violated the Open Meeting Law on eight occasions.

## ISSUE II

### APPELLANTS' RELIANCE UPON ADVICE OF ATTORNEY OJILE DOES NOT "NEGATE" A FINDING OF AN INTENTIONAL VIOLATION OF THE OPEN MEETING LAW.

#### Standard of Review concerning "intent" is "clearly erroneous."

The question of a person's intent is one of fact. Therefore, the question of Appellants' intent to violate the Open Meeting law is a question of fact. See, Mankato Free Press II)<sup>27</sup> ("Here, because this court determined that the issue of whether respondents held private interviews for the purpose of avoiding the public meetings was a factual issue that was improperly decided by summary judgment, the issue that was determined on remand was a question of fact. This court will not reverse a finding of fact unless clearly erroneous. Minn. R. Civ. Pro. 52.01.") See, also, In re Estate of Anderson, 654 N.W.2d 682, 687 (Minn. App. 2002) (the Court of Appeals will review a district court's construction of an unambiguous instrument *de novo*, but where critical evidence in the case turns on extrinsic language about the testator's intent and disputed expert opinions about the language of the instrument, a "clearly erroneous" standard of review applies).

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Unpublished opinion, 1998 WL 865714 (Attached at end of Appellants' brief, but before the Appendix.

**Argument:**

Appellants assert that their reliance on Ojile's advice should "negate" a finding of intent, and that Appellants should be shielded from liability for intentional violations of the Open Meeting Law because they consulted with Ojile. (Appellants' brief, pages 34-40). Appellants focus on the conflict between the Board and Hovel, given that Ojile was representing them both. Appellants spend much time in their brief on the district court's alleged error of "imputing" a conflict on interest to the client, and devote several pages quoting the Rules of Professional Conduct (Pages 37-39).<sup>28</sup>

Appellants' argument on this issue is seriously misplaced, because it misconstrues the basis for district court's findings and conclusions of law. There was no "imputation" of a conflict. There was no need. Rather, Hovel and the board, acting in concert with Ojile, intentionally deprived the Respondents the protections of the Open Meeting Law.

It must be stressed that Ojile was not a party in this action. Ojile was not a board member, or an elected official. The wrongdoers under the Open Meeting Law were Hovel, Johnson and Mahoney. The board members are the responsible parties, as the holders of elected office. Ojile plays such a role in an outline of the facts of this case, simply because the board members were

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The Minnesota School Boards Association devotes a similar number of pages to this same argument in its amicus brief. (MSBA brief, pages 13-17).

trying to “hide” behind Ojile’s faulty legal advice.

Appellants’ assertion that their reliance on Ojile “negates” a finding of intent flies in the face of the doctrine of *in pari delicto*. The leading case on the doctrine of *in pari delicto* is State v. AAMCO Automatic Transmissions, Inc., 199 N.W.2d 444 (Minn. 1972). The doctrine typically applies to parties in an illegal contract. But the Supreme Court in AAMCO extended it to apply to “tortious transactions based upon fraud or similar intentional wrongdoing.” 199 N.W. 2d at 448. Summarized succinctly, the doctrine provides that “anyone who engages in a fraudulent scheme forfeits all right to protection, either at law or in equity.” The doctrine is based on a court’s reluctance to intervene where parties to a dispute are both wrong doers. The doctrine is entirely applicable to the facts of this case, to bar Appellants’ claim that their reliance of Ojile should “negate” a finding of intent, as a matter of law.

Further, Ojile was acting as attorney for the Township board. As such, Ojile had a duty to the individual residents of the Township. This is analogous to a case where an attorney has a duty to a beneficiary under a will, even though his client may have been the testator who hired him to draft the will. See, e.g., Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981). Ojile’s dual role, acting in concert with Hovel and the board members, harmed the citizens of the Township because the Appellants chose to retain him and rely on him for advice, despite the heated situation between Hovel and Banks.

Ojile's actions on behalf of the Town board and Hovel may have been inappropriate. But the focus is not on Ojile's actions. It is on the *Appellants'* combined actions in holding the meetings, and in failing to give notice to Brown and Banks. The Town board was entirely misguided in using Ojile as its attorney in light of the facts adduced at trial. This constitutes the basis for the district court's finding that the Appellants were not "reasonable" in their reliance on Ojile.

The Minnesota School Board Association ("MSBA"), alone among the *amici* and Appellants, at least admits that the facts of this case are "very specific" with respect to the relationship between Appellants and Ojile. (MSBA brief, page 16) (emphasis added). This point is important, and certainly correct. This Court need not make new law on the issue of reliance upon advice of counsel. This Court need not engage in sweeping generalizations and bright-line rule making. Rather, the district court's limited findings may easily be affirmed on the grounds that the relationship and interconnectedness between Ojile, Hovel and Township board made is such that Appellants' reliance on counsel was unreasonable, and certainly does not "negate" a finding of intentional violations of the Open Meeting Law.

Further, the purported public policy debacle predicted by the *amici* is a smokescreen, in light of a 2003 statutory amendment. Minn. Stat. §13.072 provides public entities with the ability to request an opinion from the Minnesota Department of Administration as to their obligations under the

Open Meeting Law. If the public entity or officials rely on the opinion, they are shielded from penalties under the Open Meeting Law. Further, a public official is not subject to removal from office if the official acts in reliance on the opinion. This procedure was not in place in 2002. But it is relevant in that it defeats the public policy rationale put forth by the amici. In other words, the statute now provides a framework by which an official may easily shield himself or herself from penalty or liability under the Open Meeting Law. Therefore, this Court need not provide any bright line rule concerning reliance on advice of counsel, and whether it negates a finding of intentionality as a matter of law.

**Response to Arguments of  
Association of Minnesota Counties (“AMC”)**

AMC also argues that the Township officials’ reliance on Ojile’s advice negates a finding of an intentional violation of the Open Meeting Law. (AMC brief, page 3). AMC asserts that the proper standard of review on this issue is *de novo*, in that the district court was interpreting the statute in finding that the violations were intentional. (Brief, page 3). Respectfully, AMC is incorrect on the proper standard of review. The district court’s findings of intentional violations of the Open Meeting Law constitute findings of fact, and are subject to a “clearly erroneous” standard of review, as discussed above.

At page 3 of its amicus brief, AMC refers to an unpublished decision,

Wegman v. Olmsted Soil Water Conservation District, 2002 WL 31926223 (Minn. App.)<sup>29</sup> for its assertion that the district court’s finding on intentionality should be reviewed *de novo*. A careful reading of Wegman does not hold as such. There is no discussion of intentionality in the Wegman opinion, nor does it provide that the question of intent is reviewed *de novo* . .

AMC cites a unpublished Michigan Court of Appeals decision, Treul v. Otsego County Zoning Board of Appeals, 2002 WL 31082159 (Mich. App) (unpublished opinion).<sup>30</sup> This opinion is not controlling, but it discussed the Michigan open meeting law. AMC cites Treul, stating that is is a case “most on point” for the proposition that where a public board relied on advice of its attorney, there could not be an intentional violation of the Michigan open meeting law. (Brief, page 10). A careful reading of Treul reflects that the plaintiffs in that case never alleged an “intentional violation” of the Michigan open meeting law.<sup>31</sup> Further, the Michigan court stated in *dicta* simply that it did not believe an injunctive remedy was necessary where the public body commenced “good faith” reliance on counsel. In short, Treul is not remotely on point.

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<sup>29</sup> AMC Appendix, A-5.

<sup>30</sup> AMC Appendix, A-10.

<sup>31</sup> AMC Appendix, A-12.

**Response to Arguments of  
Minnesota Association of Townships (“MAT”)**

Before addressing MAT’s arguments, the question must be asked, what is MAT’s true involvement in this case, and is it appropriate? MAT is paying the attorneys’ fees for Appellants. (See MAT brief, page 1, note 1). This is so, even though the Township was dismissed from the action, and only the individual elected officials, Hovel, Johnson and Mahoney, remained in the action. The district court found intentional bad acts on the part of the Hovel, Johnson and Mahoney. It is established public policy that an insurance company will not provide insurance coverage for intentional torts of its insureds. The situation here is analogous. MAT is insuring the intentional bad acts of Hovel, Johnson and Mahoney. The residents of all township across the State are paying for the insurance coverage in this action, by virtue of their membership in MAT.

Further, it cannot be said that MAT is submitting a true “friend of the court” brief. MAT will be responsible for paying out at least \$26,000 in attorneys fees to Respondents, assuming that this Court affirms the district court’s orders for judgment. MAT has a direct financial interest in the outcome of this particular case. Township residents across the State of Minnesota may take issue with MAT paying out on a personal judgment against Township officials.

MAT states that against a “backdrop” of purported complexity of the

Open Meeting Law “must be measured the reality of local government in Minnesota.” (MAT brief, page 4). In fact, Hovel had served on the Township board for 15 years. He even took courses on the Open Meeting Law. (T-198). MAT argues that townships are “resource poor.” This argument is unpersuasive. MAT maintains a web site with a resource library that addresses the Open Meeting Law in depth. ([www.mntownships.org](http://www.mntownships.org)) In fact, Respondents used this resource extensively when first researching the Open Meeting Law.

Further, there is no evidence in the record that the Township was in fact “resource poor,” or that Respondents were “resource rich,” for that matter. Respondents are individuals facing the onerous burden of taking to task a township for violating the Open Meeting Law. The “reality” (to use MAT’s phrase) is that Respondents did not have the assistance of *amici*. The Respondents did not have an insurance company paying for their attorneys’ fees and costs.<sup>32</sup>

Even after an opinion in favor of Brown and Banks from the Department of Administration, Brown and Banks were required to proceed to litigate the matter with their counsel for *over a year*, and go through a multi-day trial, in order to remove Hovel, Johnson and Mahoney from office.

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Contrary to Appellants’ assertion, Respondents attorneys’ fees and costs on appeal are not under a contingency fee arrangement. This will be the subject of Respondents’ separate motion for attorneys fees on appeal.

Respondents are still embroiled in the litigation, as evidenced by this appeal. If this Court affirms the district court, it is expected that Appellants will petition to the Supreme Court.<sup>33</sup> Respondents raises these issues to show the Court that it is not MAT, AMC and the other *amici*, and their respective clients, that are truly paying the price of this litigation and this appeal. Rather, it is Respondents.

Respondents vehemently disagree with MAT's assertion that the district court's decision poses a "grave threat" to the ability of local governments to rely on their lawyers. (Brief, page 7). The gravest threat to open government is to allow elected officials to hide behind unwritten, undocumented "legal opinions," which serve the private and personal interests of the officials. The district court took care to explain precisely why Appellants' reliance on Ojile was misplaced, and further, why Appellants' reliance was eminently unreasonable.

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Given that their attorneys' fees are covered by the Minnesota League of Cities, there is no downside for Appellants in petitioning to the Supreme Court if this Court affirms the district court, other than perhaps the unsavory appearance it will present to the public and residents of the Township.

**ISSUE III – MINN. STAT. §13D.06, SUBD. 4, PERMITS A CAP OF ATTORNEYS’ FEES OF \$13,000 PER ACTION PER PARTY.**

**Standard of Review:**

Typically, whether a district court chooses to award attorneys fees in discretionary and therefore, reviewed under an “abuse of discretion” standard. However, in the case at bar, the district court engaged in statutory interpretation as to whether fees were awarded on a per party basis, or per action basis, or both, under Minn. Stat. §13D.06, Subd. 4. Accordingly, Respondents respectfully submit that the district court engaged in statutory interpretation or application, and its conclusion on this point is reviewed *de novo*. Heine v. Simon, 702 N.W.2d 752, 764 (Minn. 2005).

**Argument:**

Minn. Stat. §13D.06, Subd. 4(a), the applicable portion of the statute, provides as follows:

In addition to other remedies, the court may award reasonable costs, disbursements, and reasonable attorney fees of up to \$13,000 to any party in an action under this chapter.

The district court awarded \$13,000 to Brown and \$13,000 to Banks. (A-95). Respondents had submitted a detailed application to the district court under Rule 119.02, General Rules of Practice, for

\$11,998 in pre-litigation attorneys fees and costs, \$47,887 in litigation attorneys fees and costs, and \$5,729 in post-trial legal fees and costs. The litigation extended for over a year, with nine depositions and three days of trial, and a post-trial hearing.

Respondents respectfully are requesting that this Court clarify Subdivision 4 of the statute, and in so doing, hold that it permits for an award \$13,000 in attorneys' fees per party, per action. The district court appeared unclear on this particular point. Accordingly, by way of their notice of review, Respondents are requesting that this Court remand the issue of attorneys fees, with direction to the district court that an award of \$13,000 per party, per action is, in fact, permitted under the statute.

### CONCLUSION

Respondents Brown and Banks respectfully request that this Court affirm the district court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment dated October 28, 2005, and the *Amended* Findings of Fact, Conclusions of Law, Order for Judgment and Amended Judgment dated November 23, 2005, in their entirety, with the sole exception as to the amount of the award of attorneys' fees issued in Respondents' favor.

Concerning the amount of the award of attorneys' fees,

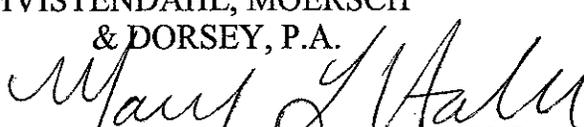
Respondents respectfully assert that the statute permits a cap on attorneys fees of \$13,000 per action, per party. Accordingly, Respondents request that this Court remand to the district court solely the issue of the amount of attorneys' fees to be awarded to Respondents with the clarification and directive set forth above.

Finally, Respondents respectfully request that this Court order Appellants to pay Respondents' attorneys fees and costs incurred in this appeal pursuant to Minn. Stat. § 13D.06, Subd. 4. Respondents will timely submit a separate motion and attorney affidavit itemizing said fees and costs.

Respectfully submitted this 24 day of February, 2006.

HVISTENDAHL, MOERSCH  
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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).