

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.*

**APPELLANTS' BRIEF AND APPENDIX**

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## STATEMENT OF LEGAL ISSUES

### **I. ARE MUNICIPAL OFFICIALS SUBJECT TO REMOVAL FROM OFFICE FOR MULTIPLE OPEN MEETING LAW VIOLATIONS ADJUDICATED IN A SINGLE PROCEEDING?**

**District court holding:** The district court held the adjudication of multiple intentional violations of the Open Meeting Law in a single proceeding satisfied the three “action” requirement for removal.

**Apposite Authorities:**

Minnesota Statute § 13D.06 (2004)  
Minnesota Statute § 645.16 (2004)  
Minnesota Statute § 645.45, subd. 2 (2004)  
*Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994)  
*Heine v. Simon*, 702 N.W.2d 752 (Minn. 2005)

### **II. DOES THE OPEN MEETING LAW AUTHORIZE AN AWARD OF MORE THAN \$13,000 TO RESPONDENTS FOR REASONABLE COSTS, DISBURSEMENTS AND ATTORNEY’S FEES?**

**District court holding:** The district court awarded each Respondent \$13,000 for reasonable costs, disbursements and attorney’s fees for the single proceeding.

**Apposite Authorities:**

Minnesota Statute § 13D.06, Subd. 4 (2004)  
*American Family Ins. Group v. Schroedl*, 616 N.W.2d 273 (Minn. 2000)

### **III. DOES RELIANCE ON THE ADVICE OF THE TOWNSHIP ATTORNEY AND THE TOWN CLERK CONCERNING COMPLIANCE WITH THE OPEN MEETING LAW NEGATE A FINDING OF AN INTENTIONAL VIOLATION OF THE OPEN MEETING LAW AS A MATTER OF LAW?**

**District court holding:** The district court held the town board of supervisors was not entitled to rely on the advice of the township attorney because he had an “obvious” conflict of interest and did not address the reliance on the advice of the town clerk.

**Apposite Authorities:**

Minnesota Statute § 13D.06 (2004)

*Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994)

*Mankato Free Press, Co. v. City of North Mankato*, 1998 WL 865714  
(Minn. App. Dec. 15, 1998)

**IV. WERE RESPONDENTS ENTITLED TO SPECIAL NOTICE FOR THE JUNE 17, 2002, MEETING CONCERNING THE TOWNSHIP ATTORNEY'S REPRESENTATION OF THE TOWNSHIP?**

**District court holding:** The district court determined special notice should have been sent to Respondents because the meeting involved a discussion of the township attorney's representation of the township and Supervisor Hovel, a feedlot operator.

**Apposite Authority:**

Minnesota Statute § 13D.04, subd. 2(d) (2004)

**V. ARE THE TOWN BOARD OF SUPERVISORS EXEMPT FROM THE NOTICE REQUIREMENTS OF THE OPEN MEETING LAW, UNDER MINNESOTA STATUTE § 366.01 (2004), WHEN THEY PERFORMED A SITE INSPECTION ON JUNE 19, 2002?**

**District court holding:** The district court did not address the application of Minnesota Statute § 366.01 Subdivision 11, but the district court determined the Appellants intentionally violated the Open Meeting Law on June 19, 2002.

**Apposite Authority:**

Minnesota Statute § 366.01, subd. 11 (2004)

**VI. DID APPELLANT HOVEL VIOLATE THE OPEN MEETING LAW WHEN HE DID NOT ATTEND THE AUGUST 7, 2002, MEETING?**

**District court holding:** The district court determined Appellant Hovel intentionally violated the Open Meeting Law on August 7, 2002, despite the uncontroverted evidence he did not attend the meeting.

**Apposite Authority:**

Minnesota Statute § 13D.04, subd. 2(d) (2004)

**VII. WERE RESPONDENTS ENTITLED TO SPECIAL NOTICE FOR THE DECEMBER 5, 2002, MEETING CONCERNING POSSIBLE ORDINANCE REVISIONS?**

**District court holding:** The district court determined special notice should have been sent to Respondents.

**Apposite Authority:**

Minnesota Statute § 13D.04, subd. 2(d) (2004)

**VIII. IS THE DISTRICT COURT'S FINDING APPELLANT MAHONEY INTENTIONALLY VIOLATED THE OPEN MEETING LAW CLEARLY ERRONEOUS WHEN NO EVIDENCE WAS INTRODUCED HE WAS AWARE OF RESPONDENTS' REQUEST FOR SPECIAL NOTICE IN 2002?**

**District court holding:** The district court determined Appellant Mahoney had knowledge of Respondents' request for notice.

**Apposite Authorities:**

Minnesota Statute § 13D.06 (2004)

*Martelle v. Thompson*, 167 N.W.2d 376 (Minn. 1969)

## STATEMENT OF THE CASE

This matter involves Respondents' claim the Cannon Falls Town Board of Supervisors ("Board") intentionally violated the Open Meeting Law on multiple occasions in the summer and fall of 2002. All of the Open Meeting Law violations stem from a single written request from Respondents for notice of special meetings regarding feedlot permits and setbacks from residential structures, as permitted by Minnesota Statute § 13D.04, subd. 2(d) (2004). Following receipt of Respondents' request, both the township attorney and the town clerk advised the town board that Respondents' request did not require the township to provide additional notice of otherwise properly noticed public meetings.

On December 29, 2004, Respondents simultaneously filed four virtually identical complaints in district court – the only difference is the meeting date for each complaint:

- Dist. Ct. File No. 25-XC-05-181 (Jul. 8, 2002 special meeting);
- Dist. Ct. File No. 25-C1-05-182 (Jul. 31, 2002 special meeting);
- Dist. Ct. File No. 25-C3-05-183 (Aug. 7, 2002 regular meeting); and,
- Dist. Ct. File No. 25-C5-05-184 (Sept. 16, 2002 special meeting).

*A-126 through A-141.* In June 2005, Respondents amended three of the complaints to add additional claims of Open Meeting Law violations:

- Dist. Ct. File No. 25-XC-05-181 (adding Dec. 5, 2002 special meeting);
- Dist. Ct. File No. 25-C3-05-183 (adding Aug. 27, 2002 special meeting);  
and,
- Dist. Ct. File No. 25-C5-05-184 (adding Jun. 15-17, 2002 special meeting).

*A-162 through A-177.* These additional Open Meeting Law claims also directly involved Respondents' written request for notice of special meetings.

By agreement of the parties, discovery and trial were consolidated as the four complaints raised common issues of fact and law.<sup>1</sup> A court trial was held before the Honorable Thomas Bibus, Judge of District Court, on September 12-14, 2005, in Goodhue County. On October 18, 2005, the district court issued a single set of Findings of Fact, Conclusions of Law, Order and Judgment, finding the individual town board supervisors intentionally violated the Open Meeting Law on eight separate occasions in 2002. The district court fined the individual town board supervisor members for each violation and removed Supervisors Gary Hovel and Keith Mahoney from office and declared their positions vacant. (Former Supervisor Lawrence D. Johnson did not run for re-election in 2005 and was no longer on the Board.)<sup>2</sup>

On November 18, 2005, the district court considered Appellants' Motion for amended Findings of Fact, Conclusions of Law and Order for Judgment.

Appellants also moved for formal consolidation of the district court files. Finally, Appellants objected to Respondents' request for an award of costs, disbursements and attorney's fees in the amount of \$52,000, \$13,000 for each "action." On

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<sup>1</sup> Although the district court did not issue a formal order of consolidation, this Court did so in its Order of December 13, 2005.

<sup>2</sup> The district court imposed a civil fine of \$2,400 against Hovel, and \$1,600 against both Mahoney and Johnson.

November 23, 2005, the district court issued amended Findings of Fact, Conclusions of Law, Order and Amended Judgment. The district court clarified its decision but otherwise denied Appellants' motions. The district court awarded attorney's fees in the amount of \$26,000 -- \$13,000 to each Respondent.

On November 29, 2005, Appellants filed this appeal. Appellants also filed an Emergency Motion for Expedited Review of Appeal and a Motion for Consolidation. In its Order of December 13, 2005, this Court denied the request for expedited review, but granted the motion for consolidation.

On December 5, 2005, the district court denied Appellants' Motion for a Stay. In its Order of December 20, 2005, this Court also denied Appellants' Motion for a Stay, but granted the applications of the Association of Counties, Minnesota Association of Townships, the Minnesota School Board Association and the League of Minnesota Cities for leave to file briefs as amici curiae.

## STATEMENT OF FACTS

### A. The Parties.

This matter involves allegations of intentional Open Meeting Law violations for meetings which occurred from June 17, 2002 to December 5, 2002, while Appellants Gary Hovel, Lawrence Johnson and Keith Mahoney were the Cannon Falls Town Board Supervisors. Cannon Falls Township is located adjacent to the City of Cannon Falls in Goodhue County. *A-1*. The township is governed by a three-member Town Board of Supervisors. Each Supervisor is elected to a staggered three-year term.

Hovel has been a dairy farmer since 1970. *Tr. Transcr.* 176. He was a town board supervisor from 1988 until the district court's decision and, if possible, intends to seek re-election, which is scheduled for March 14, 2006. *Id.*

Mahoney has been a dairy farmer for 15 years. *Id.* at 227. He was appointed a town board supervisor on June 12, 2002, to fill out the term of another supervisor and served until the district court's decision. *Id.* at 218. His seat is up for election in March of 2007.

Johnson worked for 35 years at Minnesota Malting and then had a small farm until he retired in 2002. *Id.* at 320. He is 65 years old and served as a town board supervisor for about 10 years. *Id.* at 320-21. He did not run for re-election in March of 2005. *Id.* at 284.

During most of 2002, Harvey Glaess, a school teacher, was the town clerk. *Id.* at 245-46. He was first elected to the position in March of 1999 and held the position until late 2002. *Id.* at 246. His duties included preparing the minutes, keeping records and providing notice of meetings. *Id.* at 251.

Michael E. Ojile started working as the township attorney in 1999. *Id.* at 405-06. In addition to his duties as the township attorney, Ojile also represented Hovel and his family since January 1998 on various matters. *Id.* at 346; A-3.

Respondent Robert Brown has been a township resident for over 11 years. *Tr. Transcr.* 85. He is a financial planner and owns property near Mr. Hovel. *Id.* at 84, 86. Respondent Bob Banks is a local business owner and owns property in the township near Hovel and Brown. *Id.* at 14-15.

**B. Respondents' Request for Notice.**

On March 12, 2002, Respondents' attorney sent the following letter to Cannon Falls Township Clerk Harvey Glaess:

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

- 1) Feedlot permits and set backs from residential properties;
- 2) Feedlot permits issued within Cannon Falls' urban expansion district or within two miles of the city limits.

This demand is made pursuant to Section 13D.04 subd. 2(d)<sup>3</sup> 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:

Ken Brown



Robert Banks



Thank you for your cooperation.

A-2. The letter was also copied to the township attorney. *Id.* This was the first such notice the township had ever received. *Tr. Transcr.* 404.

Following receipt of the letter, Glaess brought the letter to the attention of the town board, which at the time consisted of Supervisors Gary Hovel, Lawrence Johnson and Thomas Eng.<sup>4</sup> A-106. Mr. Ojile was also present at the meeting where the letter was discussed and opined the March 12 letter did not trigger the special notice provision of the Open Meeting Law:

My opinion was that this related to the issuance of feedlot permits, and the Board does not issue feedlot permits, and no notice is required.

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<sup>3</sup> Minnesota Statute § 13D.04 subdivision 2(d) provides:

A person filing a request for notice of special meetings may limit the request to notification of meetings concerning particular subjects, in which case the public body is required to send notice to that person only concerning special meetings involving those subjects.

<sup>4</sup> Supervisor Keith Mahoney was not on the Board at this time. Mahoney became a supervisor on June 12, 2002. A-3 through A-4.

*Tr. Transcr.* 405. Ojile reviewed the statute, but did not review any case law concerning the Open Meeting Law. *Id.* at 341. He did not advise the Board the Open Meeting Law was to be interpreted broadly. *Id.* at 250. Ojile testified it was his judgment no notice was necessary and acknowledged responsibility for this decision. *Id.* at 344. The township valued Ojile's advice and understandably had never refused to follow it in the past. *Id.* at 406.

The town clerk, who had the duty as the "responsible official" under the Open Meeting Law to provide notice of meetings, concurred with the opinion of the township attorney:

I read it as feedlot permits, and so I said I didn't feel that it applied because he specified feedlot permits as opposed to indicating setback from a feedlot, or just the fact that we are talking about feedlots.

*Id.* at 249.

In reliance on the professional opinions of their attorney and town clerk, the supervisors did not direct the clerk to provide any special notice to Respondents in 2002 of otherwise properly noticed public meetings. *Id.* at 180, 323.

### **C. Respondent Banks' Disputed Building Permit.**

A month after Respondents requested notice of certain special meetings, Respondent Banks applied for a building permit from the township. *Tr. Transcr.* 16. On April 10, 2002, the Board unanimously voted to issue Banks a building permit. *A-104; Tr. Transcr.* 25-26.

In 2002 Goodhue County and Cannon Falls Township each had a zoning ordinance mandating a minimum setback between feedlots and residential dwellings. Goodhue County mandated a minimum setback of 2000 feet between a feedlot and residence. *A-108*. Cannon Falls Township required a setback of one-quarter of a mile or 1320 feet. *A-110*.

On June 24, 2002, Goodhue County Land Use Management informed Banks his building permit violated the county's setback requirements. *A-108*. In July of 2002, Banks filed for and was granted a variance from the Goodhue County Board of Adjustment. *Tr. Transcr.* 34-36. Because of a procedural irregularity involving the county, Banks went through another hearing before the Goodhue County Board of Adjustment on August 12, 2002. *Id.*

The township was not aware of any setback issues with respect to the building permit until late July 2002. *Id.* at 35. On July 23, 2002, Supervisor Johnson accompanied Goodhue County Feedlot Officer Steve Schmidt to the Hovel feedlot, adjacent to Banks' property. *Id.* at 297. The feedlot officer staked the edge of the feedlot for purposes of determining setbacks. *Tr. Transcr.* 312. Based on the location of the stake, it appeared Banks' building site was in violation of the township ordinance that required a one-quarter mile setback between feedlots and residences. *A-125*.

**D. The 2002 Meetings.**

The district court determined Supervisors Hovel and Mahoney and former Supervisor Johnson intentionally violated the Open Meeting Law at eight separate meetings in 2002 – June 17, 18 and 19, July 8 and 31, August 7, September 16 and December 5. *A-76 through A-100*. The district court found no violations with respect to the August 27, 2002, special meeting as Respondents had actual notice of the meeting and attended this meeting. *A-91*.

All of these meetings were open to the public. *A-92, Tr. Transcr. 78*. Because of the unavailability of the town clerk, Supervisor Johnson posted notice of the June special meetings. *Tr. Transcr. 328*. The town clerk posted notice of the other meetings. *Id. at 266-267*. The township did not send special notice to Respondents of any of these meetings and relied on the advice of the township attorney and town clerk that the March 12, 2002, letter from Respondents' counsel did not require any additional notice of these posted meetings. *Id. at 269*.

**1. June 17, 2002, Special Meeting.**

On June 17, 2002, the supervisors convened a special meeting to discuss Ojile's ongoing representation of the township in light of his representation of Hovel. *A-111*. Ojile wrote a letter to the Hovels and the Board explaining his dual representation and asking if the Board wished for him to continue his

representation of the township. *A-3, 4*. The Board voted 2-0, with Hovel abstaining, to continue to use Ojile as the township attorney. *A-111*.

**2. June 18, 2002, Special Meeting.**

On June 18, 2002, the supervisors attended a public meeting of the Goodhue County Board of Commissioners, which involved, in part, a discussion of the ongoing litigation between Mark Olson and Goodhue County (“Olson litigation”). *A-22, 23, 124*. The Olson litigation involved a dispute over the requisite setbacks from Olson’s building site and Hovel’s feedlot in Cannon Falls Township. Ojile addressed the county board on behalf of both the township and the Hovel family. *Id.*

**3. June 19, 2002, Special Meeting.**

On June 19, 2002, the supervisors conducted a site inspection in the township to evaluate the setbacks for a proposed building site involving Richard Samuelson. *A-5*. The supervisors took no action at the site inspection, sending the matter back to its planning commission for further evaluation. *Id.*

**4. July 8, 2002, Special Meeting.**

On July 8, 2002, the supervisors convened a special meeting regarding its desire to become involved in the ongoing Olson litigation to ensure the integrity of its zoning ordinance. *A-6, 7*. Because of Ojile’s personal representation of Hovel,

the Board voted 2-0, with Hovel abstaining, to retain attorney Peter Tiede on behalf of the township with respect to the ongoing Olson litigation. *Id.*

**5. July 31, 2002, Special Meeting.**

On July 31, 2002, at the request of the Goodhue County Board, the Goodhue County Attorney's office "convened a meeting of individuals and entities most directly affected by Olson's request to renew his building permit." *A-8 through A-10.* The supervisors attended the meeting, where settlement of the Olson litigation was discussed. *Id.*

**6. August 7, 2002, Regular Meeting.<sup>5</sup>**

On August 7, 2002, Supervisors Mahoney and Johnson convened a regular meeting, which had been rescheduled from August 14.<sup>6</sup> *A-11, 12.* Supervisor Hovel did not attend this meeting. *Id.* At the meeting, a discussion took place concerning procedures for ensuring setbacks. *Id.* Historically, the township relied upon a property owner's representation concerning setbacks, without requiring a survey or other formal method of measurement. *Tr. Transcr.* 411. At the meeting,

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<sup>5</sup> Normally, there is no requirement to give special notice of regular meetings. However, because the regular meeting was changed from August 14 to August 7, the special notice provision of the Open Meeting Law was triggered. Minn. Stat. § 13D.04, Subd. 1 (2004).

<sup>6</sup> Although the change was not timely published in the newspaper, the town clerk posted proper notice for the regular meeting. *Tr. Transcr.* 269-70. Two residents were present at the meeting for action on building permits and the press was also present. *A-11, 12.*

there was a discussion of other possible methods or requirements for property owners in order to ensure setbacks. *Id.* at 377. In addition, Ojile raised the issue of the ongoing dispute regarding the setbacks between Banks' property and Hovel's feedlot. *Id.* The Board took no action related to either Banks' or Hovel's property. *A-11, 12.*

#### **7. August 27, 2002, Special Meeting.**

On August 27, 2002, the supervisors conducted a site inspection at Respondent Banks' property to measure the setbacks from Banks' building site to the edge of the Hovel feedlot. *A-101.* Ojile informed Banks of the meeting by letter dated August 20, 2002.<sup>7</sup> *A-102.* Respondents, their attorney and numerous supporters attended the meeting. *Tr. Transcr. 70.* Immediately following the site inspection, the Board continued the special meeting at the Cannon Falls Town Hall. The Board voted 2-0, with Hovel abstaining, that Banks' building site violated the requisite setbacks and requested he apply for a variance. *A-101.* Banks refused to do so, even though he had applied for and received a similar variance from Goodhue County. *Tr. Transcr. 73-74.*

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<sup>7</sup> The district court determined the notice requirements of the Open Meeting Law were satisfied because Respondents were provided "actual notice." Minn. Stat. § 13D.04, subd. 7 ("If a person receives actual notice of a meeting of a public body at least 24 hours before the meeting, all notice requirements of this section are satisfied with respect to that person, regardless of the method of receipt of notice.").

### **8. September 16, 2002, Special Meeting.**

On September 16, 2002, the supervisors held a special meeting and retained attorney Peter Tiede to represent the township with respect to Banks' building permit. *A-103*. The Board also rescinded the building permit previously issued to Banks by a vote of 2-0, with Hovel abstaining. *Id.*

On September 17, 2002, Attorney Peter Tiede wrote a letter to Banks' attorney informing him of the Board's decision and inviting "[Banks] to apply for a variance." *A-13*. The Board offered to waive the cost of the variance application, if Banks applied. *Id.*; *A-16, 29*. Banks, through his attorney, refused to apply for the variance and continued construction on the building site. *A-16*.

### **9. December 5, 2002, Special Meeting.**

On December 5, 2002, the Board met with the Cannon Falls Township Planning Commission to discuss ordinance revisions. *A-14, 15*. The new town clerk, Deb Stark, described the meeting as a "brainstorming" session, where no action was taken. *Tr. Transcr.* 215. The town clerk's notes of the meeting indicate 17 items were suggested to be considered in the future, ranging from gravel mines to barking dogs. Of the 17 items, two of the notations indicated "Feedlot officer contact" and "Requiring certified surveys for permit applications." *A-15; Tr. Transcr.* 212-213. The minutes also indicate:

The board discussed updating the township ordinance regarding requirements for the building process such as requiring registered surveys and information from the Goodhue County feedlot officer.

A-14.

### **STANDARD OF REVIEW**

The construction and applicability of a statute is a question of law and is reviewed de novo, without any deference to the district court's interpretation.

*Harris v. County of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004); *A.J. Chromy Const. Co. v. Commercial Mech. Servs., Inc.*, 260 N.W.2d 579, 582 (Minn. 1977).

With respect to the trial court's findings of fact, the standard of review on appeal is whether the findings are clearly erroneous. *Schuett Inv. Co. v. Anderson*, 386 N.W.2d 249, 252 (Minn. App. 1986); Minn. R. Civ. P. 52.01. The trial court's findings will be reversed if "upon review of the entire evidence, a reviewing court is left with the definite and firm conviction that a mistake has been made." *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987) (citing *City of Minnetonka v. Carlson*, 298 N.W.2d 763, 766 (Minn. 1980)). Clearly erroneous means "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Northern States Power Co. v. Lyon Food Prods., Inc.*, 229 N.W.2d 521, 524 (Minn. 1975).

## ARGUMENT

### **I. MUNICIPAL OFFICIALS ARE NOT SUBJECT TO REMOVAL FROM OFFICE FOR MULTIPLE OPEN MEETING LAW VIOLATIONS ADJUDICATED IN A SINGLE PROCEEDING.**

The district court erroneously applied the removal provision of the Open Meeting Law, Minnesota Statute § 13D.06, subd. 3 (2004), which requires the adjudication of three intentional violations in at least three separate actions before the removal of an elected official is statutorily authorized. Recognizing the need for at least three separate actions, Respondents simultaneously filed four nearly identical lawsuits – the only difference was the date of the particular meeting – in order to seek removal of the elected representatives of Cannon Falls Township. This result is contrary to the language of the statute and contrary to the express intent of the legislature.

#### **A. The Removal Provision and the Three Action Requirement.**

The Open Meeting Law authorizes the removal of an elected official in very limited situations. Minnesota Statute § 13D.06, subd. 3 provides, in pertinent part:

(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 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.

(Emphasis supplied.) In order for the extraordinary remedy of removal from office to be invoked, there are two requirements. First, the court must find the municipal official intentionally violated the Open Meeting Law. Second, the municipal official must have been found to have done so in three or more separate actions.

In 1994, the legislature incorporated both of these requirements into the Open Meeting Law in direct response to *Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994).<sup>8</sup> *Claude* involved a challenge to the Hibbing City Council's closed meetings to discuss strategy for labor negotiations. 518 N.W.2d at 839-40. The closed meetings all stemmed from the Council's erroneous belief it could properly close the meetings under the Open Meeting Law. The suit challenged the closed meetings and the court determined the closures were improper and found five intentional violations under the Open Meeting Law, for meetings that took place between January 2 and April 5 of 1991. *Id.* at 840. The Supreme Court,

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<sup>8</sup> The 1994 amendment to the Open Meeting Law was proposed and enacted while *Claude* was pending before the Minnesota Supreme Court.

interpreting the former language of the statute,<sup>9</sup> determined “once an official commits three separate, unrelated, and intentional violations, the statute mandates removal.” *Id.* at 842. Specifically, the Court found “one adjudication of three separate, unrelated, and intentional violations is sufficient for removal under the statute.” *Id.* The Court held removal from office was mandatory despite the fact the violations stemmed from a single erroneous interpretation of the Open Meeting Law and the violations were adjudicated in a single proceeding.

The legislature recognized the inequity of this situation and amended the Open Meeting Law in direct response to removal of public officials in *Claude*. The relevant amendments were contained in Minnesota Session Laws 1994, Chapter 618, House File Number (“HF”) 2028. *A-30 through A-65*. Specifically, Article I section 39 of HF 2028 amended the Open Meeting Law as it existed under Minnesota Statute § 471.705. *A-49 through A-52*. However, the proposed amendments to the Open Meeting Law were originally contained in HF 613 and its companion bill Senate File 715. Subsequently, HF 613 was included and passed as a part of the Data Privacy Omnibus bill HF 2028.

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<sup>9</sup> The former language of the statute provided, “upon a third violation by the same person connected with the same governing body, such person shall forfeit any further right to serve on such governing body.” Minn. Stat. § 471.705, subd. 2. (1990). Three or more actions were not required for removal under the former language – multiple intentional violations of the Open Meeting Law adjudicated in a single proceeding was sufficient for removal.

On March 28, 1994, the Senate Data Privacy Subcommittee heard substantial testimony concerning the impact of the Open Meeting law, including testimony from City of Hibbing Mayor Collins. Specifically, the Data Privacy Subcommittee introduced and considered amendments to Minnesota Statute § 471.705, subd. 2 (1992), the “Penalties” provision of the Open Meeting Law.

Mayor Collins testified to the impact and application of the Open Meeting Law removal provision:

If the intent was to prevent violations as I think the newspaper feels this claims, they are not interested in punishing people.

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Right now the Supreme Court is going to hear the matter, what, whether or not we should be removed from office. There are over three violations. Now our attorney is claiming that the removal from office clause is not constitutional. I think that if the law read that you had to have three separate adjudications, that that would make more sense, but it allows somebody to just wait until you have three alleged violations and then try to enforce the removal from office clause.

A-68. In response to the testimony from Mayor Collins, the Subcommittee introduced an oral amendment to the removal provision of the Open Meeting Law.

Senator Betzold: On page 10, line 2, after the word “third” I would like to insert the word adjudicated which would address the issue from Mayor Collins. Maybe we could vote on this, a few of them, we could vote separately.

Madam Chair: OK, Um, Senator Betzold, I remember Mr. Collins, bringing up that issue but I wasn’t clear what an adjudicated violation is and what an non-adjudicated violation is.

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Senator Betzold: Correct and if you use the term adjudicated, that's what I determined a court makes a decision that he has violated and if the court does it three different times, then clearly that would probably be grounds to forfeit your office.

Madam Chair: Um. Any further questions? Senator Merriam?

Senator Merriam: Madam Chair and Senator Betzold, what, I understand that if somebody had a violation, was found guilty and then did it again and was found guilty again and then he did it again and was found guilty, then I understand you've got the third adjudication. Now if instead he had done it twice and then was taken to court and was found guilty on two counts and then does it again, now do I have a third adjudication or a second adjudication. Or do I have a second or third adjudicated violation.

Senator Betzold: Ms. Chair, Senator Merriam. I read this to mean the court's got to tell ya. Ya know two different times, ya know, you violated the Open Meeting Law. On the third time you come back to court, the Judge says you've done it the third time and now you are facing forfeiture of office. Three (voices talking over each other) strikes and you're out.

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Madam Chair: Ah, Senator Betzold, following up on Senator Merriam's question. If the first time the person went to court he was found by a court to have violated the Open Meeting Law on two separate occasions, is that two adjudications, or one, is that your, yea.

Senator Betzold: Perhaps we could say on the third separate adjudicated violation. Or am I confusing it now.

Madam Chair: Well I think we have to be very careful about what we mean here. Maybe Ms. Ponte could work on, because what I am hearing you say is three separate violations, each of which have been adjudicated, or that doesn't make it any clearer. (laughter). Well,

maybe we can just hold off that amendment and does anyone have another amendment.

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Senator Betzold: I asked Ms. Ponte if she would work on this separate third adjudication and I think she has some language here that we could ...

Madam Chair: Um, we are referring members to page 10, line 2, Ms. Ponte is.

Ms. Ponte (Senate Counsel): Madam Chair, Members, it would be on line 2, strike everything after the period and on line 3 strike connected with and then insert, if a person has been found to have intentionally violated this section in three or more actions brought under this section involving, so it would read involving the same governing body comma, so that would actually require three separate court actions.

Madam Chair: Ms. Ponte, but does that get at what the original question Senator, I thought Senator Merriam had is what if you combine into one action a series of violations, which is not uncommon that you cite several different things. I wouldn't think.

Ms. Ponte: No Madam Chair this would not, this would only cover, this would be three separate actions brought against the person.

Senator \_\_\_\_\_: Madam Chair I just want to say briefly, I know I understand the concern but I would think if there are such believed intentional violations that would be brought as quickly as possible and not let them seek and accumulate and seek forfeiture of office. I hear you.

*A-71 through A-74.*

The Data Privacy Subcommittee amended the penalty provision by deleting “upon a third violation by the same person connected with” and inserting “if a person has been found to have intentionally violated this section in three or more

actions brought under this section . . .” See Minnesota Session Laws 1994-Chapter 618. The subcommittee amended the statute to include “actions” in reliance on the Senate attorney’s assurances the inclusion of “actions” meant three separate adjudications.

On April 22, 1994, the Senate adopted the amendments and passed HF 2028. Because the Senate’s amendments differed from the House’s original version of HF 2028, the bill was sent to Conference Committee on April 25 and April 26, 1994.

On April 26, 1994, Tom Deans, legal counsel for the Minnesota School Board Association (“MSBA”) testified before the Joint Conference Committee:

**I’m legal counsel for the School Board Association. I am also speaking tonight on behalf of the League of Cities and on behalf of the Association of Counties and on behalf of the Townships because we were asked to try to consolidate our testimony.**

\* \* \*

**The language on Lines 18 to 20 clarifies that a person has to be . . . has to have been found to have intentionally violated the section in three or more actions that were brought. This was brought forward by the Hibbing Mayor who did not want people to save up three actions and then all of a sudden bring it at once and try to have them removed when they didn’t have any notice they had been in violation. They had a long discussion on this in the Senate. They took a lot of testimony on this and we think that’s the right public policy.**

*A-75.*

The Conference Committee adopted the Data Privacy Subcommittee's amendment to the Open Meeting Law and the Senate passed the bill on May 5, 1994. On May 10, 1994, the Governor signed and enacted HF 2028 including the amendments to the Open Meeting Law. Specifically, Article I section 39 of HF 2028 amended the Open Meeting Law as it existed under Minnesota Statute § 471.705.

Subd. 2. [~~VIOLATION; PENALTY PENALTIES.~~] (a) Any person who intentionally violates ~~subdivision 1~~ this section shall be subject to personal liability in the form of a civil penalty in an amount not to exceed ~~\$100~~ \$300 for a single occurrence, which may not be paid by the public body. An action to enforce this penalty may be brought by any person in any court of competent jurisdiction where the administrative office of the governing body is located. ~~Upon a third violation by the same person connected with~~ If a person has been found to have intentionally violated this section in three or more actions brought under this section involving the same governing 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. 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. As soon as practicable thereafter the appointing authority or the governing body shall fill the position as in the case of any other vacancy.

(b) 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 section. The court may award costs and attorney fees to a defendant only if the court finds that the action under this section was frivolous

and without merit. A public body may pay any costs, disbursements, or attorney fees incurred by or awarded against any of its members in an action under this section.

(c) No 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 section.

Subd. 3. [~~POPULAR NAME~~ CITATION.] This section may be cited as the “Minnesota open meeting law”.

A-53; Minnesota Session Laws 1994, Chapter 618- HF 2028, Article I, Section 39.<sup>10</sup>

The current statute contains the same language providing removal from office “if a person has been found to have intentionally violated this chapter in three or more actions brought under this chapter.” Minn. Stat. § 13D.06, subd. 3(a) (emphasis added).

**B. The Legislature Amended the Statute to Prevent a Public Official From Being Removed from Office in a Single Action or Proceeding.**

The object of statutory interpretation “is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2004). The district court misapplied the statutory requirement of three or more actions, where the four complaints, involving common issues of fact and law, were adjudicated in a single proceeding. The resolution of the four complaints in a single proceeding

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<sup>10</sup> In addition to its inclusion in Appellants’ Appendix, Minnesota Session Laws 1994, Chapter 618 can be found in its entirety at: [http://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=SLAW\\_CHAP&year=1994&session\\_number=0&chapter=618](http://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=SLAW_CHAP&year=1994&session_number=0&chapter=618).

represents a single action for purposes of the removal provision. An “action” is defined as “any proceeding in any court in this state.” Minn. Stat. § 645.45(2) (2004). There were not four separate proceedings – all discovery took place in a consolidated fashion and, more importantly, only one trial took place, resulting in the district court issuing a single decision. The filing of multiple complaints, all of which were litigated in a single proceeding, is insufficient to create multiple actions for purposes of securing the removal of elected officials from office.

“Courts may examine the materials that constitute legislative history, including legislative committee tapes, when the purpose is to determine what the Legislature intended by the language it used.” *Lelm by Lelm v. Mayo Foundation*, 135 F.3d 584, 588 (8th Cir. 1998) (citing *Stearns-Hotzfield v. Farmers Ins. Exch.*, 360 N.W.2d 384, 389 (Minn. App. 1985)). In particular, the courts look to sponsors of an act when the meaning of statutory words is in doubt. *National Woodwork Mfrs. Ass’n v. N. L. R. B.*, 386 U.S. 612, 639-40 (1967). Tape recordings of committee hearings are properly considered as part of legislative history. *First Natl. Bank of Deerwood v. Gregg*, 556 N.W.2d 214, 217 (Minn. 1996).

The intention of the legislature is ascertained by considering, among other matters:

- (1) The occasion and necessity for the law;
- (2) The circumstances under which it was enacted;
- (3) The mischief to be remedied;
- (4) The object to be attained;

- (5) The former law, if any, including other laws upon the same or similar subjects;
- (6) The consequences of a particular interpretation;
- (7) The contemporaneous legislative history; and
- (8) Legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16 (2004).

Here, the circumstances and the contemporaneous legislative history clearly indicate the legislature's intent to prevent the very result reached by the district court. As discussed above, the impetus for the amendment to the Open Meeting Law was the decision in *Claude v. Collins*; i.e., the Hibbing situation. The legislature clearly and unequivocally responded to the Hibbing situation and sought to require three separate actions before removal from office was authorized. In addition to the statements of the Mayor of Hibbing and legislators, the basis for the amendments was succinctly summarized by Tom Deans, legal counsel to the MSBA and speaking on behalf of the county, city and township organizations. *See p. 24 above; A-75.*

The legislature's intent is further exemplified by the statements of Senator Betzold, the sponsor of the oral amendment, who explained the amendment was designed to implement a policy where "the third time you come back to court, the Judge says you've done it the third time and now you are facing forfeiture of office." *A-72.* The legislature intended the amendment to prevent a plaintiff from

“stockpiling” violations and using a single proceeding to remove a public official from office.

The district court’s interpretation eviscerates and renders moot the 1994 amendment to the Open Meeting Law. In interpreting a statute “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) citing *Owens v. Federated Mut. Implement & Hardware Ins. Co.*, 328 N.W.2d 162, 164 (Minn. 1983). Under the district court’s interpretation, there is no practical difference between the penalties provision of the Open Meeting Law after the 1994 amendment other than a plaintiff must file separate simultaneous complaints rather than one comprehensive complaint with multiple violations. This interpretation elevates form over substance.

The fact the district court found “four actions” based upon the filing of four separate complaints alleging eight violations of the Open Meeting Law highlights the absurdity of its interpretation. Under this interpretation, Respondents could have filed eight separate complaints, one for each alleged violation. The extraordinary remedy of removal from office, however, should not hinge on creative pleadings. If Respondents had filed one complaint, they would concede removal was not authorized. Indeed, they amended three of the complaints to spread the alleged violations out to increase the chances of satisfying the three-

action requirement. Under the district court's analysis, the Hibbing City Council would have still faced removal, even with the amendments to the Open Meeting Law, because plaintiffs only would have had to file multiple complaints simultaneously. In short, there is no principled reason to treat multiple complaints adjudicated in a single proceeding different than a single comprehensive complaint adjudicated in the same manner.

Moreover, statutory interpretation requires a construction of the provision in the context of other related provisions to determine its meaning. *Kollodge v. F. and L. Appliances, Inc.*, 80 N.W.2d 62, 64 (Minn. 1956). Minnesota Statute § 13D.06, subd. 3(b) provides the "court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith." This section clearly indicates a third successive action. Otherwise, the legislature would not have included a provision discussing an "action in connection with any alleged third violation."

Finally, the legislature differentiated between actions and occurrences. The provision for personal liability provides "a civil penalty in an amount not to exceed \$300 for a single occurrence." Minn. Stat. § 13D.06, subd. 1 (emphasis added). The fact the civil penalty provision uses the term "occurrence" while the provision for forfeiture of office was amended to use "action" is clear evidence of the legislature's intent to distinguish between multiple violations and multiple actions.

The legislative intent is clear -- in order to remove a public official under the Open Meeting Law the official must have been found to have intentionally violated the law in three successive proceedings.<sup>11</sup> Any other interpretation renders the 1994 amendments meaningless and disregards the legislature's purpose and policy in amending the Open Meeting Law. Accordingly, the district court should be reversed and Supervisors Hovel and Mahoney should be immediately reinstated.

**II. THE OPEN MEETING LAW DOES NOT AUTHORIZE AN AWARD OF MORE THAN \$13,000 TO RESPONDENTS FOR REASONABLE COSTS, DISBURSEMENTS AND ATTORNEY'S FEES.**

The Open Meeting Law allows the district court discretion to "award reasonable costs, disbursements, and reasonable attorney fees of up to \$13,000 to any party in an action under this chapter." Minn. Stat. § 13D.06, subd. 4(a) (2004). The district court, however, awarded \$13,000 each to Respondents. A-95.

In interpreting a statute, Courts "look at other related parts of the statute and other related statutes that use similar language." *State v. Banken*, 690 N.W.2d 367, 371 (Minn. App. 2005) (citing *State v. Kolla*, 672 N.W.2d 1 (Minn. App. 2003)).

A court must "read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations."

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<sup>11</sup> The district court's determination the three action requirement would allow public officials to "flaunt the statute with impunity" is unfounded. As previously stated, the personal fines provision of the statute continues to use "occurrence" rather than "action." Minn. Stat. § 13D.06, subd. 1. Accordingly, a public official who continues to violate the law would be subject to fines for each violation and would likely face a difficult re-election.

*American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citing *Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958)).

The legislature's incorporation of the term "action" in the provision for attorney's fees is subject to the same statutory interpretation as the removal provision. Specifically, the statute was amended to provide for, but limit, the recovery of attorney's fees up to \$13,000 for prosecution of claims under the Open Meeting Law.

This interpretation is consistent with the legislative history concerning the amendment to the Open Meeting Law, which included for the first time a provision for an award of attorney's fees. During the March 28, 1994, Senate subcommittee hearing there was testimony from Mark Anfinson, the Hibbing Mayor, Tom Deans from the MSBA and Joel Jamnik from the League of Minnesota Cities. The discussion relates to imposing a "cap" on an award of costs and fees – the discussion ranged from no award to up to \$15,000. Ultimately, the legislature agreed to a maximum award of \$13,000.

Respondents, themselves, recognized this limitation in their request for attorney's fees to the district court. In the supporting affidavit, Respondents' counsel stated, "The court may award attorneys' fees pursuant to M.S.A. 13D.06, Subd. 4(a) of up to \$13,000 per action." *A-179*. The proposed order submitted by Respondents' counsel also requested \$13,000 per "action." Because Respondents

had filed four complaints, they asserted an entitlement to \$13,000 per “action” or \$52,000.

Although the district court did not award \$52,000 to Respondents, the award of \$26,000 is contrary to the statute which specifically contemplates a maximum award of \$13,000, not \$13,000 “per party.” Minn. Stat. § 13D.06, subd. 4(a). Because Respondents were represented by the same counsel throughout this litigation, there is no legitimate basis to award each \$13,000.<sup>12</sup> The legislature specifically limited an award of fees to \$13,000; it did not create a statutory scheme where an award of fees is based on the number of named plaintiffs – otherwise the limitation would be meaningless as numerous citizens could sign on as putative plaintiffs merely to increase a claim for attorney’s fees. Taken to its logical conclusion, the district court’s interpretation encourages an attorney filing a lawsuit under the Open Meeting Law to include as many named individuals as possible for no purpose other than to increase the award of attorney’s fees.

Consequently, the district court’s award of \$26,000 in attorney’s fees is contrary to law and should be reversed. To the extent an award of attorney’s fees is appropriate, it should be limited to \$13,000.

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<sup>12</sup> This is particularly evident where the Respondents have a fee arrangement with their counsel which limits their exposure for fees to what is recovered in this action. *A-212*.

### **III. RELIANCE ON THE ADVICE OF THE TOWNSHIP ATTORNEY AND TOWN CLERK NEGATES A FINDING OF SPECIFIC INTENT AS A MATTER OF LAW.**

A public official must have “specific intent” to violate the Open Meeting Law to justify an award of attorney’s fees or remove the public official from office. Minn. Stat. § 13D.06, subd. 4(d) (2004). Specific intent requires “the defendant acted with the intent to produce a specific result.” *State v. Compassionate Home Care, Inc.*, 639 N.W.2d 393, 397 (Minn. App. 2002). Specific intent requires a showing a defendant acted with the intent to specifically “violate this chapter.” Minn. Stat. § 13D.06, subd. 4(d) (2004).

#### **A. Reliance on the Advice and Opinion of a Municipal Attorney and Administrator is Reasonable.**

The district court’s decision, which minimizes the township’s reliance on its attorney and does not even address the reliance on the town clerk, threatens to undermine the fabric of municipal government. Elected officials, particularly at the municipal level, are part-time citizen volunteers – here, farmers. Implicit in the nature of citizen-elected officials is the need for municipal attorneys to provide advice and guidance on the interpretation of applicable laws and regulations. The district court’s Order sends a dangerous and damaging message to public officials across the state. It implicitly requires public officials to hire independent legal counsel to determine the efficacy and reliability of legal advice provided by their municipal attorneys. This effectively forces public officials to make a separate and

independent judgment on the merits of a municipal attorney's advice. The possible effects are wide ranging and pervade every level of government.

Small cities and, in particular, townships lack the resources and staff of larger municipal entities and must be encouraged to look to their attorneys for guidance in interpreting the legal requirements of township government. Courts have continually recognized and encouraged public officials to look to and rely upon their attorney for advice in complying with the intricacies of the Open Meeting Law. *See Mankato Free Press, Co. v. City of North Mankato*, 1998 WL 865714 (Minn. App. Dec. 15, 1998); *Claude*, 518 N.W.2d at 843 ("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.") Unlike *Claude*, the supervisors actually sought and received the professional advice from the township attorney and town clerk, which is precisely what the supreme court sought to foster. That the professional advice may have been erroneous does not undermine the reasonableness of the supervisors' reliance on it. In situations such as this where professional advice is sought and received, a finding of an intentional violation of the Open Meeting Law is improper as a matter of law.

In addition, municipal attorneys have a heightened ethical duty to ensure the strictures of the Open Meeting Law are properly applied and followed. *See*

*Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 443 (Minn. App. 2005) (citing Minn. R. Prof. Conduct 1.13(b), cmt. 8) (a government lawyer may have more authority to question the conduct of public officials because public business is involved.). This heightened ethical duty recognizes the essential role municipal attorneys play in advising public officials of the legal requirements of municipal government.

Public policy dictates government officials must be entitled to rely on the advice of the municipality's attorney and administrator. As a matter of law a municipal official does not act with specific intent to violate the Open Meeting Law when he or she is acting in reliance on the advice of a municipal administrator or attorney.

**B. The District Court Erred as a Matter of Law in Determining an Attorney's "Conflict of Interest" Could be Imputed to a Client.**

In finding the supervisors acted with specific intent, the district court determined their reliance on the opinion of Township Attorney Ojile was "unreasonable" because his advice was "tainted." *A-99*. The Court found Ojile's representation of the Township and his representation of Hovel was an "obvious, common sense conflict." *Id.* This finding presents a serious legal challenge to the ability of public officials to rely on the advice of the attorneys retained to guide them through the legal responsibilities of municipal government.

The district court indicated, “it was not making a finding as to whether an ethical violation of conflict of interest occurred,” rather it found a “common sense conflict of interest.” *Id.* The district court provided no further distinction or elaboration between its finding of a “common sense conflict of interest” and a conflict of interest as defined by the Minnesota Rules of Professional Conduct. Indeed, because no such distinction exists. A “conflict of interest” is a term of art with specific legal connotations applied to attorneys and judges under the Minnesota Rules of Professional Conduct.

The alleged conflict of Ojile’s representation of Hovel and Cannon Falls Township, however, was not an actual conflict of interest. The Minnesota Rules of Professional Conduct govern and define what constitutes a conflict of interest. “A lawyer representing a government agency” must adhere to the “prohibition against concurrent conflicts of interest stated in Rule 1.7.” Minn. R. Prof. Conduct 1.11 cmt. 1 (2005). Rule 1.11 does “not prohibit a lawyer from jointly representing a private party and a governmental agency when doing so is permitted by Rule 1.7.” *Id.* at cmt. 9.

A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to

another client, a former client or a third person, or by a personal interest of the lawyer.

Minn. R. Prof. Conduct 1.7(a) (2005). However, a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Minn. R. Prof. Conduct 1.7(b) (2005).

Here, each of conditions set forth in Rule 1.7(b) were satisfied. Ojile's representation was not prohibited by law and the township and Hovel were never parties to the same litigation. Further, Ojile informed both the township and the Hovel family in writing about the nature of his representation and the potential for a possible conflict of interest. *A-3; A-113 through A-115; Tr. Transcr. 346, 386; Minn. R. Prof. Conduct 1.7 cmt. 18 and 20 (2005)*. The township held a special meeting on June 17, 2002, and consented to Ojile's continuing representation in writing. *A-111*.

In addition, Ojile twice withdrew from representing the township when it was presented with land use disputes involving land adjacent to one of Hovel's feedlots. On July 8, 2002, Ojile withdrew from representation and the township hired attorney Peter Tiede to represent its interests in the ongoing Olson litigation.

*A-116*. Ojile again withdrew on September 16, 2002, when the Board voted to rescind Banks' building permit. *A-112; Tr. Transcr.* 388. The Board again voted to retain attorney Tiede to represent the interests of the township. *Id.*

The district court erred as a matter of law when it found Ojile had an "obvious conflict of interest." Accordingly, Ojile's professional opinion could not have been "tainted" by a conflict of interest which did not exist.

Even if Ojile's representation constituted a conflict of interest, that conflict may not be imputed to the supervisors. There is a fundamental disconnect between a court or regulatory body finding an attorney has a conflict of interest and imputing that determination to individual supervisors untrained in the law or Rules of Professional Responsibility. The Minnesota Rules of Professional Conduct and the Rules on Lawyers Professional Responsibility provide a framework for disciplining lawyers who violate the Rules, not their clients. Minn. R. Prof. Conduct 8.4 cmt. 1 ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct.").<sup>13</sup>

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<sup>13</sup> The district court's determination Ojile's "conflict of interest" tainted his opinion does not square with the undisputed chronology of events in 2002. Specifically, Ojile gave his opinion to the Board prior to any conflict between Banks' building site and Hovel's feedlot. Ojile gave his advice to the Board following receipt of the March 12, 2002, letter. Ojile's alleged "conflict of interest" did not arise until the dispute over setbacks between Banks and Hovel occurred in July of 2002. The alleged conflict of interest occurred after Ojile issued his opinion; therefore, his opinion could not have "tainted" at the time it was rendered.

The Rules of Professional Conduct “are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.” Minn. R. Prof. Conduct Scope, ¶ 20; Rule 8.1 cmt. 1. “The purpose of discipline is not to punish the lawyer but, rather, ‘to protect the courts, the public, and the profession and to guard the administration of justice.’” *In re Petition for Disciplinary Action Against Westby*, 639 N.W.2d 358, 370 (Minn. 2002) (quoting *In re Flanery*, 431 N.W.2d 115, 118 (Minn.1988)).

The Rules of Professional Conduct are not a sword to be used by a party litigant. As a matter of law, the individual supervisors should not be held responsible for an erroneous opinion from the township attorney because said attorney is alleged to have a “conflict of interest.” The individual supervisors properly relied on the advice of the township attorney and town clerk, even if later determined to be wrong. Accordingly, the Court should reverse the district court’s determination the supervisors intentionally violated the Open Meeting Law.

#### **IV. RESPONDENTS WERE NOT ENTITLED TO SPECIAL NOTICE FOR THE JUNE 17, 2002, MEETING CONCERNING THE TOWNSHIP ATTORNEY’S REPRESENTATION OF THE TOWNSHIP.**

It is undisputed the special meeting on June 17, 2002, involved a discussion related to “Mr. Ojile’s representation of both the Hovel’s personally and the Township Board in relation to the Olson matter.” *A-90; A-111*. The district court determined special notice was required because “the Olson matter involved feedlot

permits and setbacks.” *Id.* The Open Meeting Law provides that a citizen “may limit the request to notification of meetings concerning particular subjects, in which case the public body is required to send notice to that person only concerning special meetings involving those subjects.” Minn. Stat. §13D.04, subd. 2(d).

Although the Open Meeting Law is to be “liberally construed,” *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schools*, 332 N.W.2d 1, 6 (Minn. 1983), it is not construed so broadly as to contradict a specific request for notice or require municipal officials to provide notice of meetings only tangentially related to the specific topics requested. Here, the Board convened the June 17, 2002, meeting to discuss a possible conflict of interest in Ojile’s representation of the township. That Ojile’s potential conflict arose because of litigation involving feedlots and setbacks did not trigger the requirement of special notice.

Requiring government officials to provide notice of meetings unrelated or only tangentially related to a citizen’s specific request for notice is contrary to the plain language of the Open Meeting Law allowing citizens to limit their request for notice to particular subjects. Accordingly, the finding of an intentional violation of the Open Meeting Law related to the June 19, 2002, meeting must be reversed.

**V. TOWNSHIP OFFICIALS ARE EXEMPT FROM THE OPEN MEETING LAW WHEN THEY PERFORM SITE INSPECTIONS UNDER MINNESOTA STATUTE § 366.01 (2004).**

The June 19, 2002, special meeting took place at “the Samuelson property to do an onsite inspection of a proposed building site.” *A-79; A-5; Tr. Transcr. 223-224*. The Open Meeting Law, however, “does not apply to a gathering of town board members to perform on-site inspections, if the town has no employees or other staff able to perform the inspections and the town board is acting in essentially a staff capacity.” Minn. Stat. § 366.01, subd. 11 (2004). Cannon Falls Township does not employ “staff” or other personnel to perform site inspections. Accordingly, the June 19, 2002, site inspection is exempted from the requirements of the Open Meeting Law.

The statute does provide “town board shall make good faith efforts to provide notice of inspections to each news medium that has filed a written request for notice.” *Id.* (emphasis added). On June 19, 2002, no news medium had requested special notice. The district court failed to address this exception to the Open Meeting Law in either its Order or Amended Order. *A-76 through A-100*. Therefore, the district court’s finding of an intentional violation of the Open Meeting Law on June 19, 2002, is contrary to law and must be reversed.

**VI. APPELLANT HOVEL DID NOT VIOLATE THE OPEN MEETING LAW AT A MEETING HE DID NOT ATTEND.**

The district court determined Appellant Hovel intentionally violated the Open Meeting Law on August 7, 2002, despite the undisputed fact he was not present at the meeting. *A-92*. The district court reasoned “attendance was not mandatory at the meeting to constitute a violation, as he actively participated in the rescheduling and failure to give notice.” *Id.* This determination is contrary to the plain language of the Open Meeting Law.

The open-meeting law is designed to avoid secret meetings, to allow the public to be informed about public officials' decision-making, and to allow members of the public to present their views to their public officials. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 4 (Minn. 1983).

Appellants submit, however, a municipal official must actually be present at an improperly noticed meeting to violate the Open Meeting Law – particularly for an intentional violation to be assessed. *See Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d at 438 n. 1 (municipal official avoiding potential Open Meeting Law claim by not attending disputed closed meeting). Accordingly, the district court’s determination Hovel intentionally violated the Open Meeting Law on August 7, 2002 must be reversed.

## **VII. RESPONDENTS WERE NOT ENTITLED TO SPECIAL NOTICE OF THE DECEMBER 5, 2002, MEETING.**

The district court determined the December 5, 2002, meeting triggered Respondents' request for notice because the meeting minutes indicated there was a discussion concerning "updating the township ordinance regarding requirements for the building process such as requiring registered surveys and information from the Goodhue County feedlot officer." *A-91* (quoting *A-14*). Contrary to the district court's finding, this was not the "sole topic" discussed at this meeting. The current Town Clerk, Deborah Stark, testified the meeting was a "brainstorming" session between the Board and Planning Commission to discuss ideas to update the township's ordinances. *Tr. Transcr.* 213. Even Respondents recognized Ms. Stark as doing an "upstanding" job on behalf of the township. *Id.* at 75.

The district court misreads the plain language in the December 5 meeting minutes which specifically indicate the meeting was a discussion to update the ordinance. The town clerk provided a contemporaneous list of the 17 topics discussed at the meeting, which demonstrates the meeting was truly a "brainstorming" session which did not trigger any special notice. *A-15*. Again, the district court interprets the request for notice so broadly as to eviscerate the specific topics in Respondents' request. Consequently, the district court's finding of an intentional violation of the Open Meeting Law on December 5, 2002, is clearly erroneous and must be reversed.

**VIII. THE DISTRICT COURT'S FINDING THAT APPELLANT MAHONEY INTENTIONALLY VIOLATED THE OPEN MEETING LAW IS CLEARLY ERRONEOUS.**

Supervisor Mahoney testified on numerous occasions he was unaware of Respondents' request for special notice until January of 2003 when the Respondents approached the Board with these allegations. *Tr. Transcr.* 218-219, 228. Despite this uncontroverted testimony, the district court determined Mahoney was aware of the request for notice during 2002. *A-78; A-89*. The district court determined the Respondents' request for notice "was discussed at the June 12, 2002 meeting, June 17, 2002 meeting, or both." *Id.* This finding is clearly erroneous and unsupported in the record. There was no testimony, no evidence or even an argument Mahoney was aware of the request for notice in 2002.

The district court based its decision on Ojile's billing records indicating a "review of Open Meeting Rules" on June 14, 2002. *Id.; A-118*. Again, there was no testimony, no evidence or argument the Respondents' request for notice was discussed at the June 12 or June 17 meeting. Ojile testified he could not recall why he reviewed the Open Meeting Law on June 14. *Tr. Transcr.* 345. Notably, June 14, 2002, was the same day the notices of special meetings were posted for the June 17, June 18 and June 19, 2002, meetings. *A-123 through A-124; Tr. Transcr.* 291-293.

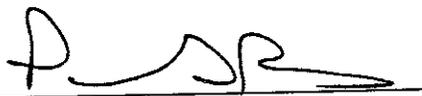
Intent may be established by circumstantial evidence, however “circumstantial evidence must justify a reasonable inference as to the issuable facts.” *Martelle v. Thompson*, 167 N.W.2d 376, 379 (Minn. 1969). “It is not enough that there may be some basis for bare conjecture, speculation, or suspicion. The conclusion arrived at should outweigh and preponderate over any other theories.” *Id.* Here, the district court’s finding Mahoney was aware of Respondents’ request for notice is pure conjecture and speculation. The record is devoid of any evidence or testimony indicating Mahoney was aware of the request for notice in 2002. Therefore, the district court’s determination Mahoney intentionally violated the Open Meeting Law is clearly erroneous and should be reversed.

**CONCLUSION**

For the foregoing reasons, Appellants respectfully request the Court of Appeals reverse the district court, vacate the imposition of personal penalties, vacate the award of attorney's fees, and immediately reinstate Hovel and Mahoney to their positions as supervisors for Cannon Falls Township.

Respectfully submitted,  
IVERSON REUVERS

Dated: January 6, 2005.

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**CERTIFICATE OF COMPLIANCE UNDER MINN. R. APP. P. 132(3)**

Paul D. Reuvers, attorney for the Appellants, certifies that this brief complies with the type volume limitation contained in Rule 132 (3) as follows:

There are less than 10,500 words in this brief, not including the table of contents and the table of citations. The word processing software used to prepare this brief was MS Word.

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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).