STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE OF WISCONSIN *ex rel.*
JOSEPH A. RICE
Plaintiff,
v.

MILWAUKEE COUNTY BOARD
OF SUPERVISORS, and
LEE HOLLOWAY,
Defendants.

Unclassified
Case Code: 30703
Case No. 11-CV-9399

PLAINTIFF"S REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT

The defendants' brief is, to put it mildly, rife with ironies and contradictions. Without challenging plaintiff's observation that the text of the open meeting law quite clearly requires that the subject of a meeting, whether or not under the "emergency" two hour provision, must be given in advance of and prior to the meeting, the brief says that no reported case holds that a post meeting notice would not suffice. D. Br. 6. No reported (or unreported) case even suggests the possibility, much less condones, that a governmental body can end-run around that requirement with such a clearly impermissible maneuver. Having conceded, as they must, that the requirements of the open meetings law cannot be supplanted by "newspaper stories" about what a governmental body might do, they urge this court to ignore a clear violation of the law by appealing to those very stories. Having claimed that, as a result of these stories, it is almost incomprehensible – indeed it strains credulity – to believe that the public would not know that the Board would take up redistricting at its April 21 meeting, they turn around and argue that the Board itself "could not have" known that redistricting might be a topic.[1]

[1] Defendants think it incredible that a member of the public, having read that the Board was expected to take up redistricting, "would consult the agenda and decide to stay home because the agenda, as originally posted [i.e., as it existed prior to the commencement of the meeting] did not specifically [or in any other way] reference the report of

Apparently oblivious to the utter disregard – if not contempt for the public – that such a position entails,[2] the defendants attack Rice for political posturing while attacking his counsel for comments about the decade-old County pension scandal wholly unrelated to this lawsuit made in a column published by an opinion journal.[3] Having conceded that redistricting is just the type of thing about which specific and advance public notice is most important, i.e., it is of non-routine and of significant public interest, *State ex rel. Buswell v. Tomah Area School District*, 301 Wis.2d 178, 732 N.W.2d 804 (2007), they proceed to refer again to newspaper reports and argue that a "detailed entry" about redistricting was not necessary. Perhaps not, but the meeting notice contained no entry of any type. There was no notice at all.

Defendants' brief is also notable for what it does not contain. It contains no explanation of how statutory language that requires something (notice) before something else (a meeting) can be interpreted to allow the notice to follow the commencement of meeting. While the impossibility of such an interpretation seems self-evident, Rice offered a careful exegesis of the statute explaining why such an interpretation would be wrong. (Plaintiff's Brief in Support of Motion for Summary Judgment, pp. 6-8) (hereafter "Plaintiff's Brief") Defendants make no

---

Special Committee on Redistricting [or in any other way allude to the subject or the possibility that it would be considered]" (bracketed material inserted). With all due respect, that is precisely what they would do. The public would expect that the Board would comply with the open meetings law and that it could rely on the Board to comply with the law and mean what is says and does not say in noticing a meeting. That the defendants believe otherwise is indicative of why we are here.

[2] The Board and Chairman are essentially arguing that they could not be bothered to inform the public that redistricting might be a topic because of the off chance that the very subcommittee that developed the redistricting plan might not approve a plan, while the public should be expected to have "seen through" the absence of notice and understood that the Board might nevertheless do something that its meeting notice – because of the subject matter requirements of the open meetings law – necessarily implied that it would not do. We regret that the defendants have taken umbrage at our description of the absurdity of this position, but one rarely encounters such upside down reasoning.

[3] What connection there is between arguments offered as part of an official proceeding regarding the defendants' legal obligations to the public and opinion journalism regarding the former County Executive's response to a scandal that resulted in a criminal prosecution, multiple recalls and crippling legacy costs is not evident. Plaintiffs' counsel is uncertain what to make of such unorthodox briefing tactic having never encountered it in almost thirty years of practice. We certainly hope that it was not a misguided attempt to enlist the court as part of the "Milwaukee County team." Judges don't work that way.

effort to respond. Although it would not have excused notice given after a meeting commenced, they also fail to offer any credible explanation of why the Board – which had until approximately July 1 to adopt a redistricting plan – had to pass the plan on April 21 and not one day later. Once again, Plaintiff carefully deconstructed that claim. (*See* Plaintiff's Brief, pp. 9-10.) Defendants make no response.

This type of convolution is generally indicative of a weak case.[4] While we appreciate that the defendants may not appreciate that Rice has pointed out the frivolous nature of their position, this is an inevitable consequence of the position that they chose to take. There is little that need be said in reply.

I. THE DEFENDANTS VIOLATED THE OPEN MEETINGS LAW

As we pointed out in our initial brief, there is an absolute prohibition against providing notice after a meeting has commenced. Words mean something, and the Open Meetings Law clearly requires that notice be provided before a meeting has begun. The defendants don't even attempt to address our arguments or the statutory language, implicitly inviting the court to ignore clear statutory language. The law requires that notice of a meeting's subject matter be given "prior to" (in the case of normal twenty four notice) and "in advance of" (in the case of two hour notice when normal notice is impractical or impossible) the meeting. "Prior to" and "in advance of" cannot mean "after." "Meeting" does not mean "agenda item." For this reason alone, defendants lose.

Even if this was not the case, the defendants cannot rely on the two hour "emergency" provision of Wis. Stat. § 19. 84(3). As noted in our principal brief, there was no requirement that

[4] We are all familiar with the old lawyers' adage that "When you don't have the law on your side, argue the facts, when you don't have the facts, argue the law, and when you don't have either the facts or the law, just argue."

the Board pass a tentative plan on April 21 or, for that matter, by May 20. Even if the Board's regularly scheduled meeting on May 20 would have been "too late," the desire of a full time Board to meet only one day each month does not constitute an emergency. While a preexisting schedule might be entitled to some consideration in the case of a volunteer board, there is no case that justifies a two hour notice because the relevant governing body does not want to meet on some later date (in this case, say, April 22 or April 24) for which twenty four notice would be possible.[5]

And even were this not the case, it would have been easy to notice the subject of redistricting for the April 21 meeting. If, as is apparently the case, the defendants were able to tell the press that they might take up redistricting at that meeting, then they could have told the public in a notice compliant with the requirements of Chapter 19. But unfortunately for the defendants, whether or not some members of the public had some actual notice of redistricting is irrelevant to the question of whether the Board followed the statutory notice requirements.

Even if there was "uncertainty" as to what the Redistricting Committee was going to do, the same "possibility" that defendants now claim the public should have relied upon notwithstanding the notice could have the topic of a line in the meeting notice. Public bodies tentatively notice subject matters contingent on some interim development with great frequency.

II. THIS CASE IS NOT MOOT.

The defendants are wrong in suggesting that passage of a final plan makes this case moot.

[5] For some reason, the defendants bring up the Supreme Court's recent decision in *Ozanne v. Fitzgerald*. Although they mischaracterize the holding in that case, they presumably agree that it has no application here. The Supreme Court held that a mere statutory limitation cannot result in the invalidation of a law passed by the same branches of government that created the limitation. The Open Meetings Law otherwise remains fully applicable to the legislature and individual legislators. The holding is rooted in the idea of separation of powers, and the notion that one legislature has no power to bind a future legislature. The County and its Board are creations of the legislature and, subject to certain limitations not present here, must comply with whatever requirements the legislature imposes upon them. In any event, plaintiff does not agree that the conduct of the defendants here compares favorably with the conduct of the legislature in *Ozanne*.

Whether or not implementation of the redistricting plan should be enjoined, Chapter 19 was clearly violated. Courts have full authority – and a duty – to declare a violation of the open meetings law and impose forfeitures apart from whether any official action is to be invalidated. For example, in *Buswell*, invalidation of the action taken in violation of the Open Meetings law was no longer possible, but the Court nevertheless reversed the Court of Appeals to grant declaratory relief and order that attorneys' fees be rewarded:

> Section 19.81(4) requires that the provisions of the open meetings law be liberally construed to advance the law's purposes. This court has interpreted that requirement to merit awarding attorney fees to the prevailing relator where doing so advances the purposes of the open meetings law. *Hodge v. Town of Turtle Lake*, 180 Wis.2d at 78, 508 N.W.2d 603. Such is the case here. Awarding attorney fees to Buswell will provide an incentive to others to protect the public's right to open meetings and to deter governmental bodies from skirting the open meetings law. Accordingly, we remand the case to the circuit court to determine the appropriate award.

Buswell, supra, 2007 WI 71, at ¶ 54. *See also State ex rel. Lynch v. Conta* 71 Wis.2d 662, 239 N.W.2d 313 (1976) (only declaratory relief sought and granted) At minimum, this Court ought to grant Rice declaratory relief, impose a forfeiture on Chairman Holloway and award Rice his costs and attorney fees.

But there should be more. The insubstantiality of the arguments offered in support of the defendants' actions suggest that this was a blatant end-run around the open meeting law that, if not deliberate, was a misguided attempt to avoid correcting a clear failure on the part of defendants and their staff to comply with the law. This ought not to pass without substantial consequences. Although the defendants now argue that Rice should have moved for an injunction several weeks earlier than he did rather than attempt to resolve the matter extra-

judicially, they would have undoubtedly made the same arguments then that they do now. There is no time. The violation is occurred by passage of the final plan.

State statute clearly requires passage of the tentative plan as a precondition of adoption of the final plan. The tentative plan here was *ultra vires*, passed in violation of the open meetings law. Passage of the tentative plan then requires a period of consultation with localities – something that did not happen here as established by various municipal resolutions that have gone unrebutted by the defendants. This court should enjoin implementation of the final plan for failure to comply with a statutory prerequisite, i.e., passage of a tentative plan. The defendants will, of course, be free to repass the plan both tentatively and in its final form, but that is the case whenever there is a violation of an open meetings law. Forcing them to do so is not an empty act. It is vindication of the important legal obligations imposed by and policies reflected in the Open Meetings law.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

_____

Attorneys for Plaintiff
Richard M. Esenberg
Wisconsin Bar No. 1005622
rick@will-law.org
Thomas C. Kamenick
Wisconsin Bar No. 1063682
tom@will-law.org
Wisconsin Institute for Law & Liberty, Inc.
225 E. Mason Street, Suite 300
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385