345TH DISTRICT COURT
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October 14, 2016

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RE: **Cause No. D-1-GN-16-000615**; *Brian Rodgers vs. The City of Austin, in the 345th Judicial District Court, Travis County, Texas*

Mr. Rodgers contends the agenda notice at issue here was not sufficient for actions taken by the City Council. The Texas Supreme Court has described the requirements of the Open Meetings Act as follows:

> We have held that general notice in certain cases is substantial compliance even though the notice is not as specific as it could be. However, less than full disclosure is not substantial compliance. Our prior judgments should have served as notice to all public bodies that the Open Meetings Act requires a full disclosure of the subject matter of the meetings. The Act is intended to safeguard the public's interest in knowing the workings of its governmental bodies. A public body's willingness to comply with the Open Meetings Act should be such that the citizens of Texas will not be compelled to resort to the courts to assure that a public body has complied with its statutory duty.

The Supreme Court, in the same case, also stated:

> As long as a reader is alerted to the topic for consideration, it is not necessary to state all of the consequences which may flow from consideration of the topic.

The Third Court of Appeals, in *SOS v. City of Dripping Springs*, cited that latter statement in concluding an agenda notice was adequate even though it did not state "the Agreements' substantial impact - including thousands of homes, central water and wastewater and wastewater systems, commercial development, and golf courses."

A court's determination, under the Open Meetings Act, begins with a comparison of the notice given and the action taken by the governmental body. That facial comparison of plain language may end the inquiry. For example, in *Rettberg v. Texas Department of Health,* a public board's notice that it would "discuss and possibly act on the evaluation, designation and duties of the board's executive secretary" was self-evidently sufficient to terminate the secretary.

However, the case law does not limit the court's consideration to a comparison of the language. In *Cox,* notice of "personnel matters" was insufficient notice that the AISD board would be considering the selection of a new superintendent particularly because "the subject slated for discussion was one of special interest to the public." In the same case, the AISD's board's notice of "litigation" was insufficient notice of a discussion of "a major desegregation lawsuit which has occupied the Board's time for a number of years, and whose effect will be felt for years to come." With regard to both, the Supreme Court identified a special public interest by the mere nature of the actions taken, without need of evidence that the public was in fact interested in the matters.

The notice here identified a Planned Unit Development by name and a City reference number and stated the City Council would consider "an ordinance amending City Code Chapter 25-2 by zoning property ... [providing the location] ... from interim-rural residence (I-RR) district-zoning and interim-single family residence-standard lot (SF-4a) district zoning to planned unit development (PUD) district zoning."

The actions taken include approval of a 100% waiver of development and water impact fees over 30 years estimated at 50 to 80 million dollars in return for the developer's payment of that amount into a fund for low-income housing within the development. The Council amended a pre-existing ordinance that limited waivers to low-income housing within the city limits. [1]

In a comparison of the notice given and the action taken by the governmental body, the subject matter of zoning a development does not, without more, alert a reader to an approval of water impact fee waivers and an amendment of the low-income housing waiver ordinance. The City argues the notice sufficed because the PUD section of the City Codes includes "Development Bonuses" for the provision of low-income housing. Yet "Development Bonuses," under "Zoning" in the Code, are exceptions to the "maximum height, maximum floor area ratio, and maximum building coverage." The waiver of fees for low-income housing is found under "Water and Wastewater." And that ordinance limits waivers to low-income housing within the city limits. Citizens may be charged with knowledge of the City Code, but they cannot be expected to anticipate, without notice, that a Code provision might be amended. Moreover,

[1] It appears that the PUD ordinance, with the Consent Agreement it references, supersedes or waives rather than amends the pre-existing low-income housing ordinance, however the City did not object to Mr. Rodgers' characterization of the action as an amendment. Regardless of the characterization, it granted a waiver of fees that otherwise would have been prohibited, and it set a precedent for doing so.

because the notice did state that a *different* ordinance might be amended, the failure to include a reference to the low-income housing ordinance was a misleading omission.[2]

Additionally, the actions taken here are of special public interest. The dollar amount of the waivers is very large, and the effect will be felt for 30 years. The amendment of low-income housing waiver is in a different category from a zoning variance or even the amendment of a zoning ordinance. The City argues, nonetheless, that because it had the authority to take these actions in considering a PUD, the public had sufficient notice. But notice is meaningless if citizens must with every notice expect the possibility of immense consequences. Matters of special interest require special notice because no individual can attend every meeting of every public body. Members of the public must make choices in their public and personal lives, and the purpose of notice is to enable them to do so intelligently.

I will grant Mr. Rodgers' motion for summary judgment with respect to the Open Meetings Act and declare the City's action void.

Mr. Rodgers also claims that the waiver of the water impact fees violates state law, Chapter 395 of the C.P.R.C. He has clarified that he is not claiming standing to sue directly under that statute. Instead, he claims standing to sue as a taxpayer who is opposing an expenditure of taxes for an illegal purpose. The alleged illegal purpose is the redirection of water impact fees to the provision of low-income housing. Mr. Rodgers requests a declaration that the PUD ordinance violates Chapter 395 an injunction of "future ordinances that would also violate Chapter 395."

The City contends that the court lacks jurisdiction to adjudicate this claim on the ground that Mr. Rodgers cannot meet the requirements for taxpayer standing. Without reaching that jurisdictional challenge, the court lacks jurisdiction over the Chapter 395 claim because its decision to void the ordinance moots the question of its validity under that statute, and the validity of any future ordinance is not ripe. The ordinance cannot be reenacted without a new agenda notice compliant with the Open Meetings Act as well as a subsequent public meeting. Moreover, Chapter 395 explicitly provides for a waiver of water impact fees for low-income housing, including outside a city's limits, if the housing meets federal requirements. Therefore, the legality of any future ordinance depends on its specific requirements, which makes a future controversy even more speculative. I will grant the City's plea as to Mr. Rodgers' claim under Chapter 395.

Sincerely,

Stephen Yelenosky

[2] Mr. Rodgers provides evidence that member of the City Council did not themselves find the notice adequate. The court is reluctant, without authority to support it, to take that into consideration because the sufficiency of notice is not dependent on any particular individual's assessment of it. Certainly, the court would not consider evidence that individual members of the public thought the notice insufficient. However, evidence that elected members of the governmental body voting on the ordinance did not think they had sufficient notice may be a different matter.