

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 91-0126

STATE OF WISCONSIN

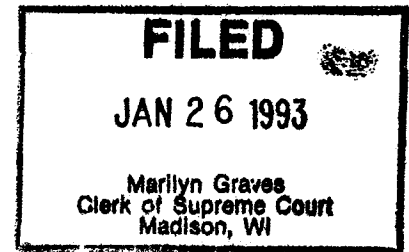
State of Wisconsin ex rel. Fred Badke,
Bernice Badke, Michael T. Sullivan, Jr.,
Jeanne Sullivan and Richard Lennertz, M.D.,

Plaintiffs-Appellants-Petitioners,

v.

Village Board of the Village of
Greendale and Village of Greendale,

Defendants-Respondents.



REVIEW of a decision of the Court of Appeals affirming an order of the Circuit Court for Milwaukee County, Judge Gary A. Gerlach. Reversed. Rights declared.

WILLIAM A. BABLITCH, J., A majority of the members of the seven member Village Board of the Village of Greendale (Village Board) regularly attended meetings of their Plan Commission, including four meetings at which a proposed housing project (the Sileno project) was discussed. The Village Board had ultimate decisionmaking responsibility on the project. It is undisputed that there was no intent to violate the open meeting law. Nevertheless, the question is whether their attendance at these four meetings constituted "meetings" within the meaning of Wisconsin's Open Meeting Law, thus necessitating a notice to the public of their attendance.

The Village Board asks us to affirm the court of appeals' decision that this case is moot, and, accordingly, not address any

of the issues presented. Because a determination that this case is moot would thwart the purpose of the open meeting law, we decline to follow the court of appeals with respect to mootness. We will address all issues.

We hold that when, as here, one-half or more of the members of a governmental body attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility, such a gathering is a "meeting" within the meaning of the open meeting law, unless the gathering is social or chance. Given that a majority of the Village Board trustees regularly attended these meetings, and such attendance was anticipated by the trustees, these gatherings were clearly not social or chance. Accordingly, notice of these meetings was required.

Petitioners (cumulatively referred to as Badke) also allege that the failure of the Village Board to move the meeting at which the Village Board voted on the Sileno project to an adequately sized room to handle overcrowding or provide amplification so that all who wanted to attend the meeting could clearly hear the proceedings was a violation of the open meeting law's requirement to hold meetings "open to all citizens at all times." Given the facts, we find this claim to be without any merit whatsoever. To literally interpret the words "open to all citizens at all times" would lead to unreasonable and absurd results. These words demand reasonableness, not literal adherence. The meeting was held at the village hall which holds 55 people and has an adjacent foyer that

holds approximately 20 people. At most, three people were ultimately denied entrance because of the crowd. Under the facts and circumstances presented, holding the meeting at the village hall was reasonable. There was no violation.

The relevant facts follow. Developer, Joseph Sileno (Sileno) applied to the Village of Greendale for a special use permit to construct a 364 unit apartment complex on a 56 acre, vacant parcel of land. Under the Village of Greendale's procedures, such an application is first given to the Plan Commission for its recommendation and then to the Village Board for its final decision.

Sileno presented its proposal at four Plan Commission meetings. Advance notice of the Plan Commission meetings was provided as required under the open meeting law. The village clerk also mailed each Village Board trustee notice of the Plan Commission meetings and copies of the agendas for the meetings. The Village Board is comprised of seven trustees, two of whom also serve on the Plan Commission.

A quorum of the Village Board attended each of the Plan Commission meetings. As stated in Badke's brief:

Prior to each of the plan commission meetings, the Village gave notice that the plan commission was holding a meeting. The Village sent the notices of the plan commission meetings to the Board of Trustees.

As admitted by the Village, a quorum of the Village Board attended each of four (4) plan commission meetings at which the Sileno proposal was presented. Four (4) trustees attended the December meeting at which Sileno and its architect made a presentation and answered questions from the Village staff. Five (5) trustees attended the January plan commission meeting at which the Sileno architect made another presentation, the Village

staff expressed density and traffic concerns. Plan commissioners and a Village Trustee, who was not on the commission, engaged in a discussion with the architect. Five (5) trustees attended the February plan commission meeting at which the Sileno architect described changes made to respond to concerns expressed at the prior meeting and the Village planner and commissioners commented. All seven (7) Village trustees attended the April plan commission meeting at which the Village manager and Sileno architect made presentations, plan commissioners commented and then voted to recommend approval with a few modifications. Badke brief at 7 (citations to the record omitted).

Trustees who attended the Plan Commission meetings submitted affidavits stating that they attended the meetings as interested observers and citizens.

Subsequent to the Plan Commission's recommendation to approve Sileno's application, the Village Board met to vote on the proposal. The Village Board met for its meeting in the village hall, a facility which holds 55 people. The village hall also has a foyer that can accommodate approximately 20 people. Prior to April 17, 1991, the day of the meeting, the Village Board received a petition signed by more than 1,600 village residents opposing Sileno's plan. Additionally, a resident sent the village manager a letter asking that the village hold the meeting at another site. Police were assigned to the meeting for crowd control.

From the record, we discern that no more than three people, if that, were ultimately denied entrance into the meeting. The press attended the meeting. There is testimony in the record that some citizens who could not get into the village hall and remained in the foyer were unable to hear the proceedings, but there is also evidence to indicate that the proceedings were clearly audible in

the foyer except during those times the crowd itself became disruptive. The Village Board approved Sileno's application at this meeting.

Fred Badke and other Greendale residents filed an action in the circuit court alleging that the Village Board violated the open meeting law's requirement that all meetings of local governmental bodies "shall be open to all citizens at all times." The circuit court issued a preliminary injunction to prevent the Sileno development from proceeding. Following the issuance of the temporary injunction, the Village Board reconvened and revoted on Sileno's application in a proceeding that complied with the open meeting law. After the revote, both parties stipulated to dissolve the temporary injunction.

The plaintiffs amended their initial complaint to seek declaratory relief regarding the alleged April 17 violation and added a second claim that the open meeting law was violated by not giving public notice of a Village Board meeting when a quorum of the Village Board attended the Plan Commission meetings on the proposed development. Both parties moved for summary judgment on the two claims.

The circuit court granted the Village Board's motion for summary judgment and dismissed Badke's complaint on the grounds that the Village Board had substantially complied with the laws' requirements and that to require a "supertechnical" standard of compliance would unduly burden local governments. On appeal, the court of appeals held that the Village Board's second meeting at

which it held a revote on the Sileno project mooted the controversy and that none of the exceptions to the mootness doctrine applied. We accepted Badke's petition for review.

When reviewing a grant or denial of a motion for summary judgment, we apply the standards set forth under sec. 802.08(2), Stats., which provides that the judgment sought shall be rendered only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In addition, "even if there are no disputed material facts, summary judgment is not appropriate if reasonable alternative inferences may be drawn from these facts: in such a situation, a trial is proper." Ervin v. City of Kenosha, 159 Wis. 2d 464, 478-79, 464 N.W.2d 654 (1991) (citation omitted). At oral argument, the parties agreed that there is no issue as to any material fact. Accordingly, we determine whether only one reasonable inference can be drawn from the undisputed material facts and entitle Badke or the Village Board to judgment as a matter of law.

I.

We first discuss the issue of mootness. Badke seeks a declaratory judgment that the Village Board's actions violated the open meeting law. In its brief, before directly addressing mootness, the Village Board claims that certain prerequisites to obtaining declaratory relief have not been satisfied in this case. First, the Village Board claims that this case does not present a

justiciable controversy. We disagree.

In Loy v. Bunderson, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982), this court determined that a justiciable controversy must exist between the parties before declaratory relief may be obtained. Specifically, we stated:

- 'There must exist a justiciable controversy -- that is to say:
- '(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
- '(2) The controversy must be between persons whose interests are adverse.
- '(3) The party seeking declaratory relief must have a legal interest in the controversy -- that is to say, a legally protectible interest.
- '(4) The issue involved in the controversy must be ripe for judicial determination.' Id. (citation omitted).

The Village Board contends that there is no existing controversy in this case, and Badke has no claim of right. Specifically, the Village Board asserts that the controversy in this case centered around the proposed Sileno project and whether such development should continue. Thus, it reasons, any claim of right Badke might have had was satisfied when the Village Board held a second valid meeting where it approved the permit for the development and allowed construction to go forward. According to the Village Board, the second meeting extinguished the controversy and Badke's claim of right.

If the granting of the Sileno permit was the center of the controversy in this case, then the Village Board's arguments might have merit. However, the existing controversy in this case involves the process, not the substance, of the Village Board's actions. The proceeding itself is at the heart of the dispute in this case, as in any open meeting law case. However, an alleged

open meeting law violation usually does not concern the merits or the ultimate resolution of the substantive matter which was discussed at the meeting. The open meeting law is concerned with the process of public decisionmaking. The law's purpose is to protect the public's right to be informed to the fullest extent regarding the affairs of government. If a simple revote on the substantive matter at issue at an alleged invalid meeting extinguished a violation of the open meeting law, the purpose behind the law would be thwarted.

The controversies in this case are whether the Village Board violated the open meeting law by attending Plan Commission meetings without giving notice of a Village Board meeting and whether the Village Board violated the open meeting law by excluding some residents from the April 17 meeting. The sections of the open meeting law in question deal with procedure -- they do not concern the merits of the Sileno project. We conclude that the revote at the second, valid meeting did not extinguish the controversy in this case or Badke's claim of right.

The Village Board also asserts that this case involves nothing more than a mere difference of opinion, which is not enough to make a justiciable controversy. Specifically, the Village Board claims that Badke seeks "nothing more . . . than a declaration that Respondent violated the Open Meeting Law." Village Board brief at 8. This dispute is more than a mere difference of opinion, however, in that Badke seeks to exercise his right under sec. 806.04(2), Stats., to have Wisconsin's Open Meeting Law judicially

construed.¹ Succeeding on review will do more for Badke than resolve a difference of opinion. Succeeding will, as Badke suggests, teach the Village Board what to do under the law to avoid future violations. For example, if the regular attendance of Plan Commission meetings by a quorum of the Village Board does in fact require notice, the Village Board will continue to violate the law if this court does not issue a declaratory judgment mandating otherwise. Furthermore, Badke has a claim of right by virtue of the authorization to seek a declaratory judgment in sec. 19.97(4).²

Next, relying on the same reasoning as used to explain why this case does not present a justiciable controversy, the Village

¹ Section 806.04(2), Stats., provides in relevant part:

POWER TO CONSTRUE, ETC. Any person interested under a deed, will written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

² Section 19.97(4), Stats., provides:

If the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint, the person making such complaint may bring an action under subs. (1) to (3) on his or her relation in name, and on behalf, of the state. In such actions, the court may award actual and necessary fees to the relator if he or she prevails, but any forfeiture recovered shall be paid the state.

Board contends that, because the valid second meeting extinguished the controversy, a judgment by this court will not have any practical legal effect upon an existing controversy, and the action is therefore moot. A case is moot when a judgment can have no practical legal effect upon the existing controversy. Hahner v. Board. of Ed. Wisconsin Rapids, 89 Wis. 2d 180, 186, 278 N.W.2d 474 (Ct. App. 1979). This case is not moot. As explained earlier, the controversy in this case did not end when the Village Board held its second meeting. The controversy in this case is the legal status of the acts that preceded the revote, and a declaratory judgment will have a legal effect on that controversy: it will declare the legal status of the Village Board's acts. We conclude that the criteria for sustaining a declaratory action have been met, and the controversy continues despite the second, valid meeting of the Village Board. Accordingly, this case is not moot.

We also note that the consequences of accepting the Village Board's argument concerning mootness would be to render the open meeting law meaningless in many future cases. To dismiss enforcement proceedings on the grounds that a revote makes this case moot would invite circumvention of the policy of the open meeting law. Rather than hold open meetings, a governmental body would know it could hold secret meetings to discuss a proposal, wait until someone filed a complaint, and then hold a valid open meeting to vote on the proposal. The complaint would then be dismissed as moot. The public would never know of the information

