

Justices oppose open meetings?

I sat in on the oral arguments for the case *Cheyenne Newspapers v. Building Code Board of Appeals of the City of Cheyenne*.

The basis of this dispute is that the newspaper alleged that the Board of Appeals violated State Statute by holding a closed meeting and reached a decision about demolition permits for six old houses on House, Evans and 22nd St.

Usually, I agree with the rulings of the Wyoming Supreme Court and in previous oral arguments I sat in on, I respected the attention given the arguments and questions posed by the Justices.

Yesterday (the oral arguments were on October 21, 2009 at 1:30 pm), I left the building shaking my head like the Aflac duck in the Yogi Berra in the barber chair commercial.

What did they ask? What did Justice Golden, whom I have admired as the most astute of the five, suggest? Did he really speak against the principles of the Wyoming open meeting statutes that virtually every state has adopted? Did he really ask what would be wrong with, basically, doing all the heavy lifting in a secret meeting and then coming out before the public and re-voting on the matter and that would comply with the open meetings statute? Did he really ask that?

If that principle applied to governing bodies, there would be no open meetings law. They'd decide everything in secret.

Early in the oral arguments, Chief Justice Voigt asked why the Appeals Board had gone into closed session. He was told that the board felt they were not covered by the Public Meetings Act and they said they were going into closed session "to deliberate." Again, if this is judicially allowed, the open meetings law is valueless. The public could only attend votes.

This Board, at the district court, argued that it was a "quasi-judicial" body and exempt from open meeting requirements. At the Supreme Court, that argument was a silent defense. As the WT-E counsel said, there is no such exemption in the statutes. None that would apply.

Justices referred to the "Decker" ruling of 2008. That case involved a "panel" set up by the Medical Commission and it was ruled to not be an agency and, therefore, the panel was exempt from the Open Meetings Act.

But the Appeals Board in this case has to be considered an agency, a governing body, because they make binding decisions and are quite unlike the Decker panel.

Justice Kite asked if there had been "any effort to make the decision in public?"

What happened and would be easy to do in other settings, is that the decision was made in a closed session (the attorney for the City was very careful and defensive about referring to the secrecy as an executive session because there are specific exceptions for subjects that can be discussed in executive session and

this appeal does not apply) and then, at a later meeting, the Appeals Board made the decision formal in a public setting.

Again, if this is adopted, what the statutes will mean is that the public is entitled to be present for the vote, but not the debate and deliberations leading to the decision. That would, as the statutes say, create "an absurd result."

Chief Justice Voigt asked that very question: "What's to prevent every body from meeting and then coming back for voting?" He went on to say, "there is no teeth in the statute as written," meaning there is no penalty for violation.

The WT-E attorney said there is ambiguity in the statute (which allows the Supreme Court to determine the intention of the Legislature) that "would allow a way for public entities to avoid the law by having a second meeting to take action." That is, and has been, done for eternity. It is called the telephone.

Nobody knew whether the Appeals Board had legal counsel - other than the hearing officer who is also an attorney but was not acting as legal counsel to the Board. Say, what? Before the Appeals Board went into a closed session to debate, deliberate and decide, the City Attorney "asked" them not to. As did Jim Angell from the Wyoming Press Association. Why did she not order them not to?

Any defense that such a secret meeting was not for the purpose of making a decision is without merit. In a closed meeting, with no member of the public present to observe, take notes or record, and with no transcript of the proceedings, there are numerous ways to make a "collective commitment." In other words, a vote. Simply asking, "are we all in agreement?" Or, "if anyone is not in agreement with denying the demolition permits, so indicate." A vote does not require a showing of hands or a completed ballot.

When the City's attorney was asked by Justices Kite and Golden, simultaneously, "How do we know no action was taken?" Her answer: "I don't think we know that."

If there was no vote taken in the closed meeting, why did the City first claim the Board was a "quasi-judicial body" so the open meetings law did not appeal to it? It seemed the City kept changing its argument as they went along.

There was much skating around questions of whether the Board is a quasi-judicial body, whether action was taken, whether the Board is a governing body, etc.

Justice Kite asked the City's attorney, "Why is it not a governing body?" City's attorney: "I'm not that confident" it's not.

Justice Burke asked a similar question about whether a vote had been taken in private: "How would we know?" He was answered by the City's attorney, "there is an assumption of good faith." Justice Kite: "Why should we assume that when they were asked and advised to stay in public and didn't?"

The City's attorney stated the reasons for wanting to conduct business in secret: "to hold free and open discussion without political pressures," and "because there must be a limited time for discussion in public." Not in private? She expressed the very reasons that statutes require meetings that do the public's business be conducted in front of the public and with public participation.

The WT-E attorney suggested bodies could conduct deliberations in private, then "cure illegal actions by doing it legally later." Justice Golden seemed to endorse such an action: "Then they do it over and cancel earlier action." That is absurd and it can't be what the Legislature intended. And it is not what the law reads, unless the language is twisted to make illegal action legal.

Justice Kite, who proved to be the most astute of the five this day, related how "boards all over the state have conducted meetings in public" believing that was required of them. Then, she said, profoundly: "If you can't stand the heat, stay out of the kitchen."

It cannot be tolerable for agencies that are subsets of the State, City or County to hold closed meetings because it is more expedient to debate and deliberate without public interference or because it takes less time when done in secrecy.

This is a case the WT-E should prevail. In the Decker case, the ruling was a majority decision with Justice Kite and Chief Justice Voigt dissenting. Justice Burke did not hear that case. The prediction here is a win for the WT-E, 3-2, with Justices Golden and Hill dissenting.

LCSD1 school start times

If a survey was sent out, asking parents of school age children in LCSD1 for input as to what time they would prefer school to start (which determines what time it will end), the responses should have been considered.

To poll parents and then ignore the input is another example of the old: "If we want your opinion, we'll give it to you."

If the administration and/or board prefers one start time over another, regardless of what time parents weighed in with, they should not have presented the question to parents. If parents, by a meaningful margin, preferred a certain time, that is the time school should start. Will it matter much? No. Honestly, it probably won't.

The City used "throw a bunch against the wall, see what sticks" arguments for the Appeal Board's behind-closed-door action:

1. It is a quasi-judicial body so the law does not apply;
2. It is not a "governing body" so the law does not apply;
3. If the law does apply, no decision was made so the Board was not in violation;
4. If the law does apply and if they did make a decision, they cured that illegal action by actually voting in front of the public later; and
5. It's the City of Cheyenne, expect them to break the law. (They didn't really use this one, but it was a easy shot to take at them for their past, so I had to include it.)

It's similar to a defense of, "I didn't kill the guy but if I did, it was self-defense."

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