

At a Motion Term of the Supreme Court
of the State of New York held in and for
the Sixth Judicial District at the Broome
County Courthouse on the 15th day of
July, 1998

PRESENT: HON. ROBERT W. COUTANT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT :: BROOME COUNTY

JOHN CHEEVERS, as resident and
Supervisor of the Town of Union,

Petitioner,

vs.

THE TOWN OF UNION, and ROBERT
ALLEN, MICHAEL ARCHANGELI,
DONALD BATTAGLINI, and FRANCIS
McMANAMON, the above named individuals
as elected councilmen of the Town of Union,

Respondents.

DECISION AND ORDER
INDEX NO. 98-1401
RJI NO. 98-0879-M

APPEARANCES:

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COUTANT, J.

An article entitled "Union won't fight tax cut for IBM" was published in the March 29, 1998 issue of the Press & Sun-Bulletin. The article begins with a statement that "Town of Union officials are convinced that IBM Corp. will seek another tax assessment reduction, but have no plans to fight it". The article quoted, among others, petitioner, Supervisor of respondent Town of Union and John McDonald, Town Assessor. In response to such article, an advertisement entitled "Dear Resident of The Town of Union" (hereinafter the Dear Resident article) was published in the Press & Sun-Bulletin newspaper on April 2, 1998, April 3, 1998 and April 5, 1998. The Dear Resident article was composed by respondents Robert Allen, Michael Arcangeli, Donald Battaglini and Francis McManamon (hereinafter the individual members) who are four of the individual members of the Town Board of respondent Town of Union (petitioner is the fifth member).¹ Petitioner commenced this CPLR article 78 proceeding by order to show cause containing a temporary restraining order enjoining payment of the expense for publishing the Dear Resident article. Respondents answered and asserted several affirmative defenses.

On or about June 2, 1998, the Town Board passed a resolution by a 4-1 vote to incur an obligation to pay the publication expense of \$864.92 for the Dear Resident article.² It is petitioner's contention that the individual members conducted a meeting in

¹ The caption of this proceeding is hereby amended to reflect the correct name of respondent Michael Arcangeli.

² Petitioner cast the one vote against the resolution.

violation of Public Officers Law § 104 since notice was not given to anyone, including him. Petitioner argues that the determination to publish the article as a report of the Board was invalid and, thus, payment of the publication expense is not a proper expenditure of Town funds and violates Town Law § 116 (13). Respondents claim that often committees of the Board handle matters of policy and action between formal meetings of the Board and that their informal contact led to the decision to publish the Dear Resident article. Respondents contend that there was no meeting and, thus, no violation of the Open Meetings Law.

Pursuant to Public Officers Law § 104, "[p]ublic notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media * * * at least [72] hours before such meeting [and] [p]ublic notice of the time and place of every other meeting shall be given, to the extent practicable * * * at a reasonable time prior thereto". An aggrieved person may enforce the provisions of the Open Meetings Law by commencement of a CPLR article 78 proceeding or an action for declaratory judgment (Public Officers Law § 107). "The cornerstone of the Open Meetings Law is that decisions made by public bodies should be made publicly [and that the law] is violated when a quorum of a public body holds a private meeting for the purpose of transacting public business, thus making unavailable for public scrutiny that body's deliberative process" (*Matter of MCI Telecommunications Corp. v Public Serv. Commn. of the State of N.Y.*, 231 AD2d 284, 290).

The individual members each provide affidavits which basically contain the same information as detailed by respondent Robert Allen, the member who initiated the Dear Resident article. Allen contacted respondent Donald Battaglini and determined that

neither person gave any information to the newspaper reporter. Both members discussed their concern that the impression created by the initial article was that IBM, the Town's largest employer, was seeking a reduction in its tax assessment and that the Town would not defend such a proceeding. Allen spoke with respondent Francis McManamon who confirmed that he provided no information to the reporter and also expressed the same concern about the public's perception of the Town's policy regarding tax assessment cases. McManamon contacted respondent Michael Arcangeli who was also in agreement with the feelings of the other members. In addition to a concern that the residents would be misled about the Town's policy of fighting the tax reduction by the initial article, the members were also allegedly concerned that such an article would specifically give IBM the wrong impression that it would receive all requested assessment reductions without a fight. Admittedly, Allen "did not contact [petitioner] about the Town's response to the article because [petitioner] was directly quoted as a source of information in the article and he had not consulted with [Allen] and had not mentioned to [Allen] that he had made any statements or representations about assessments in general or the IBM assessment specifically".

Allen prepared the Dear Resident article and read it by telephone to Battaglini and McManamon, individually. Both members made minor changes and McManamon contacted Arcangeli and read him the Dear Resident article. All agreed that the Dear Resident article correctly stated existing Town policy and should be disseminated to the public. The Valley News published the Dear Resident article verbatim and without charge. However, the Press & Sun-Bulletin indicated that it would not publish the Dear Resident article without editing unless it was submitted as a paid advertisement. In

order to ensure that the Dear Resident article was published verbatim, the members submitted it as a paid advertisement. The individual members all aver that the information contained in the Dear Resident article was to educate the public as to the existing Town policy and that the Town was concerned about its tax base and would aggressively defend any tax assessment reduction proceeding.³ The individual members aver that the Dear Resident article was a reaction of the majority of the Board to an inaccurate portrayal of a matter of great financial importance and that it does not endorse or advance the views of any specific party or member. A voucher was prepared for payment of the publication expense, but petitioner refused to sign the check. The Town Comptroller indicated that without petitioner's signature, the Board must formally approve the expense for payment. As indicated previously, a formal resolution was passed, allegedly ratifying the Town's position concerning tax assessment proceedings and approving payment of the expense.

Initially, there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as "the official convening of a public body for the purpose of conducting public business" (Public Officers Law § 102 [1]). Although "not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], * * * informal

³ Apparently after publication, IBM sought a reduction in its assessment and the parties involved signed a confidentiality agreement (the Board passed a resolution approving and authorizing the confidentiality agreement). A settlement was negotiated and, although the assessment was reduced, the reduction was apparently less than that requested by IBM.

conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting" (*Matter of Goodson Todman Enter. v City of Kingston Common Council*, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner as formal votes (see, *Matter of Orange County Publs. v Council of City of Newburgh*, 60 AD2d 409, 415, *affd* 45 NY2d 947).

The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were "present" and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a "meeting" circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law (see, Public Officers Law § 102 [1]; *Matter of Goodson Todman Enter. v City of Kingston Common Council*, *supra*, at 106).

"Courts are empowered, in their discretion and upon good cause shown, to declare void action taken by a public body in violation of [the Open Meetings Law]" (see, *Matter of Ireland v Town of Queensbury Zoning Bd. of Appeals*, 169 AD2d 73, 76; Public Officers Law § 107 [1]). Although not all violations of the Open Meetings Law trigger enforcement sanctions (see, *Matter of Goodson Todman Enter. v City of Kingston Common Council*, *supra*, at 106; *Matter of Thomas v New York Temporary*

State Comm. on Regulation of Lobbying, 83 AD2d 723, 724, *affd* 56 NY2d 656), during the meeting at issue, the individual members confirmed existing Town Policy and decided to inform the public of such policy by publishing the Dear Resident article. When the determination was made to publish the Dear Resident article in the Press and Sun-Bulletin, the individual members implicitly decided to incur the publication expense. The action which took place without benefit of public scrutiny is declared void.

Town Law § 116 (13) provides that "towns may incur obligations for any purpose necessary to give effect to the powers herein granted, including but not limited to * * * [t]he actual expense incurred in the publication and distribution of a report relative to the fiscal affairs, official acts, programs and meetings of boards, commissions, departments and other agencies, of a town". Such subdivision has been interpreted to authorize expenses incurred in order to inform and educate residents as to the activities, programs and other official affairs of the town board, commission, or department or agency as a body; however, the report cannot contain articles by individual board members which set forth the individual positions and opinions of particular board members (see, 1994 Opns St Comp No. 94-5).⁴ Petitioner's argument that the Dear Resident article contains opinions and beliefs of the individual members is persuasive.⁵ The Dear resident article does contain information concerning the fiscal affairs of the

⁴ Although petitioner requested a ruling on whether the publication expense would be a proper expenditure of Town funds, the State Comptroller's Office has apparently declined to entertain such request.

⁵ A copy of the Dear Resident is attached as Exhibit A.

Town by informing the public that the Town Board would do all that it could to maintain its tax base by aggressively defending tax assessment reduction proceedings.

However, the Dear Resident article also contains the opinions and beliefs of the four individual members, evinced by statements such as "[w]e question [petitioner's] motive in discussing potential assessment reductions", "[w]e greatly value IBM as an asset", "[w]e hope that IBM will realize that assessment reductions have created ever higher tax rates" and "[w]e are asking that you write to us with your thoughts on assessment reductions so that we may properly represent your interests as these issues come before your Town Board". A reading of the Dear Resident article leads to the conclusion that it is written by the individual members rather than the Town Board and represents their individual opinions. Notwithstanding that the subsequent formal resolution to pay the publication expense was made at a regularly scheduled Town Board meeting, the Board cannot ratify payment of an expense which is not a legitimate expenditure of Town funds.

Petitioner has also requested counsel fees. Pursuant to Public Officers Law §107(2), the court may, in its discretion, award reasonable counsel fees to the successful party. Counsel fees are not appropriate where the violation was unintentional or purely technical and non-prejudicial, or where the defendant made a good-faith reasonable effort to comply (see, *Matter of Gordon v Village of Monticello*, 87 NY2d 124, 127-128). In this matter, the individual members conducted Town business through a series of telephone calls, in an apparent effort to circumvent the Open Meetings Law. Petitioner, a Board Member, as well as the Public, was deliberately

deprived of notice of the meeting. As a result, this court finds that counsel fees in the amount of \$500 are appropriate.

In conclusion, the individual members held a meeting in violation of the Open Meetings Law and, *inter alia*, incurred an expense for publication of the Dear Resident article. This court holds that as a result of the violation, the action to publish the article as a report of the Town is declared void. The publication expense is not a legitimate Town expense under Town Law § 116 (13) and, therefore, the Town is enjoined from paying such expense. In addition, Petitioner is awarded counsel fees in the amount of \$500.

This constitutes the decision and order of the court. No motion costs are allowed.

Dated: September 3, 1998
Binghamton, New York



ROBERT W. COUTANT
JUSTICE, SUPREME COURT