IN THE COURT OF APPEALS OF IOWA

No. 8-362 / 07-1338
Filed June 25, 2008

NADINE ADELE,
Plaintiff-Appellant,

vs.

THE CITY OF PLEASANT HILL,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Nadine Adele appeals from the district court order dismissing her claims against the City of Pleasant Hill. **AFFIRMED.**

Thomas D. Hanson and Jonathan D. Bergman of Hanson, Bjork & Russell, L.L.P., Des Moines, for appellant.

Bradley M. Beaman and Gregory A. Witke of Bradshaw, Fowler, Proctor & Fairgrove, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., Vogel and Mahan, JJ., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

MAHAN, J.

Nadine Adele, a resident of the City of Pleasant Hill, appeals from the district court order dismissing her claims against the City of Pleasant Hill. We affirm.

I. Background Facts and Prior Proceedings

In early November 2005 residents of the City of Pleasant Hill elected Phil Hildebrand to be their new mayor. In the process, the incumbent mayor, Mark Langerud, was voted out of office. Hildebrand was set to begin his term as mayor in January 2006.

On November 22, 2005, the city council held a closed session meeting to conduct city administrator Robert Fagen's performance review. A taped conversation of this meeting reveals the council first discussed Fagen's past performance and future job responsibilities. The council also discussed how his job may be changed from "city administrator" to "city manager" with new responsibilities if a proposed ordinance was signed into law. In the course of these discussions, the council members voiced their general approval of the proposed ordinance. The council members also discussed how they felt the new mayor should have the opportunity to weigh-in on the proposed ordinance, so they determined the ordinance would be read in an open meeting on three different occasions, with the third reading occurring after the new mayor had assumed office.

On November 29, 2005, the proposed ordinance was read at the city council meeting, and all members of the city council expressed their approval of the ordinance. During the same meeting, the council also approved Fagen's new

employment contract. The contract was written so it would be effective whether or not the proposed ordinance was ultimately passed.

On December 13 the council once again read the proposed ordinance and once again unanimously expressed their approval of the ordinance. After the third and final reading on January 10, 2006, the proposed ordinance passed by a vote of four to one. Rather than use his power to veto the ordinance, the newly elected mayor signed the ordinance into law.

On February 8, 2006, Adele filed a pro se petition in district court against Pleasant Hill. Adele raised numerous issues. She claimed the city had refused to provide her with various records and refused to allow her to attend an unrelated steering committee meeting in December 2005. She also claimed the new ordinance constituted an illegal change in the form of the government of Pleasant Hill because it changed the structure from that of a mayor-council form to a council-manager form without submitting the vote to the electorate. Adele also claimed the entire ordinance should be declared void because it contained a provision stating the ordinance could not be modified unless four-fifths of the members of the city council agreed to the modification.

Adele eventually hired counsel and, more than one year after she filed her original petition, amended the petition to add the claim that the city council had violated Iowa's open meetings law when it held the closed session on November 22, 2005.

At trial the district court heard testimony from Hildebrand, the new mayor elected in November of 2005. Hildebrand testified that in his opinion the new ordinance did not change Pleasant Hill's form of government and Pleasant Hill

still operated under a mayor-council form of government. The court also reviewed the taped meeting of the November 22, 2005 closed session.

On July 11, 2007, the district court entered a ruling rejecting each claim raised by Adele. The court concluded there was not an open meeting violation and not an open records violation. The court also concluded the ordinance was not invalid because it did not constitute an illegal change to the form of Pleasant Hill's city government. Finally, the court found the four-fifths provision was "surplusage" because, pursuant to Iowa Code section 380.4, the city council could change the ordinance with a simple majority of the council.

On appeal, Adele claims the court erred when it found there was no open meetings violation and erred when it concluded the ordinance was not invalid. Adele does not challenge the decision on her open records claim.

II. Merits

The thrust behind Adele's appeal is that the members of the city council had an improper motive for passing this ordinance—they passed this ordinance to strip the new mayor of his powers.

> As a general rule, the acts of a municipal corporation, which are within its power, are not subject to judicial review unless there is a manifest and palpable abuse of power, and it is well established that the motives of the council acting in its legislative capacity cannot be inquired into.

Pell v. City of Marshalltown, 241 Iowa 106, 111, 40 N.W.2d 53, 56 (1949). As discussed below, the city council had the power to create the position of city manager and the power to define the duties of that position through an ordinance. *See* Iowa Code § 372.4(1) (2005). In light of the fact that the council waited so that the new mayor could have the opportunity to veto this proposed

ordinance, we find there was no manifest and palpable abuse of power and consequently will not look to the motives of the council to determine the validity of this ordinance. Therefore, we will limit our analysis to the legal arguments presented on appeal.

A. Open Meetings Violation

Adele claims the disputed ordinance should be declared void and the position of city manager eliminated because the city council discussed the ordinance during a closed session.

Review of actions to enforce Iowa's open meetings law are ordinary actions at law. *Schumacher v. Lisbon Sch. Bd.*, 582 N.W.2d 183, 185 (Iowa 1998). Our review of this claim is for errors at law. Iowa R. App. P. 6.4. The trial court's findings are binding if they are supported by substantial evidence. *Schumacher*, 582 N.W.2d at 185.

Iowa's open meetings law is contained in chapter 21 of the Iowa Code. The open meetings law "seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of government decisions, as well as those decisions themselves, are easily accessible to the people." Iowa Code § 21.1. Pleasant Hill is a governmental body within the definition of chapter 21 and therefore subject to the open meetings statute. *See Id.* § 21.2(1)(b) (defining a governmental body as a "board, council, commission or other governing body of a political subdivision or tax-supported district in this state").

A key component of Iowa's open meetings law is that "[f]inal action" by any governmental body on any matter must be taken in an open session unless

some other provision of the Code expressly permits such actions to be taken in a closed session. *Id.* § 21.5(3). Section 21.5 sets forth the limited circumstances where a closed session may be appropriate and further limits the scope of the discussions during the closed session to those topics "directly relate[d] to the specific reason announced as justification for the closed session." One such reason for a closed session is to evaluate the professional competency of an individual whose "performance or discharge is being considered." *See id.* § 21.5(1)(i).

On appeal, Adele does not challenge the basis for the closed session. She only claims the council violated chapter 21 when it discussed business that did not directly relate to Fagen's performance appraisal. Specifically, she claims:

> By agreeing in advance to the ordinance and establishing in advance how and when the city council would be voting on the new city manager ordinance, [the closed] meeting constituted "final action" pursuant to Iowa Code Chapter 21, and all matters deriving therefrom, including Ordinance No. 650 itself, should be declared void.

The district court rejected this argument, finding that the council's decision to set a timetable for discussing the ordinance in future open sessions was not "final action" within the meaning of chapter 21. The court found the "final action" on the ordinance was when the new mayor signed the ordinance into law.

Iowa Code section 21.6 sets forth the remedies for suits to enforce Iowa's open meeting law. Section 21.6(3)(c) states, in pertinent part, that a court

> [s]hall void any action taken in violation of this chapter, if the suit for enforcement of this chapter is brought within six months of the violation and the court finds under the facts of the particular case that the public interest in the enforcement of the policy of this chapter outweighs the public interest in sustaining the validity of the action taken in the closed session.

Pursuant to this section, the district court could only void the council's closed meeting "action" if (1) Adele brought suit to enforce the open meetings law within six months of the closed meeting and (2) the public interest involved in the enforcement of the policy outweighed the interest in sustaining the validity of the action taken during the closed session. Upon our review of the record, we find Adele has failed to satisfy either of these elements.

Even if we were to assume, arguendo, that the council's decision to set a timetable for reading and voting on the ordinance was "final action" violating chapter 21, the record reveals Adele did not bring suit to enforce the alleged violation within six months of the closed meeting. While Adele filed the present lawsuit in February 2006, her original petition did not allege a violation of Iowa's open meetings law in regards to this particular meeting.[1] Adele did not make this claim until February 2007—more than fifteen months after the closed meeting—when she filed a second amended petition. We find no reason to toll the timeframe to raise an open meetings claim merely because she filed a lawsuit challenging the ordinance on other grounds.

Likewise, we are unable to conclude that the public interest involved in the enforcement of chapter 21 outweighs the validity of the action taken during the closed session. Even if we were to accept Adele's premise that the council should not have expressed any opinion on the proposed ordinance and should not have scheduled the dates upon which this ordinance would be subject to public debate, we find this still does not outweigh the public interest in sustaining

[1] As noted above, Adele did allege Pleasant Hill violated the open meetings law in regards to an unrelated meeting in December 2005.

the validity of the action taken in the closed session. This ordinance was discussed in open session on three occasions. On each occasion, a majority of the council expressed their approval of the proposed ordinance. On at least one occasion the council heard members of the public express their disapproval of the ordinance. These arguments persuaded one member of the council to vote against the ordinance. The new mayor did not exercise his power to veto the ordinance. Instead, he signed the ordinance into law even though, according to Adele, it substantially limited the powers of his office. In light of the very public process involved in the ultimate decision to pass this ordinance, we find no reason to void the ordinance merely because the council's first dialogue about the ordinance came during a closed session.

B. Change in the Form of Government

Adele claims the district court should have voided the ordinance because it transferred the mayor's powers to the city manager and changed Pleasant Hill to a council-manager form of government without following the procedures set forth in Iowa Code section 372.2.[2] This claim regarding the validity of this ordinance was brought as a declaratory judgment action and tried in equity. Where a declaratory judgment action was tried in equity in the district court, our review is de novo. *Allamakee County v. Collins Trust*, 599 N.W.2d 448, 451 (Iowa 1999). Accordingly, our review of this claim is de novo. *Id.*

[2] The decision to change the form of government for the city must be submitted directly to the electorate via a special city election. Iowa Code § 372.2. The city council may not, by ordinance alone, create a new form of city government. *City of Burlington v. Citizens to Protect Our Freedoms*, 214 N.W.2d 139, 141 (Iowa 1974).

Iowa Code chapter 372 regulates the organization of city government. Section 372.1 outlines the eight different forms of city government. It is undisputed that, prior to the enactment of this ordinance, Pleasant Hill operated under the mayor-council form of government. The fighting issue on appeal is whether the disputed ordinance changed the city's form of government from a mayor-council form to a council-manager-at-large form of government.

Iowa Code section 372.4 describes the mayor-council form of city government:

> A city governed by the mayor-council form has a mayor and five council members elected at large . . . . The council may, by ordinance, provide for a city manager and prescribe the manager's powers and duties, and as long as the council contains an odd number of council members, may change the number of wards, abolish wards, or increase the number of council members at large without changing the form.

While the mayor is not a member of the council and does not vote as a member of the council, the mayor does have the responsibility to appoint and dismiss the marshal or chief of police, subject to the consent of the majority of the council. *See* Iowa Code § 372.4(2).

Section 372.6 describes a council-manager-at-large form. In this form, there are five council members elected at large for staggered four-year terms. *Id.* § 372.6. At the first meeting of the new term following each city election, the council elects one member of the council to serve as mayor. *Id.* The mayor remains a voting member of the council. The council appoints a city manager who operates under a prescribed list of duties set forth in section 372.8. *Id.*

Adele does not dispute that Pleasant Hill has most of the attributes of a mayor-council government. For example, the city council has five council

members who are elected at large. The mayor is selected by the citizens of Pleasant Hill, not the city council. The mayor is not a member of the city council and does not vote as a part of the city council. Also, the mayor does, with the consent of the city counsel, appoint the police chief.

Despite the obvious differences between a mayor-council form of government and the council-manager form of government, Adele contends the disputed ordinance changed Pleasant Hill's form of government because it created a city manager position with new duties that were previously assigned to the mayor. Because the ordinance sets forth several duties and powers of the new city manager position which are also listed as duties and powers of a city manager under a council-manager form of government, Adele claims the council changed Pleasant Hill's entire form of city government.

We disagree. Section 372.4 specifically states that the city council, in a mayor-council form of government, "may, by ordinance, provide for a city manager and prescribe the manager's powers and duties." That is precisely what the council did in this case. We find it is only natural that a city council would look to the list of prescribed duties for a city manager in a council-manager form (as set forth in section 372.8) when deciding what powers and duties to assign its own city manager.

Pleasant Hill's form of government did not change when this ordinance was signed into law; the council merely used its statutorily given power to create the position of city manager and to prescribe the new city manager's powers and duties. We find no reason to void this ordinance simply because some of the powers and duties assigned to the new city manager were those prescribed to a

city manager in a council-manager form of government or those previously performed by the mayor.

C. Four-Fifths Provision

The final provision of this ordinance states, "This ordinance may only be modified by four fifths of the city council." Adele claims this final provision is contrary to law,[3] and therefore contends we should void the entire ordinance and eliminate the city manager position. Adele cites no authority for her proposition that the entire ordinance should be declared void based upon one distinct, allegedly invalid, provision in the ordinance. Because she did not cite to any authority in support of this issue, we deem it waived. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.").

III. Conclusion

Having considered all issues raised on appeal, whether or not specifically addressed in this opinion, we affirm the district court's decision.

AFFIRMED.

Vogel, J., and Nelson, S.J., concur; Sackett, C.J., concurs in part and dissents in part.

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[3] In support of her claim, Adele cites to Iowa Code section 380.4, which states, "[p]assage of an ordinance, amendment, or resolution requires a majority vote of all of the members of the city council." She also cites to *Thurston v. Huston*, 123 Iowa 157, 160, 98 N.W. 637, 638 (1904), where our supreme court stated:

> In the absence of any statutory or charter restriction, we think the rule is well established that a majority of a quorum is all that is required for the adoption or passage of any resolution or order properly arising for the action of a city council or other collective body exercising legislative, judicial, or administrative functions.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part:

CLAIMED OPEN MEETINGS VIOLATION. Plaintiff contends the district court erred in concluding the November 22, 2005 closed meeting of the Pleasant Hill City Council complied with the Iowa open meetings law. The majority has affirmed this finding. I disagree. There was a clear violation of Iowa Code section 21.3 (2005) as there was not the required notice and the session evolved into the discussion of issues not authorized by section 21.5 for a closed session.

Open meetings are dictated by Iowa Code section 21.3, that provides in applicable part:

> Meetings of governmental bodies *shall be preceded by public notice* as provided in section 21.4 and shall be held in open session unless closed sessions are expressly permitted by law. *Except as provided in section 21.5, all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.*

(Emphasis supplied.)

It appears to be agreed that the mayor and council sought to close the meeting under the provision of Iowa Code section 21.5 that provides in applicable part:

> 1. . . . A governmental body may hold a closed session *only to the extent a closed session is necessary for any of the following reasons:*
>
> . . . .
>
> i. To evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered *when necessary to prevent needless and irreparable injury to that individual's reputation* and that individual requests a closed session.
>
> . . . .

> 2. . . . *A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.*

(Emphasis supplied.)

Before the commencement of the closed meeting a motion was made to which all council persons agreed to go into closed session pursuant to Iowa Code section 21.5. This was not on the published agenda.

At the closed session there were evaluations of the city administrator Fagen, letters supporting him and praising him from the council, and minor suggestions for change in the way certain things were handled. Plaintiff agrees this discussion is permitted in a closed meeting and would have been alright if the discussion had ended there. But it did not.

The meeting then evolved into a discussion of granting Fagen a three-year employment contract, copies of which had been distributed. The mayor indicated the contract was needed to keep continuity within the city so if there was a new mayor and all new city council members they could not fire the city administrator in the first week. A council person addressed the date of the contract and whether it should be approved before or after the mayoral election, and said someone had shown it to the incoming mayor and he said he would support it. The current mayor and council then discussed items related to the contract such as a car allowance and benefits, and multiple voices agreed to address the contract at the next council meeting. A council person told Fagen there was no problem and that he was going to get a car allowance and a provision for a cell

phone put in his contract and the mayor said he did it.[4] There also was a discussion about the two-month notice provision in the contract should Fagen leave.

The meeting then turned to consideration of an ordinance termed Ordinance No. 650 which had been handed to the council earlier. In the course of the meeting the mayor related that he wanted Fagen to direct the police department particularly because the incoming mayor, who had formerly been the mayor, wanted the police department to work for him. The proposed ordinance that was handed out changed the designation of a person in Fagen's position from city administrator to city manager and apparently put the city manager in charge of the police department. The mayor recommended to the council if they all were okay with the ordinance, then it would be introduced at the next meeting. After a discussion there was agreement to present the ordinance at three meetings and not to waive the second or third reading. There was further discussion as to whether the ordinance should be passed before the end of that year or the next year and the decision was made to pass it the following year, setting up the schedule so the new mayor would have to respond in public.

To summarize, the council discussed at least two items which are not authorized by the open meetings law to be discussed in closed session, namely an employment contract and an ordinance, while they did not pass or approve either as they recognized that needed to be done in an open meeting. They expressed approval for same and plotted their collective course of action in presenting the issues at an open meeting. Iowa Code section 21.3 requires

[4] Apparently the mayor did it by making a notation on a copy of the contract.

discussion, "whether formal or informal," to be conducted in open session.[5] Iowa Code § 21.3. There is some suggestion the fact that the two items discussed were ultimately voted on in open session exonerates the open meetings violation. I find no authority to support this suggestion.

In *Barrett v. Lode*, 603 N.W.2d 766 (Iowa 1999), the court addressed a similar issue. There, the school board discussed, in what may have been a de facto closed session, along with the evaluation of the superintendent, the administrative needs for the coming school year. *Barrett*, 603 N.W.2d at 770-71. There the court said,

> [W]e [ ] reject the contention of defendants that the discussion of administrative needs for the coming year would be so inextricably linked with the proposed evaluation of the superintendent in closed session that this topic did not need to be shown on the agenda or discussed in the public portion of the meeting.

Id. at 770.

I would find the uncontroverted evidence proves the closed session extended well beyond a review of Fagen's job performance and supports a finding as a matter of law that there was a violation of the open meetings law. As in *Barrett*, the extension of the session was not so linked with his evaluation that the topic did not need to be shown on the agenda or discussed in the public portion of the meeting. *See id.* Having so found, I would remand to the district

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[5] There is some confusion in the district court opinion as to whether or not there need be 'final action' in closed session to support a finding of an open meetings law violation. In addressing this, the court cited Iowa Code section 21.5(3) which provides "Final action by any governmental body on any matter shall be taken in an open session unless some other provision of the Code expressly permits such actions to be taken in closed session." I disagree with any suggestion that only "final action" must be taken in an open meeting as section 21.3 clearly says, among other things, that "all actions and discussions" unless excepted under 21.5 "s*hall be* conducted and executed in open session." (Emphasis supplied.)

court to consider the remedy under Iowa Code section 21.6. The numerous remedies are provided in this section for violation of the open meetings law. *See* Iowa Code § 21.6. These include, among other things, an assessment of damages against those who participated in the violation, as well as the voiding of any action taken if the suit is brought within six months[6] of the violation. Iowa Code § 21.6(3)(a), (c). The court, in considering whether to void the action, is authorized to weigh whether the public interest in sustaining the validity of the action taken in closed session outweighs the public interest in enforcing the policy of open meetings laws of chapter 21.[7] Iowa Code § 21.6(3)(c).

CHANGING FORM OF GOVERNMENT. While I believe the enactment of Ordinance No. 650 violated the spirit of the law most particularly because its purpose in part was to strip the new mayor of powers, I reluctantly concur with the majority and would affirm the district court on this issue.

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[6] The remedies section appears to be the only place the six-month provision applies.

[7] It appears to me in rejecting the plaintiff's challenge, the majority is confusing one of the many ways a violation can be enforced pursuant to Iowa Code section 21.6 with Iowa Code section 21.5 which spells out when a governmental body may hold a closed session.