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COURT OF APPEALS, STATE OF COLORADO **2 East Fourteenth Avenue, Suite 300** **Denver, CO 80203**	
DISTRICT COURT, GUNNISON COUNTY, STATE OF COLORADO J. Steven Patrick District Judge Case Number: 04CV10	
LARRY DARIEN, DANA DARIEN, TOM WILLIAMS, and DAN BRUMBAUGH, Plaintiffs-Appellants v. THE TOWN OF MARBLE, COLORADO, a body corporate, THE TOWN COUNCIL OF THE TOWN OF MARBLE, and HAL SIDELINGER, ROBERT PETTIJOHN, and MIKE EVANS, in their official capacities as members of the Town Council, Defendants-Appellees	**▲ COURT USE ONLY ▲**
Attorney for *Amicus Curiae:* Geoffrey T. Wilson, #11574 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Telephone: 303.831.6411 Telefax: 303.860.8175 E-mail: gwilson@cml.org	**Case Number: 05 CA 587**

ANSWER BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE*

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COMES NOW, the Colorado Municipal League (the "League") by its undersigned counsel, pursuant to Rule 29, Colo. App. R., and files this brief as *amicus curiae* in support of Defendant-Appellee, the Town of Marble (the "Town").

STATEMENT OF ISSUES ON APPEAL

The League hereby adopts and incorporates by reference the Statement of Issues on Appeal in the Answer Brief of the Town.

STATEMENT OF FACTS AND OF THE CASE

The League hereby adopts and incorporates by reference the Statement of Facts and of the Case in the Answer Brief of the Town.

SUMMARY OF ARGUMENT

The Colorado Open Meetings Act requires jurisdictions that provide notice of their meetings by posting to include with such posting "specific agenda information where possible." §24-6-402(2)(c) C.R.S. At issue in this appeal is whether the Town of Marble complied with this requirement.

In this case, the Town of Marble included with its posted meeting notice specific agenda information for an upcoming regular Town Board meeting. The posted agenda included all information available to the Town clerk at the time she prepared the meeting agenda for posting. The League respectfully urges that the

Town included with its posting all agenda information it was "possible" to include, as that term is reasonably construed according to its plain and ordinary meaning.

Appellants urge this Court to read into the Colorado Open Meetings Act a role for meeting agendas in jurisdictions that post their meeting notices, that would limit the discretion of such public bodies to discuss or take action on any matter not specifically identified in the posted agenda. This is a requirement that the General Assembly has not seen fit to adopt directly; the League respectfully urges this Court not to read it into the law.

ARGUMENT

I. INTRODUCTION

The Colorado Open Meetings Act (COMA) §24-6-401-402 C.R.S., provides openness, notice, minutes and executive session requirements for meetings of state and local public bodies, including municipal governing bodies, such as the Marble Town Board.

COMA's requirements concerning notice of meetings are set forth in §24-6-402(2)(c) C.R.S., which provides:

> Any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.

"Full and timely notice" is not defined in COMA, but Colorado courts have held that this is a "flexible standard," aimed at providing fair notice to the public. Benson v. McCormick, 195 Colo. 381, 383, 578 P.2d 651, 653 (1978); VanAlstyne v. Pueblo Housing Authority, 985 P.2d 97, 100 (Colo. App. 1999). Without foreclosing other potential forms of notice, COMA provides that notice by posting will be "deemed" full and timely notice. §24-6-402(2)(c) C.R.S.

> In addition to any other forms of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public place or places for posting such notice shall be designated annually at the local public body's first regular meeting of each calendar year. The posting shall include specific agenda information where possible. Id.

Here, the Town of Marble provided notice by posting of the date, time and location of an upcoming regular meeting of the Town Board. As required by COMA, the Town's posting also included specific agenda information.

Consequently, this appeal is not about whether the Town included specific agenda information in its notice posting. There is no question that the Town did

so. Rather, this appeal focuses on whether the Town's meeting notice was defective, because it was "possible" to have included additional specific agenda information in the posting.

The resolution of this question is important, because COMA provides that a formal action of a local public body (such as the decision of the Marble Town Board to terminate one aspect of the Tomb of the Unknowns project) is not valid unless it occurs at a meeting that meets COMA requirements, including the requirement for proper notice. §24-6-402(8), C.R.S. Appellants are seeking to invalidate a 4-1 vote of the Town Board with which they disagree, by arguing that it was "possible" to have included *additional* specific information in the posted agenda. They argue, in essence, that, because it was possible, before the meeting, to envision the Board taking a vote on whether to permit a permanent structure in the Town park, as part of the Tomb of the Unknowns project, and because the agenda did not specifically forecast such a possibility, the Board's action violated the Colorado Open Meetings Act and must be overturned.

The District Court dismissed Appellant's complaint. The League respectfully urges this Court to affirm the decision of the District Court.

II. Appellants urge a construction of COMA's agenda posting requirement that is contrary to the plain meaning of the statute and leads to an unreasonable, absurd result; this Court should reject such a construction.

Read in light of its evident purpose, COMA's somewhat colloquial requirement that posted notice of a meeting include specific agenda information "where possible" §24-6-402(2)(c) C.R.S., may reasonably be read to require that the posting include such agenda information "when possible," "to the extent possible" or "if possible." Nothing in COMA suggests that this language is intended to provide public entities with direction as to the *location* of their notice posting.

This section may also reasonably be read to define a particular point in time when its obligation must be met. The obligation is described in terms of what must be included with the posting of other meeting information. Thus, it is reasonable to presume that what must be included with such a posting is whatever specific agenda information it was "possible" to include, as of the date of posting. To the extent the person preparing the agenda is informed that discussion or action on a topic is planned for the meeting, prior to time that agenda information is posted, appropriate agenda information should be included in the posting, because it is reasonably "possible" to do so. And that is exactly what the Town of Marble did in the case at bar.

In construing the word "possible" in the context of COMA's agenda posting requirement, several well established rules of construction are helpful. First among these is that courts are guided by legislative intent, and "to discern that intent '[courts] afford the statutory language its ordinary and common meaning.'" Normandin v. People, 91 P.3d 383, 386 (Colo. 2004) quoting: Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue, 40 P.3d 1260, 1264 (Colo. 2002); Bd. of County Comm'rs. of Costilla Co. v. Costilla Co. Conservancy Dist., 88 P.3d 1188, 1193 (Colo. 2004) (words in COMA to be given their "plain and ordinary" meaning). It is presumed in such construction that the General Assembly intends a just and reasonable result, §2-4-201(1)(c) C.R.S.; Bd. of County Comm'rs of Park County v. Park County Sportsmen's Ranch, LLP, 45 P.3d 693, 711 (Colo. 2002); In re marriage of Roosa, 89 P.3d 524, 528 (Colo. App. 2004) and one that is "feasible of execution." Section 2-4-201(1)(d), C.R.S.

The word "possible" has been defined as "being within or up to the limits of one's ability or capacity as determined by nature, authority, circumstances or other controlling factor" Webster's Third International Dictionary of the English Language Unabridged, Merriam-Webster, Springfield, Mass. (3rd ed. 1993), and as "capable of happening. . . capable of occurring or being done without offense to character, nature or custom," American Heritage Dictionary of the English Language, Houghton-Mifflin, Co., Boston, Mass. (4th ed. 2000), as well as a thing

"that may or can exist, be done, or happen; that is in a person's power, that one can do." Shorter Oxford English Dictionary on Historical Principles, Vol. 2, n2, Oxford Univ. Press, Oxford (5th ed. 2002).

In the case at bar, the record reveals that the posted notice of meetings was regularly prepared by the town clerk. Rec. pps. 122-123 (testimony of Town clerk Karen Mulhall). As of the time that the meeting notice for the January 8, 2004 regular Town Board meeting was posted (along with agenda information) trustee Sidelinger had not decided to make a motion to terminate Town involvement in the permanent structure aspect of the Tomb of the Unknowns project. Rec. pps. 73-75; 78 (testimony of Mayor Hal Sidelinger). Having not formed the intention to make his motion, Sidelinger, of course, had not requested that such a topic be included in the agenda as of the date of posting. Rec. pps. 78 (Testimony of Mayor Hal Sidelinger); 154-155 (testimony of Town clerk Karen Mulhall). Indeed, as the trial court observed in its order, "Sidelinger had no preconceived intent nor planned to make the motion to withdraw support of the TOU project prior to the discussion which occurred at the meeting." Darien, et. al., v. Town of Marble, et. al., Gunnison County District Court, No. 04CV10, Findings of Fact, Conclusions of Law and Order, February 2, 2005 (Order), at p. 13 (attached as Appendix A).

By requiring that specific agenda information be included with the posting only "where possible," the General Assembly obviously contemplated that there

would be circumstances when posting of such information would not be possible. According the term "possible" its ordinary and common meaning, it is reasonable to assume that one of those occasions would be when no one requests that a particular matter be agendized prior to posting of the notice. It would be unreasonable and absurd to assume that the General Assembly intended its language to require those charged with posting meeting notice and agenda information to perform the impossible task of including in such posting information of which they are unaware. As Colorado courts have said, no provision of law should be interpreted in a way that requires an impossible task. People v. Interest of K.M.J., 698 P.2d 1380, 1382 (Colo. App. 1984); accord: Brady v. City of County of Denver, 181 Colo. 218, 220, 508 P.2d 1254, 1256 (1973).

Here, the Town posted specific agenda information as part of its notice, to the extent such information was available, at the time of posting. To paraphrase the definition of "possible" quoted above, the Town included with its posting specific agenda information to the extent that it was within the ability or capacity of the Town to do so. In short, the Town complied with the requirements of COMA, as reasonably construed.

III. Appellants invite this Court to read into COMA a role for meeting agendas that the General Assembly has not seen fit to enact; this Court should decline the invitation.

In determining the extent of the obligation imposed by COMA's requirement that posted notice include specific agenda information "where possible," §24-6-402(2)(c) C.R.S., it is worth considering what the General Assembly has *not* chosen to make an obligation under COMA.

The General Assembly might have made it the law of the state of Colorado that "full and timely notice" must include a detailed agenda, listing all topics and all potential actions to be considered at an upcoming meeting. But this General Assembly has not done. Indeed, except in the case of notice by posting (and then only "where possible"), legally sufficient notices of meetings under COMA are not expressly required to include *any agenda information whatsoever.*

The General Assembly might also have made it the law of the state of Colorado that a state or local public body be limited to taking action only on those topics and only to the extent specifically identified in its agenda. And the General Assembly might adopt exceptions to this requirement, perhaps applicable in cases of bonafide emergencies, where it was "impossible" to foresee the necessity for consideration of a particular topic. But this also, significantly, the General Assembly has not done.

Yet, in this appeal, Appellants essentially invite this Court to read into COMA precisely these requirements, at least for those jurisdictions that *post* their meeting notices. The League respectfully urges this Court to decline the invitation. The decision of whether or not to insert into COMA these dramatic new requirements is appropriately left to the General Assembly, following full debate on the numerous public policy considerations that would pertain.

Appellants here seek to elevate the requirement that notice by posting include specific agenda information "where possible" into a sweeping requirement that public bodies that choose this form of notice be barred from virtually any discussion or action not *specifically* forecast in their previously posted agenda. As no agenda information *at all* need be part of "full and timely notice" of meetings by publication, or by any other means, this construction would require courts to presume that the General Assembly intended application of this severe limitation on legislative prerogative to depend *entirely* upon the form of notice chosen by the public body. This is completely ridiculous, an absurd result, and one obviously at odds with the well established rule of construction that "a statutory interpretation leading to an illogical or absurd result will not be followed." Frazier v. People, 90 P.3d 807, 811 (Colo. 2004); accord: Bd. of County Comm'rs of Costilla Co. v. Costilla Co. Conservancy Dist., 88 P.3d at 1193; Concerned Parent of Pueblo Inc.

v. Gillmore, 47 P.3d 311, 313 (Colo. 2002) (forced or strained construction of statute to be avoided, as well as construction that leads to an absurd result).

The League respectfully urges a more practical, reasonable construction of the agenda posting requirement in §24-6-402(2)(c) of COMA. The statute may reasonably be read as reflecting the desire of the General Assembly, while not wishing to define or limit other forms of notice that would qualify as "full and timely" under COMA, to merely add a somewhat relaxed agenda posting requirement to the law, applicable only to those jurisdictions that choose to provide notice of their meetings by posting. However, even in these jurisdictions, posting of specific agenda information isn't mandatory; it is only required when it is reasonably "possible" to include such information with the posting.

A reasonable interpretation of this requirement is that the General Assembly was simply expressing its desire that posted meeting notices include agenda information, as discussed above, to the extent such agenda information has been determined at the time of posting. The General Assembly quite reasonably might have decided not to extend such a requirement to jurisdictions that choose to provide notice of their meetings by publication, due to consideration of local fiscal impact (such impact could be potentially significant, especially for smaller towns, which would be obliged by such a mandate to regularly purchase far more column inches of legal advertising from the local paper), as well as practicality (insofar as

publication deadlines for local papers are often well in advance of a meeting; thus, at a time when much of the agenda may still be undetermined). Simply requiring that this information be included with a posted notice, on the other hand, would not have the same fiscal impact, and could well provide some additional, useful information to the public. It is evident in the General Assembly's choice of words that it did not want this modest agenda posting requirement to be burdensome on the government. That is why, rather than requiring specific agenda information in all forms of notice, or tying public bodies to their agendas, the General Assembly simply required that agenda information accompany only *posted* notice, and then only when "possible."

It would be inconsistent with this intent to permit COMA's agenda posting requirement to become a device that those on the losing side of a local political dispute may use to overturn votes with which they disagree, by identifying ways in which it was "possible" for posted specific agenda information to have been even more specific.

In the construction of statutes, courts consider the consequences that flow from a particular construction. Common Sense Alliance v. Davidson, 995 P.2d 748, 755 (Colo. 2000). It is worth considering where the requirements that Appellants urge this Court to read into COMA would lead. One can envision numerous, interminable arguments in public meetings about whether the posted

agenda was "specific" enough to permit a proposed course of discussion or action, while public entities scramble to avoid this unfortunate scenario either by switching to some form of notice *other* than posting, or by posting in advance huge lists of potential topics and actions, in an effort to preserve the body's opportunity to act.

As noted above, nothing in §24-6-402(2)(c) C.R.S., or elsewhere in COMA, indicates that the General Assembly intended to elevate posted specific agenda information to a condition precedent to lawful discussion or action under COMA.

CONCLUSION

Under the facts of the present case, it is reasonable to conclude, as the trial court did, that the Town of Marble's actions reveal no violation of the Open Meetings Law.

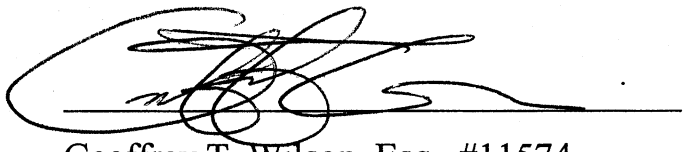
Here the Town timely posted notice of the date, time and location of its upcoming January 8, 2004 regular Town Board meeting. As part of its posted notice, and as required by COMA, this notice included all of the specific agenda information of which the official who handled the posting for the Town was aware, when the notice was posted. Nothing in the record indicates that the Town was acting in bad faith by seeking to evade or manipulate the notice requirements of COMA in order to mislead the public.

COMA provides a severe penalty for violation of its terms. Actions tainted by violations, including failure to provide the proper advance notice of meetings, are void. The League respectfully urges that neither the language of COMA, nor the actions of the Town of Marble in this case require such a sanction, in the case at bar.

WHEREFORE, for the reasons stated herein and in the Answer Brief of the Town of Marble, the decision of the trial court should be affirmed.

Respectfully submitted this 30th day of September 2005.

COLORADO MUNICIPAL LEAGUE



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District Court Gunnison County, State of Colorado 200 East Virginia Avenue Gunnison, CO 81230 Telephone: (970) 641-3500 Fax: (970) 641-6876	^ COURT USE ONLY ^
Plaintiffs: LARRY DARIEN; DANA DARIEN; TOM WILLIAMS; and DAN BRUMBAUGH Defendants: THE TOWN OF MARBLE, COLORADO, a body corporate; THE TOWN COUNCIL OF THE TOWN OF MARBLE; and HAL SIDELINGER and ROBERT PETTIJOHN, in their official capacities as members of the TOWN COUNCIL	Case No.: 04CV10 Div.: 2

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for a bench trial on Monday, January 24. Appearing for Plaintiffs were Danielson and Santarelli. Appearing for Defendants were Caloia and Geiger. The Court heard evidence from Plaintiff Dana Darien, Defendant Hal Sidelinger, the Town Clerk and Manager, Karen Mulhall, Chris Sidelinger, Tom Williams, Dr. Vincent Savage, Loyal Leavenworth, Steve Finn, Connie Manus, Hank VanSchaack, and Bettie Lou Gilbert.

The issue before the Court is the sufficiency of the notice posted by the Defendant Town of Marble prior to its January 8, 2004 regular meeting of the Town of Marble Board of Trustees. The issue is a question of interpretation of Colorado Revised Statute 24-6-401, *et seq.* In particular is the issue of the language set forth in C.R.S. § 24-6-402(2)(c) as it relates to the facts in this matter.

The Court hereby finds, concludes and orders as follows:

FINDINGS OF FACT

1. The Marble quarry was the quarry for a number of well-known marble buildings and monuments including the Tomb of the Unknowns in Arlington National Cemetery.

2. Sierra Minerals Corporation, at the time the quarry operator, through its president, Rex Loesby, approached the Town of Marble along with others including the Marble Historical Society about possible participation by the Town in a project to replace the Tomb of the Unknowns, frequently referred to in various documents as The TOU project. There was also discussion of having a second quarry block removed as "insurance" with the possibility that it could be left in the Town of Marble.

3. The historic Mill Site is now in the ownership of the Town and is known as the Mill Site Park.

4. There was a proposal presented by Rex Loesby and others that the two marble blocks be placed at the Mill Site Park and potentially the site would be used for finishing the blocks and/or as a permanent display location for the second replacement block.

5. Rex Loesby formally presented this to the Board at the October 2nd, 2003 Town of Marble Board of Trustees meeting.

6. There was a public meeting at the Marble Fire Station on Saturday, November 1, 2003. This meeting was characterized by various witnesses as "ugly" or emotional, confrontational and divisive.

7. The matter was again discussed at the November 6, 2003 Town Council meeting.

8. Exhibit 11 is the agenda for that meeting which has as item 13 Mill Site update. Exhibit 12 is the minutes of that meeting which sets forth at p. 1 a recap of correspondence from Tom Williams as president of the Marble Historical Society concerning the November 1 meeting and at pp. 2 and 3 a discussion of the Mill Site update. Wayne Brown, then the mayor of the Town, opened the floor for six people to express their views on the TOU project, three for each side for three minutes each. He further indicated that there was no specific proposal before the Board and that there would not be a decision made that night.

9. The Mill Site Committee was scheduled to meet on November 19, 2003. Prior to that meeting Wayne Brown had requested Karen Mullhall to "poll" the members of the Board of Trustees, to authorize the mayor to appoint members to the Mill Site Committee, to spell out the roles and responsibilities and power of the committee – specifically that it would be advisory to the Board of Trustees only, and to evaluate how to gather opinion as to the project. All members of the Town Council approved or agreed to that outline. There was also discussion that the committee needed to report back to the Board by February 5, 2004.

10. The November 19 meeting had been planned to minimize the likelihood of a repeat of the November 1 meeting. In particular Tom Williams had met with Eli Beeding and Wayne Brown prior to the meeting. The meeting began with Eli Beeding, a known opponent of the TOU project, then Tom Williams, who is the president of the Marble Historical Society and was supportive of the project, and

then communications by the mayor consistent with the information previously indicated.

11. There were protests with respect to the appointment of the committee and the consensus of the group was to include three more members than those identified in the proposal from the mayor, which had been two members of the Town Council, two members of the Marble Historical Society and two at large members. The committee of nine was selected at that time. At that meeting they also agreed to meet once in December and every other week in January.

12. Members of the Mill Site Committee included Plaintiff Dana Darien as co-chair with Defendant Hal Sidelinger also as a co-chair. Witnesses Bettie Lou Gilbert, Connie Manus, Steve Finn and Hank VanSchaack also were members of the committee.

13. The agenda for the December 4, 2003 Town Council meeting did not include any item concerning the Mill Site Committee or the TOU project; however, it did note that the next Mill Site Committee meeting would be Thursday, December 11.

14. The mayor wrote a letter dated December 6, 2003 to the Small Business Administration inquiring as to their position on a deed restriction they had placed on the Mill Site Park when the property had been conveyed by it to the Town.

15. At the December 11 meeting of the Mill Site Committee the mayor "rescinded" the February 5 deadline. The members of the committee had been requested to develop ideas for size and scope of the project which were then discussed. The committee then discussed options on how to gather valley-wide

public opinion. The consensus was that a survey of property owners and registered voters was the best option and that the Town and the Marble Historical Society would be approached concerning funding.

16. Exhibit 29, attached to this Order as Appendix A, is the agenda notice for the January 8, 2004 meeting. There is no dispute that this notice was posted at least 24 hours prior to the meeting and was posted in the regularly designated location.

17. In relevant part the agenda states as follows:

> 6. Mill Site Committee Update Hal Sidelinger 7:30 to 7:45 P.M.
>
> - Authorization for Mill Site Committee survey expenditure(s)
> - Endorse replacement of MSC member
>
> Below the "box" detailing the agenda is the following statement:
>
> This agenda is subject to change, including the addition of items up to 72 hours in advance or the deletion of items at any time. All times are approximate. For further information, contact Karen Mulhall at 384-0761. If special accommodations are necessary per ADA, contact 384-0761 prior to the meeting.

(From other agendas of Defendant Town of Marble the Court has reviewed, this language is consistently included with the notice). The next paragraph reads as follows:

> The next Town Council meeting will be held Thursday, February 5, 2004. The next Mill Site Committee meeting will be held Thursday, January 15 at 7:00 p.m. in the school.

18. Prior to the meeting Hal Sidelinger then co-chair of the Mill Site Committee and also a member of the Board of Trustees and one of their two representatives to the Mill Site Committee had, in preparation of his work on the Mill Site Committee, reviewed the Town of Marble Master Plan. He had also had discussions with

various concerned citizens and also with the mayor. He had concluded that he could no longer support the TOU project. More particularly, he had concluded that it would violate the Master Plan for the Town. See also the discussion in the minutes of this point as set forth at p. 2 of Exhibit 30, ¶ 7. After further discussion and as stated in the minutes which are quoted here from Exhibit 30:

> Hal made a motion that the Town Council not allow a permanent structure for the Tomb of the Unknown Soldier project in the Mill Site, nor should the second block of marble be on permanent display in the Mill Site Park. Mike seconded the motion and the motion passed 4 to 1, with Vince being opposed.

19. As developed at trial, while other than the Town Council members and the clerk and manager there were 15 interested persons at the Board of Trustees meeting of January 8, 2004 but not one of those in attendance was a proponent of the project, more particularly with the possible exception of one person, all of the citizens in attendance were outspoken opponents of the TOU project.

20. The Mill Site Committee went forward with its January 15, 2004 committee meeting.

21. The February 5, 2004 agenda noted under item 12 correspondence regarding alleged violation of Sunshine Laws. Exhibit 34, the minutes of the February 5, 2004 meeting notes that a letter was received by a number of concerned citizens including one of the Plaintiffs alleging a violation of Sunshine Laws and requesting rescission of the Town's decision on the TOU project.

22. The evidence is uncontroverted that the Town's attorneys, Ms. Caloia and Ms. Geiger, advised the council to rescind the decision, to place it on a future agenda, but that nothing in that advice or their opinion suggested that the Town had

done anything wrong, rather it was the easiest way out of the situation. No action was taken in response to that discussion.

23. Plaintiffs Dana and Larry Darien operate a ranch, a bed and breakfast, a Nordic center and a sandwich shop in the Marble area. She has lived in the Marble area 27 years and he has lived there his entire life. His family has owned the ranch since the 1930s.

24. Tom Williams is a part-time resident of the Marble area, has been a member of the Marble Historical Society for greater than 10 years, has been on the Board since 2001 and has been the president since August of 2001. He traveled to Indiana to confer with the American Legion with respect to possible funding of this project and traveled to Arlington to meet with officials there concerning this project.

25. Plaintiff Dan Brumbaugh did not testify. The Response to the Motion to Dismiss for Lack of Standing suggests that he is a part owner of a local business, Outwest Guides. He is a resident of the Town.

26. Hal Sidelinger was on the Town Council and on the Mill Site Committee at all times relevant. He has since become mayor.

27. Wayne Brown, the mayor at all times relevant to this proceeding passed away shortly after the events discussed above.

28. Defendant Robert Pettijohn is a member of the Board of Trustees.

29. By stipulation filed January 6, 2005 Mike Evans was dismissed from this proceeding as he no longer serves on the Board of Trustees.

30. This suit was filed February 9, 2004.

SUMMARY OF ARGUMENTS

1. Plaintiffs argue that the testimony, even from the town clerk/manager and Defendant Hal Sidelinger suggest that posting the agenda noting the consideration of a motion to not go forward with the TOU project was possible. Accordingly, under C.R.S. § 24-6-402(2)(c) the Open Meetings Act has been violated. They argue further that under the concept of "*expressio unius*" the agenda as presented is misleading in that it suggests that the only actions to occur on this issue at the meeting were an "update" and more particularly that there were only two items under the Mill Site Committee update, specifically funding of a survey and appointment or affirmation of replacement members to the Mill Site Committee. That accordingly this agenda as posted led the proponents of the TOU project to believe that nothing as significant as the motion that was presented would occur. That was further corroborated by the reference to the fact that the next meeting of the Mill Site Committee was to occur on January 15 of the following week.

2. Defendants' argument is that the notice posted comports with the law, that it is a fair and flexible standard, that to require any greater detail would paralyze local government particularly small governments that meet only once per month and that the use of terms such as "update" are common practice not only for this small town but many other small communities in western Colorado.

CONCLUSIONS OF LAW

1. The Court denied a renewed Motion to Dismiss at the conclusion of Plaintiffs' case based on standing. The Court was not cited to any new authority on this proposition. This Court has previously ruled that economic interests, based on Wimberly v. Erinberg, 570 P.2d 535 (Colo. 1977), are insufficient to establish

standing. The Court relied on Ainscough v. Ownes, 90 P.3d 851 (Colo. 2004). That Court, citing Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission, 620 P.2d 1051 (Colo. 1980), notes that deprivation of a legally created right, although intangible, is nevertheless an injury in fact for purposes of evaluating standing. See also Rector v. City and County of Denver, 2005 WL 170733 (Colo.App. January 27, 2005), noting that Colorado grants parties to lawsuits the benefit of a relatively broad definition of standing. Clearly as to all of the Plaintiffs other than Mr. Brumbauh the evidence is uncontroverted. The Court concludes that the minutes of the February 5 meeting noting his objection is sufficient to give him standing as well.

2. This Court has previously ruled in the Order on Motion to Dismiss on June 15, 2004 that the action of the Town Council in this instance was a legislative or policy-making decision, as distinguished from a quasi-judicial function. See generally Prairie Dog Advocates v. City of Lakewood, 20 P.3d 1203 (Colo.App. 2003), and Cherry Hills Resort Development Co. v. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988).

3. C.R.S. § 24-6-401 defines the policy of this state as follows: It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret.

4. C.R.S. § 24-6-402(2)(c) provides as follows:

> Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public

place or places for posting such notice shall be designated annually at the local public body's first regular meeting of each calendar year. The posting shall include specific agenda information where possible.

a. It is uncontroverted that a notice was published and that it was published in a designated public place no less than 24 hours prior to the holding of the meeting.

b. The issue before the Court turns on the language of the last sentence quoted above. Plaintiffs contend that it was possible to post specific agenda information of a decision to withdraw from the TOU project. Defendants counter that the project was noticed for the meeting. The purpose of the Open Meetings Law has perhaps been most recently explained by Justice Bender in Board of County Commissioners of Costilla County v. Costilla County Conservancy District, 88 P.3d 1188 (Colo. 2004), at p. 1191 as follows:

> The OML is a complex statute, the central purpose of which is to ensure public participation in the policy-making process by requiring public access to a wide range of government meetings.

He then goes on to note on the same page:

> Paragraph 402(2)(c) is somewhat broader, and requires that before any meeting may take place where formal action may be taken or where a quorum of a local public body is in attendance or expected to be in attendance, public notice must be provided...

In that case the Colorado Supreme Court concluded that notice was not required where a quorum of the Board of County Commissioners were attending a public meeting called by another entity and at which that body was not part of the discussion nor furthering public policy.

Perhaps the earliest Colorado case discussing an earlier version of the Open Meetings Law is Benson v. McCormick, 578 P.2d 651 (Colo. 1978). That case hinged on whether or not the notice of the Senate calendar constituted "fair notice" as contemplated by the Open Meetings Law. That Court cautioned at p. 653:

> Absent adequate and fair notice, however, the salutary purposes of the Open Meetings Law could easily be defeated. The statute, therefore, requires that "full and timely notice" be given of meetings at which public business will be considered.

That case goes on to state at the same page:

> "Full and timely notice" for legislative committee meetings, which may be held almost daily, differs from "full and timely" notice for a monthly meeting of a public board.

Consequently, whether the statutory notice requirement has been satisfied in a given case will depend upon the particular type of meeting involved.

In discussing the facts before it in that case, the Colorado Supreme Court discussed the unique nature and pressures of legislative committees and that to require precise agenda notices would unduly interfere with the legislative process. It concludes that the Open Meetings Law was never intended to interfere with the ability of public officials to perform their duties in a reasonable manner.

Here we have the very situation noted in Benson. That is, this was a regular monthly meeting of the Town of Marble Board of Trustees. In Lewis v. Town of Nederland, 934 P.2d 848 (Colo.App. 1996), the fact pattern involved a town council taking an emergency action consistent with a municipal ordinance and ratifying that at the next duly notified regular meeting. The issue was specifically whether or not the municipal ordinance for emergency situations was in conflict with the Open Meetings

Law. In what is at least an unusual fact pattern in its own right in that instance the position of mayor and two trustee positions were vacant and the town had received notice that another trustee was going to be unavailable for nearly six weeks. Accordingly, the emergency meeting was called and the board members "converged around Shortridge", the trustee leaving the area for six weeks, and declared the emergency meeting to nominate an individual to one of the vacant trustee positions which entire episode lasted six minutes. The Court goes on to note that there is no specific discussion of emergency situations under the Colorado Open Meetings Law but then, citing Benson, supra, notes that the statute sets a "flexible standard" for notice depending on the type of meeting involved.

In Cole v. State, 673 P.2d 345 (Colo. 1993), in a *per curiam* decision, the Colorado Supreme Court concluded that the Open Meetings Law applied to legislative caucus meetings. That Court noted that the intent of the Open Meetings Law was to enable citizens to obtain information about and to participate in the legislative decision-making process. It goes on to note at p. 349 that these types of statutes should be "interpreted most favorably to protect the ultimate beneficiary, the public."

The Court concludes that the "flexible standard" and statutory language of "where possible", especially as here, for a topic that is on the agenda, constitutes compliance with the requirements of 24-6-402(2)(c).

5. Counsel for Plaintiffs has argued the Latin maxim "*expressio unius*" or more fully "*expressio unius est exclusio alterius*" which, loosely translated, is to express or include one thing implies the exclusion of the other. See Black's Law Dictionary, 7th Ed. 64 Colorado cases have addressed this concept. In a 2003 Colorado Court of

Appeals case on the Open Records Act, Black v. Southwestern Water Conservation District, 74 P.3d 462 (Colo.App. 2003), the issue was whether or not a public entity could impose a fee for inspecting and copying records. The argument was that because there was a specific reference to authority of criminal justice agencies to assess fees but not to entities such as the water conservation district that they were precluded from imposing such a fee under this legal maxim. The Court rejected the argument as it related to those facts based on the legislative history.

Not surprisingly, there is no Colorado case discussing whether "update" is or is not a sufficient notice.

The Court concludes that the legal maxim has no meaningful application in this instance. The Mill Site Committee update presumably would involve some sort of a report on the status of what the committee was doing which would seem to be broader than simply the request for funding of the survey and confirmation of the appointment of substitute members, the two bullet points underneath the update. An update suggests a report and/or discussion. It is not surprising that what could lead from any such discussion is a consensus to, or not to, take action.

5. While the Court cannot conclude that the subjective intent of the proponent of the motion is applicable, the Court is not unmindful that his testimony was that the movant, Defendant Hal Sidelinger, had no preconceived intent nor plan to make the motion to withdraw support of the TOU project prior to the discussion which occurred at the meeting. If in the course of a report or update it becomes apparent as to a direction which a legislative body intends to head, the Court is not persuaded that the failure to note that formal action may be taken on that topic

precludes the legislative body from acting. The Court recognizes that it would have been possible for the Town to have either elected to put formal notice of this motion on the next month's agenda or, having taken the action in January and having had the concern expressed to have rescinded the action to have noticed it for the March or later meeting and to have discussed the matter further. The Court must conclude that such a ruling can and would unduly and needlessly delay actions by local governmental entities where the topic has been identified at the public meeting. Further, to interpret the statute that narrowly would necessarily mean that governmental entities' agendas would either need to anticipate in advance of a meeting all matters upon which action might be anticipated, that terminology such as updates and reports would necessarily require specification as to whether any action would or would not ensue and, further, if there was an indication of an update or a report and there were any subheadings under that such subheadings would preclude any actions other than on the specified subheadings. The Court is not prepared to conclude that such was the intent of the Open Meetings Act.

6. Finally, Plaintiff suggests, based on decisions interpreting similar but not identical statutes from other states, that the level of public interest, or controversy, should be weighed by the Court. The Colorado statute is silent on this point. The Court declines to add this as a factor to the analysis of whether Defendant Town complied with the Open Meetings Law in this instance.

ORDER

Based on the foregoing conclusions, the Court concludes that Plaintiffs' claim should be dismissed. The Court declines to award attorney's fees pursuant to 24-6-

402(9) specifically finding that this claim was neither frivolous, vexatious nor groundless. Costs are awarded to Defendants They shall have 15 days within which to submit their Bill of Costs.

Dated this 2nd day of February, 2005.

BY THE COURT:

J. Steven Patrick
District Judge

xc: Danielson; Calola

TOWN COUNCIL REGULAR AGENDA

Note: Meeting is second Thursday of January

1.	Call to order and Roll Call	Wayne Brown	7:00 P.M.
2.	Minutes of Previous Meeting	Wayne Brown	7:05-7:10 P.M.
3.	Resolution Number 1, Series of 2004, regarding posting of notices for Town business	Wayne Brown	7:10-7:15 P.M.
4.	Building Inspector's Report • General Update of in-progress buildings	Steve Pavlin	7:15-7:20 P.M.
5.	Sidelinger Building Application (re-modal)	Steve Pavlin/Hal Sidelinger	7:20-7:30 P.M.
6.	Mill Site Committee Update • Authorization for Mill Site Committee survey expenditure(s) • Endorse replacement of MSC member	Hal Sidelinger	7:30-7:45 P.M.
7.	Discussion regarding Sunshine Laws	Mike Evans	7:45-8:00 P.M.
8.	Correspondence	Karen Mulhall	8:00-8:05 P.M.
9.	Administrative	Wayne Brown	8:05-8:10 P.M.
10.	Suggestion from Citizen	Charlotte Graham	8:10-8:15 P.M.
11.	Discussion of snowplowing (possible executive session)	Wayne Brown/Robert Pettijohn	8:15-8:45 P.M.
12.	Adjournment	Wayne Brown	8:45 P.M.

THE agenda is subject to change, including the addition of items up to 24 hours in advance of the meeting or later in emergency circumstances. All times are approximate. For further information, contact Karen Mulhall at 384-0761. If special accommodations are necessary per ADA, contact 384-0761 prior to the meeting.

The next Town Council meeting will be held Thursday, February 5, 2004.
The next Mill Site Committee meeting will be held Thursday, January 15 at 7:00 p.m. in the school.

Plaintiff Exhibit 29

EXHIBIT A

DEPOSITION EXHIBIT

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of September, 2005, I deposited a true and complete copy of the foregoing **Answer Brief of the Colorado Municipal League as *Amicus Curiae*** in the U.S. Mail, postage prepared, addressed as follows:

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