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Arnold v. City of Stanley Appellant's Brief Dckt. 41600

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS ARNOLD and REBECCA ARNOLD,

Plaintiffs-Appellants,

v.

CITY OF STANLEY, a municipal subdivision of the State of Idaho,

Defendant-Respondent.

Supreme Court Docket No. 41600-2013
Custer County No. 2012-142

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho
in and for the County of Custer
District Case No. 2012-142

The Honorable Joel E. Tingey, District Judge, presiding.

Fredric V. Shoemaker, ISB No. 1687
Thomas J. Lloyd III, ISB No. 7772
GREENER BURKE SHOEMAKER OBERRECHT P.A.
950 W. Bannock Street, Suite 950
Boise, Idaho 83702
Telephone: (208) 319-2600
Facsimile: (208) 319-2601

Attorneys for Plaintiffs-Appellants, Thomas Arnold and Rebecca Arnold

Paul J. Fitzer, ISB No. 5675
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorneys for Defendant-Respondent

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950 W. Bannock, Suite 520
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorneys for Defendant-Respondent

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STATEMENT OF THE CASE

This Appeal addresses a narrow issue of statutory interpretation concerning two words contained, but not defined, in the Idaho Open Meeting Law. Idaho Code § 67-2347(6) grants statutory standing to commence a civil action, seeking to require compliance with the Idaho Open Meeting Law, to "[a]ny person affected by a violation of the provisions of" the statutory provisions set forth in the Idaho Open Meeting Law. Upon a successful showing of noncompliance in a suit brought by a person "affected by" a violation of the Open Meeting Law requirements, the statute mandates that the governmental action giving rise to such suit "shall be null and void." I.C. § 67-2347(1).

In the instant case, it is undisputed (and was undisputed in the proceedings below, as found by the district court) that Respondent City of Stanley ("the City") did not comply with the provisions of the Idaho Open Meeting Law, specifically the notice requirements of I.C. § 67-2343, when it passed City Ordinance No. 189 on August 9, 2012. It is also undisputed that Appellants Thomas and Rebecca Arnold (the "Appellants"), who own real property in Stanley undisputedly affected by Ordinance No. 189, timely commenced a civil action to challenge the City's failure to abide by said notice requirements, in accordance with the time limitations imposed by I.C. § 67-2347(6). The only issue to be decided on appeal, then, is whether these affected property owners have the requisite statutory standing to challenge a government entity's failure to abide by the Idaho Open Meeting Law; in other words, whether an owner of real property affected by government action taken in contravention of the Open Meeting Law is a person "affected by a violation of the provisions" of the Open Meeting Law.

The facts of the proceedings below are neither complex nor extensive, and they are undisputed in the record below: Plaintiff-Appellant Rebecca Arnold is and at all times relevant hereto has been a resident of Boise, Ada County, Idaho. (Affidavit of Rebecca Arnold in Support of Motion for Summary Judgment, filed concurrently herewith ("Arnold Aff."), ¶ 2.) (R. at 34 (¶ 2).) Plaintiff-Appellant Thomas Arnold is and at all times relevant hereto has been a resident of Custer County, Idaho. (R. at 34, 35 (¶ 3).) Together, the Arnolds own real property within the City of Stanley, County of Custer, Idaho, more particularly described as follows: Lot 5 of Mountain View Subdivision, according to the official Plat thereof, recorded on June 7, 2007 as Instrument No. 236774, in the records of Custer County, Idaho; and Parcel B according to the Record of Survey thereof, recorded September 1, 2005 as Instrument No. 232245, in the official records of Custer County, Idaho, which real property has been affected by those actions of the City that give rise to this action ("Property"). (R. at 34, 35 (¶ 4), 40 (Ex. A).) The City is a political subdivision of the state of Idaho and is located within Custer County, Idaho.

On or about August 7, 2012, by and through Mr. Doug Plass, the City Clerk and Treasurer for the City, the City provided notice to interested persons of the date and time for three public hearings to take place on August 9, 2012, to wit:

a. Thursday, August 9, 2011 [sic] at 5:00 pm, for "public comment on proposed Ordinance #189";

b. Thursday, August 9, 2011 [sic] at 5:15 pm, for "public comment and consideration of an Application for Variance" requested by River 1 Inc.; and

c. Thursday, August 9, 2011 [sic] at 5:30 pm, for "public comment on the proposed FY13 City of Stanley Budget."

(R. at 34, 35 (¶¶ 5-7), 44-49 (Exs. B-D).)

On August 9, 2012, at 5:25 p.m., in contravention of the notices provided as identified above, the City convened a public hearing for the purpose of deliberating toward a decision on the City's Fiscal Year 2013 Budget (the "5:25 p.m. Hearing"). (R. at 34, 36 (¶ 9).) Based on the audio recording of the 5:25 p.m. Hearing, the City closed the 5:25 p.m. Hearing at or about 5:29 p.m., before the time actually noticed for the hearing on the Fiscal Year 2013 Budget. (R. at 34, 36, (¶ 10).) The City had not previously posted any meeting notice or agenda for a budget hearing to be held on August 9, 2012 at 5:25 p.m., and did not amend the meeting notice or agenda that had been published on August 7, 2012. (R. at 34, 36 (¶ 11).) Though the City posted a meeting and agenda notice for a Public Hearing on the FY2013 Budget to be held August 9, 2012 at 5:30 p.m., the entire hearing was conducted prior to the time identified by that Notice. (R. at 34, 36 (¶ 12).)

In addition to the public hearing identified in the foregoing paragraphs, the City had a regularly-scheduled Stanley City Council Meeting set for 6:00 p.m. on Thursday, August 9, 2012. (R. at 34, 36 (¶ 13).) On August 9, 2012 at 5:31 p.m., approximately twenty-nine (29) minutes before the scheduled time for the City Council Meeting, the Mayor of the City convened a City Council meeting to make decisions and/or to deliberate toward decisions, including a decision and/or deliberation on Ordinance No. 189 (the "5:31 p.m. Meeting"). (R. at 34, 36 (¶ 14).) The City had not provided any meeting notice or agenda notice for a City Council

meeting to be held on August 9, 2012 at 5:31 p.m. (R. at 34, 37 (¶ 15).) Though the City posted a meeting notice and agenda notice for a regular City Council meeting to be held on August 9, 2012 at 6:00 p.m., such notice did not notify interested parties of a meeting that actually started at 5:31 p.m. (R. at 34, 37 (¶ 16), 54 (Ex. E).) The City did not amend the agenda that the City used at the 5:31 p.m. Meeting. The City proceeded to then hear matters that were not on the agenda for the City Council meeting scheduled for 6:00 p.m. (R. at 34, 37 (¶ 16), 54 (Ex. F).) At the 5:31 p.m. Meeting, among other actions, the City enacted Ordinance No. 189, which Ordinance adversely affects Plaintiffs' rights with respect to the Property. (R. at 34, 37 (¶ 17), 75 (Ex. G).) All of the starting and ending times of the various hearings and meetings relevant hereto are noted in the Official Minutes of the August 9, 2012 proceedings, meaning there is can be no dispute that the facts material to this case evidence a failure by the City of Stanley to comply with its own published notices and agendas for those proceedings, and therefore no dispute that the City's actions did in fact violate Idaho's Open Meeting Law. (*See* R. at 34, 37 (¶ 16), 54 (Ex. F).)

Ordinance No. 189, passed by the City Council at the 5:31 p.m. Meeting, modified Stanley Municipal Code Sections 17.24.010, 020 and 030, and 17.26.010, to limit the usage of property located within the Stanley City Limits that lacks certain frontage on a street or highway. Specifically, the Municipal Code was amended to instruct that, "for each dwelling erected or maintained" in Stanley, the property on which that dwelling sits must have "a minimum lot or parcel width of forty-eight feet (48') per building," which lot width was specified by Ordinance 189 to mean "street or highway frontage when it exists, or to the minimum dimensions of a lot

without frontage." (R. at 34, 37 (¶ 18).) The Arnolds' Property has street frontage, but does not have frontage of forty-eight feet on a public street or highway, as is required by Ordinance No. 189 (the effect being that the Arnolds' Property is 'unbuildable' according to the Stanley Municipal Code following the enactment of Ordinance No. 189). (R. at 34, 38 (¶ 20).) The Arnolds are therefore persons affected by the City's actions at the 5:31 p.m. Meeting, as their private property rights were adversely affected by actions taken by the City. (R. at 34, 38 (¶ 19).)

On September 6, 2012, within the 30 days required under Idaho Code § 67-2347(6), the Arnolds filed suit in the Magistrate Division of the Custer County District Court, in the Seventh Judicial District of the State of Idaho.[1] (R. at 8.) The case was assigned to the Honorable Joel E. Tingey. (*Id.*) On July 5, 2013, the Arnolds filed their Motion for Summary Judgment, supported by a Memorandum in Support thereof and an Affidavit of Rebecca Arnold, seeking entry of judgment as a matter of law on the grounds that the undisputable (and, later, undisputed) facts

[1] Though the Arnolds clearly filed their Complaint with the requisite notation, "Magistrate Division," so as to comply with the mandate of I.C. § 67-2347(6) that a challenge under the Idaho Open Meeting Law be filed in the Magistrate Division of the appropriate local court, it appears that neither the City nor the District Court for Custer County considered the matter to have been actually in the Magistrate Division. (*See, e.g.*, R. at 14 (no notation of Magistrate Division in the City's Answer) and R. at 173 (no notation of Magistrate Division in the District Court's filings).) The Arnolds continued to file documents with the "Magistrate Division" notation throughout the underlying proceedings, as it was their understanding (in view of I.C. § 67-2347(6)) that the proper venue for the action was in the Magistrate Division. (R. at 9 (citing I.C. § 67-2347(6) in the Venue allegation of the Complaint).) This appeal was therefore originally filed in the District Court for Custer County (R. at 185-192), but upon notification to the Arnolds' counsel that matter was considered by the District Court to have already been resolved at the District Court level, the Arnolds filed the instant Appeal to this Court (R. at 193-197).

demonstrated that the City had not complied with the notice requirements of the Open Meeting Law in passing Ordinance #189. (R. at 22-80.) With its Motion for Summary Judgment, the Arnolds also filed and served a Notice of Hearing, scheduling a hearing for their Motion for Summary Judgment on August 21, 2013. (R. at 6.) On August 5, 2013, the parties executed a Stipulation to reset that hearing, as counsel for the City was not available for the scheduled August 21, 2013 hearing date, and the hearing was rescheduled to take place on September 18, 2013. (*Id.*)

Subsequently, the City filed its own Motion for Summary Judgment on September 3, 2013, which was supported by an Affidavit of Doug Plass and a Memorandum both in support of the City's Motion for Summary Judgment and in Response to the Arnolds' Motion for Summary Judgment. (R. at 81-162.) The City also filed and served a Notice of Hearing, scheduling a hearing on the City's Motion for Summary Judgment for October 16, 2013. The City further attached a number of "Exhibits" to its Memorandum, in violation of Rules 56(c) and (e) of the Idaho Rules of Civil Procedure, as the exhibits were not attached to an Affidavit properly authenticating those documents.[2] The Arnolds filed their Reply Memorandum in Support of their Motion for Summary Judgment on September 11, 2013.

[2] Because the City filed its separate Motion for Summary Judgment on the exact same issue presented by the Arnolds' Motion for Summary Judgment, the two hearings were consolidated on the record during the first hearing, on the Arnolds' Motion for Summary Judgment, on September 18, 2013. (Tr. at pp. 5-6.) As such, the Arnolds' Responsive briefing had not yet become due when the City's Motion was heard, and the proceedings therefore did not present any opportunity for the Arnolds to brief objections to the Exhibits filed in violation of Rule 56.

Oral argument was held on September 18, 2013, on the conflicting Motions for Summary Judgment filed by the parties, and the District Court took the matter under advisement. (R. at 173.) On September 30, 2013, the Court issued its Memorandum Decision and Order, granting the City's Motion for Summary Judgment, and the attendant Judgment from which this Appeal is taken. (R. at 175-184.) In the District Court's Memorandum Decision, it confirmed there had been an undisputable violation of the Open Meeting Law: "The City's meeting minutes are undisputed as to the times the City commenced each hearing and or [sic] meeting. . . . The City provided notices for each meeting, but failed to amend or properly notify the public of the scheduled time changes as required by Idaho law." (R. at 181.) The Court further found that the Arnolds had "timely filed the subject action." (R. at 182.) Thus, the only question addressed by the District Court was "whether [the Arnolds] are persons 'affected by a violation of the provisions' of the Act." (*Id.*) With very little analysis, and without any citation to existing case law, the Court concluded:

> Rather, the threshold issue on this case turns on the particular language of § 67-2347(6). Plaintiffs are only entitled to challenge the action if they were affected by a "*violation* of the provisions of this act". (emphasis added). The alleged violation necessarily refers to the starting time of the hearings, not the ultimate action taken in the hearing. Here, there is nothing in the record to support a claim that the Plaintiffs were affected by the early starting time.
> . . .
> As such, Plaintiffs are not an "affected party" and do not have standing under § 67-2347(6) to seek to void the action taken at the meeting.

On the foregoing basis, the District Court granted the City's Motion for Summary Judgment, and the instant Appeal ensued.

ISSUE PRESENTED ON APPEAL

As noted, the sole issue in this Appeal is whether the Court erred in interpreting Idaho Code § 67-2347(6) to restrict standing, to commence a civil action to require/enforce compliance with the Idaho Open Meeting Law, only to individuals who have been adversely affected by a procedural violation of the Open Meeting Law's requirements, and not to individuals adversely affected by the substance of action taken in violation of the Open Meeting Law.

STANDARD OF REVIEW

"The interpretation of a statute is a question of law over which" the Idaho Supreme Court "exercises free review." *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 726, 184 P.3d 844, 851 (2008) (quoting *Carrier v. Lake Pend Oreille Sch. Dist. # 84,* 142 Idaho 804, 807, 134 P.3d 655, 658 (2006)). The Court "must construe a statute to give effect to the Legislature's intent." *Id.* "Statutory interpretation begins with an examination of the literal words of the statute." *Thomas v. Worthington*, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999) (citing *State ex rel. Lisby v. Lisby*, 126 Idaho 776, 779, 890 P.2d 727, 730 (1995)). "The language of the statute is to be given its plain, obvious and rational meaning." *Id.* (citation omitted). "In attempting to discern and implement the intent of the legislature, the Court may seek edification from the statute's legislative history and contemporaneous context at enactment." *Id.* (citing *Corporation of Presiding Bishop v. Ada County*, 123 Idaho 410, 416, 849 P.2d 83, 89 (1993)).

ARGUMENT

I. The Letter And Purpose Of The Idaho Open Meeting Law Supports A Broad Allowance Of Statutory Standing For Idaho Citizens To Maintain Their Sovereignty.

The stated purpose of the Idaho Open Meeting Law leaves no room for doubt that the Idaho Legislature intended the law to afford broad protections to the people of the state of Idaho against the type of abuses that can occur when proceedings and deliberations are kept from the public eye:

> The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

I.C. § 67-2340.

The purpose of the Open Meeting Law has been reaffirmed throughout its Legislative History. For example, when the Legislature amended the statute in 1977 to add Section 67-2347 – wherein the Legislature first declared that a violation of the Open Meeting Law would render the action taken "null and void," – the Statement of Purpose for the enacting legislation stated that the addition was "to provide a remedy for violations in order to achieve the original goal of guaranteeing the public's right to know." (Statement of Purpose, H.B. 257 (1977).)

Since that time, the Legislature has amended the Open Meeting Law and underscored the need to maintain the broad and cohesive policies of both ensuring access to meetings and deliberations of the government, as well as providing Idaho citizens with a remedy for violations of the Open Meeting Law by their governing bodies. In 1992, the Legislature passed legislation

to "add[] . . . the private right to seek compliance with the act." (Statement of Purpose, H.B. 793 (1992).) In those 1992 amendments to I.C. § 67-2347 (originally added in 1977, *supra*), the Legislature added the private right of action to commence a civil action to require compliance with the Open Meeting Law, and expanded the language of what would give rise to nullification of a governmental action taken in violation of the Open Meeting Law, such that any violation of an "action ~~taken~~, or any deliberation or decision-making that leads to an action," would render the ultimate "action" null and void. (Idaho Session Laws 1992, Ch. 156, Section 4, p. 509 (no emphasis added; legislative amendments shown).) As recently as 2004, the Idaho Legislature again reaffirmed, in the statement of purpose for the 2004 amendments to the Open Meeting Law, its intention "to better serve the intended purpose of ensuring that the public may attend the meeting." (Statement of Purpose, H.B. 534 (2004) (emphasis added).)

The history of the Open Meeting Law indisputably reveals the broad intention of the Legislature to protect the people of the state of Idaho from abuses of the Open Meeting Law, and to provide the people of the State with an enforcement mechanism to guarantee compliance therewith. To these explicit ends, and with limited exception, the Idaho Open Meeting Law broadly requires that "all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act." I.C. § 67-2342. The law sets forth particular requirements for the methods and manner in which a public body must give notice of meetings:

> No less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice shall be given unless otherwise provided by statute. Provided however, that any public agency that

> holds meetings at regular intervals of at least once per calendar month scheduled in advance over the course of the year may satisfy this meeting notice by giving meeting notices at least once each year of its regular meeting schedule. The notice requirement for meetings and agendas shall be satisfied by posting such notices and agendas in a prominent place at the principal office of the public agency, or if no such office exists, at the building where the meeting is to be held.

I.C. § 67-2343(1). In addition to notice of the actual meetings, the law sets forth a stringent requirement for the publication of a meeting agenda in advance of each scheduled meeting:

> An agenda shall be required for each meeting. The agenda shall be posted in the same manner as the notice of the meeting. An agenda may be amended, provided that a good faith effort is made to include, in the original agenda notice, all items known to be probable items of discussion.
>
> (a) If an amendment to an agenda is made after an agenda has been posted but forty-eight (48) hours or more prior to the start of a regular meeting, or twenty-four (24) hours or more prior to the start of a special meeting, then the agenda is amended upon the posting of the amended agenda.
>
> (b) If an amendment to an agenda is proposed after an agenda has been posted and less than forty-eight (48) hours prior to a regular meeting or less than twenty-four (24) hours prior to a special meeting but prior to the start of the meeting, the proposed amended agenda shall be posted but shall not become effective until a motion is made at the meeting and the governing body votes to amend the agenda.
>
> (c) An agenda may be amended after the start of a meeting upon a motion that states the reason for the amendment and states the good faith reason the agenda item was not included in the original agenda posting.

I.C. § 67-2343(1). Subject to the specifically-enumerated methods for amending a meeting agenda, then, a public body must comply with the notice requirements. *Id.*

In order to enforce compliance with the Idaho Open Meeting Law, the Idaho Legislature

determined that it would be in the best interest of the people of the state of Idaho that the law be strict and unequivocal about a failure to abide by the law:

> If an action, or any deliberation or decision[-]making that leads to an action, occurs at any meeting which fails to comply with the provisions of sections 67-2340 through 67-2346, Idaho Code, such action shall be null and void.

I.C. § 67-2347(1). In other words, though the Legislature deemed it prudent to provide broad protections to the people of the state of Idaho, its tolerance for abuses and violations of the law is very narrow. The law is not worded narrowly to create a cause of action *only* upon a procedural deliberation or decision-making that leads to an action; rather, the law specifically indicates that the action, itself, may give rise to standing to assert a cause of action for a violation of the open meeting law. (*Id.*) In such cases, "***[a]ny*** person affected by a violation of the provisions of" the act may bring an action seeking injunctive and declaratory relief rendering those actions null and void.[3] I.C. § 67-2347(6). The thematic breadth of the law continues through the recitation of the time limits for filing such an action: "Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the *decision or action* that results, *in whole or in part*, from a meeting that failed to comply with the provisions of this act." *Id.* (emphasis added).

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[3] The District Court apparently and rightfully recognized, as urged by the Arnolds (Tr. at pp. 9:7 – 11:24; R. at 166-168), that the Idaho Open Meeting Law created a statutory standing requirement separate from and superior to standard Article III standing, and thereby did not accept the City's invitation to analyze the Arnolds' case from an Article III perspective. (R. at

This Court has never before had the opportunity to interpret the "affected by" language of I.C. § 67-2347(6), which governs the statutory standing created by the Idaho Legislature, in the context of a property owner whose property interests are actually adversely affected by governmental action taken in violation of the Open Meeting Law. Though the City and the District Court narrowly interpreted the "affected by" language to include only those persons who may have been physically shut out of a meeting despite a clear intention to be in attendance, there is nothing in the plain language of the statute that supports such a narrow reading. The Arnolds respectfully submit that, while a person shut out of a meeting would, indeed, be "affected by" the violation and would consequently have a private cause of action to declare the action null and void, there is nothing in the statute that would support the District Court's decision that a person in such a situation is in the *only* class of persons "affected by" the violation for purposes of statutory standing.

Rather, as owners of real property *actually* affected by the City's action, the Arnolds occupy a uniquely limited and heightened class of persons who were "affected by" the City's action taken in violation of the Open Meeting Law. Indeed, the Arnolds have a far greater interest in the outcome of the deliberations over Ordinance No. 189 than, for example, a random citizen who may have attempted to attend the noticed City Council Meeting at 6:00 p.m. Inconsistent with the broad scope of the Open Meeting Law, however, the City and the District Court interpret the Open Meeting Law to only provide a private enforcement action to the

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182.) *Accord Stockmeier v. Nevada Dept. of Corrections Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225 (Nev. 2006) (cited by Arnolds at R. at 167).

otherwise disinterested citizen and not to those whose rights are substantively "affected by" the actions passed in violation of the Open Meeting Law.

By focusing only on *one* of several ways in which a person may be "affected by" a violation of the Open Meeting Law, both the City and the District Court did what the Legislature has not opted to do – they *narrowed* the application and scope of the Open Meeting Law, in direct contravention of the stated purpose of that legislation. To be clear, the Arnolds' argument here is *not* that the words "affected by" would apply to any random citizen of the state of Idaho, such that those words would be rendered moot in the context of the statute, but that the classes of persons that could be "affected by" a violation of the provisions of the Open Meeting Law need not be so limited and are in fact broader than the narrow scope afforded by the District Court. This is not an argument for the type of "generalized grievance" to which this Court has correctly declined to extend statutory standing. *See Student Loan Fund of Idaho, Inc. v. Payette Cnty.*, 125 Idaho 824, 828, 875 P.2d 236, 240 (Ct. App. 1994). Rather, as owners of the Property adversely affected by Ordinance No. 189, the Arnolds have a distinct and palpable injury under Ordinance No. 189, such that they are indisputably "affected by" its passage in violation of the Open Meeting Law. *Id.*

Indeed, even counsel for the City broadly defined an "affected person" during oral argument in the underlying summary judgment proceeding, construing the breadth of the statutory protections afforded to the people of Idaho as considerably expansive: "An affected person just means you have been harmed or you have had a right deprived by virtue of the challenged governmental conduct. You don't get a free-all . . . You have to have a vested

interest in the outcome of it." (Tr. at pp. 20:23 – 24:21.) As affected property owners, the Arnolds had a vested interest in the outcome of Ordinance No. 189. They further had a vested interest in ensuring that the letter and spirit of the Open Meeting Law was followed, and to ensure that the City conducted its business (adverse to their property rights) in plain view, for all interested citizens to attend, observe, listen, and participate.

II. Available Idaho Case Law Supports A Determination That The Arnolds Have Standing Under The Idaho Open Meeting Law.

Though the District Court did not, itself, cite or otherwise reference any case law upon which it based its decision that the Arnolds lacked standing, the case law presented by the parties in the underlying proceedings – in fact, especially the case law presented by the City, itself – strongly supports a reversal of the District Court's grant of summary judgment to the City.

1. *Cowan*

In its briefing ahead of oral argument, and during oral argument to a lesser extent, the City relied on this Court's decision in *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006), in support of its proposition that the Arnolds lacked standing to raise their challenge to the City's passage of Ordinance No. 189. (*See, e.g.*, R. at 91; Tr. at pp. 18.) As pointed out in the Arnolds' Reply Memorandum (R. at 168-170), however, *Cowan* stands for the exact opposite conclusion as that reached by the City and the District Court on the issue of standing, albeit under a different statutory scheme.

First, this Court in *Cowan* was not confronted with nor did it decide any question of compliance with the Idaho Open Meeting Law. 143 Idaho at 508 (noting that the case arose

under the provisions of the Local Land Use Planning Act ("LLUPA")). In fact, the Idaho Open Meeting Law is not once mentioned in the entirety of the *Cowan* opinion. Consequently, there is no discussion in *Cowan* about the prerequisites for a civil action to have governmental action declared null and void under the Open Meeting Law. Rather, the portion of *Cowan* that was relied upon by the City in its Motion for Summary Judgment was limited to a discussion about standing under the Fremont County Development Code ("FCDC"). Not surprisingly, the FCDC does not contain the same or any similar language as the Open Meeting Law, permitting "any person affected by a violation" of the law to bring an action for enforcement of proper notice requirements. With respect to the portion of *Cowan* relied upon by the City, then, it is patently irrelevant to any discussion about the Arnolds' standing to bring a civil action to "requir[e] compliance with the provisions of [the] act." I.C. § 67-2347(6).

However, though the portion of *Cowan* originally relied upon by the City offers neither binding nor persuasive authority on the question presented in the case at bar, an earlier section of the Idaho Supreme Court's decision in *Cowan* is instructive. Before the discussion of the propriety of the plaintiff's cause of action under the FCDC, this Court addressed the question of "standing" under a legislative scheme closely analogous to the Idaho Open Meeting Law. Analyzing the Local Land Use Planning Act ("LLUPA"), this Court noted that the Legislature had provided for a cause of action by any "***affected person*** to seek judicial review of an approval or denial of a land use application . . . ." *Cowan*, 143 Idaho at 508 (citing I.C. § 67-6521(1)(d)) (emphasis added). The "*affected person*" language of LLUPA is synonymous with the language

of the Idaho Open Meeting Law permitting civil actions by any "*person affected*," and, Plaintiffs argue, should follow the same standards relative to standing.

In the discussion of that "affected person" language and standard, this Court in *Cowan* was presented with the exact same arguments now asserted by the City in the instant action: "The Board argues that Cowan has failed to allege a distinct palpable injury or particularized harm he has suffered, but has instead only alleged generalized grievances." 143 Idaho at 509. The plaintiff, *exactly* as the Arnolds had alleged in this action, countered that his "land will be adversely affected" by "adversely impact[ing] his property rights and diminish[ing] his property value." *Id.* In turn, this Court unequivocally rejected the Board's argument and found, under the "affected person" standard of LLUPA, that Cowan unquestionably "has standing to pursue his claims." 143 Idaho at 509-510. The Arnolds' above analysis of the relevant *Cowan* standing discussion is likely the reason that the City did not press its reliance on *Cowan* during oral argument during the proceedings below.

In the case at bar, the record contains the Affidavit of Rebecca Arnold, who has alleged and provided evidence that the actions taken during the City's meetings that were held in violation of the Open Meeting laws will adversely affect the property that she owns with her husband. (*See generally*, R. at 34.) Thus, just as in *Cowan*, the Arnolds have standing to pursue this civil action under the "affected person" / "person affected by" standing requirement set forth in the Idaho Open Meeting Law, and the District Court's determination ought to be reversed and this case remanded to the District Court for further proceedings consistent with that finding, if any would be necessary.

2. *RKO*

At oral argument in the proceedings below, though it had not cited the case at all in its Memorandum in Support of Summary Judgment, the City relied heavily for the first time on what was referred to as "the RKO case," *Rural Kootenai Organization, Inc. v. Board of Com'rs of Kootenai County*, 133 Idaho 833, 993 P.2d 596 (1999) ("*RKO*"). (Tr. at pp. 18:23-19 – 19:10; 20:9-10.) In fact, *RKO* supports the Arnolds' argument in this Appeal, that standing to challenge an action in violation of the notice requirements ought to be construed broadly to allow an affected property owner to commence a civil action to nullify an action taken in contravention of the notice requirements of the Open Meeting Law.

Though *RKO* is not a case that was raised under the Idaho Open Meeting Law, it did arise under similar notice requirements codified in the Local Land Use Planning Act.[4] 133 Idaho at 841 ("A threshold question is whether RKO has standing to argue that its procedural due process rights were violated as a result of not receiving proper notice of the meetings."). Presumably, the City relied on *RKO* during oral argument because this Court's ultimate determination in that case was that the members of the Rural Kootenai Organization, Inc. did *not* have standing to challenge the Kootenai County Board of Commissioners' approval of a third-party's subdivision plat. However, there are significant and compelling differences between the relation of the

[4] During oral argument, counsel for the City erroneously referred to *RKO* as "an Open Meetings Act case," which representation was not challenged by the Arnolds due to the fact that *RKO* had not previously been cited by the City and that the Arnolds were therefore unaware of its application, if any, to the issue at hand.

members of RKO to the challenged governmental action, and the Arnolds' relation to the action of the City in passing Ordinance No. 189.

Crucially, in *RKO*, this Court distinguished between, for purposes of standing, persons who own property "*near*" property affected by government action, and those who own property that *actually is* affected by government action. 133 Idaho at 841. Referencing the Idaho Court of Appeals decision in *Student Loan Fund of Idaho, Inc. v. Payette County*, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994), this Court determined that the members of RKO did not have standing since they merely "own[ed] property near the proposed subdivision," but could not otherwise show any "particularized harm." 133 Idaho at 841.

In direct contrast to the members of RKO, the record is undisputed in the instant litigation that the City's passage of Ordinance No. 189 directly affected property owned by the Arnolds. (R. at 178.) According to the standard set forth in *RKO*, then, the Arnolds fit the precise description of a party who has standing under a statutory scheme specifically granting standing to those "affected" by the problematic governmental action.

3. *Noble*

Finally, the City relied upon this Court's decision in *Noble v. Kootenai County ex rel. Kootenai County Board of Commissioners*, 148 Idaho 937, 231 P.3d 1034 (2010), both in its briefing (R. at 90) and during oral argument (Tr. at p. 20:10). However, as with each of the foregoing cases, *Noble* instructs the exact opposite conclusion and result drawn by both the City and the District Court in the proceedings below. During oral argument, the City attempted to distinguish between a party that is not provided any notice of a action covered by the Open

Meeting Law and a party that receives notice but, as with the Arnolds, merely owns property that is affected by the action:

> What all of these cases say is that if you have actual notice and you had the opportunity to be there, because that's -- you know, Mr. Lloyd was trying to discuss what the purpose behind the open meeting statutes are; and the violations he's alleging is that it wasn't noticed properly for this alleged 5:25 hearing or whatever he titles it. Well, notice is there to allow people to give testimony; and if they're not allowed to give testimony, you have a violation. Was there somebody here that was not allowed to give testimony? I mean, that's the whole point.

(Tr. at p. 23:15-24.)[5] In concluding that the Arnolds were not persons "affected by a violation of the provisions" of the Open Meeting Law, the District Court echoed the City's comments: "This is not a case where a party planned on making comment but was unable to do so because of the early starting time. . . . As to Plaintiffs, the early start times were inconsequential and as such, Plaintiffs were not adversely affected by the violation." (R. at 183.)

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[5] Notably, as set forth *supra* in the recitation of facts herein, the deliberation over the subject Ordinance No. 189 that was noticed to occur at 6:00 p.m., began at 5:31 p.m. There was no notice of a City Council meeting that was to begin at 5:31 p.m. This is not, as the City phrased it in the proceedings below, a matter of a meeting that began a mere five minutes early. (*See* Tr. at pp. 22:22 – 23:2.) The meeting began a full twenty-nine minutes before it was supposed to and, just as with *Noble*, the public was therefore effectively shut out from the process. This is true even though, as in *Noble*, there had been some prior, albeit defective, notice of the meeting. Further, in contrast to the City's argument, there is nothing in the Open Meeting Law requiring that a person desire to give testimony in order to have standing to assert an Open Meeting Law violation. A governmental entity need not necessarily deny the public an opportunity to present testimony to nevertheless violate the provisions of the Open Meeting Law if the procedures prescribed by the Open Meeting Law are not followed. *See* I.C. § 67-2342(1) (requiring only that all persons be able to *attend*, not necessarily *testify*, at public meetings). Here, the public's right to attend the City Council meeting that began at 5:31 p.m. was foreclosed because there was no notice of the 5:31 p.m. meeting.

The Arnolds respectfully submit that there is not such a thing as an "inconsequential" violation of the Open Meeting Law. *Noble* strongly supports this position. "Idaho's open meeting laws, I.C. § 67-2340 *et seq.*, are designed to allow the public to be present during agency hearings. At the very least this means that the public must be permitted to get close enough to the hearing body to hear what is being said." 148 Idaho at 943. This Court stressed the design of the Open Meeting Law in *Noble*, despite it also being a case, as here, wherein the plaintiffs-appellants were "affected by" the violation of the Open Meeting Law by virtue of their property ownership of real property affected by an agency decision. *See generally, Id.* In *Noble*, this Court noted that "Applicants were given notice of the site visit, Applicants' representatives saw the Board arrive on site, and a record was made of the site visit." *Id.* at 942. Notwithstanding those facts, the plaintiffs had standing to proceed with their action under the Open Meeting Law. *Id.* at 943. The same result should issue here.[6]

III. The Court's Narrow Reading Of I.C. § 67-2347(6) Is Inconsistent With The Purpose Of The Open Meeting Law.

Notably, counsel for the City admitted at oral argument that a failure to abide by the provisions of the Open Meeting Law would be a violation worthy of starting the process all over again, if the violation was brought to the City's attention. With reference to one of the City's

[6] In a footnote, the District Court noted that *Noble* could provide a basis to dismiss the Arnolds' action, if the City's actions were found to not "substantially prejudice[] the rights of the challengers." (R. at 183.) However, the Court did not address that alternate argument in view of its decision on standing under I.C. § 67-2347(6). As the District Court did not address that argument, and as the record below was not developed on whether or not the City's "action substantially prejudiced the rights of" the Arnolds, this Court should not now take up that issue in this appeal.

meetings that had concluded before it's noticed start time, counsel for the City stated: "And had she come in at 5:31 and wanted to give testimony on something of this nature, well, **maybe we would have an issue at that point. In fact, I would have advised the City just to go redo it again because that would pose a problem.**" (Tr. at p. 24:14-18.)

What the issue presented hereby boils down to is whether the District Court was correct in its decision to judicially create and impose extra-statutory restrictions or limitations on an otherwise broadly-drafted statutory scheme, which was clearly drafted by the Legislature with the unambiguous intention to provide broad protections against either overt or covert abuses by governmental entities. Indeed, the position advocated by the City is the exact type of conduct that the statute was specifically designed to prevent, as the City has herein attempted to disregard its legal obligations without any ability of interested parties to exercise their sovereignty and implement the very checks and balances that the Legislature very explicitly imposed. The City would have this Court create, out of whole cloth, exceptions to the Open Meeting Law, contradicting the very clear directive from the Idaho Legislature regarding the people's ability to have access to the deliberations and actions of their governing bodies. The City asks that this Court uphold the District Court's decision to narrow the universe of "affected" persons far beyond the broad intentions of the Legislature. Respectfully, this Court should decline that invitation to invade upon the province of the Idaho Legislature.

The position advocated by the City and adopted by the District Court is neither supported by the plain language and explicit legislative purpose of the Open Meeting Law, nor is it good law as a matter of public policy. Should this Court follow the District Court's decision and

endorse an agency's ability to self-classify violations of the Open Meeting Law as "de minimis" or "inconsequential," the *only* enforcement mechanism provided by the Idaho Legislature will be substantially handicapped. Government agencies throughout Idaho would receive a green light from this Court to begin avoiding the clear mandates of the Open Meeting Law, so long as they are able to creatively cast the impacts of their violations on challenging parties as "inconsequential," "de minimis," or any sort of other qualifying language that is entirely absent from the relevant statutes. Whittling away at the efficacy of the Open Meeting Law in such a manner is directly contrary to the stated and express purpose of the Idaho Legislature in enacting that Law, and should be rejected by this Court.

CONCLUSION

By virtue of their personal ownership of property directly affected by Ordinance No. 189, which Ordinance was undeniably passed by the City of Stanley in violation of the mandates of the Idaho Open Meeting Law, the Arnolds had statutorily-conferred standing to commence this action to seek a declaration that Ordinance No. 189 was null and void. The District Court usurped the Legislature's role in limiting lawsuits to procedural, as opposed to substantive, violations of the Open Meeting Law. Thus, the District Court erred when it granted summary to judgment to the City on the basis that the Arnolds did not have standing to enforce the Open Meeting Law against the undisputed violation by the City. Just as this Court found in the analogous circumstances presented by *Cowan*, their ownership of property that is impacted by the City's enactment of Ordinance No. 189 is sufficient to establish, under I.C. § 67-2347(6), that they fall within the classification of persons "affected by a violation of provisions" of the Open

Meeting Law. The Arnolds therefore respectfully request that this Court reverse the decision of the District Court and remand this case for further proceedings consistent with such a decision.

RESPECTFULLY SUBMITTED this 16th day of June, 2014.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

By _____
Fredric V. Shoemaker
Thomas J. Lloyd III
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of June, 2014, two (2) true and correct copies of the within and foregoing instrument was served upon:

Paul J. Fitzer
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Attorneys for Defendant-Respondent

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ E-mail: pjf@msbtlaw.com

Fredric V. Shoemaker
Thomas J. Lloyd III