COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO STATE INVESTMENT COUNCIL, as Trustee, Administrator, and Custodian of the LAND GRANT PERMANENT FUND and the SEVERANCE TAX PERMANENT FUND,

Plaintiff-Appellee,

and

STATE OF NEW MEXICO ex rel. FRANK FOY, SUZANNE FOY, and JOHN CASEY,

Plaintiffs-Intervenors-Appellants,

v.

DANIEL WEINSTEIN, VICKY L. SCHIFF, WILLIAM HOWELL, and MARVIN ROSEN,

Defendants-Appellees,

and

GARY BLAND, et al.,

Defendants.

Ct. App. No. 33,787
Santa Fe County
D-101-CV-2011-01534

BRIEF OF AMICI CURIAE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT AND NEW MEXICO PRESS ASSOCIATION IN SUPPORT OF PLAINTIFFS-INTERVENORS-APPELLANTS

Daniel Yohalem
1121 Paseo de Peralta
Santa Fe, New Mexico 87501
(505) 983-9433 Fax: (505) 989-4844
dyohalem@aol.com

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Statutes and Court Rules **Page**

New Mexico Cases

Other State and Federal Cases

Other Authorities

INTEREST OF AMICI

NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT ("NMFOG") is an educational and charitable organization dedicated to assisting New Mexico citizens with understanding, exercising and preserving their rights under the federal and New Mexico Constitutions, the NM Inspection of Public Records Act, the NM Open Meetings Act, and other New Mexico open government laws. NMFOG has an office in Albuquerque and members throughout New Mexico. NMFOG is involved in the present case because of its concern for maintaining transparency in government operations and the need to ensure that a public body cannot avoid compliance with the Open Meetings Act by delegating authority to a committee or subcommittee comprised of less than a quorum of the public body.

NEW MEXICO PRESS ASSOCIATION is a statewide organization, operated as a non-profit corporation, representing the interests of the print media in New Mexico. Its membership consists of a substantial majority of all daily and weekly newspapers in New Mexico. One of the duties of the press is to inform the public about the activities of its government. In order to do this the members of the New Mexico Press Association depend on access to government operations and business, including those of the State Investment Council. The decision of the District Court in this case to allow a state agency to operate in complete secrecy

threatens the press's ability to inform the public and substantially jeopardizes the public's right to know what its government is doing.

Pursuant to Rule 12-215(B) NMRA, counsel for amicus served all counsel with timely notice of the intent to file this brief via email on April 11, 2015.

PRELIMINARY STATEMENT[1]

Amici file this brief to alert the Court to the substantial threat to transparency in government posed by the State Investment Council's attempt to operate in secret through its Litigation Committee. The SIC's investment recovery litigation concerns financial practices that are of great public interest. These cases examine possible corruption and breaches of fiduciary duty that may have done substantial harm to the State of New Mexico. The press and the public have a right to know about the settlement of these cases and the process by which they are being settled. But the SIC appears to have deliberately attempted to shield these settlements from public view. It has created a Litigation Committee to settle these cases behind closed doors, instead of bringing each settlement before the SIC for consideration in the public eye. It is clear on the face of the SIC policy that created the Litigation Committee and empowered it to settle this important litigation that a major purpose of this strategy was to avoid compliance with the Open Meetings Act by the SIC. The creation of the committee was unlawful, the failure of the SIC to decide on the settlements in compliance with the OMA was unlawful, and the failure of the Litigation Committee to act in compliance with the Open Meetings Act was unlawful. Amici seek the assistance of this Court to reverse this conduct

---

[1] As required by Rule 12-215(F), NMRA, the undersigned counsel certify that they authored this brief in its entirety. No party to this case or any party's counsel authored any part of this brief, nor did they provide any monetary contribution or support to fund the preparation or submission of the brief.

and throw open the curtain of secrecy behind which the SIC is operating.

STATEMENT OF FACTS

1. Over the past few years the New Mexico State Investment Council ("SIC") filed a number of lawsuits to try to recover hundreds of millions of dollars for the State of New Mexico that were lost through a series of bad investments of the State's permanent funds that the SIC claims were the result of official corruption and/or breaches of fiduciary duty. As exemplified by the instant appeal, some of those lawsuits are now at the stage where settlements are being negotiated and reached. [2]

2. The SIC adopted a Recovery Litigation Settlement Policy purporting to delegate authority for decisions concerning settlements in the various investment recovery lawsuits to a "Litigation Committee" it created comprised of at least three members of the SIC. These three SIC members do not constitute a quorum of the full SIC, which has 11 members. NMSA 1978, §§ 6-8-2(B) (2010). In addition to the SIC members who serve on this committee, the Governor's in-house General Counsel may also be a member of the Litigation Committee. *See* **Exhibit A, SIC "Recovery Litigation Settlement Policy," filed in this Court on Feb. 18, 2015**

---

[2] *Santa Fe New Mexican*, April 12, 2015, "Years After Richardson Left Office, Scandal Still Unresolved." Available at http://www.santafenewmexican.com/news/local_news/pay-to-play-scandal-lingers-long-after-richardson/article_57ef5349-1b9b-5590-b21d-c5496da75961.html

by Plaintiff-Appellee ("SIC Policy").

3. The SIC Policy expressly provides that "For the avoidance of doubt, the authority to settle legal matters rests not with the SIO [State Investment Officer] but with the SIC's litigation committee." SIC Policy, p. 2.

4. The SIC Policy also provides that "Litigation committee resolutions and decisions shall be unanimous. If unanimity is not reached on a particular potential settlement, or if a committee quorum is not obtained, the committee may consult the entire Council [*i.e.*, the SIC]. If the entire Council then votes to approve a settlement, that vote must be conducted in open session." SIC Policy, pp. 1-2.

5. The Litigation Committee has met 7 to 8 times. The Litigation Committee meets in secret and has never released a public notice, agenda or minutes for any of its meetings, nor has it voted on any settlements in a meeting open to the public. Testimony of Peter Frank, **[11-25-13 Tr. 16:11-24:22].**

6. The Litigation Committee has secretly agreed to settlements with a number of the defendants in investment recovery cases in the New Mexico district courts. *See* **[RP 4152, 4169, 4166, 4562]**.

SUMMARY OF ARGUMENT

The SIC's delegation of its litigation settlement authority to a litigation committee was not authorized by the statutes that created the SIC or by general

principles of administrative law. Therefore, the decisions by the committee have no effect and must be submitted to the full SIC for decision by a majority of a quorum of the SIC in a meeting open to the public, as required by the SIC's own policies and by the Open Meetings Act, NMSA 1978, §§ 15-10-1, *et seq.*, ("OMA"). In the alternative, if the SIC is determined to have properly delegated its authority to the Litigation Committee, then the Committee became a public body subject to the requirements of the OMA. Because the SIC Litigation Committee failed to comply with the public notice, agenda, limited minutes, and public decision requirements of the OMA, all the litigation settlements made by the Committee must be reconsidered by the Committee following procedures that comply with the OMA.

ARGUMENT

I. The SIC's Delegation of Litigation Settlement Authority to a Litigation Committee was in Violation of Law.

The Legislature created the State Investment Council for the purpose of investing and managing the State's two large permanent funds (the land grant permanent fund and the severance tax permanent fund which support public schools and universities) and funds from a few other sources. NMSA 1978, §§ 6-8-1, et seq. (2010 and 2011). The SIC's duties are set forth in Section 6-8-7. *Id.* The Legislature specifically determined which government officials would serve on the

SIC to fulfill this critical role in state government and how all the other members would be selected. *Id.*, § 6-8-2(A) (naming as the SIC's members the governor; state treasurer; commissioner of public lands; secretary of the department of finance and administration; the chief financial officer of "a state institution of higher education appointed by the governor with the advice and consent of the senate;" four members appointed by the New Mexico legislative council with the advice and consent of the senate, provided that no more than two members shall be members of the same political party; and two members appointed by the governor with the advice and consent of the senate). The Legislature also set the SIC members' terms and qualifications. *Id.*, § 6-8-3. Finally, the Legislature specifically provided the mechanism by which "all actions" by the SIC must be taken: "All actions of the council shall be by majority vote, and a majority of the members shall constitute a quorum." *Id.*, § 6-8-2(B).

These authorizing statutes are carefully and specifically drawn to spell out the SIC's composition, duties and means of taking action. They also specifically limit the SIC's authority to delegate and even to contract for services to assist the SIC in the performance of its duties. The Legislature did not provide for delegation by the SIC of any of its duties to a committee for any purpose, let alone litigation settlement. Indeed, the SIC authorizing statutes allow only one delegation of authority: "The Council may delegate administrative functions to the state

investment officer." *Id.*, § 6-8-7(A). Further, under its authorizing statutes the SIC may contract only for very limited services: investment advice from consultants, contingent fee litigation services from an attorney, custodial banking services performed by a bank, and investment consultation and management services from another state agency. *Id.*, § 6-8-7(C), (G), (H) and (I), respectively. And nothing more.

As a general matter, "Administrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them...or which require the exercise of judgment." *Kerr-McGee Nuclear Corp. v. New Mexico Environ. Imp. Bd.*, 1981-NMCA-044, ¶ 52, 97 N.M. 88, cert. quashed (1981). "An important aspect of gauging the delegation of discretion is whether the discretion is reviewable. When the ultimate decision 'does not rest with the delegate, the delegation is permissible.'" *Old Abe Co. v. New Mexico Min. Comm'n.,* 1995-NMCA-134, 121 N.M. 83, 94 (internal citations omitted). In particular, the duties of the SIC that are not specifically delegated are not delegable. *State ex rel. Udall v. Colonial Penn Ins. Co.*, 1991-NMSC-048, 112 N.M. 123, 129, 812 P.2d 777, 783 (affirming lower court decision that the duties imposed by law on the State Investment Office, Officer, and Council were nondelegable as a matter of law). Here, when the Litigation Committee is unanimous in accepting a settlement, the SIC gave all its discretionary decision-

making authority to settle litigation to the delegate (the Litigation Committee) without any review and final decision by the SIC. Thus, the delegation was invalid under New Mexico law.

This conclusion comports with the rulings from courts in other states. In *Bradley v. State Human Affairs Comm'n*, 293 S.C. 376, 360 S.E.2d 537 (Ct. App. 1987), the court held that the State Employee Grievance Committee could not delegate to its attorney its legislative authority to make or modify the decision as to an employee's grievance. In *Rutgers, State Univ. v. Rutgers Council of AAUP Chapters,* the court held that "public officials [are] charged with governmental responsibility they cannot lawfully abdicate or bargain away." 256 N.J.Super. 104, 115, 606 A.2d 822 (App.Div. 1992), *aff'd,* 131 N.J. 118, 618 *A.*2d 853 (1993). This is because public authority cannot be delegated in the absence of any indication that the Legislature intends to do so. *Application of North Jersey Dist. Water Supply Comm.*, 417 A.2d 1095, 1115 (N.J.Super.1980). Indeed, it is well settled that "an administrative agency may not subdelegate the exercise of discretionary acts unless the Legislature expressly grants it authority to do so." *Edmond v. Dep't. of Corrections (On Remand),* 143 Mich.App. 527, 536, 373 N.W.2d 168 (1985). In *Western Oil & Gas Assn. v. Monterey Bay United Air Pollution Control Dist.*, 49 Cal.3d 408, 427-8 (1989), the court allowed a limited delegation to a pollution control officer by the Pollution Control District because

all the authority to make decisions had been retained by the District and the officer only provided technical assistance and made recommendations.

Given the very limited scope of the SIC's duties specified in Section 6-8-7, the SIC litigation was presumably initiated by the SIC to enforce the fiduciary duties that are imposed on persons and entities that invest funds for the state. *See* Section 6-8-7(F). While the SIC has express authority to hire an attorney to litigate such a claim, the SIC has no authority to delegate the wholly discretionary decision concerning the settlement of an investment recovery case. The entire purpose of these cases was the recovery of funds that the SIC believed had been lost to the state as a result of improper or illegal investments. The decision to accept a particular amount of money by the SIC as a party in litigation is an action that only the SIC may take and that action must be taken by a majority of a quorum of the SIC.

Because the Litigation Committee lacked lawful authority to settle any of the investment recovery lawsuits, those settlements are without effect and must be ratified or rejected by vote of a majority of a quorum of the SIC in an open and public meeting. Until that happens, these settlements are unenforceable and merely recommendations by the Litigation Committee to the SIC.[3]

---

[3] The District Court's ruling on the issue of delegation is merely conclusory and contains no discussion of or legal support for its conclusion that the SIC's delegation of authority to the Litigation Committee was lawful. *See* District

II. In the Alternative, if the State Investment Council Properly Delegated Its Authority to the Litigation Committee, the Committee Became a Public Body and Failed to Comply with the Open Meetings Act.

If the SIC properly delegated its authority to settle lawsuits to the Litigation Committee, the committee stepped into the shoes of the SIC and therefore was subject to the New Mexico Open Meetings Act ("OMA"). This is a very important principle for the future of the OMA. If this Court does not reverse the District Court's erroneous decision, any policymaking body would be able to skirt OMA compliance merely by delegating authority to a committee of less than a quorum of the main body. This is not a hypothetical concern. The problem of clandestine committees in New Mexico is not limited to the SIC. Currently pending in Santa Fe District Court is a case against the Interstate Stream Commission ("ISC") in which a citizen is suing the ISC because a subcommittee of four of the nine ISC members met often without public notice over a four-year period when they made important public policy decisions and winnowed the field of choices for the full ISC board without complying with any OMA requirements. *See Gaume v. The New Mexico Interstate Stream Commission,* D-101-CV2014-02266, State of New Mexico First Judicial District Court, filed October 15, 2014. In addition, Amicus New Mexico Foundation for Open Government has received complaints about

---

Court's Findings of Fact and Conclusions of Law Related to the Qui Tam's Intervenors' Objections to Settlements at Conclusion of Law, filed February 12, 2014 ("Dist. Ct. Findings"), Conclusions of Law No. 3, p. 30, **[RP 5663-64]**

many public bodies attempting to avoid compliance with the OMA by creating subcommittees and delegating decision-making on hot issues to those subcommittees.

A. The law and sound public policy require committees with decision making authority to comply with the OMA.

In enacting the OMA, the New Mexico Legislature declared that all persons are entitled to the greatest possible information regarding the affairs of government and therefore all meetings of a policymaking body should be open to the public. NMSA 1978 § 10-15-1(A). The OMA's reach is long and extends to "[A]ll meetings of a quorum of members of any board, commission, administrative adjudicatory body *or other policymaking body of any state agency,* any agency or authority of any county, municipality, district or any political subdivision held *for the purpose of formulating public policy....* or for the purpose of taking any action within the authority of or the *delegated authority* of any board, commission or other policymaking body" (emphasis added). NMSA 1978 §10-15-1(B).

Also known as sunshine laws, open meetings laws require that public business be conducted in front of the public. Even when public meetings can legally be closed, the public deserves to know when the public body is meeting, what topics are being discussed behind closed doors, which public officials or persons are in attendance, and that no other public business is being conducted in

secret. The public was not able to learn about any of this here, even though the Litigation Committee was settling millions of dollars of claims that had been made by the State of New Mexico. The process followed here sets a dangerous precedent. With the use of committees and advisory groups growing throughout the state, the basic democratic and due process principles upon which the nation and our state were founded are being jeopardized.

Although the OMA does not expressly describe its applicability to committees or subcommittees, the New Mexico Attorney General has looked at this question extensively. In 1990, the Attorney General considered whether an advisory committee to the City of Las Cruces which routinely closed its meetings was subject to the OMA. The opinion noted that the critical issue in the analysis was whether such a committee was a "policymaking" body under the OMA, observing that the legislature apparently did not intend "fact-finding groups" or other non-decision-making entities to be governed by the act. Although the Las Cruces subcommittee did not make final decisions, it narrowed the list of potential contractors, eliminating dozens of potential candidates and thereby subjecting it to OMA compliance. N.M. Att'y. Gen. Op. 90-27 (1990).

Fourteen years later in an open meetings opinion letter, the Attorney General confirmed that the OMA's coverage includes a county commission, as well as any subcommittees of the commission that have been delegated any policymaking or

decision making responsibilities. NM Att'y. Gen. Op., 2004 WL 2019898, (N.M.A.G. Jan. 27, 2004).

In explaining the applicability of the OMA, the Attorney General's Open Meetings Act Compliance Guide (8th Ed. 2015) ("AG Guide") cites no less than four examples in which committees must comply with the OMA. *Id.*, at 11 (when a board of regents of a state university delegates policy making authority on post-graduate curricula to a faculty senate, the senate becomes subject to the OMA for the purpose of exercising this authority); *Id.* at 11 (when a five-member city council delegates its authority to two city council members and others to evaluate and recommend potential contractors to the full board, the committee must comply with the OMA); *Id.* at 11 (when a state commission delegates all of its authority to a search committee of experts, that committee is subject to the OMA); *Id.* at 11-12 (intercommunity water supply association must comply with the OMA when it has certain government powers).[4]

Also in its commentary, the AG Guide notes that a non-statutory committee appointed by a public body may constitute a policymaking body subject to the OMA if it makes decisions on behalf of, formulates recommendations that are binding in any legal or practical way on, or otherwise establishes policy for the

[4] Available at: https://docs.google.com/viewer?a=v&pid=sites&srcid=bm1hZy5nb3Z8dGVzdC1ubWFnfGd4Ojg4Y2I4MTcyYjM1Y2ViYQ

public body. "A public body may not evade its obligations under the Act by delegating its responsibilities for making decisions and taking final action to a committee. This is true even when the public body delegates its authority for holding a meeting or hearing to a single individual." *Id.* at 9.

New Mexico has no case law on this issue, or on the definition of policymaking, but a few jurisdictions with analogous open meetings statutes have addressed the problem. The leading case is *Schmiedicke v. Clare Sch. Bd.*, 228 Mich. App. 259, 262-264, 577 N.W.2d 706 (1998), *overruled on other grounds (attorneys' fees and costs)*, *Speicher v. Columbia Twp. Bd. of Trustees*, 497 Mich. 125, 860 N.W.2d 51 (2014). In *Schmiedicke* the Clare School Board created a Personnel and Policy Committee (PPC) which met in private to review and decide on evaluations and contract renewals for school administrators. The decisions of the PPC were merely ratified by the full School Board. The Michigan Court of Appeals ruled that because the PPC was a public body as defined by Michigan statutes, the deliberations of the PPC constituted a meeting under the Michigan Open Meetings Act. "Here, it is clear that a decision regarding the method by which administrators are evaluated affects public policy. Likewise, deliberations regarding the length of contracts offered to employees involves the formulation of public policy." *Id.* 262-263. Finally, the Court held that because the PPC's meetings were held behind closed doors, they violated the OMA:

> The primary purpose of the OMA is to ensure that public entities conduct all their decision-making activities in open meetings and not simply hold open meetings where they rubber-stamp decisions that were previously made behind closed doors. See *Booth Newspapers, supra* at 222, 507 N.W.2d 422; *Wexford Co. Prosecutor v. Pranger,* 83 Mich.App. 197, 204, 268 N.W.2d 344 (1978). Here, defendant school board's referral to the PPC for a recommendation was a delegation of authority to perform a governmental function. The focus of the inquiry is the authority *delegated* to the PPC, not the authority it *exercised.* The PPC failed to openly deliberate on the governmental function that the defendant school board had delegated to it. Subsequently, the defendant school board adopted the PPC's recommendation. The defendant school board's adoption of the recommendation effectively foreclosed any involvement by members of the public and essentially meant that the decision made by the PPC at a closed meeting was a fait accompli. *Booth Newspapers, supra* at 229, 507 N.W.2d 422. Consequently, the PPC made closed-session deliberations and decisions in violation of the OMA.

Id. at 264.

The Texas Court of Appeals in *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tx. Ct. App. 2003), held that under the Texas Open Meetings Act ("TOMA"), a "government body does not always insulate itself from the TOMA's application simply because less than a quorum of the parent body is present." *Id.* at 478. The Texas court did a thorough analysis of whether a subcommittee of the city council consisting of less than a quorum of council members served in an advisory or decision-making capacity thereby subjecting the committee to the TOMA. Because the Council rubberstamped every "recommendation" made by the subcommittee over an eight year period, the court ruled that the subcommittee was

itself subject to the TOMA.[5] The dissent in another Texas case which was decided on the basis of a different Texas statute, *Tarrant Regional Water Dist. v. Bennett*, 453 S.W.3d 51 (Tx. Ct. App. 2014), correctly noted that if a public body's essential business is being conducted by committees that are not following the open meetings law, then the statute's very purpose is being thwarted.

In the case before this Court, the SIC specifically transferred all its decision making power in regard to settling investment recovery lawsuits to the Litigation Committee. *See* Recovery Litigation Settlement Policy adopted by the SIC on June 26, 2012. The Litigation Committee makes **all** the decisions for the SIC as to settlements and functions as much more than an advisory panel to the SIC. The committee delivers to the SIC reports, not recommendations, on lawsuit settlements the Committee has made, all of which have final legal and financial implications for the state. Consequently, the SIC's Litigation Committee is subject to and must comply with the OMA.

---

[5] *Also see e.g., Silver Express Co. v. Dist. Bd. of Tr. of Miami-Dade Cmty. Coll.*, 691 So.2d 1099 (Fla. 3d DCA 1997) (committee appointed by college's purchasing director to consider proposals to provide flight training services was subject to Florida's Sunshine Law, where committee's function was to weed through various proposals and to determine which were acceptable); *Baxter County Newspapers Inc. v. Medical Staff of Baxter Gen. Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981) (if decision-making authority has been delegated by the governing body to a particular group, the open meetings requirement goes along with the delegation).

B. **Since the litigation committee is itself a decision-making policymaking public body, the OMA requires public notice of its meetings, even when most of the meeting is properly closed.**

The SIC claims and the District Court ruled the activities of the Litigation Committee are exempted entirely from the OMA by the "threatened or pending litigation" exception, NMSA 1978 §10-15-1(H)(7). But even though a public body may discuss threatened or pending litigation behind closed doors, several important OMA requirements apply to the body nonetheless. Here, the Litigation Committee failed to issue notices of and agendas for meetings, failed to maintain even limited minutes of meetings, and failed to vote on the settlements in public even though approvals of settlements are actually approvals of public contracts which must be voted on in public.

The litigation exception of the OMA provides in relevant part:

> **Section 10-15-1(H).** The provisions of Subsections A, B and G of this section do not apply to:
>
> ***
>
> (7) meetings **subject to the attorney-client privilege** pertaining to threatened or pending litigation to which the public body is or may be a participant.

NMSA 1978 §10-15-1(H)(7), emphasis added. Thus, OMA requirements *not* contained in subsections (A), (B) or (G) continue to apply to meetings that may be

closed to discuss threatened or pending litigation.[6]

The OMA's public notice requirement applies to all meetings of the Litigation Committee. "Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority of quorum of the body is in attendance, **and any closed meetings**, shall be held only after reasonable notice to the public." NMSA 1978, §10-15-1(D) (emphasis added). Importantly, the OMA specifically requires that a closed meeting "shall not be held until public notice, appropriate under the circumstances, stating the specific provision of law authorizing the closed meeting and stating with reasonable specificity the subject to be discussed, is given to members and to the general public." NMSA 1978, § 10-15-1(I)(2). See also AG Guide, p. 15.[7]

As a public body subject to the OMA, the Litigation Committee was also required to produce for the public an agenda for each meeting. NMSA 1978, § 10-15-1(F). "Meeting notices shall include an agenda containing a list of specific

[6] In essence, Subsection A prohibits closed meetings and mandates public meetings as the general rule for government, Subsection B applies this basic mandate to every level of government and broadly defines the types of meetings covered, and Subsection G requires that minutes of meetings be kept. NMSA 1978 §§ 10-15-1(A), (B) and (G).

[7] In *Bd. of Trustees v. Bd of Co. Commrs,* the Montana Supreme Court in a case involving the necessity for public notice of open meetings ruled that meetings held without public notice amount to "clandestine meeting[s]" and violate the "spirit and the letter" of the Montana Open Meeting Law. 186 Mont. 148, 155-56, 606 P.2d 1069, 1073 (1980) (voiding a clandestine meeting of a quorum of county commissioners held without notice).