

# Appeals court sides with Bloom on walking quorum case

## Kamenick: Decision violates the language and spirit of the open meetings law

By Richard Moore

OF THE LAKELAND TIMES

In an unpublished opinion, a three-judge court of appeals panel has upheld circuit court judge Michael Bloom's dismissal of an open-meetings complaint filed by the general manager of *The Lakeland Times* and *Northwoods River News* against Rhinelander mayor Chris Frederickson and four Rhinelander city council members.

In the complaint, Heather Holmes — and *The Lakeland Times* in a prior complaint — contended the mayor and council members conducted a series of personal communications, email messages, in-person meetings, and communications leading effectively to the writing and signing of a letter of reprimand to city council president George Kirby, all of which, the complaint contended, amounted to an illegal walking quorum concerning governmental business without public notice.

In his January decision, Bloom found Holmes had failed to allege the council members discussed any governmental business or reached any agreement to take uniform action against Kirby, among other things, and the district III court of appeals agreed.

"Holmes's complaint does not allege any express or tacit agreement among the members to take any action against Kirby other than to deliver a letter to him expressing their frustration with his refusal to participate in the council meeting," the appeals court decision states.

The lawsuit stemmed from a Jan. 30, 2019, letter signed by Frederickson and council members Andrew

Larson, David Holt, Steve Sauer, and Ryan Rossing and sent to city council president George Kirby. In the letter, the officials questioned Kirby's leadership, suggesting that he resign "given recent events" and promising a forthcoming conversation that "may be uncomfortable."

The officials also concluded Kirby's conduct at a January council meeting did "not reflect the level of leadership" they were looking for from a seasoned, experienced elected official and suggested he resign "given recent events."

Holmes filed the complaint in circuit court after Oneida County district attorney Michael Schiek declined to prosecute a similar complaint by *Lakeland Times* and *Northwoods River News* publisher Gregg Walker. Holmes first resubmitted the allegation to Schiek as a verified, or notarized, complaint.

After the district attorney declined for a second time to prosecute, the lawsuit was filed.

After the court of appeals decision this week, Walker said he was disappointed but not surprised, and he called attention to the fact it is not recommended for publication.

"That limits its precedential value and impact," Walker said.

Published opinions have precedential value and may be cited as controlling law in Wisconsin, according to the Wisconsin court system, while unpublished authored opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Newer unpublished opinion such as this one may be cited for persuasive value but not as controlling law.

Walker also noted the narrowness of the decision.

"Significantly, the court did not embrace Bloom's more outlandish and bizarre conclusions, namely, that governmental bodies can hold meetings with a quorum present and talk about anything they want so long as they do not take a vote," he said.

Walker said the newspaper was looking at possible next steps, including an appeal.

*The Times'* attorney in the case, Tom Kamenick, the president and founder of The Wisconsin Transparency project, said the decision violates the language and the spirit of the open meetings law.

"It allows governmental bodies to avoid having to hold public meetings on sensitive governmental issues by meeting in small groups and agreeing to take informal action instead of a formal vote," Kamenick said. "Rhinelander's city council decided to deal with a rogue council member privately, instead of publicly in a properly noticed, open meeting."

Decisions of such importance need to be made in full view of the public, Kamenick said.

"If a majority of the city council had met at the same time and agreed to send this letter, it would have been a clear violation of the law," he said. "The prohibition on walking quorums is supposed to prevent evasions of the law by doing the same thing split over multiple smaller meetings."

### The decision

In the decision, written by appeals judge Mark Seidl, the court concluded Holmes' complaint failed to allege facts, as opposed to what it considered mere legal conclusions.

"In particular, the complaint does not allege sufficient facts to support

Holmes's claim that the four members improperly conducted government business by agreeing to or voting on action to be taken regarding Kirby," Seidl wrote.

The main dispute, the judge wrote, is whether the emails and personal meetings between the members and the mayor leading up to the transmittal of the letter to Kirby constituted a meeting under the open meetings law.

For that to happen, Seidl continued, Holmes had to allege sufficient facts tending to show that there was "a purpose to engage in governmental business, be it discussion, decision or information gathering" and that "the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed."

The judges only visited briefly that second element, precisely because, Seidl wrote, the complaint flunked the first test, that is, the judges found no "purpose to engage in governmental business."

"In order to plead a business purpose for the meetings sufficient to survive a motion to dismiss, it is not enough to allege that there were communications between the members regarding their personal positions, or that they asked other members for their opinions," Seidl wrote. "Nor is it enough to show that the members read and signed a pre-meeting resolution or document

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