IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA WILDLIFE ALLIANCE, and JOHN TOPPENBERG, Director, Alaska Wildlife Alliance, Plaintiffs, v. TED SPRAKER, Chairman, Alaska Board of Game, and ALASKA BOARD OF GAME, Defendants.	Case No. 3AN-13-05825CI

ORDER AND DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

An interest group petitioned an Alaska State board for an emergency regulation. The board's executive director polled individual board members by email to ascertain whether they wished to summarily deny the petition, which they did. The email admonished members not to discuss the matter with one another to avoid application of Alaska's open meeting law. Did the serial email poll violate that law?

II. FACTS AND PROCEEDINGS

On September 16, 2012 the executive director of defendant Alaska Board of Game ("Board" or "State) received an emergency petition from plaintiff Alaska Wildlife Alliance and others. The petition alleged that the Board's elimination of a wolf-protection buffer zone around Denali National Park had resulted in an emergent threat to protected wolves within the park. The petition sought

enactment of an emergency regulation closing the eastern boundary of the park to the taking of wolves.[1]

The next day the Board's director sent separately to each of the seven Board members an email attaching a copy of the petition, and written comments thereon by the Alaska Division of Wildlife Conservation. The email invited the Board members to adopt one of two positions in response: either the petition failed to satisfy criteria for adoption of an emergency regulation, or a Board meeting was necessary to consider the petition.[2]

By letter dated September 19, 2012, the director informed the Wildlife Alliance of the Board's denial:

> After consideration of the petition, the Joint Board Petition Policy and the comments provided by the Department of Fish and Game, the Board denied the petition, finding that the request does not meet the criteria under the policy for adoption of emergency regulation, and decided not to schedule the matter for a public hearing.
>
> The Board's decision was not by a meeting, but by an e-mail poll consistent with long-standing practice on petitions for an emergency regulation when no Board meeting is otherwise scheduled within 30 days of receiving a petition.[3]

The Wildlife Alliance then pleaded additional facts and moved for reconsideration. The director indicated that the Board's administrative procedure made no provision for reconsideration, but that the Alliance could refile a second original petition. The Alliance did so. The Board's director again emailed the Board, this time adding a caution:

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[1] Pl's Mot. for Summ. J., Ex. 1.
[2] *Id.*, Ex. 7.
[3] *Id.*, Ex 2.

> Please e-mail your response back to me without cc'ing other Board members or anyone else. Because this vote is by e-mail rather than in a meeting or teleconference, Board members should refrain from communicating with each other before voting has been completed by the Board and announced by me.[4]

The Board again decided no emergency existed, thus denying the petition.

On March 15, 2013, the Wildlife Alliance filed a Complaint for Declaratory and Injunctive Relief, seeking a ruling that the Board's email polling procedure violated Alaska's Open Meeting Act ("OMA"), which reads in relevant part:

> (a) All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law. Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.
>
> . . . .
>
> (h) In this section,
>
> . . . .
>
> (2) "meeting" means a gathering of members of a governmental body when
>
> (A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity. . .

The parties cross-moved for summary judgment on the open-meeting issue. The Wildlife Alliance also sought to clarify that the Board possesses inherent

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[4] *Id.*, Ex. 11 at 5.

power to reconsider its initial petition decisions. The court put a decision on record, finding that the Board's longstanding procedure was entitled to deference and was a reasonable way to summarily dispose of emergency petitions. But once the court learned that the Wildlife Alliance sought oral argument, it vacated its oral findings and heard argument.

III. APPLICABLE LAW

In cases requiring judicial interpretation of statutes, courts consider whether the statute has a plain and practical meaning, but flexibly interpret the statute to the degree legislative history supports some degree of divergence from the literal text:

> We interpret statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." We decide questions of statutory interpretation on a sliding scale: "[T]he plainer the language of the statute, the more convincing contrary legislative history must be."[5]

But a court reviewing an administrative agency's interpretation of statute may defer to an agency's reasonable interpretation thereof if the agency possesses relevant expertise or engages in fundamental policy-making:

> We use one of two standards to review agency interpretations of statutes. We apply the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions. We apply the independent judgment standard, under which "the court makes its own interpretation of the statute at issue, ... where the agency's specialized knowledge and experience would not be particularly

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[5] *Marathon Oil Co. v. State, Dept. of Natural Resources*, 254 P.3d 1078, 1082 (Alaska 2011) (citations omitted).

probative on the meaning of the statute." We give more deference to agency interpretations that are "longstanding and continuous."[6]

IV. DISCUSSION

The court in its now withdrawn initial ruling credited the state's argument that no meeting occurred, and the Board had merely made something akin to a screening decision that the petition did not merit the calling of a meeting. Certainly there was no literal "gathering" of a quorum of the board; the email poll was explicitly designed to avoid that potential pitfall.

But a 1985 decision of the Alaska Supreme Court declined to interpret the OMA quite so mechanistically. Members of the Anchorage Assembly considering a project met with the proposed contractor on-site. The Court held that this preliminary on-site consultation constituted a meeting subject to the OMA:

> [T]he [on-site] meeting could have been held as a scheduled work session of the Anchorage Assembly open to the public. Without public access to the Quadrant meeting, the "people's right to be informed" under the OMA was severely limited. In *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 239 N.W.2d 313, 330–331 (1976), the court stated:
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> > The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be *influenced* dictates that compliance with the law be met. (Emphasis in original.)
>
> The trial court erred in ruling that the [on-site] presentation was not a meeting under the OMA. We reverse its ruling and

[6] *Id.*

> hold that a "meeting" includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business.[7]

Even though the facts of the case fit comfortably within the OMA's definition of a meeting as a "gathering", the Court explicitly untethered its holding from that datum:

> Given the strong statement of public policy in [AS 44.62.312, State Policy Regarding Meetings], the question is not whether a quorum of a governmental unit was present at a private meeting. Rather, the question is whether activities of public officials have the effect of circumventing the OMA.[8]

In 1994 the Court extended its OMA jurisprudence to expressly include off-record conversations between individual board members, culminating in a merely *pro forma* public meeting:

> The superior court found that Board members had one-on-one conversations with each other, in which they discussed reapportionment affairs and districting preferences, and solicited each other's advice. It also found that the "dearth of [substantive] discussion on the record, combined with the manner of some Board members at trial, as well as other evidence presented at trial, convinces this court that important decision making and substantive discussion took place outside the public eye." Our review of the record indicates support for the factual finding that the Board conducted some of its reapportionment business outside scheduled public meetings. Based on this finding, we agree with the superior court that the Board violated the Open Meetings Act.[9]

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[7] *Brookwood Area Homeowners Ass'n, Inc. v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985).

[8] *Id.*, at 1323 n.6.

[9] *Hickel v. Southeast Conference*, 868 P.2d 919, 929-930 (Alaska 1994).

A 1985 California appellate case held that the use of serial telephonic conversations between staff and board members to poll the board violated that state's OMA.[10] The Nevada Supreme Court more recently applied similar logic to email polls:

> [I]f a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting.[11]

This conclusion appears to be the majority position of American jurisdictions ruling on the matter of serial telephonic or email polls.[12]

At first blush, the Board of Game's decision not to convene appeared largely procedural to this court. But it was in effect a denial of the Wildlife Alliance's petition on the merits. Had the board convened it would obviously have been required to meet publicly. The Board's director expressly directed members not to confer to avoid the appearance of a meeting. This stratagem falls within our Supreme Court's definition of impermissible avoidance of the strictures of the OMA. There is no principled way to distinguish between what a board might consider to be a matter for summary resolution via an email poll and a matter apt for public scrutiny under the OMA. The OMA protects

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[10] *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal.App.3d 95, 214 Cal.Rptr. 561 (Cal. Ct. App. 1985).

[11] *Del Papa v. Bd. of Regents of Univ. and Cmty. Coll. Sys. of Nev.*, 956 P.2d 770, 778 (Nev. 1998).

[12] *See Rehab Hosp. Services Corp. v. Delta-Hills Health Sys. Agency, Inc.*, S.W.2d 840, 842 (Ark. 1985); *Hitt v. Mabry*, 687 S.W.2d 791, 796 (Tex. Ct. App. 1985); *Bd. of Trustees of State Insts. of Higher Learning v. Miss. Publishers Corp.*, 478 So.2d 269, 278 (Miss. 1985); *State ex rel. Cincinnati Post v. Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996).

robust public disclosure by simply depriving boards of the power to make such an arbitrary distinction. While the obvious alternative procedure of convening a noticed teleconference of the Board involves a certain measure of time and expense, that is simply how boards must conduct business in order to comply with the OMA.

The Wildlife Alliance did not meaningfully brief the issue of whether due process requires an administrative entity to provide a mechanism for petition reconsideration. It instead argued that the Board should have exercised its inherent power to reconsider. Here the Board provided *de facto* reconsideration by reviewing a second petition with added facts. It effectively accorded reconsideration. The court declines to issue a declaratory judgment on that matter.

V. ORDER

The court concludes that it erred in its initial decision, and that the Board must consider the Alaska Wildlife Alliance's petition compliantly with the OMA. The court enjoins the Board from utilizing serial postal, telephonic, or electronic polling of individual board members to approve or deny the holding of a Board meeting to consider emergency petitions.

DATED at Anchorage, Alaska this 16th day of December, 2014.

I certify that on 12-17-14
A copy of the above was mailed to each of the following at their addresses of record: Meacham, Nebon
Judicial Assistant/Deputy Clerk

John Suddock
Superior Court Judge